

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

American Federation of State, County,)	
And Municipal Employees, Council 31,)	
)	
Petitioner,)	
)	Case No. L-RC-19-006
and)	
)	
City of Chicago,)	
)	
Employer.)	

ORDER

On July 1, 2019, Administrative Law Judge Anna Hamburg-Gal, on behalf of the Illinois Labor Relations Board, issued a Recommended Decision and Order in the above-captioned matter. No party filed exceptions to the Administrative Law Judge’s Recommendation during the time allotted, and at its September 10, 2019 public meeting, the Board, having reviewed the matter, declined to take it up on its own motion.

THEREFORE, pursuant to Section 1200.135(b)(5) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(b)(5), the parties have waived their exceptions to the Administrative Law Judge’s Recommended Decision and Order, and this non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.

Issued in Chicago, Illinois, this 10th day of September 2019.

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

/s/ Helen J. Kim
Helen J. Kim
General Counsel

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
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American Federation of State, County and)	
Municipal Employees, Council 31,)	
)	
Petitioner/Labor Organization,)	
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and)	Case No. L-RC-19-006
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City of Chicago,)	
)	
Employer.)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On August 16, 2018, the American Federation of State, County and Municipal Employees, Council 31, (AFSCME or Union) filed a petition with the Illinois Labor Relations Board (Board) seeking to add the titles Business Consultant and Senior Business Consultant employed at the City of Chicago (City or Employer) to the historical, AFSCME-represented Unit #1. The Employer opposed the petition, asserting that the employees sought to be represented are excluded from coverage of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2014), as amended, pursuant to the exemption for managerial employees. In accordance with Section 9(a) of the Act, an authorized Board agent conducted an investigation and determined that there was reasonable cause to believe that a question concerning representation existed. A hearing on the matter was conducted on February 7, 2019. Both parties elected to file post-hearing briefs.

I. PRELIMINARY FINDINGS

The parties stipulate and I find:

1. The City is a public employer within the meaning of Section 3(o) of the Illinois Public Labor Relations Act (“Act”).
2. The American Federation of State, County and Municipal Employees, Council 31 ("Union" or "Petitioner") is a labor organization within the meaning of Section 3(i) of the Act.
3. This matter is properly before the Administrative Law Judge.

II. ISSUES AND CONTENTIONS

The issue is whether the business consultants and senior business consultants (collectively, “business consultants”) employed in the City’s Department of Business Affairs and Consumer Protection (“BCAP” or “Department”) are managerial within the meaning of Section 3(j) of the Act.

The Employer asserts that the business consultants satisfy both prongs of the managerial test. First, it argues that they are predominantly engaged in executive and management functions because they help accomplish the Department’s mission to administer and facilitate all aspects of the Department’s licensing function and are almost exclusively responsible for it. The Employer explains that they exercise discretion in determining which license(s) an applicant must obtain, in collecting documents, in assessing the truthfulness of an applicant, in determining whether issuance of a liquor license would have a deleterious impact on public health, safety or welfare, and in helping applicants develop plans of operation to cure objections to a license. Next, the Employer asserts that the business consultants direct the effectuation of management policies and practices by applying the Department’s policies and procedures on licensing and making effective recommendations on how those policies will operate. Specifically, the Employer contends that the business consultants make effective recommendations on whether the Department should issue hospitality licenses. In addition, the Employer notes that in one instance, a business consultant made an effective recommendation to create a new procedure.

The Union asserts that the business consultants do not satisfy either prong of the managerial test. First, it argues that the business consultants are not predominantly engaged in executive and management functions because their chief role is to compile information and documents. Furthermore, the Union asserts that any discretion they exercise in performing their functions is significantly limited by licensing ordinances, their supervisor’s instructions, and the IRIS computer system. The Union denies that the business consultants play any role in creating plans of operations to cure objections. Second, the Union argues that the business consultants are not responsible for directing the effectuation of management policies and practices. It reasons that the business consultants serve only an advisory function and do not determine the methods or means of how the Department provides its services. With respect to non-hospitality licenses, the Union asserts that the business consultants do not made recommendations on whether an application should be approved; they simply collect and forward information to their superiors. With respect

to hospitality licenses, the Union asserts that the business consultants' recommendations are constrained by their supervisors' directives and the ordinances.

III. FACTS

1. Overview and Organizational Structure

The Department of Business Affairs and Consumer Protection (“BACP” or “Department”) is responsible for fostering the economic growth and vitality of the City of Chicago by regulating licenses and protecting consumers. Rose Escareno is the Commissioner of the Department. The Department also has a First Deputy Commissioner and Deputy Commissioners who oversee each of the Department’s following nine divisions: Administration, the Small Business Center, Business Compliance Enforcement, Small Business Advocacy, Intergovernmental Affairs, Liquor Control, Outreach, Education & Municipal Television, Prosecutions & Adjudications, and Public Vehicle Licenses and Administration.

The Department employs approximately 190 employees including the business consultants and senior business consultants (collective, “business consultants”) at issue in this case.¹ All the business consultants work in the Small Business Center where they process applications for licenses. The Small Business Center handles between 30,000 and 40,000 clients a year.

The City of Chicago created the Small Business Center by merging different departments and subfunctions of departments to create a “one-stop shop” for citizens’ licensing needs. The purpose of the Small Business Center is to simplify the licensing process by giving one entity total control over the application process for obtaining a license and thereby permitting business owners to resolve all their licensing issues in one place.

The Small Business Center is comprised of the following nine sections that each perform different functions: Triage Licensing; Licensing and Business Assistance; Zoning/Permit Intake Licensing; Internet Call Center & Online Licensing; Public Way Use; Criminal History, Valet, and Tobacco; House Share; and the Local Liquor Control Commission, which includes the Hospitality Section. According to the organizational chart, at least one supervisor oversees each section. The supervisors relevant to this case hold the title of Business Consultant Supervisor (BC Supervisor)

¹ The only difference between the senior business consultants and the business consultants is the level of business experience they obtained before the Department hired them.

or the title of Assistant Commissioner.² Assistant Commissioner Mike Tibbs works in the Criminal History, Valet and Tobacco section. BC Supervisor Byran Knipper works in the Hospitality section, under the Local Liquor Control Commission. The Local Liquor Control Commission has an Assistant Commissioner in addition to a BC Supervisor. All supervisors supervise all the business consultants, irrespective of where the business consultants appear on the organizational chart or the type of license applications they process.

Senior Business Consultants Shaub Menk and Daniel Correa specialize in applications for hospitality licenses, which include liquor licenses and public place of amusement (PPA) licenses. Senior Business Consultant David Chan specializes in applications for tobacco licenses. The remaining nine business consultants process applications for non-hospitality licenses. The business consultants in the hospitality section assist in other areas, and the two senior business consultants who are currently assigned to triage are capable of helping in the hospitality group. The business consultants rotate through the triage section every two months.

The Criminal History, Valet and Tobacco section also includes two criminal history analysts who are represented by AFSCME. The Zoning/Permit Intake Licensing section employs Administrative Assistant IIs. The Public Way Use Section employs an Auditor II and a Clerk III.

2. Types of Licenses

The City issues licenses pursuant to ordinances enacted by the City Council. The Department issues approximately 50 different types of licenses. It issues and maintains over 61,000 licenses.

