STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

American Federation of State, County, And Municipal Employees, Council 31,	)	
Petitioner,	)	
	)	Case No. L-RC-19-017
and	)	
City of Chicago,	)	
Employer.	)	

ORDER

On September 12, 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 November 14, 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the parties have waived their exceptions to the Administrative Law Judge's Recommended Decision and Order, and this non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.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 14th day of November 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,	)	
and	)	Case No. L-RC-19-017
City of Chicago,	)	
Employer.	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On April 9, 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 an employee in the title Administrative Services Officer I ("ASO I"), employed by the City of Chicago (City or Employer) in its Department of Family and Support Services to the existing, AFSCME-represented Unit 1. The Employer opposed the petition, asserting that the employee sought to be represented is excluded from coverage of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2014), as amended, pursuant to the exemption for confidential 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 April 10, 2019 before ALJ Sharon Purcell. The Board subsequently transferred the case to the undersigned. Both parties elected to file post-hearing briefs.

I. PRELIMINARY FINDINGS

The parties stipulate and I find:

1. The Employer is a public employer within the meaning of Section 3(o) of the Illinois Public Labor Relations Act. 5 ILCS 315/3(o).
2. The Employer is a unit of local government subject to the jurisdiction of the Board's Local Panel pursuant to Section 5(b) of the Act.

3. The Union is a labor organization within the meaning of Section 3(i) of the Act.
4. At all relevant times, the Employer and the Union are parties to a collective bargaining agreement, dated July 1, 2017 – June 30, 2022.
5. On or about January 11, 2019, the Union filed a representation petition seeking to add the Administrative Services Officer 1 – Excluded position within the Department of Family and Support Services, currently occupied by Valerie Lathion, to Unit #1.

II. ISSUES AND CONTENTIONS

The issues are (1) whether the petition is barred by the Union's 2012 agreement, (2) whether the Union's petition has majority support, (3) whether the proposed unit is appropriate, and (4) whether the petitioned-for position is confidential within the meaning of Section 3(c) of the Act.

The Employer asserts that the Union must be bound to its agreement of 2012 to exclude the petitioned-for ASO I because the Board holds parties to their stipulations. The Union counters that the agreement does not bar its petition because it contains only general exclusionary language, which does not state the reason for the exclusion.

The Employer next asserts that the Union does not have sufficient support within an appropriate unit. It argues that the Union must obtain majority support within a City-wide title, which it identifies as "ASO I-Excluded." It asserts that there are five positions in this title and that the Union must therefore have majority support within that group. The Union counters that it need only obtain majority support in the petitioned-for position, and that the proposed unit is appropriate because the Employer previously agreed to split the ASO I classification by including some ASO Is in the unit and excluding others. It concludes that the petition need not be dismissed for failing to seek fewer than all employees in the ASO I title.

On the merits, the Employer asserts that the ASO I position, held by Valerie Lathion, is confidential within the meaning of the Act under both the labor nexus test and the authorized access test. Regarding the labor nexus test, the Employer asserts that Lathion assists Deputy Commissioner of Human Resources and Administrative Services Monica Rafac and Supervisor of Personnel Administration Nedrick Miller in a confidential capacity. The Employer contends that Lathion gathers and scans documents for these individuals pertaining to grievance arbitrations, disciplinary matters, and investigations into employees by the Office of the Inspector General or

the Equal Employment Opportunity Office. The Employer reasons that Lathion thereby has access to the Department's litigation strategy and advance knowledge of contemplated discipline against bargaining unit members.

The Union counters that Lathion's assistance to Rafac and Miller does not satisfy the confidential exclusion because neither Rafac nor Miller formulate, establish, and effectuate labor relations policies. In addition, the Union asserts that Lathion does not assist Rafac and Miller in a confidential capacity. Rather, she provides Rafac with administrative assistance related to personnel files and related information, which do not give her advance knowledge of the Employer's labor relations policies. The Union further asserts that the Employer's claimed reliance on Lathion's future duties regarding grievance processing is misplaced where the Employer did not advise Lathion that she would have new duties and did not give a reason for assigning them.

Regarding the authorized access test, the Employer similarly argues that Lathion has authorized access to documents that give her advance notice of contemplated discipline against bargaining unit members and of the Employer's litigation strategy on personnel matters. The Employer also argues that, in the future, Lathion will again gather documentation to assist the department in responding to grievances and will therefore have advance notice of the Employer's strategy in responding to grievances. The Employer denies that the performance of these duties is speculative, where Lathion's past duties were similar.

The Union counters that Lathion does not have authorized access to confidential materials because, in the four years that she has worked for the Employer, she has never viewed grievance files, collective bargaining proposals, or reports from the Office of the Inspector General. The Union further notes that the Employer did not present evidence that Lathion had ever viewed the investigation reports from the EEO Office. The Union argues that Lathion does not have advance notice of disciplinary actions against unit members, despite gathering and scanning documents to support such action, because Rafac has not informed her of why she needs the documents. The Union rejects the Employer's reliance on Lathion's future duties to support the claimed exclusion, reasoning that they are speculative and contrived.

III. FACTS

1. The Parties' Agreement and the Certification

The Union represents a broad-based historical unit of City administrative and clerical employees known as Unit 1. The unit includes over 150 different titles and approximately 1172 employees.

On or around July 25, 2011, the Union filed a petition in Case No. L-RC-12-003 seeking to add the title Administrative Services Officer I (ASO I) to Unit 1. There were then 30 employees in the ASO I title. The Employer objected to the petition.

On January 11, 2012, the parties reached an agreement on the petition. They agreed to include 19 ASO Is in the unit and they agreed to exclude 11 ASO Is. The agreement states the following in relevant part: "The City agrees that the Union's petition to represent the title Administrative Services Officer I will be granted and that the following…nineteen (19) positions…will be certified….The Union has agreed to exclude from its petition the following eleven (11) positions currently occupied by the following employees." The parties identified the included and excluded positions by employee and department. The parties' agreement did not identify a reason for any of the exclusions.

Within certain departments, the parties excluded some ASO Is, but included others. For example, the parties agreed to included one ASO I employed in the Department of Transportation, yet agreed to exclude another ASO I employed in that same department. Similarly, they agreed to include one ASO I employed in the Office of Emergency Management and Communications (OEMC), yet agreed to exclude another ASO I employed in that same department. Among the excluded positions was the petitioned-for ASO I within the Department of Family and Support Services, held by Valerie Lathion. Lathion is the current position holder.

The Union did not promise that it would refrain from organizing or seeking to represent the excluded titles in the future.

2. Department's Organizational Structure

The Department of Family and Support Services handles all the human services for the City. It serves clients from zero to senior years old, including the homeless. The Department employs 315 full-time employees and approximately 300 part-time employees. Approximately 80% of the full-time staff is unionized. The part-time staff is non-union. The Department

maintains 15 senior satellite centers. When there is sufficient funding, the City staffs those centers with employees from a delegate agency, but the Department currently uses its own employees to staff them due to funding constraints.

The Department is comprised of a programmatic arm and an administrative arm. Human Resources and Administrative Services is the administrative arm of the Department. Monica Rafac is Deputy Commissioner of Human Resources and Administrative Services. Rafac directly oversees Nedrick Miller, the Supervisor of Personnel Administration, and four other employees. Rafac indirectly oversees an additional seven employees.

Valerie Lathion is an Administrative Services Officer I whose position is at issue in this case. She has held the ASO I position since 2000 and previously worked in a different Department. After moving to the Department of Family and Support Services, she reported to Miller from July 2013 to July 2014. She has reported to Rafac since July 2014. Currently, Lathion does not perform ASO I duties. Instead, she temporarily oversees a satellite senior center operated by the Department. This assignment began in June 2018. Rafac testified that she hopes to return Lathion to her regular duties at the main office by June 2019. Prior to the hearing in this case, no member of management had told Lathion when her temporary assignment would end.