A business owner may apply for a limited business license, a regulated business license, or one of 47 different specialty licenses. A limited business license is a general license used for the sale of general unrestricted merchandise or the procurement of services. A regulated business license is required for activities that are more regulated by ordinance such as tattooing, body art, expediting, handyman, home repair, and home occupation. A specialty license is required for business activities that raise issues regarding health, safety, and criminality, such as massage establishments and businesses selling tobacco. The Department imposes greater scrutiny on applicants for a regulated business and specialty license than for a limited business license. Of the

² The supervisors of the Public Way Use section hold different titles.

licenses administered in the last calendar year, more than half were limited business licenses. The remainder was comprised of regulated business and specialty licenses.

The length of time required to process a license application varies. Regulated business licenses and specialty business licenses take longer because they both require background checks, which can take up to 30 days to complete, and some regulated business licenses also require field inspections by other departments. By contrast, inspections and background checks are not required for limited business licenses, and they typically issue in a day.

Business consultants handle all types of license applications except for firearms license applications and emerging business license applications.³

A business consultant may not keep control of the particular application through the application process, except in tobacco license applications. Accordingly, the business consultant who performs the intake may not be the business consultant who reviews the documents or issues the license. However, the applicant may request to see the same consultant if the application process is complicated and is longer than one day.

4. Process for Obtaining a Non-hospitality License

a. Intake/Triage – All Non-hospitality Licenses

The applicant comes to the small business center to apply for a license. A business consultant in the triage section provides the applicant with a document to complete. The applicant completes the document by providing information about himself, his prospective business location, and a description of his proposed business activity. The business consultant reviews the document and performs an initial consultation to determine, based on the applicant's description of their business activity, what license or licenses the applicant needs. To that end, the business consultant asks the applicant questions about how the applicant generates revenue.

If an applicant obtains the wrong license, then the enforcement team will cite his business for selling goods not covered by the license, and the applicant might be required to pay a penalty. In addition, the City may revoke the license, which is a process that is costly to the City.

BC Supervisor Castaneda offered an example to demonstrate how business consultants ensure that applicants receive the correct license or licenses: A business consultant suggested to

³ The BC supervisors handle firearms license requests. Deputy Commissioner Matt Allee handles requests for emerging business licenses.

an applicant, who wished to sell goods at a flea market, that she should seek a limited business license, instead of the itinerant license she initially requested, because it would be cheaper in the long run.⁴ The business consultant asked further questions about the goods the applicant intended to sell, and informed her that if she wished to sell gold, silver, used CDs, or used audio equipment, she would need to obtain a secondhand dealer license, which would cost \$2000. The applicant elected to forgo the more expensive selling activities and opted for a limited business license. This illustrative example provided by Castaneda demonstrates, by a preponderance of the evidence, that the business consultants do sometimes provide such guidance to applicants, even though Senior Business Consultants Shaub Menk and David Chan both denied doing so.

Once the business consultant obtains the required information on the information sheet, he tries to verify it. As part of this process, the business consultant must also ascertain whether the applicant is accurately representing the nature of his business and its ownership. Applicants make misrepresentations on a weekly basis.

For example, in one case, a woman applied for a food license, accompanied by her father, whose application for a license the Department had denied the week before because he owed a debt to the City. The business consultant informed Assistant Commissioner Tibbs about the situation and asked for his opinion. Tibbs spoke with the father and told him that the daughter would need to apply for the license on her own and that the father could not discuss the business with the business consultant.

In a second case, an applicant sought a license for some day care centers although only his spouse was an officer of the corporation. The business consultant became suspicious of the applicant and upon further review, the Department determined that he had a criminal history and could not hold a license. The man's criminal history also disqualified his spouse from holding a licenses, and the pair had to sell their existing daycare businesses.

In a third case, a business consultant informed his superiors of an applicant who wished to obtain a license for a talent agency for high-end models, but could not answer basic questions about his business model. The consultant felt uncomfortable about the interaction and thought others should know about it in case the applicant returned.

⁴ The consultant informed the applicant that the cost of the itinerant merchant license would be prohibitive because after five weekends, it would cost \$100 whereas the limited business license, which lasts two years, would cost \$125.

In a fourth case, a business consultant informed an applicant that he needed a commercial address from which to operate a business teaching music lessons to children, not the home occupation license the applicant initially sought. The applicant returned later that day stating that he had a commercial address. However, the business consultant learned that the location of the address was a PO Box, and he informed the applicant that he could not be licensed out of a PO Box.

Once the business consultant successfully verifies the information on the sheet provided by the applicant, the business consultant generates a license application, which may cover more than one license. After the business consultant saves part of the application in the Department's software application system, Integrated Revenue Information System (IRIS), the system automatically sends the application to the zoning section for review.

b. Zoning – All Non-hospitality Licenses, With Two Exceptions

All licenses, except for street performers or peddler's licenses, require a zoning review. Administrative Assistants in the Zoning Permit Intake Licensing section check whether a license can issue for the address for which the permit is sought. They review the description of the business provided by the applicant to determine whether the address of the business is zoned for the stated business activity. They can approve the application, deny it, or request additional information. The zoning section does not rely exclusively on the information provided by the business consultant. If the zoning section determines that the license is not permitted at the selected the location, the application is denied unless the applicant wishes to amend its business model. The business consultants cannot override the zoning section's determinations, but they can work with the applicant to figure out how to accommodate those zoning issues.

If the applicant is seeking a limited business license, holds no debt to the City, and the application passes zoning review, the business consultant requests payment and issues the license under his own signature. He does not need approval to issue the license. The Commissioner has delegated to the business consultants the authority to sign the licenses under her authority.

c. Review and Collection of Documents – Regulated and Specialty Licenses

If the applicant is seeking a regulated or specialty business license and zoning approves the application, the business consultant requests and reviews the applicant's financial documents.

The business consultant collects and reviews the corporate documents to determine which individuals have a sufficient ownership interest (5% or more) to require a fingerprint and background check. The types of documents required depend on the corporate structure, i.e., whether it is a corporation or a limited liability company. When the business consultant identifies the applicant's type of business entity in IRIS (e.g. corporation, LLC, LLP, trust), IRIS generates a list of documents that the business consultant must collect. If the entity is a corporation, the business consultant collects the stock certificates. If the entity is an LLC, the business consultant collects the management agreements. In cases where the business is held in trust, the business consultant collects the trust documents. Sometimes an applicant indicates that he is the sole owner, when in fact others also have an ownership interest. The business consultant determines whether there are other owners by reviewing the corporate documents.

In addition, the business consultant collects and reviews the applicant's financial documents. All applications for regulated and specialty business licenses include a financial disclosure form that requires the applicant to list their expenses and source of funds. The listed source of funds dictates the documents that the business consultant must request. For example, if the source is a loan, the business consultant requests the loan documents. If the source is a gift, the business consultant asks to see a copy of the source of the gift. However, many applicants are not forthcoming with the department and try to hide the source of their funds. Accordingly, if the business consultant believes that the applicant's disclosure of finances raises a red flag, the business consultant may ask for additional financial information.⁵ If the business consultants have questions, they speak to Assistant Commissioner Tibbs who offers recommendations on what additional documentation the business consultant should request.

One former business consultant with a background in accounting, Esau Orduno, who is now a BC Supervisor, recommended to Tibbs that the business consultants ask additional, more probing financial questions related to the issuance of tobacco licenses. Tibbs accepted his recommendation and implemented the process he recommended.