1. Duties of Deputy Commissioner Rafac and Supervisor of Personnel Administration Miller

Deputy Commissioner Rafac oversees hiring, terminations, labor relations, payroll, and workers compensation matters. Rafac is also responsible for discipline and labor issues for all Department employees, not just those in Human Resources and Administrative Services. To that end, Rafac is the Department's liaison to a number of City Departments and offices. She is the liaison to the Department of Human Resources, which includes the Equal Employment Opportunity Office (EEO Office). The EEO Office investigates complaints related to harassment, discrimination, sexual harassment, and violence in the workplace. Rafac is the liaison to the Department of Law including that Department's Labor Relations Division regarding employee discipline, termination, and employment-related issues. Rafac is the liaison to the Office of the Inspector General (OIG) regarding human resources complaints and matters relating to hiring oversight. Finally, Rafac is the liaison to the Office of Budget and Management on matters related to the personnel budget and hiring.

As the liaison to these Departments, Rafac is responsible for providing them with information and receiving the reports they complete. For example, if an employee files a complaint with the EEO Office against another employee, Rafac must provide the EEO Office with information pertaining to both employees, including their personnel files. The accused employee may not be aware that he is under investigation at the time Rafac is gathering information to provide the EEO Office. When the EEO Office concludes an investigation, it sends an investigative report to Rafac explaining the outcome of the investigation, whether the allegations were founded or unfounded. If the EEO Office finds that the allegations are founded, the report may include a recommendation for discipline. Rafac receives the report either by email or in a hard copy form, by mail. At the time Rafac receives the report, the Department has not yet informed the employee of the outcome of the investigation.

Similarly, Rafac provides the OIG with relevant information, including the investigated employee's personnel file. Rafac receives investigative reports from the OIG in hard copy form, by mail, before the employee is made aware of the outcome.

Likewise, Rafac initiates discipline and discharge proceedings by communicating with the Law Department. In cases of discipline, Rafac provides the law department with the employee's personnel files, disciplinary files, and the files of individuals who had received similar discipline in the past. In cases of discharge, Rafac sends the law department a request to discharge an employee, drafts a document detailing the issue to the law department, and provides the Department with documentation to support her request. The documentation includes the affected employee's personnel file, the employee's time and attendance records, the employee's hiring documentation, and/or other information depending on the nature of the case. The affected employee is not necessarily aware that Rafac is seeking his discharge at the time Rafac provides the law department with her request. Rafac works with the Law Department to address strategies on legal matters.

Rafac does not ordinarily attend contract negotiations. Rafac discusses the provisions that she and Miller wish to change in the contract. Miller attends negotiations and reports to her on what occurred. In one case, Rafac adamantly opposed a proposal that presented a means to change the grade of a title employed within the Department, and the City's negotiators modified their proposal in response to that feedback.

Rafac signs off on third level grievances. She has authority to approve or deny grievance settlement agreements.[1] Rafac does not attend grievance meetings. However, Rafac and Miller discuss strategy for handling the grievance, and Miller informs her about what occurred at the grievance meeting. If the Union demands to arbitrate a grievance, Rafac and Miller represent the Department and the Law Department acts as counsel in the matter.

Rafac is involved in employee layoff and classification. In the event of a layoff, she and her staff would review seniority dates and vacancies. She is responsible for employee classifications/reclassifications in cases where the Employer wishes to reorganize. In cases where a union seeks to represent a title within the Department, she works with Miller and the Law Department to determine how the Employer should move forward.

Supervisor of Personnel Administration Miller oversees labor relations for the Department. He represents the Department in contract negotiations. He provides the Department's position on contract proposals, he receives and reviews the Union's proposals, and he sometimes provides the Union with the Department's proposals. He informs the Employer's key principals as to why the Department is not interested in particular proposals presented by the Union. Miller maintains the information he collects and generates during contract negotiations in a file on a desk in his office. The information primarily includes his notes and the parties' proposals.

Miller has a role in employee discipline. He investigates allegations that employees have violated the personnel rules, and he assists managers in drafting incident reports. He makes a recommendation to Rafac about whether an employee should receive discipline and he sends her a packet to support his recommendation which includes his recommendation, the pre-disciplinary activity, the notes, and the incident report. He scans the information and provides it to Rafac. After Rafac determines the level of discipline, Miller assists the Department in drafting the notice of discipline provided to the employee.

Miller receives grievances and helps management formulate a response. If the Union files a grievance at the third step, he discusses it with Rafac and proposes a response. Miller gathers information to respond to the grievance. This includes the grievant's disciplinary history and other parts of the grievant's permanent file. He gathers information both electronically and from his

[1] If the proposed settlement is extraordinary and involves a large sum of money, Rafac needs to consult her supervisor before approving a settlement.

paper grievance files, which he keeps locked in his office. The grievance file includes the grievance, supporting data provided by the Union and or the Department, his notes from the first or second level grievance hearings, and the outcome.

Miller has suggested changes to the Department's policies. Miller is responsible for notifying the union of policy changes.

2. Past Duties of ASO I Valerie Lathion

While serving as an ASO I at the Department, Lathion worked with interns and placed them with managers. When an individual was injured on the job, she followed up with the supervisor and put the relevant information into the computer system. She updated employees about their benefits via email. If a member of the public suffered an injury on City property, she obtained an incident report from the manager on duty and sent it to the Law Department. When an individual went on duty disability, she entered their status into the computer system. She maintained personnel files by filing records of discipline that the Employer had already issued to the employee. She also sent documents to storage.

From 2013 to 2014, when Lathion reported to Miller, she gathered information pertaining to grievances and disciplinary matters, and delivered them to the appropriate individuals. Miller testified that Lathion had access to his grievance files and discipline files because she had access to his office and the files are open in the office. Lathion confirmed that while she reported to Miller, she had access to Miller's grievance files. Lathion took notes at grievance meetings and sometimes served as a notetaker at pre-disciplinary hearings.

From 2014 to July 2017, while Lathion reported to Rafac and performed ASO I duties, Miller did not ask her to access his grievance files or any other files in his office, and she did not attend any pre-disciplinary hearings. There is no evidence in the record as to whether Lathion took notes at grievance meetings during that time. However, Rafac testified that Lathion assisted her in maintaining her grievance files, which she keeps outside her office in a locked cabinet. Lathion had access to the key and could use it as needed.

While Lathion reported to Rafac and performed ASO I duties, she gathered information including personnel and disciplinary files that Rafac provides to various City departments and offices including the Law Department, the Human Resources Department, and the OIG. Rafac testified that she informed Lathion in cases when she intended to submit the gathered information

to the OIG, but did not tell her the subject of the investigation. Rafac further explained that she cannot broadcast the fact that an employee is under investigation. By contrast, Lathion testified that Rafac did not give her any information about why she needed the files. Unionized employees in payroll and timekeeping may become aware that there is an ongoing investigation because Rafac may need to collect relevant records from them.

Lathion has never had access to Rafac's emails or Miller's emails. She has never seen any collective bargaining proposals from the City or the Union. The Employer has never asked Lathion to type up layoff notices or to review employees' seniority for layoff purposes. Lathion has never been involved in drafting grievance responses.

While Lathion reported to Rafac, she opened Rafac's mail. Rafac receives OIG reports and EEO reports by mail or by email. Lathion did not open any letters from the Inspector General's Office because they are marked confidential and she does not open any letters labeled confidential. When Rafac received a letter marked "confidential," Lathion would give it to Alice Lancaster, the Director of Administration. Lathion has never scanned any OIG reports for Rafac.

3. Anticipated Duties

Rafac and Miller testified that when Lathion returns to the main office, she will report directly to Miller. She will continue to maintain personnel files and disciplinary files. In addition, Lathion will continue to assist in gathering information for Rafac in responding to EEO Office, OIG, and Law Department requests.

Although Rafac testified that Lathion would be the primary note-taker for disciplinary actions, Miller testified that she will only serve as notetaker at pre-disciplinary meetings if no one else could perform that function.

Miller testified that Lathion will take notes at third step grievance hearings, and if necessary, also at lower-level grievance meetings. Miller testified that he will also ask her to gather information related to grievances, "if she has the time and [he] find[s] that there are some issues that can be handled in an educational way." He stated that he will instruct her as to the information he would like her to collect for him and that he will tell her where she can find it.

Neither Rafac nor Miller informed Lathion that she would be responsible for new duties when she returned to the central office.

IV. DISCUSSION AND ANALYSIS

1. Effect of the Parties' Agreement

The parties' 2012 agreement does not bar the petition because the agreement contains only general exclusionary language, unaccompanied by any promise by the Union that it will refrain from seeking to represent the employee at issue.

The Board has a well-established practice of holding parties to their stipulations regarding bargaining unit inclusions and exclusions where the parties' stipulations identify the reason for the exclusions. City of Chicago, 33 PERI ¶ 45 (IL LRB-LP 2016) (collecting cases). However, if the parties' agreement does not identify the reason for the exclusions, the Board will not preclude a union from seeking to represent the excluded positions, unless the union has also made an express promise that it will refrain from organizing or representing them. City of Chicago, 33 PERI ¶ 45; Chicago Hous. Auth., 11 PERI ¶ 3027 (IL LLRB 1995).

Here, the parties' agreement contains only general exclusionary language because it does not explain why the parties chose to add certain ASO Is to the bargaining unit while excluding others. State of Illinois, Department of Central Management Services (Department of Insurance), 20 PERI ¶ 74 (IL LRB-SP 2004) (agreement contained a general exclusionary clause because it did not explain reason for the agreed exclusion). Furthermore, the parties' agreement contains no promise by the Union that it will refrain from seeking to represent the excluded positions. Accordingly, the Union is not estopped from seeking to represent the position at issue. City of Chicago, 33 PERI ¶ 45 (general exclusionary clause did not bar the petition absent promise from union that it would refrain from seeking to represent the previously-excluded employees).

Notably, there are no equitable considerations in this case that warrant a contrary result. In Quincy Public Library, the Board carved out an equitable exception to the rule regarding general exclusionary clauses, but it does not apply here. Quincy Public Library, 11 PERI ¶ 2041 (IL SLRB 1995). In that case, the union entered into a voluntary recognition agreement with the employer wherein it agreed to drop its request to represent certain titles in exchange for the employer's waiver of its right to a hearing/election. Quincy Public Library, 11 PERI ¶ 2041. The agreement contained only general language and no promise by the union that it would refrain from seeking to represent the excluded employees. Id. However, the Board nevertheless held the union to the agreed-upon exclusions because the union petitioned to represent the excluded positions a mere ten days after the Board certified the voluntarily recognized unit. Id. The Board reasoned that

"a waiver was inherent in the parties' agreement," and it imposed an equitable remedy. Id. (imposing a 12-month bar to the union's attempt to petition for the disputed positions).

Here, by contrast, the Union's good faith cannot be questioned because there is no close proximity between the parties' earlier agreement and the Union's petition to include a previously-excluded position. Indeed, the Union waited over six years after the parties' agreement to file its petition, and it therefore did not deprive the Employer of its bargained-for benefits. Indeed, not even an express waiver of the Union's right to represent the identified employee would be enforced in perpetuity. City of Chicago, 33 PERI ¶ 45.

Thus, the parties' 2012 agreement does not bar the petition.

2. Question of Majority Support

The petition has majority support. When a union seeks to add positions to an existing unit, there is no question of representation in the existing unit. There is only a question of representation among the employees sought to be added. Dupage Area Vocational Educ. Auth. v. State Educ. Labor Relations Bd., 167 Ill. App. 3d 927, 939-40 (4th Dist. 1988) (addressing similar procedure arising under the Illinois Educational Labor Relations Act). In such cases, the Board considers whether there is sufficient support for the union among the employees that the union seeks to add. Ill. Dep't of Cent. Mgmt. Servs. (Dep't of Children and Family Services), 8 PERI ¶ 2037 n. 2 (IL SLRB 1992) (ALJ found that "there [was] nothing inappropriate in adding employees to an existing unit through a representation petition"; Board affirmed and directed election in petitioned-for group). Here, the petitioned-for group is comprised of one individual, and the Union has demonstrated majority support within that group of one.

3. Confidential Exclusion

ASO I Lathion is not a confidential employee within the meaning of Section 3(c) of the Act.

The purpose of the confidential exclusion is to prevent employees from having their loyalties divided between the employer, who expects confidentiality in labor relations matters, and the union, which may seek disclosure of management's labor relations material to gain an advantage in the bargaining process. City of Evanston v. Ill. State Labor Rel. Bd., 227 Ill. App. 3d 955, 978 (1st Dist. 1992).

The Act sets forth two tests to determine whether an employee is subject to the confidential exclusion, (1) the labor nexus test and (2) the authorized access test. 5 ILCS 315/3(c). The Board has also adopted the reasonable expectation test, which applies in the absence of a preexisting collective bargaining relationship where the workplace is therefore new to collective bargaining. Chief Judge of the Cir. Court of Cook Cnty. v. Am. Fed of State Cnty. and Mun. Empl., Council 31, 153 Ill. 2d 508, 524 (1992).

a. Authorized Access Test

ASO I Lathion is not confidential under the authorized access test because the Employer has failed to demonstrate that Lathion has authorized access to confidential material in the ordinary course of her duties. Although Lathion had advance knowledge of the Employer's contemplated disciplinary action against other employees while reporting to Rafac, the Employer has not demonstrated that she will retain this duty when reporting to Miller.

An employee is confidential under the authorized access test if, in the regular course of his duties, he "ha[s] authorized access to information concerning matters specifically related to the collective-bargaining process between labor and management." Chief Judge of the Cir. Court of Cook Cnty., 153 Ill. 2d at 523. Information related to the collective-bargaining process includes (1) the employer's strategy in dealing with an organizational campaign, (2) actual collective-bargaining proposals, and (3) information relating to matters dealing with contract administration. Dep't of Cent. Mgmt. Serv. (Dep't of State Police) v. Ill. Labor Rel. Bd., State Panel, 2012 IL App (4th) 110356 ¶ 27; City of Evanston., 227 Ill. App. 3d at 978. An employee's "access to 'confidential' information concerning the general workings of the department or to personnel or statistical information upon which an employer's labor relations policy is based is insufficient to confer confidential status." Dep't of Cent. Mgmt. Serv. (Dep't of State Police), 2012 IL App (4th) 110356 ¶ 27; City of Evanston, 227 Ill. App. 3d at 978. Likewise, merely supplying raw financial data for use in negotiations is insufficient to warrant exclusion under this test. Chief Judge of Circuit Court of Cook County v. Am. Fed'n of State, County, & Mun. Employees, Council 31, AFL-CIO, 218 Ill. App. 3d 682, 705 (1st Dist. 1992); but see Dep't of Cent. Mgmt. Serv., 2011 IL App (4th) 090966 ¶ 168, 181.