⁵ Business Consultant Chan's testimony to this effect illustrates that the business consultants may ask for additional information even though some business consultants, such as Menk, do not typically do so unless directed by a supervisor.

d. Payment, Background Check, and Inspections – Regulated and Specialty Licenses

After triage, document review, and zoning review are complete, the business consultant asks the applicant to pay for the license. The applicant's payment initiates the fingerprinting process. The business consultant sends the application to the criminal analyst who performs fingerprinting. The business consultant does not determine whether an applicant's criminal history affects their eligibility for a license. The business consultants do not normally see the results of the fingerprint checks.

The applicant's payment also initiates any required inspections. The IRIS system populates the types of inspections required based on the type of license required. The business consultant does not determine which inspections are necessary for a license.

a. Submission of Application to Supervisor and/or Issuance of License - Regulated and Specialty Licenses

After the applicant has submitted all the required information, the business consultant checks with the Illinois Secretary of State to ensure that the entity is not revoked or dissolved. If the corporation is in good standing with no outstanding debt, the business consultant informs the supervisor that the application is complete. If the applicant has outstanding debt or wishes to pick up the license in person, the business consultant can place a hold (i.e., a red flag) on the application. Only a supervisor can lift the hold.⁶ In addition, if the business consultant states that the applicant is not qualified and did not meet the requirements of the license, the license does not issue.

The business consultant provides the documents to Assistant Commissioner Tibbs for supervisory document review. The business consultant does not include any written recommendation as to whether Tibbs should approve or deny the license.

Assistant Commissioner Tibbs then performs a review of the documents. He testified that he double checks the business consultants' work. He ensures that the required documents are completed in the application, he ensures that the corporate documents are accurate and up-to date, and he reviews the financial disclosures and bank statements. He ensures that the applicant is eligible for issuance of a license based on his criminal history, and he ensures that the location of

⁶ In some cases, the Department places holds on applications automatically.

the business is eligible for issuance of a license. Tibbs then determines whether to approve or deny the application and indicates, in IRIS, whether the application is approved or denied.

If the Department denies the application, Tibbs prepares a denial letter to send to the applicant. Tibbs does not inform the business consultants of whether the application has been denied or approved.

5. Processing of Online Applications, Excluding Liquor

Businesses may apply online for all manner of licenses except for liquor licenses. When applicants apply online, the business consultant does not speak to the applicant face-to-face before the applicant submits his application, and the applicant himself selects the category of business he is engaged in, not the business consultant. The business consultant receives the applications after they have passed through zoning review.

When the business consultant receives the online application, he runs a social security number check to determine whether the applicant owes debts. If the applicant owes a debt, the business consultant sends the applicant a hold notice, and the applicant will follow up with the business consultant about whether he resolved the debt. If the applicant has not resolved the debt after approximately a week, the Department will approve the application. However, the Department will put a hold on it. If the applicant owes no debt, he pays the application fee. The business consultant marks the application as complete in the system and passes the documents to Assistant Commissioner Tibbs to review. At that time, the business consultant also sends the applicant for fingerprinting. If the applicant has a felony, the business consultant will receive a notice from the criminal history section to contact the applicant. The criminal history section may inform the business consultant that the applicant failed a criminal history check if that issue may be corrected with a document. However, the business consultant does not know whether the Department has approved an online application unless the customer informs him.

6. Hospitality Licenses

The Local Liquor Control Commission is created by the Illinois Liquor Control Act. The statute designates the mayor of each municipality as the Local Liquor Control Commissioner, and it grants the mayor the authority to have a designee. Shannon Trotter is the mayor's designee and serves as the Local Liquor Control Commissioner. Trotter oversees Assistant Commissioner Amanda Weiland and BC Supervisor Bryan Knipper.

The Local Liquor Control Commission oversees the issuance of liquor licenses and public place of amusement licenses (PPAs), collectively termed hospitality licenses. A business must obtain a liquor license when it wishes to sell liquor. A business must obtain a PPA license when the owner would like to conduct any exhibition or performance, which may include sporting events, DJs, and dancing.

Applicants for both classes of licenses and the all individuals with ownership of more than 5% of the business must be deemed eligible for issuance of a license based on a background check. The location of the business must also be eligible for issuance of a liquor or PPA license.

In 2018, the Local Liquor Control Commission reviewed approximately 6000 liquor license renewals, 500 new liquor license applications, and 200 “change of officers” applications for liquor licenses. It reviewed approximately 700 public place of amusement license renewals and 70-80 new applications.

The role of the business consultant in processing hospitality-related licenses is similar to the role of the business consultant in processing non-hospitality related licenses.

a. Intake/Triage - Hospitality Licenses

The business consultant performs a consultation and identifies the full scope of licenses that the applicant requires. For example, an applicant might request a hotel license, but may also need a liquor or public place of amusement license if the applicant indicates that the hotel has mini-bars and a ballroom that hosts events.

In addition, the business consultant flags individuals who he believes are not being truthful and raises the issue to the Commissioner’s attention.⁷ For example, a business consultant must review a business’s site plan to determine whether a business is seeking to evade a prohibition on liquor stores established by a moratorium or other zoning rules. A “moratorium” is a prohibition on the issuance of a new liquor license at a specific location. Restaurants are exempted from moratoriums, while taverns are not. Accordingly, the business consultant must determine whether an individual is requesting a restaurant license instead of a tavern license to evade the moratorium. Similarly, business districts do not permit the establishment of businesses that sell exclusively liquor but they do allow the sale of liquor under an accessory packaged goods license, which means the liquor is sold as an accessory to a different type of good. Accordingly, the business consultant

⁷ This occurs on a regular basis.

must review the site plan for which an applicant is seeking an accessory packaged goods license to determine whether the applicant is seeking to evade the prohibition on liquor stores. Likewise, in processing PPA license applications, the business consultant must determine whether the applicant is misrepresenting the nature of his business to improperly evade the zoning provision's rules by claiming that his business falls within an exception, when in fact it does not. In cases where the business consultant believes an applicant is lying, he places a note in his application summary for Commissioner Trotter's attention, and Trotter decides how to handle the matter.

Trotter testified that if the applicant has a problem with zoning or another problem that would bar issuance of the license, the business consultant helps problem solve. For example, if the applicant wants to open a liquor store but the zoning prohibits the issuance of a liquor license, then the business consultant may ask questions and assess whether an accessory packaged goods license would serve the applicant's purpose. Such a license would allow the business to sell liquor in a business district where liquor stores are barred.

b. Zoning – Hospitality Licenses

After the intake process, the business consultant sends the application to zoning review. If zoning rejects the hospitality license, the business consultant cannot override that decision. However, Commissioner Trotter testified that the business consultant can work with the applicant to figure out how to accommodate those zoning issues.

If zoning approves the application, the applicant pays for the license, and provides the required documentation regarding his business.

c. Document Collection and Review

The business consultants collect and review documents related to the entity's corporate structure and its financial condition. The business consultants' review and collection of these documents mirrors the process used in reviewing applications for non-hospitality licenses.

BC Supervisor Knipper testified that he has a continual dialogue with the business consultants about the documents they should request. The business consultants ask Knipper, during their review of documents, whether they should request certain other documents.

d. Inspections and Criminal History

The business consultant sends owners with the requisite 5% or more interest in the business for fingerprinting and a background check.