However, individuals who have advance notice or prior knowledge of contemplated disciplinary action against an employee are confidential employees. City of Chicago, 36 PERI ¶

12 (IL LRB-LP 2019) (reaffirming Board precedent on this issue); State of Ill. Dep't of Cent. Mgmt. Servs (Dept. of Corrections) ("DOC 2017"), 33 PERI 121 (IL LRB-SP 2017) aff'd by unpub. ord. 2018 IL App. 1st 171322-U (investigators who made findings on employee misconduct had advance notice of discipline against employees); City of Chicago Office of Inspector Gen., 31 PERI ¶ 6 (IL LRB-LP 2014) (investigators who received and reviewed draft charges from the employer's legal department before the employer issued discipline had advance knowledge of contemplated discipline); City of Rolling Meadows, 34 PERI ¶ 116 (IL LRB-SP 2017) (employee who had access to disciplinary documents prior to issuance was confidential under the authorized access test); State of Ill., Dep't of Central Mgmt. Servs., 30 PERI ¶ 38 (IL LRB-SP 2013) (employee with prior knowledge of contemplated discipline was a confidential employee); cf. City of Naperville, 20 PERI 184 (IL LRB-SP 2004) (internal affairs sergeant who investigated employee misconduct and drafted reports was not confidential despite having access to internal affairs files); cf. Pleasantview Fire Protection Dist., 17 PERI ¶ 2006 (IL LRB-SP 2000) (affirming ALJ's conclusion that petitioned-for captains were public employees, despite having foreknowledge of discipline and grievance handling); cf. State of Illinois, Department of Central Management Services, 25 PERI ¶ 139 (IL LRB-SP 2009) (noting that employees excluded under the authorized access test must have "authorized access to confidential information concerning anticipated changes which may result from collective bargaining negotiations").

The employee's access to such confidential material must occur in the ordinary course of her duties. In interpreting the phrase, "in the regular course of duties" the Board distinguishes "between infrequent but normal tasks and mere *ad hoc* assignments." City of Chicago, 26 PERI ¶ 114 (IL LRB-LP 2010). An employee who only infrequently, but consistently, assists with or has authorized access to confidential information may be considered a confidential employee, but an employee's role is merely *ad hoc* when such access is not part of her regular duties. Id.; see Chief Judge of the Circ. Crt. of Cook Cnty., 218 Ill. App. 3d at 703 (an employee's occasional substitution for a confidential employee was insufficient to render that employee a confidential employee because this substitution was not performed on a regular basis). The Board has noted that an employee's authorized access occurs in the regular course of their duties when the employee had such access in the past and where the Employer is likely to grant them the same access in the future. City of Chicago, 36 PERI ¶ 12.

Here, Lathion had advance knowledge of disciplinary actions against employees while reporting to Rafac because she was authorized to view the EEO reports that Rafac received by mail. The reports explain the outcome of an EEO investigation, state whether the allegations are founded or unfounded, and can include disciplinary recommendations. In turn, Lathion had advance knowledge of the most likely disciplinary outcome against employees whose conduct was subject to EEO investigation. She knew that Rafac would likely impose discipline if the EEO recommended disciplinary action. Indeed, as evidenced by the disciplinary recommendations contained in such reports, the purpose of the investigation is to resolve complaints of discrimination and harassment brought by City employees by disciplining those who violate the EEO policy. She also knew that Rafac would likely not impose discipline where the allegations are deemed unfounded because the AFSCME contract states that the Employer cannot discipline employees without just cause. DOC 2017, 33 PERI 121 (applying such an analysis) aff'd by unpub. ord. 2018 IL App. 1st 171322-U. Although Lathion did not participate in the investigatory process and was not responsible for making recommendations on the question of discipline, the Board's case law on the authorized access test does not include an exception in such cases. City of Rolling Meadows, 34 PERI ¶ 116 (IL LRB-SP 2017) (petitioned-for employee had access to disciplinary documents before the employer issued them and therefore satisfied authorized access test).

However, the Employer has not demonstrated that Lathion's advance knowledge of contemplated disciplinary actions will occur in the ordinary course of her duties when she returns to her duties as an ASO I, after her temporary assignment ends. The threshold question in analyzing this issue is whether Lathion's future duties are appropriate for consideration in this case. The Board's case law suggests that they are. The Board has considered future duties of vacant positions where the Employer has provided an "abundance of information that very clearly and specifically defines" the duties an employee will be expected to perform. Dep't of Cent. Mgmt. Servs. (State Police), 33 PERI ¶ 55 (IL LRB-SP 2016); cf. State of Illinois, Department of Central Management Services, 20 PERI ¶ 105 (IL LRB-SP 2004) (refusing to consider future duties of internal investigators in a "revamped position," analogizing it to consideration of the duties of a vacant position). In addition, while the courts have noted that the there is an "inherent risk" that an employer could rely on speculative future duties to exclude employees from a bargaining unit, courts have permitted consideration of such duties where they reflect the

positionholder's actual responsibilities. Compare One Equal Voice v. Illinois Educ. Labor Relations Bd., 333 Ill. App. 3d 1036, 1042 (1st Dist. 2002) and Dep't of Cent. Mgmt. Services/Dept. of State Police, 2012 IL App (4th) 110356 ¶ 30.

Here, Lathion's future duties are appropriate for consideration because Lathion's position is effectively vacant. Lathion was not performing the duties of an ASO I when the Union filed its petition or at the time of hearing because she was on a one-year temporary assignment working at a satellite senior center. Moreover, the Employer presented an abundance of evidence concerning Lathion's future duties. It provided testimony from two witnesses that it intends to change the reporting structure such that Lathion will report to Miller instead of Rafac when she returns from her temporary assignment. In addition, the Employer described the duties that it expects her to perform upon her return, which include the duties she previously performed when reporting to Miller, and the duty of gathering personnel-related documents upon Rafac's request. Lathion's performance of these duties is not merely a speculative possibility because the duties are consistent with the responsibilities set forth in her job description, and she has performed them in the past to some degree while holding the ASO I position.

Contrary to the Union's contention, the Employer does not appear to have changed Lathion's duties to maintain her exclusion from the bargaining unit. The changes do not in fact help the Employer satisfy its burden of proving confidential status, as discussed more fully below. In addition, the Employer's actions do not appear contrived under the particular facts of this case. Although the Employer did not inform Lathion of these changes prior to hearing in this matter (April 2019), it had no imminent need to do so because it did not expect her to resume her ASO I duties for at least another two months (July 2019). Moreover, it is not clear that either Rafac or Miller reasonably would have mentioned these impending changes to Lathion, absent evidence that she was in contact with them while working away from the main office at a satellite senior center. Finally, the Employer's failure to give a detailed explanation for the change, apart from implied operational need, does not warrant an adverse inference in this case where the Employer has simply reinstated a prior reporting relationship and asked Lathion to resume duties she previously performed.

However, noticeably absent from the Employer's description of Lathion's new duties is any continuing responsibility to open Rafac's mail. The Employer has therefore failed to prove by a preponderance of the evidence that Lathion will have continued access to confidential materials

in the ordinary course of her duties. Although Lathion will continue to gather documents at Rafac's request, there is no indication from the record that she will have mail-related responsibilities. Moreover, there is no indication that Lathion performs mail functions for the office as a whole, such that her mail-related responsibilities would continue irrespective of whether she reported to Miller or Rafac. Finally, Lathion did not open any mail while she reported to Miller, lending weight to the finding that she performed those responsibilities in the regular course of her duties only while she reported to Rafac. Under these circumstances, it would be unusual for Lathion to continue opening Rafac's mail when Lathion does not report to her.[2]

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[2] In the alternative, if the Board determines that Lathion will likely continue opening Rafac's mail upon return from her temporary assignment, I recommend that the Board reject the Union's claim that Lathion does not have authorized access to confidential EEO Office investigatory reports in the ordinary course of her duties. The Employer need not show that Lathion has ever seen an EEO Office investigatory report to prove confidential status, as the Union contends. Am. Fed'n of State, County & Mun. Employees, Council 31 v. Illinois Labor Relations Bd. ("Treasurer"), 2014 IL App (1st) 132455 ¶ 42. Rather, it must simply demonstrate that real and more than incidental access to such confidential material will occur in the regular course of her duties. Id. (citing Glenview, 374 Ill. App. 3d at 902). If the Board determines that Lathion will resume her mail-related duties, the Employer has met that burden. Rafac receives EEO reports by mail and those reports constitute confidential material under the Board's application of the authorized access test. Lathion has authorized access to such confidential reports because she opens Rafac's mail, and the responsibility to open an individual's mail necessarily includes the authority to view its contents. Accordingly, Lathion's authorized access to such reports is neither tangential to nor incidental to her regular job duties. City of Rolling Meadows, 34 PERI ¶ 116 (Board found petitioned-for employees had authorized access to the proposals they photocopied irrespective of whether the employer had directed them to view or read those documents); Vill. of Homewood, 8 PERI 2010 (Board found petitioned-for employee had authorized access to draft proposals received through the mail; Board did not examine whether employee had read its contents).

Moreover, Lathion's failure to deny that she had seen EEO investigatory reports would support the Board's determination that she had actual access to such material in the ordinary course of her duties and that she would continue to have such access in the future when opening Rafac's mail. Where "a position has existed for a substantial amount of time, the Board will weigh heavily the employee's actual access to collective bargaining material." Am. Fed'n of State, County & Mun. Employees, Council 31 v. Illinois Labor Relations Bd. ("Treasurer"), 2014 IL App (1st) 132455 ¶ 42. Yet, in cases where the courts have found no actual access, they have done so in reliance on the petitioned-for employee's testimony that she had never seen, or had never been asked to read, the confidential materials in question. Treasurer, 2014 IL App (1st) 132455, ¶ 41; Niles, 387 Ill. App. 3d at 70. Here, by contrast, Lathion never denied that she had seen EEO Office investigatory reports. The absence of such a denial is rendered more conspicuous by the fact that Lathion did deny having seen other types of confidential documents such as the Employer's bargaining proposals. Cf. Treasurer, 2014 IL App (1st) 132455, ¶ 41 (petitioned for employee testified that she had never seen or been asked to review collective bargaining documents during her many years of employment; employee was not confidential); cf. Niles, 387 Ill. App. 3d at 70 (employee testified that she had never once read a collective bargaining document nor had she been asked to read such a document during her years of employment; employee was not confidential).

Furthermore, Lathion does not have authorized access to any other type of confidential collective-bargaining-related information. Lathion never had authorized access to OIG investigations, even when reporting to Rafac. Although Lathion opened Rafac's mail, OIG reports are marked confidential, and Lathion does not open envelopes marked as confidential.

Lathion's access to personnel files, standing alone, is insufficient to render her confidential under the authorized access test. An employee is not a confidential simply because she has access to personnel information such as disciplinary action files, unless such access gives the employee advance knowledge of the Employer's contemplated disciplinary actions. City of Naperville, 20 PERI 184 (general rule); County of Fulton, 6 PERI ¶ 2024 (IL SLRB 1990) (same); City of Chicago, 36 PERI ¶ 12 (exception where access gives petitioned-for employee advance notice of contemplated discipline; collecting cases). Here, Lathion's access to employees' personnel and disciplinary files does not give her advance knowledge of contemplated discipline. The preponderance of the evidence demonstrates that the disciplinary files contain only records of issued discipline and not contemplated disciplinary actions because Lathion places the records of discipline into the file after the Employer has issued the discipline to the affected employee.

Likewise, Lathion's access to grievance files does not demonstrate that she has authorized access to confidential collective bargaining-related information because there is insufficient evidence that she thereby obtains advance knowledge of the Employer's grievance strategies. Significantly, the Employer introduced no evidence that the grievance files contain confidential information concerning the Employer's deliberations, the disclosure of which would give the Union an unfair advantage in grievance settlement negotiations or arbitration. City of Naperville, 20 PERI 184 (petitioned-for employee did not participate in developing the employer's grievance responses or have access to such responses before the employer presented them to the union). The files contain copies of grievance forms that the Employer has returned to the Union pertaining to the first and second step of the process, but there is no indication that the Employer places documentation of a grievance resolution into the file before it provides that response to the Union. Although the grievance files contain the notes that Miller took in the first and second step grievance meetings, there is no evidence that the notes contain his deliberations. To the contrary, the evidence presented permits the finding that the notes simply document the events of meetings also attended by the Union, which are therefore not confidential. Bd. of Educ. of Plainfield Cmty. Consol. Sch. Dist. No. 202, Will & Kendall Ctys. v. Illinois Educ. Labor Relations Bd.

("Plainfield"), 143 Ill. App. 3d 898, 910 (4th Dist. 1986) (secretaries who typed up principals' notes from grievance meeting did not assist principals in a confidential capacity where union representative and affected employee were also present at the meeting where notes were taken).

In sum, Lathion is not confidential under the authorized access test where the Employer has not demonstrated by a preponderance of the evidence that she will have authorized access to confidential material in the ordinary course of her duties when she resumes her ASO I duties.

b. Labor Nexus Test

Lathion is not confidential under the labor nexus test based on her assistance to either Miller or Rafac.

An employee is confidential under the labor nexus test if the employee, "in the regular course of his or her duties, assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations." 5 ILCS 315/3(c) (2012). The person assisted by the employee must perform all three functions before a finding of confidentiality may be made. Chief Judge of the Cir. Court of Cook Cnty., 153 Ill. 2d at 523.

A person who is actively involved in collective bargaining negotiations and the development of contract proposals and negotiations strategy formulates, determines, and effectuates management policies with respect to labor relations. Vill. of Homewood, 8 PERI 2010 (IL SLRB 1992). The individual must play a key role in the process by which the subordinates' wages, hours, and working conditions are established. City of Naperville, 20 PERI 184 (citing Vill. of Homewood, 8 PERI 2010). Merely attending negotiations is insufficient to demonstrate that an individual formulates, determines, and effectuates management's labor policies. Health and Hosp. Sys. of Cook County v. Illinois Labor Relations Board, 2015 IL App (1st) 150794, 62. Although an individual who is not the ultimate decisionmaker and implementer of labor relations policy may still qualify as one who formulates, determines, and effectuates management's labor polices, an individual who merely offers opinions on proposals does not perform all three functions. Plainfield, 143 Ill. App. 3d at 911; City of Chicago, 26 PERI ¶ 114.

1. Assistance to Miller

Lathion's assistance to Miller does not satisfy the labor nexus test. Although Miller formulates, determines, and effectuates management policies with regard to labor relations, Lathion does not assist him in a confidential capacity.

As noted above, it is appropriate to consider the duties that the Employer expects Lathion to perform for Miller after she returns from her temporary assignment. These duties are more than merely a speculative possibility because they are duties Lathion has performed in the past in her ASO1 position while reporting to Miller. Moreover, the Employer demonstrated that Lathion's reporting relationships are flexible because she has reported to both Rafac and Miller, at different times during her tenure as an ASO I in the Department.