In addition, the business consultant coordinates the inspection process. The business consultant places the applicant on a list so that the relevant departments perform the inspections. The business consultant may also ask the departments to submit the approvals so that the Commission can issue the license. Sometimes this involves clicking a button on a computer. Other times, if there is an impending deadline, the business consultant communicates directly with the relevant department. The required inspections may include inspections by the Department of Health, the Department of Buildings, the Department of Fire, and the BCAP's own Business Compliance Enforcement section.

e. Notice

The Department gives notice of a liquor license application to the local police commander, the local alderman, and the registered voters within 250 feet of the applicant's premises, as required by law. Aldermen may object to the issuance of a liquor license based on nuisance, police issues, and deleterious impact on the neighborhood. Similarly, the Department gives notices of a PPA license application to the local alderman and registered voters within 250 feet of the applicant's premises, as required by law.

When the business consultants receive an objection to a liquor license from either the police or the alderman, they recommend rejection of the application. When the business consultants receive an objection from the police, they do not verify the basis of those objections. There is no rule as to what level of community objection will result in a denial of the license. Generally, if close to half of the notified community members object to a liquor license, the Commissioner makes the determination of whether to issue the license.

The police or the alderman may withdraw their objections to the issuance of a liquor license if the applicant agrees to a plan of operation, which is a legal contract that places additional restrictions on the license for the duration of its term. A plan of operations may require the business owner to reduce hours of operation, reduce product sales, or satisfy security requirements. Similarly, an alderman may withdraw his objections to the issuance of a PPA license if the applicant agrees to a plan of conduct, which is a plan of operation applicable to PPA licenses. A

plan of conduct might require the establishment to close its windows to abate noise, or to limit certain types of entertainment that would be more disruptive to the community.

The Department receives plans of operation from aldermen, the police, the applicant, or the applicant's attorney. They similarly receive plans of conduct from aldermen, the applicant or the applicant's attorney. If the business consultant receives a plan of operations/conduct prior to completing the application summary and the applicant accepts the plan as a condition of the license, then there is no longer an impediment to granting the license. The business consultant makes a recommendation to approve or deny the application based on all the materials in the application, which include the plan of operation/conduct. If the business consultant receives an objection or a plan of operation/conduct after he issues his recommendation, neither the objection nor the plan serves as the basis for his recommendation.

Business consultants provide applicants with examples of plans that prior applicants have executed, which are found on the City's website. The weight of the evidence demonstrates that the example plans they provide are relevant to the objections. This conclusion is supported by testimony from Trotter, that the examples the business consultants provide address the objector's concerns. It is also supported by Menk's testimony on this subject. Menk stated that he only sometimes provides a random example to applicants, indicating by implication, that he sometimes provides example plans that are tailored to the problems raised by the objectors.

The business consultants do not draft plans of operation or plans of conduct. However, they may implement edits to a plan made by the Commissioner.

f. Application Summary

Once the business consultant has completed all the discussions, research, and reviews, and has ensured completion of inspections and criminal background checks, he completes an application summary document. The summary includes the facts presented to the business consultant by the client, the result of the business consultant's investigation, and the information gathered from other inspecting departments and through IRIS. The business consultant then makes a recommendation to approve or deny the application. If the business consultant approves the application, the BC Supervisor then performs a document review on the application.

Senior Business Consultant Correa sometimes talks to BC Supervisor Knipper about the application before he drafts the summary. Knipper has occasionally told Correa his position on whether he believes the license will be approved, irrespective of Correa's recommendation.

The business consultants base their decision solely on the materials presented in the application. They do not take into account Trotter's previous decisions on licenses when determining whether to recommend approval or denial of an application.

g. Document Review by Supervisor

Once the business consultant completes his review and submits his application summary, BC Supervisor Knipper then undertakes a more in-depth review of corporate and financial documents initially reviewed by the business consultant. He also reviews the criminal history results and the lease, to ensure that the applied-for business activity is permitted under the lease.

Following this review, the supervisor either approves, denies, or conditionally approves the document review. The supervisor informs the business consultant if he determines that additional documentation is necessary.

Senior Business Consultant Correa testified that Knipper has occasionally disagreed with his recommendations, but not often.

Trotter testified that BC Supervisor Knipper's document review is a separate determination and is not an approval of the business consultant's decision because he does not review matters related to law enforcement and community concerns. For example, in one case, Senior Business Consultant Correa recommended denial of a license application because the community, the alderman, and the police all voiced an objection to issuance of the license. The objectors noted that the location for which the license was sought had a history of crime, loitering, and police activity. The business consultant concluded that "overall the issuance of licenses would tend to create a law enforcement problem and have a deleterious impact on the health, safety or welfare of the community in which the licensed premises is to be located." BC Supervisor Knipper approved the document review in that case, but Trotter followed the business consultant's recommendation to deny the application based on law enforcement concerns and deleterious impact on the health, safety or welfare of the community.

h. Review by the Commissioner

If the supervisor approves the document review, then Commissioner Trotter approves, denies, or conditionally approves the application. When Trotter receives a recommendation from the business consultants and the BC Supervisor, she accepts those recommendations more than 95% of the time.⁸ She accepts the recommendations because the business consultants have already identified that the appropriate licenses are being issued. They have already problem-solved issues to satisfy the alderman, the community, or the local police commander, and they have already vetted any location restrictions. They have ensured that the inspections have been completed. In addition, BC Supervisor Knipper has reviewed the documents a second time to ensure that the Commission is not issuing licenses to those who are ineligible to obtain them.

IV. DISCUSSION AND ANALYSIS

The business consultants are not managerial employees within the meaning of Section 3(j) of the Act.

The Act excludes managerial employees from engaging in collective bargaining to “maintain the distinction between management and labor and to provide the employer with undivided loyalty from its representatives in management.” Chief Judge of 16th Judicial Cir. v. Ill. State Labor Rel. Bd., 178 Ill. 2d 333, 339 (1997). Section 3(j) of the Act defines a managerial employee as “an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices.” 5 ILCS 315/3(j). A two-part “traditional test” is used to determine managerial status under Section 3(j): first, the employee at issue “must be engaged predominately in the executive and management functions which specifically relate to running a department and include such activities as formulating department policy, preparing the budget, and assuring efficient and effective operations of the department,”⁹ and second, “the employee

⁸ Menk testified that Trotter rejects one out of three of his recommendations. However, he was unable to offer evidence regarding the rate at which Trotter accepts the business consultants’ recommendations in the aggregate. Accordingly, Trotter’s testimony is unrebutted.

⁹ “Other executive and management functions include using independent discretion to make policy decisions as opposed to following established policy, changing the focus of an employer’s organization, being responsible for day[-]to[-]day operations, negotiating on behalf of an employer with its employees or the public[,] and exercising authority to pledge an employer’s credit.” State of Illinois, Department of Central Management Services, 21 PERI 205 (IL LRB-SP 2005).

must direct the effectuation of management policies and procedures.” Vill. of Elk Grove Vill. v. Illinois State Labor Relations Bd., 245 Ill. App. 3d 109, 121-22 (2nd Dist. 1993) (quoted text); City of Evanston v. Ill. State Labor Rel. Bd., 227 Ill. App. 3d 955, 974-975 (1st Dist. 1992).