Turning to the merits, Miller formulates, determines, and effectuates management policies with regard to labor relations. He performs all three functions when he participates in contract negotiations and serves as the Department's representative at the table. He first discusses the existing contract with Rafac and, in conjunction with Rafac, determines the provisions that the Department would like to change. He then attends contract negotiations, provides the Union with the Department's proposals, and reviews the Union's proposals. He also provides the Employer's principal negotiators with the Department's position on the Union's proposals. The fact that Miller performs his duties with the input of his superior, Rafac, does not change the fact that he is an individual who formulates, determines, and effectuates management's labor policies. See State of Ill. (Dep't of Cent. Mgmt. Servs)., 12 PERI ¶ 2034 (IL SLRB 1996) (superior formulated, determined, and effectuated labor relations policies even though her own supervisor needed to approve the proposals she drafted). Indeed, the Board previously held that labor liaisons for the City of Chicago who perform these functions fit the profile of superiors contemplated by the labor nexus test.[3] City of Chicago, 26 PERI ¶ 114; cf. County of Fulton, 6 PERI ¶ 2024 (advisory input into the collective bargaining process does not mean that the superior is formulating, determining,

[3] However, there is insufficient evidence that Miller formulates management's labor relations policies through his suggestions to change Department policies absent additional explanation regarding the substance of his suggestions and their outcome. Health and Hops. Sys. of Cook County v. Illinois Labor Relations Board, 2015 IL App (1st) 150794, 62 (where chief provided no examples of policies that she created and executed, the evidence did not show that she formulated policies regarding collective bargaining).

and effectuating policy). Miller further effectuates management policies with respect to labor relations by serving as the third step of the grievance process. Plainfield, 143 Ill. App. 3d at 908-9 (handling steps of the grievance procedure constitutes effectuation of management's labor relations policies but not formulation or determination).

However, Lathion does not assist Miller in a confidential capacity. To be confidential under the labor nexus test, the assistance provided by the petitioned-for employee must provide her with advance information about collective bargaining positions or strategies. Health and Hosp. Sys. of Cook County, 2015 IL App (1st) 150794, 64; Bd. of Educ. of Cmty. Consol. High Sch. Dist. No. 230, Cook County v. Illinois Educ. Labor Relations Bd. ("Consolidated"), 165 Ill. App. 3d 41, 61 (4th Dist. 1987). Lathion's obligation to collect information in preparation for grievance hearings does not demonstrate that she assists Miller in a confidential capacity because compiling information for employee grievance procedures does not constitute confidential assistance. Health and Hosp. Sys. of Cook County, 2015 IL App (1st) 150794 ¶ 65 (even "substantial assistance" to labor department in addressing individual grievances did not render petitioned-for employees confidential under labor nexus test); Niles, 387 Ill. App. 3d at 74 (where testimony indicated that petitioned-for employees provided supervisor with information pertaining to grievance handling, they were not confidential under labor nexus test).

Lathion's duty to maintain personnel files likewise does not demonstrate that she assists Miller in a confidential capacity. An employee is not confidential simply because she has access to personnel information such as disciplinary action files. City of Naperville, 20 PERI 184; County of Fulton, 6 PERI ¶ 2024. The court has noted in analyzing the labor nexus test that the term "labor relations" does not include mere access to personnel or statistical information, even if that information is confidential." Health and Hosp. Sys. of Cook County, 2015 IL App (1st) 150794, 59; see also City of Wood Dale, 2 PERI 2043 (IL LRB-SP 1986). As noted above, Lathion's maintenance of disciplinary files is limited to filing records of disciplinary action that the Employer has already tendered to the affected employee, and does not constitute confidential assistance.

Similarly, Lathion's duty to maintain grievance files does not demonstrate that she assists Miller in a confidential capacity. As a preliminary matter, there is insufficient evidence as to what such maintenance entails. Assuming it entails unfettered access to the files, there is insufficient evidence that the grievance files contain confidential information that, if disclosed to the Union,

would give the Union an unfair advantage in handling grievances. Although the files contain Miller's notes, the evidence indicates that these are notes he took during first and second level grievance hearings, at which the Union was also present, and the Court has held that petitioned-for employees' do not provide confidential assistance by performing tasks that require them to read those notes. Plainfield, 143 Ill. App. 3d at 910 (typing grievance notes did not constitute confidential assistance). While the files additionally contain the grievances, there is no indication that Miller askes Lathion to place the Employer's response to the grievance into the file before he gives the response to the Union.

Next, Lathion's obligation to take notes at grievance meetings and/or pre-disciplinary meetings does not indicate that she assists Miller in a confidential capacity because any information presented at such meetings is equally available to the Union. Plainfield, 143 Ill. App. 3d at 910 (secretaries who typed up principal's notes from grievance meeting did not assist principals in a confidential capacity where union representative and affected employee were also present at the meeting). Indeed, the Employer presented no evidence that Lathion was privy to any grievance resolutions before the Employer presented them to the Union. City of Naperville, 20 PERI 184. Nor has the Employer presented evidence that Lathion was privy to any disciplinary decisions arising from information obtained at pre-disciplinary meetings.

Moreover, Lathion's duties at grievance meetings are distinguishable from those of employees deemed confidential in City of Chicago (Dep't of Law). City of Chicago (Dep't of Law), 4 PERI ¶ 3028 (IL LLRB 1988). There, the Board noted that some petitioned-for attorneys in the City's law department were confidential because they regularly represented the employer in high-level grievance proceedings. City of Chicago (Dep't of Law), 4 PERI ¶ 3028. The Board reasoned that the grievance process is an extension of the collective bargaining process and that "an employee who regularly represents his employer in high-level grievance proceedings likely will be involved in or privy to significant labor policy formulation." City of Chicago (Dep't of Law), 4 PERI ¶ 3028. Here, by contrast, Lathion does not represent the employer in the same manner as an attorney of the Law Department, and there is no other basis from which to infer that she is privy to significant labor policy formulation. The evidence demonstrates that Lathion is removed from the decision-making process because Miller makes the decision on the grievance in consultation solely with his supervisor, Rafac.

The Employer's reliance on a second Board decision involving the City is misplaced to the extent that it is inconsistent with a subsequent first district appellate court decision addressing substantially the same issue. The Employer notes that the Board in City of Chicago held that employees who took notes at grievance meetings or pre-disciplinary meetings performed confidential assistance sufficient to satisfy the second prong of the labor nexus test. City of Chicago, 26 PERI ¶ 114. However, five years later, the appellate court determined that even greater and more substantive assistance to an Employer on grievance matters than that provided by the employees at issue in City of Chicago did not constitute confidential assistance. Health and Hosp. Sys. of Cook County, 2015 IL App (1st) 150794, ¶ 64. There, the petitioned-for employees researched the grievance, met with the labor team to discuss the results of their research, and could even be called to testify on behalf of an employer at a grievance hearing. Id. at ¶ 21, 64-65. Lathion's more marginal assistance in grievance and pre-disciplinary matters, which involves the gathering of supporting documents and note-taking at the meetings, therefore does not constitute confidential assistance under the court's rationale set forth in Health and Hosp. Sys. of Cook County. Indeed, Lathion's grievance and discipline-related functions do not give her advance knowledge of collective bargaining strategy, strategies regarding grievance handling, or advanced knowledge of contemplated disciplinary actions. Consolidated, 165 Ill. App. 3d at 62 ("it does not normally follow that an employee with mere access to records of grievances always acts in a confidential capacity…[n]or does being a secretary to a person involved in the handling of grievance always render that employee confidential"); Chief Judge of Circuit Court of Cook County, 218 Ill. App. 3d at 701 (employee Grieshaber who typed grievance and disciplinary documents for her supervisor did not satisfy either test for confidential status); Bakersfield Californian, 316 NLRB 1211, 1212 (1995) (employee's obligation to type documents related to discipline and grievances did not render her confidential).

Notably, there is no evidence that Lathion assists Miller in any of his negotiating and collective bargaining functions. There is no indication that she types the Employer's proposals before the Employer tenders them to the Union, or that she participates in any meetings at which the Employer discusses its negotiation strategies or prospective proposals.

In sum, Lathion does not assist Miller in a confidential capacity.

2. Assistance to Rafac

Lathion's assistance to Rafac likewise does not satisfy the labor nexus test. Although Rafac formulates, determines, and effectuates management policies with regard to labor relations, Lathion does not assist her in a confidential capacity.

The evidence regarding Rafac's participation in collective bargaining is sparse. However, under the Board decision in City of Chicago there is sufficient evidence to show that Rafac formulates, determines, and effectuates management policies with regard to labor relations through Miller. In conjunction with Miller, she identifies the provisions of the contract she would like to change, provides proposals to the Union, through Miller, during collective bargaining, and offers opinions on proposals that the Employer's negotiators act upon. City of Chicago, 26 PERI ¶ 114 (individual who provided feedback to Union's proposals and made her own proposals through her labor liaison formulated, determined, and effectuated labor relations policy); cf. Plainfield, 143 Ill. App. 3d at 910-11 (merely offering opinions on proposals did not demonstrate that individuals were formulating policy where there was no evidence that the employer ever acted upon them); cf. County of Fulton, 6 PERI ¶ 2024 (individual who made suggestions on proposals when they were solicited by the contract negotiator did not formulate, determine, and effectuate labor relations policy).

Rafac additionally effectuates management policies regarding labor relations by performing personnel-related functions such as recommending the discharge of employees to the Law Department, determining the appropriate level of lower-level discipline, approving third-step grievance decisions, and authorizing the settlement of grievances at the third step. Plainfield, 143 Ill. App. 3d at 908 (such actions effectuated existing labor relations policies but did not qualify as formulation or determination of such policies).

However, Lathion will not assist Rafac in a confidential capacity when she returns from her temporary assignment. As a general matter, the petitioned-for employee must report directly to the individual she assists in a confidential capacity. Health and Hosp. Sys. of Cook County, 2015 IL App (1st) 150794, ¶ 65 (employer did not show that petitioned-for employees assisted individuals in a confidential capacity where they did not report directly to those individuals); City of Chicago, 2 PERI ¶ 3017 n. 2 (IL SLRB 1986) (requiring direct assistance, but finding none where petitioned-for employees were separated from the individual assisted by three layers of supervisory hierarchy); but see State of Illinois, Department of Central Management Services, 25

PERI ¶ 184 (IL LRB-SP 2009) (applying labor nexus test to an indirect report, but finding no issues of fact for hearing). Here, the Employer presented evidence from two witnesses that Lathion would no longer report to Rafac and that she would instead report to Miller.

Even if the Board considers the functions Lathion will perform for Rafac upon her return to the main office in analyzing the labor nexus test, such functions do not qualify as confidential assistance. Lathion's obligation to maintain Rafac's grievance files does not show that she assists Rafac in a confidential capacity where there is insufficient evidence regarding the type of information contained in those files and whether that information, if disclosed to the Union, would give the Union an unfair advantage in handling the grievance. Consolidated, 165 Ill. App. 3d at 61 ("labor nexus test is designed to protect against premature disclosure of bargaining positions").

Lathion will not assist Rafac in a confidential capacity when she gathers personnel and disciplinary documents at Rafac's request for submission to the OIG, the EEO Office, and the Law Department. Contrary to the Employer's suggestion, this duty does not give Lathion advance notice of contemplated disciplinary actions. The OIG, EEO Office, and the Law Department may recommend disciplinary action against employees based in part on the materials Lathion gathers for Rafac. However, the gathered documents do not reveal the disciplinary decision itself. Rather, they are akin to raw materials such as statistical and financial data that go into making a decision. Chief Judge of Circuit Court of Cook County, 218 Ill. App. 3d at 701. Indeed, compiling personnel information pertaining to employee discipline is similar to compiling information for employee grievance procedures, which the courts have found insufficient to constitute confidential assistance. Niles, 387 Ill. App. 3d at 71.

Moreover, the preponderance of the evidence demonstrates that Rafac does not inform Lathion that she is contemplating disciplinary action against a particular employee when she asks Lathion to gather personnel files. Rafac confirmed that she cannot broadcast the fact that an employee is under investigation, and Lathion testified that Rafac does not tell her why she needs the materials. Even if Lathion is generally aware that the requested information pertains to an investigation, she would not know its likely disciplinary outcome. She also could not know the identity of the employee at issue based on the information Rafac requests. Rafac routinely seeks files of several employees at a time, not just the employee under investigation. For example, Rafac routinely provides the EEO Office with information pertaining to both the accused employee and

the accuser. In cases of discharge, Rafac provides the Law Department with the files of the targeted employee and also the files of employees who have received similar discipline in the past.

Finally, the existence of investigations is not confidential because Rafac does not withhold that information from union members. She noted that Union members who work in payroll or timekeeping may become aware of a pending investigation when she asks them for information to submit to the OIG, the EEO Office, and the Law Department.

Finally, as discussed above, there is insufficient evidence that Lathion's responsibility to open Rafac's mail will continue in the ordinary course of Lathion's duties once she returns from her temporary assignment and reports to Miller instead of Rafac.

Thus, Lathion is not confidential under the labor nexus test.

4. Appropriateness of the Proposed Unit

The unit proposed by the Union is appropriate even though it omits some employees in the ASO I title. The presumption of inappropriateness is rebutted by the parties' pattern of bargaining and by the fact that maintaining the presumption here would not further its intended purpose.

Section 9(b) of the Act states the following: "The Board shall decide in each case, in order to assure public employees the fullest freedom in exercising the rights guaranteed by this Act, a unit appropriate for the purpose of collective bargaining, based upon but not limited to such factors as: historical pattern of recognition; community of interest including employee skills and functions; degree of functional integration; interchangeability and contact among employees; fragmentation of employee groups; common supervision, wages, hours[,] and other working conditions of the employees involved; and the desires of the employees. For purposes of this subsection, fragmentation shall not be the sole or predominant factor used by the Board in determining an appropriate bargaining unit." 5 ILCS 315/9(b).

In construing this language, the Board has expressed a preference for large, functionally-based bargaining units, which cross departmental lines, to promote stability in labor relations and economy and efficiency in public bargaining and contract administration. County of Cook and Sheriff of Cook County, 15 PERI ¶ 3011 (IL LLRB 1999); County of Cook (Office of the Medical Examiner), 3 PERI ¶ 3033 (IL LLRB 1987); City of Chicago (Department of Law), 3 PERI ¶ 3026 (IL LLRB 1987); County of Cook (Cook County Hospitals), 3 PERI ¶ 3023 (IL LLRB 1087); County of Cook (Office of the Medical Examiner), 3 PERI ¶ 3016 (IL LLRB 1987); County of

Cook (Department of Supportive Services), 2 PERI ¶ 3027 (IL LLRB 1986); City of Chicago (Watley), 2 PERI ¶ 3009 (IL LLRB 1986); State of Illinois, Department of Central Management Services (Department of Employment Security), 1 PERI ¶ 2027 (IL SLRB 1985); DuPage County Board, 1 PERI ¶ 2003 (IL SLRB 1985).