With respect to the first prong of the test, “executive and management” functions require more than the simple exercise of discretion or specialized expertise; rather, an employee must possess and exercise sufficient authority and autonomy to establish department goals or the means of achieving such goals on a broad scale. Village of Elk Grove Village, 245 Ill. App. 3d at 122 (citing City of Evanston, 227 Ill. App. 3d at 975); Cnty. of Cook v. Illinois Labor Relations Bd.-Local Panel, Serv. Employees Int’l Union, Local 74-HC, 351 Ill. App. 3d 379, 388 (1st Dist. 2004); Dep’t of Cent. Mgmt. Servs / Dep’t of Healthcare & Family Servs. v. Illinois Labor Relations Bd., State Panel, 388 Ill. App. 3d 319, 331 (4th Dist. 2009). Additionally, where an individual’s decisions are significantly circumscribed by predetermined requirements and procedures, the employee’s activities are not managerial under the Act. Eighteenth Judicial Circuit (Chief Judge), 14 PERI 2032 (IL SLRB 1998) aff’d Chief Judge of Eighteenth Judicial Circuit v. Illinois State Labor Relations Bd., 311 Ill. App. 3d 808, 815 (2nd Dist. 2000).

“An element to be considered in determining an employee’s managerial status is whether his policymaking role is advisory or subordinate since ‘it is the final responsibility and independent authority to establish and effectuate policy that determines managerial status under the Act.’” Cnty. of Cook, 351 Ill. App. 3d at 387-8 (quoting Village of Elk Grove Village, 245 Ill. App. 3d at 122 and City of Evanston, 227 Ill. App. 3d at 975); Dep’t of Cent. Mgmt. Servs / Dep’t of Healthcare & Family Servs., 388 Ill. App. 3d at 330-31. Nevertheless, under certain circumstances, an advisory employee who makes “effective recommendations” may also be managerial. ICC, 406 Ill. App. 3d at 775 (citing Chief Judge of the Sixteenth Judicial Circuit, 178 Ill. 2d at 339-40).

With respect to the second prong of the test, the employee must have “substantial discretion to determine how and to what extent policies will be implemented and [also] have the authority to oversee and direct that implementation.” Village of Elk Grove Village, 245 Ill. App. 3d at 122. It is not enough that an employee performs duties that are essential to an employer’s ability to accomplish its mission; rather, he “must possess the authority or responsibility to determine the specific methods or means of how the employer’s services will be provided.” Dep’t of Cent. Mgmt. Servs. (Health & Family Servs.), 388 Ill. App. 3d at 331.

1. Executive and Management Functions

The business consultants are not predominantly engaged in executive and management functions.

The business consultants do not engage in executive and management functions by helping “run” the department. An employee is deemed to help run a department where his job duties encompass a major component of the agency’s mission and where he directs the effectuation of existing policies by making effective recommendations on “major policy” issues. Department of Central Management Services, Illinois Commerce Commission (“ICC”), 406 Ill. App. 3d 766, 779 (4th Dist. 2010). Notably, employees’ activities in helping run a department must entail more than the mere exercise of professional discretion and technical expertise because the exercise professional discretion and technical expertise is insufficient, more generally, to satisfy the first prong of the managerial test. Department of Central Management Services/Department of Healthcare and Family Services, 388 Ill. App. 3d at 330; Illinois State Board of Elections, 28 PERI ¶ 70 (IL LRB-SP 2011).

Contrary to the Employer’s contention, an employee does not perform executive or management functions merely by undertaking functions that encompass an agency’s entire mission or a major component of it. Although the ICC court noted that one could “reasonably make such an argument,” the analysis the court applied emphasized the extent of the petitioned-for employee’s control over the enterprise. To that end, the court drew a comparison between the petitioned-for ALJs at issue in ICC and the faculty members at issue in Yeshiva.¹⁰ It noted that the ALJs could qualify as managerial if they were be deemed “the whole game” when it came to utility regulation, just as the faculty members who exercised “absolute authority” over academic matters were the whole game when it came to academic policy. ICC, 406 Ill. App. 3d at 779 (remanding for further consideration on this issue). Notably, this approach is consistent with Board and appellate court cases, which hold that the first prong of the managerial definition requires employees to possess the authority to broadly affect the organizations’ purpose. Dep’t of Cent. Mgmt. Services v. Illinois State Labor Relations Bd., 278 Ill. App. 3d 79, 89 (4th Dist. 1996); Illinois Dep’t of Cent. Management Servs., 5 PERI ¶ 2012 n. 2 (IL SLRB 1989).

¹⁰ N.L.R.B. v. Yeshiva Univ., 444 U.S. 672, 686 (1980).

Here, the business consultants perform functions that encompass a major component of the Department's mission, but the limited discretion they exercise precludes a finding that those functions are executive or managerial. The business consultants advance the mission of the Department, to facilitate the licensing application process, by performing the following tasks: They speak with applicants to determine the types of licenses they need. They determine whether the applicant is being truthful in his representations. They may inform applicants about the cost of one license versus another, or how the applicant could obtain a different license if the license initially sought is not permitted at the business location. In processing applications for limited business licenses, the business consultants may summarily issue the licenses if the applicant owes no debts to the City and the zoning section determines that the applicant's business is zoned for that activity. In processing applications for non-hospitality regulated/specialty licenses, the business consultants determine whether the applicant must submit additional financial documentation, and they then provide the application to a supervisor who decides whether to issue the license. In processing applications for hospitality licenses, the business consultants review the relevant documents provided by the applicant, and make a recommendation on whether the license should issue. If the police or aldermen object to the issuance of a hospitality license¹¹ they may send applicants examples of plans of operation/conduct accepted by other applicants and approved by the Department that resolved objections in other cases.

However, in undertaking all these functions, the business consultants lack the authority and discretion to broadly affect the department's goals and the means of achieving them. Each function is addressed in turn below. First, the process by which the business consultants triage a case and determine which license an applicant requires is solely an exercise of technical or professional discretion. During the triage process, the business consultant compares the applicant's business activity to the available licenses but exercises no broad discretion in selecting which licenses apply. Rather, the business consultant must select the correct license or licenses, as identified by the City's ordinances based on the applicant's business activity, and in some cases, the applicant's own cost-based preferences. Village of Elk Grove Village, 245 Ill. App. 3d at 122 (no broad discretion found). The existence of a correct versus an incorrect selection is rendered evident by the fact that the City has an enforcement process by which it will fine businesses who have an incorrect license or revoke the license altogether. Accordingly, the authority of the business

¹¹ Police objections only apply to liquor licenses.

consultants is considerably narrower than the authority of the senior procurement specialists who had discretion to consider as many as 30 different factors in identifying the lowest responsible bidder for a City contract. Cf. City of Chicago, 35 PERI ¶ 12 (IL LRB-LP 2018)

Given these limitations on the business consultants' exercise of discretion, their authority to inform applicants about their license options is not an executive or management function. As a general matter, an individual is not engaged in executive and management functions where he merely informs the public about the services that the public entity provides. City of Chicago (Mayor's Office of Information and Inquiry), 10 PERI ¶ 3003 (IL LRB-LP 1993). The guidance that the business consultants provide to applicants is, at its core, purely informational. The fact that it may be tailored to a particular applicant's concerns does not change the fact that the business consultant is simply informing the applicants of the licensing options available to them under the City's ordinances. For example, a business consultant can explain that one license may be cheaper, while another more expensive license would allow for the sale of a broader range of goods. Likewise, a business consultant may note that a license for a liquor store may be barred at the business's location, but that a different type of license would be permitted if the applicant elected to limit the amount of liquor sold in relation to other goods.

The Employer couches this exchange of information as "problem solving," but that characterization, even if accurate, does not render the business consultants' duties executive or managerial where the consultants cannot leverage the agency's authority to compel a particular choice. Indeed, the business consultants have no power to require an applicant to select one license or another, or to deny a license for which the applicant's business is otherwise qualified. In this respect, the business consultants' functions are distinguishable from those of the financial planning analysts at issue in City of Chicago, who actively negotiated agreements on behalf of the employer with third parties and could influence a third parties' actions through a give-and-take process. Cf. City of Chicago, 34 PERI ¶ 90 (IL LRB-LP 2017).

By extension, the business consultants are not predominantly engaged in executive and management functions when they ultimately issue the limited business license under their own signature after completing the triage process and receiving approval from zoning. As discussed above, the triage process is not an executive or management function, and the routine issuance of the limited business license to an applicant whose business qualifies for such a license under the City's ordinances is therefore likewise not an executive or management function. Indeed, the

decision of whether to issue the limited business license is not within the business consultants' control. If the applicant qualifies for the license, the business consultant must issue it. If the applicant does not qualify for the license because of zoning restrictions, for example, the business consultant cannot issue it, but may provide the applicant with information about how to cure the problem. In turn, if the applicant decides to change his business model to satisfy the zoning requirements, such that there is no longer a bar to issuance of the license, the business consultant must issue the license.

The Employer correctly notes that the business consultants do not simply check boxes and instead engage in some exercise of discretion when interacting with applicants and determining what questions to ask them when ascertaining whether a limited business license or some other license is required. However, the fact that business consultants' duties are not wholly routine or ministerial does not mean that their actions constitute executive and management functions. Chief Judge of the 11th Judicial Circuit, 16 PERI ¶ 2043 (IL SLRB 2000). Indeed, the right to join a union is not limited to those who perform rote or mechanical tasks and extends even to those who exercise professional discretion, provided that the exercise of that professional discretion is part of the routine discharge of professional duties, as it is in this case. City of Chicago, 8 PERI ¶ 3020 (IL LLRB 1992) (citing Montefiore Hospital, 261 NLRB 569 (1982)).

Next, the business consultants do not engage in executive and management functions when they process applications for non-hospitality, regulated or specialty licenses. In such cases, they do not make any recommendations. They merely collect the facts and compile information for a superior to review in greater depth, along with other materials, provided by other employees of the department. Compiling facts and information for a superior's review, without providing any recommendations, does not constitute an executive or management function. Chicago Park District, 8 PERI ¶ 3006 (IL LLRB 1992). The fact that the superior may make his decision based in part on information provided by the business consultant does not render the business consultants' information-collection duties executive or managerial in nature, particularly where they make no recommendations based on the information they have collected. Chicago Park District, 8 PERI ¶ 3006; State of Illinois, Department of Central Management Services (Public Aid), 2 PERI ¶ 2019 (IL SLRB 1986) (preparation of factual reports was not executive and management function where it simply served as the basis for recommendations made by others).

The discretion exercised by the business consultants in collecting documents relevant to processing applications for regulated and specialty licenses does not transform the business consultants' data-collection tasks into executive or managerial functions. Executive and management functions require more than just the exercise professional discretion and technical expertise. Department of Central Management Services/Department of Healthcare and Family Services, 388 Ill. App. 3d at 331; Illinois State Board of Elections, 28 PERI ¶ 70. Here, the business consultants' exercise of direction in collective documents is purely based on their technical expertise in the City's licensing process, or in some cases, their background in accounting. City of Chicago, 8 PERI ¶ 3020 (fact-finding and information-compiling duties, using professional judgment and expertise were not evidence of executive and managerial functions).

Moreover, any discretion exercised by the business consultants in collecting such documents is also significantly circumscribed by the City's ordinances, the Department's computer system, and the directives of their superiors. Decisions that are significantly circumscribed by predetermined requirements and procedures are not executive and management functions. Eighteenth Judicial Circuit (Chief Judge), 14 PERI 2032 aff'd Chief Judge of Eighteenth Judicial Circuit, 311 Ill. App. 3d at 815. Here, for example, the City's ordinances require all individuals with 5% ownership interest in a business to submit to a background check before obtaining a specialty or regulated business license. The business consultants identify the nature of the business entity in the IRIS computer system, and the computer lists the documents that the business consultant must collect to determine who possesses the requisite 5% ownership interest sufficient to warrant a background check. In collecting financial documents, the business consultants are guided by the source of funds outlined by the applicant on the financial disclosure form. The business consultants may ask for more information than what the ordinance requires; however, the evidence indicates that they do not exercise such initiative independently and instead are guided by the regular input of their superiors and their superiors' express directives. Indeed, one supervisor noted that there is a continual dialogue between the supervisor and the business consultant about the appropriate documents to collect. Notably, the superior's instructions necessarily take precedence over the business consultants' opinions because the superior performs his own review of the documents and will know if the business consultant has ignored his directives. Chief Judge of Eighteenth Judicial Circuit, 311 Ill. App. 3d at 815 (probation officers

who made independent decisions in each of their cases when carrying out their duties were not managerial where they worked within “relatively well-defined” guidelines).

Next, the business consultants do not engage in executive and management functions when they make recommendations on whether the Department should grant or deny an application for a hospitality license. As a preliminary matter, there is insufficient evidence that the business consultants exercise any discretion in determining whether the issuance of a hospitality license is permitted under the City’s ordinances, let alone the broad managerial discretion required under the Act. Trotter’s testimony referenced by the Employer on brief, does not support the Employer’s claim that the business consultants “flesh...out” ambiguous language in the municipal code. Trotter simply asserted it that was the business consultant’s job to determine whether any of the stated exceptions to the PPA ordinance applied. Although she noted that the PPA ordinance was vague because the rules are in the exceptions, the Employer presented no evidence to suggest that the exceptions themselves were vague.

More importantly, there is insufficient evidence that the business consultants are authorized, in practice, to interpret arguably vague ordinances. Rather, the evidence demonstrates that, in practice, the business consultants apply bright line tests and lack authority to make decisions on ambiguous subjects. For example, an ordinance provides that the Commissioner can deny a liquor license if its issuance would have “a deleterious impact on the health, safety or welfare of the community in which the licensed premises is to be located. However, in practice, the business consultants do not interpret these terms to determine whether that standard is met. Instead, the business consultant automatically recommends denial of a license if he receives any police objection or aldermanic objection, without even reviewing the sufficiency of the objections presented. If there are only citizen objections to the license, the business consultant will recommend approval of the license, unless half or more than half of the notified citizens object. In such cases, the business consultant simply informs the Commissioner of the issue, and the Commissioner determines whether the objection warrants denial of the license.