To that end, the Board has held that a petitioned-for unit is presumptively inappropriate where the employer has an established centralized personnel system and the petitioner has sought to represent only a portion of employees in the same job classification or, alternatively, only a portion of employees who perform similar duties. County of McHenry and McHenry County Recorder of Deeds, 31 PERI ¶ 8 (IL LRB-SP 2014); Cnty. of Cook (Medical Examiner's Office), 17 PERI ¶ 3005 (IL LLRB 2001); Cook Cnty. (Office of the Medical Examiner), 3 PERI ¶ 3033; Cnty. of Cook and Cook Cnty. Sheriff, 15 PERI ¶ 3011; see also City of Chicago (Law Dep't), 3 PERI ¶ 3026; Cook Cnty. Hosp., 3 PERI ¶ 3023; Cnty. of Cook, 3 PERI ¶ 3016; Cook Cnty. (Dep't of Supportive Serv.), 2 PERI ¶ 3027; City of Chicago, 2 PERI ¶ 3009.

The presumption attaches in this case because the City of Chicago has a centralized personnel system, and the Union has sought to represent fewer than all of the ASO Is employed by the City. Specifically, the Union has sought to add one ASO I to a unit that contains other ASO Is, but it has not sought to represent the remaining unrepresented ASO Is. City of Chicago (Department of Law), 3 PERI ¶ 3026 (City of Chicago has a centralized personnel system that covers all employees).

However, the Union has rebutted the presumption of inappropriateness by showing that the Employer previously agreed to a unit that included less than all of the ASO Is. An employer undermines the basis for applying the presumption of inappropriateness if it has voluntarily agreed to a petition that encompasses fewer than all employees in the petitioned-for job classification under the employer's centralized job classification system.[4] County of Cook, 24 PERI ¶ 37 (IL LRB-LP 2008); County of Cook, 24 PERI ¶ 36 (IL LRB-LP 2008); cf. County of Cook (Medical Examiner's Office), 17 PERI ¶ 3005. Here, the Employer assented to the petition in Case No. L-RC-12-003, which excluded 11 of the 30 ASO Is. Furthermore, the Employer not only agreed to

[4] A petitioner may also rebut the presumption of inappropriateness in other ways, but they are not relevant here. See Cnty. of McHenry and McHenry Cnty. Recorder of Deeds, 31 PERI ¶ 8; City of Naperville, 28 PERI ¶ 98 (IL LRB-SP 2011); Rend Lake Conservancy, 14 PERI ¶ 2051 (IL SLRB 1998); see also City of Rolling Meadows, 16 PERI ¶ 2022 (IL SLRB 2000); State of Ill., Dep't of Cent. Mgmt. Services (Dep'ts of Transportation and Natural Resources), 14 PERI ¶ 2019 (IL SLRB 1998).

split the classification, it even agreed to split unit-placement within departments. It included one ASO I in the Department of Transportation, while excluding another in that same department, and it did the same with the ASO Is in the OEMC. Accordingly, the parties' own arrangement of unit inclusions and exclusions, approved by the Board, provides a rational basis for setting aside the presumption. To do otherwise would deprive employees of the rights granted them under the Act in a case where the "presumption is no longer rooted in fact." County of Cook, 24 PERI ¶ 37.

Contrary to the Employer's contention, the petitioned-for employee does not hold a different title than the ASO Is at issue in Case No. L-RC-12-003, and the parties' earlier practices regarding the ASO I title remain relevant. The Employer asserts that the petitioned-for position in fact holds the title "ASO I-excluded." However, the term "excluded" does not denote a different title. It simply signifies the fact that the petitioned-for employee was excluded from the Board's certification in Case No. L-RC-12-003, pursuant to the parties' agreement. The Employer effectively confirmed this finding by arguing that the parties' 2012 agreement covers the position at issue here and bars this petition. Indeed, as the Employer correctly notes, the certification in Case No. L-RC-12-003 identifies Lathion as an "ASO I."

Moreover, maintaining the presumption here would not further its intended purposes. The presumption serves to avoid undue fragmentation by preventing the formation of units with no traditional basis and little internal cohesiveness. DuPage County Board, 1 PERI ¶ 2003. Here, however, the proposed unit has a traditional basis because it is a historical unit of administrative and clerical employees, to which the Employer has already consented to add 19 ASO Is. These factors render the unit internally cohesive and also distinguish it from proposed units that the Board has rejected.[5] Cf. Cnty. of Cook (Medical Examiner's Office), 17 PERI ¶ 3005 (finding that only county-wide unit was appropriate, rejecting departmental unit); cf. Cnty. of Cook and Cook Cnty. Sheriff, 15 PERI ¶ 3011 (same); cf. Cnty. of Cook (Medical Examiner's Office), 3 PERI ¶ 3033 (finding county-wide unit was appropriate, rejecting office-wide unit); cf. Cnty. of Cook, 3 PERI ¶ 3016 (finding historical Administrative Professional unit was appropriate, rejecting office-wide unit of investigators); cf. Cook Cnty. (Dep't of Supportive Serv.), 2 PERI ¶ 3027 (finding unit that included administrative employees was appropriate, rejecting standalone unit of caseworkers).

In addition, the Union's proposed unit does not unduly fragment employee groups because there is no present issue of fragmentation where employees are added to an existing unit. County

[5] The Employer cites to no case analogous to this one in which the Board has dismissed the petition.

of Cook, 3 PERI ¶ 3024 (IL LLRB 1987) (where both unions sought to add employees to existing units, neither proposed unit would fragment the employer's workforce); City of Chicago, 2 PERI ¶ 3014 (IL LLRB 1986) (ALJ rejected union's contention that addition of detention aides to Unit 1 would cause over-fragmentation).

Finally, the Union's proposed unit configuration presents no greater risk of future fragmentation than the parties' present configuration. The Union's current proposed unit configuration omits some ASO I positions, but in this respect, it is the same as the configuration the parties previously agreed upon, which likewise omitted some ASO I positions. Moreover, the Union's configuration, because it adds the petitioned-for ASO I to a broad-based clerical/administrative unit, does not encourage the creation of small, departmental units, potentially represented by other unions. Cf. Cnty. of Cook (Medical Examiner's Office), 17 PERI ¶ 3005 (rejecting addition of clericals to department-wide unit, fearing that it would set precedent for numerous labor organizations to file petitions in the future likewise seeking smaller departmental units of clericals).

Arguably, it might be more appropriate to add all the remaining ASO Is to Unit 1, but the standard for judging whether a unit is appropriate is not whether the petitioned-for unit is the most appropriate but whether it is an appropriate unit. City of Chicago, 25 PERI ¶ 77 (IL LRB-LP 2009); City of Chicago, 23 PERI ¶ 172 (IL LRB-SP 2007) (citing Rend Lake Conservancy District, 14 PERI ¶ 2051 (IL SLRB 1998)). Here, the parties' pattern of bargaining and the contours of the proposed unit, discussed above, demonstrate that the proposed unit is appropriate, even though it omits some ASO I positions.

In sum, the proposed unit is appropriate.

V. CONCLUSIONS OF LAW

1. The parties' 2012 agreement regarding unit inclusions and exclusions in the ASO I title does not bar the petition.
2. The petition has majority support.
3. The petitioned-for unit is appropriate.
4. The position of Administrative Services Officer I held by Valerie Lathion is not confidential within the meaning of 3(c) 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 following position in the Administrative Services Officer I title is to be included in the AFSCME-represented bargaining unit #1: the position in the City of Chicago's Department of Family and Support Services currently occupied by Valerie Lathion.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Adm. 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, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted in the Board's Springfield office. Exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 12th day of September, 2019

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

/S/ *Anna Hamburg-Gal*

Anna Hamburg-Gal
Administrative Law Judge