Similarly, the ordinance provides that that the Commissioner may excuse the distance limits imposed on the issuance of liquor licenses near a public library, but there is insufficient evidence that the business consultants make any recommendations on such matters. Chicago Municipal Code Section 4-60-020(d). The burden is on the Employer to provide sufficient evidence demonstrating its asserted exclusion. 80 Ill. Adm. Code 1210.107(a) (2003); see also

Cnty. of Will, 34 PERI ¶ 91 (IL LRB-SP 2017). Moreover, where the Employer claims that the petitioned-for employees exercise managerial authority by applying governmental regulations, it cannot meet its burden without showing how the petitioned-for employees exercise substantial discretion in doing so. Cnty. of Will, 34 PERI ¶ 91. Here, the Employer had the opportunity to question its own witnesses and the Union’s witnesses about the business consultants’ discretion in this regard but declined to do so. It likewise declined to present any evidence that a business consultant had ever effectively recommended that the Commissioner grant such a waiver. Moreover, the Commissioner’s reservation of authority to make unilateral assessments in ambiguous cases (e.g., applications with considerable citizen objections) weighs against a finding that the business consultants make any recommendations on similarly ambiguous issues. Illinois Department of Central Management Services, 5 PERI 2004 (IL SLRB 1988) (employees were not managerial where they exercised independent judgment only in routine matters).

Contrary to the Employer’s contention, the large total number of applications does not warrant the inference that the business consultants make recommendations on ambiguous cases where it is unclear how many applications present such ambiguities. Although the Commissioner likely cannot perform a de novo review of all applications, it is reasonable to infer that she focuses her attention on those cases that are not routine, such as those that permit her to grant a waiver of zoning rules. In addition, the business consultants’ “continuous dialogue” with superiors about the extent of the financial records they must request is consistent with the finding that resolution of most ambiguous matters is left to the higher-ranked employees. In sum, it is not the mere existence of ordinances that undermines the Employer’s claim of managerial authority, but the absence of evidence that the business consultants exercise substantial discretion in applying them. Cnty. of Will, 34 PERI ¶ 91; cf. City of Chicago, 35 PERI ¶ 12.

Next, the business consultants’ limited involvement in plans of operation or plans or conduct does not qualify as an executive or management function. A plan of operation/conduct is an agreement between an applicant and the entity that submitted an objection to the issuance of a hospitality license, which cures the objection. However, the business consultants do not draft the plans, they have no control over what such plans contain, and they have no authority to require an objector to agree to a plan. They simply provide applicants with examples of plans of operation/conduct executed by other applicants that have cured objections raised in other cases. The fact that the business consultants may sometimes choose relevant examples, as opposed to

random ones, does not evidence the exercise of executive or managerial discretion. The fact that they may point out areas that require special attention likewise fails to demonstrate the exercise of managerial discretion. Illinois Department of Central Management Services, 5 PERI 2012 (IL SLRB 1989) (specialists who walked vendors through standardized documents highlighting areas that needed special attention exercised purely technical discretion, rather than managerial discretion).

Similarly, the business consultants' consideration of these plans when making a recommendation on a hospitality license does not render the recommendation an executive or management function. The business consultant makes a binary choice. If the applicant or his attorney submits an agreed-upon plan, the objection is cured and the business consultant recommends that the Commissioner issue the license, provided the applicant meets the other eligibility requirements related to zoning and criminal history. If the applicant does not submit an agreed-upon plan, then the objection remains, and the business consultant recommends that the Commissioner deny issuance of a license. This is a routine and non-managerial task.

Next, the business consultants' obligation to inform management of applicants they believe to be untruthful does not qualify as an executive or management function. An employee who merely filters information to upper management, which may or may not be important, is not engaged in executive and management functions, absent any recommendations pertaining to the information they have identified. Am. Fed'n of State, County, & Mun. Employees, Council 31 v. State, Illinois Labor Relations Bd., 2014 IL App (1st) 130655 ¶43. Here, the business consultants merely flag suspicious applicants and thereby serve as a conduit of information for higher-ups, but do not take any action on the matter themselves or make recommendations on what actions others should take. For example, when an individual appeared to be using his daughter to obtain a license he could not himself obtain the previous week, the business consultant simply informed Assistant Commissioner Tibbs of his suspicions, who then assessed the situation and decided how to handle the matter. The business consultants are arguably the "first line of defense" against criminal activity, as the Employer asserts, and thereby serve an important function. However, their role as a conduit of information to higher-ups is not managerial where their authority to influence agency action on these matters arises only upon inadequate performance of their duties, i.e., by "actively or negligently failing to flag an issue that should otherwise have been flagged." Id.

Finally, the business consultants are not predominantly engaged in executive and management functions when they make recommendations on policy. The managerial test includes a predominance requirement, which focuses the examination on the petitioned-for employees' most important function or those functions that comprise most of their work time. Am. Fed'n of State, County & Mun. Employees, Council 31 v. State Dep't of Cent. Mgmt. Services (Illinois Commerce Comm'n), 2018 IL App (1st) 140656, ¶ 20 (Board properly construed the word “predominantly” in section 3(j) of the Act to mean “superiority in importance or numbers”). Making effective recommendations on department policy can qualify as an executive and management function. Am. Fed'n of State, County & Mun. Employees, Council 31 v. Illinois Labor Relations Bd., State Panel, 2014 IL App (1st) 123426, ¶ 47. However, such a function will not satisfy the predominance requirement, standing alone, where the petitioned-for employees rarely perform it or where there is evidence that it is not superior in importance when compared to their other tasks. Am. Fed'n of State, County, & Mun. Employees, Council 31, 2014 IL App (1st) 130655 ¶ 36; Dep't of Cent. Mgmt. Services/Dep't of Healthcare & Family Services, 388 Ill. App. 3d at 332.

Here, the business consultants' policy recommendations do not comprise the bulk of their work time nor does policy recommendation constitute their most important function. The business consultants' policy recommendations are exceedingly rare. The Employer noted only one instance in the Department's history in which any business consultant had ever influenced the Department's procedures through an effective recommendation. Indeed, there is no evidence that any of the currently-employed business consultants have made any recommendations on Department policy, let alone effective ones. Moreover, the business consultants' main task is not the formulation of policy through effective recommendation, but rather the processing of license applications—not an executive or management function. Even in cases where the business consultants make recommendations on whether the department should grant a hospitality license, their recommendations do not set precedent for future application, and do not alter existing standards. State of Illinois, Department of Central Management Services (Department of Human Services), 28 PERI ¶ 126 (IL LRB-SP 2012). Accordingly, the very minimal role that a lone business consultant played in effectively recommending a change the Department's procedures fails to demonstrate that the business consultants are predominantly engaged in executive and management functions. See Am. Fed'n of State, County, & Mun. Employees, 2014 IL App (1st)

130655 ¶ 36; cf. Dep't of Cent. Management Serv. (ICC), 30 PERI 206 (IL LRB-SP 2014) aff'd by State Dep't of Cent. Mgmt. Services (Illinois Commerce Comm'n), 2018 IL App (1st) 140656, ¶ 44-46.

The Employer correctly notes that the infrequent formulation of policy through effective recommendation does not always preclude a finding that the petitioned-for employee is predominantly engaged in executive and management functions. Dep't of Cent. Management Serv. (ICC), 30 PERI 206. However, in cases where the petitioned-for employees' recommendations on policy are infrequent, the employer must show the petitioned-for employees also perform other executive and management functions such that the employees' functions satisfy the predominance requirement in the aggregate. Id. The Employer has not done so here.

For example, the Court upheld the Board's determination that the IT Director at the Illinois Commerce Commission was a managerial employee, even though he had only made effective recommendations on two policies during his tenure. Dep't of Cent. Mgmt. Services (Illinois Commerce Comm'n), 2018 IL App (1st) 140656, ¶ 44, 46. The Board reasoned that the IT Director performed additional functions that satisfied the first prong of the statutory test. Dep't of Cent. Management Serv. (ICC), 30 PERI 206. He developed a case management system used by the entire agency, he created performance evaluation used by the entire agency, and as head of the IT Division, he was likely also ultimately responsible for the deploying division's resources. Id.

Here, by contrast, the business consultant's role in recommending changes to policy and procedure are even less prominent than the IT Director's, at issue in ICC. Furthermore, unlike the ICC's IT Director, the business consultants at issue here perform no other executive and management functions that can be aggregated with the lone effective recommendation on procedure to demonstrate that they are predominantly engaged in executive and management functions. Finally, the business consultants are the lowest-ranked employees within their division, not the highest, as was the case with the IT Director, and are not ultimately responsible for the deployment of the division's resources. The business consultants may inadvertently cost the Department money by issuing incorrect licenses that later require revocation, but they do not affirmatively decide when or how the Department should spend its resources. Cf. Dep't of Cent. Management Serv. (ICC), 30 PERI 206.

In sum, the business consultants are not predominantly engaged in executive and management functions.

2. Directing the Effectuation of Management Policies and Practices

The business consultants are not responsible for directing the effectuation of management policies and practices.

As noted above, an employee satisfies the second part of the test when he has substantial discretion to determine *how* and to *what extent* policies will be implemented, as well as the authority to oversee and direct their implementation. Village of Elk Grove Village, 245 Ill. App. 3d at 122; City of Chicago (Mayor's Office of Information and Inquiry), 10 PERI ¶ 3003 n. 7.

Here, the business consultants do not direct the effectuation of management policies and practices when they process applications for non-hospitality regulated/specialty licenses or when they process applications for limited business licenses. Their role consists of applying existing policies and procedures, and exercising professional discretion. “It is not enough to meet the second part of the managerial definition that an individual *effectuates* management policy” and performs duties essential to the employer's ability to accomplish its mission. Eighteenth Judicial Cir. (Chief Judge), 14 PERI 2032 aff'd Chief Judge of Eighteenth Judicial Circuit, 311 Ill. App. 3d at 815. Indeed, every employee in an organization who is not about to be discharged could be said to effectuate management policy and procedure, but that does not demonstrate that they do so on a broad, managerial scale. State of Illinois, Department of Central Management Services (Department of Healthcare and Family Services), 28 PERI ¶ 75 (IL LRB-SP 2011) (employee effectuated management policy and procedure, but “that could be said of every employee of an organization not about to be discharged”; employee was not managerial).

The fact that the business consultants issue limited business licenses without supervisory review does not demonstrate that they exercise substantial discretion to determine *how* and to *what extent* policies will be implemented, given the restrictions on their authority set forth above.

Likewise, the business consultants do not direct the effectuation of management policies and practices through their effective recommendations on whether the Commissioner should issue hospitality licenses. “If an ostensibly advisory employee exercises managerial authority through his or her recommendations on major policy issues, which the superiors almost always accept, [the court] will look beyond the formal structure of the employee's participation in the enterprise, *i.e.*, the making of recommendations, and take account of the power that the employee actually wields.” ICC, 406 Ill. App. 3d at 779. However, the Board has emphasized that not all effective

recommendations are managerial in nature. State of Illinois, Department of Central Management Services (Department of Human Services), 28 PERI ¶ 126.

Here, the power that the business consultants actually wield is narrow and limited by the City's ordinances and the Department's internal procedures concerning their application. The business consultants' recommendations do not concern "major policy issues" that guide future agency action on similar matters. They consider each application in isolation, without regard to the Commissioner's prior determinations in similar cases, and their recommendations have no bearing on future cases. Nor do the recommendations guide the ultimate decisionmakers on novel issues such as new legislation or policy formulation. Thus, their recommendations on hospitality licenses simply effectuate existing ordinances and policies by helping the Department issue its product—licenses. State of Illinois, Department of Central Management Services (Department of Human Services), 28 PERI ¶ 126 (determining on similar grounds that the ALJ's recommendations did not direct the effectuation of management policies and practices); cf. Am. Fed'n of State, County & Mun. Employees (AFSCME), Council 31, 2014 IL App (1st) 123426, ¶ 47 (ALJs directed the effectuation of management policies and practices by helping formulate policy through their effective recommendations).

The effective recommendation offered by former business consultant Orduno, to ask more in-depth questions when reviewing financial documents, does not demonstrate that the business consultants are responsible for directing the effectuation of management policies and practices. Employees who serve in a purely advisory and subordinate capacity are not managerial unless the structure of the enterprise belies the power that an advisory employee actually wields. Compare Dep't of Cent. Mgmt. Services v. Illinois State Labor Relations Bd., 278 Ill. App. 3d 79, 87 (4th Dist. 1996) and Dep't of Cent. Mgmt. Services/Illinois Commerce Comm'n v. Illinois Labor Relations Bd., 406 Ill. App. 3d 766, 779 (4th Dist. 2010). Here, the business consultants do not in fact wield great power over the enterprise. Orduno's recommendation on procedure is not part of a larger role played by business consultants in directing the effectuation of management policies and practices. The business consultants cannot change the focus or mission of the Department and, as discussed above, their recommendations on the issuance of licenses, while routinely accepted, do not qualify as "managerial order[s]." Dep't of Cent. Mgmt. Services v. Illinois State Labor Relations Bd., 278 Ill. App. 3d at 88. Indeed, Orduno's recommendation on the new procedure is not representative of the work performed by employees in the petitioned-for title. The

petitioned-for employees' job descriptions do not indicate that they are responsible for refining the Department's processes, either directly or through effective recommendation, and Orduno is the sole employee who has ever made such a recommendation. Thus, Orduno's effective recommendation does not satisfy the second prong of the managerial test. Cf. Dep't of Cent. Mgmt. Services/Illinois Commerce Comm'n v. Illinois Labor Relations Bd., 406 Ill. App. 3d at 779.

In sum, the business consultants are not managerial employees within the meaning of Section 3(j) of the Act.

V. CONCLUSIONS OF LAW

1. The Business Consultants and Senior Business Consultants are not managerial employees within the meaning of Section 3(j) of the Act.

VI. RECOMMENDED ORDER

Unless this Recommended Decision and Order Directing Certification is rejected or modified by the Board, the American Federation of State, County and Municipal Employees, Council 31 shall be certified as the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment pursuant to Sections 6(c) and 9(d) of the Act.

INCLUDED: The titles of Business Consultant and Senior Business Consultant are to be added to the historical AFSCME-represented Unit #1.

EXCLUDED: All supervisory, managerial and confidential employees within the meaning of the Act.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200-1240, the parties may file exceptions to this recommendation and briefs in support of those exceptions no later than 14 days after service of this recommendation. Parties may file responses to any exceptions, and briefs in support of those responses, within 10 days of service of

the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the recommendation. Within five days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross responses must be filed with the General Counsel of the Illinois Labor Relations Board, to either the Board's Chicago Office at 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. 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 1st day of July 2019

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

/s/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**