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

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| American Federation of State, County, And Municipal Employees, Council 31, | ) | |
| Petitioner, | ) | |
| and | ) | Case No. L-RC-19-019 |
| City of Chicago, | ) | |
| Employer. | ) | |

## ORDER

On December 11, 2019, Administrative Law Judge Donald W. Anderson, 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 February 6, 2020 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the parties have waived their exceptions to the Administrative Law Judge's Recommended Decision and Order, and this non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.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 6th day of February 2020.**

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

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

**STATE OF ILLINOIS**
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## ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On January 11, 2019, the American Federation of State, County and Municipal Employees, Council 31 ("AFSCME" or the "Union" or "Petitioner") filed a majority interest representation/certification petition with the Local Panel of the Illinois Labor Relations Board ("the Board") seeking to represent three employees working in the title of Classification & Compensation Analyst in the City of Chicago's Department of Human Resources in its existing Human Services and Inspection bargaining unit (Bargaining Unit #3).

On February 6, 2019, the City of Chicago (the "City" or the "Employer") filed an Objection to the Petition on the asserted grounds that the employees occupying the position at issue are "confidential employees" within the meaning of Section 3(c) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2016), as amended ("the Act"). The Employer also asserted that it would be inappropriate to add the Classification and Compensation Analyst to Bargaining Unit #3 because that would result in an impermissible conflict of interest.

The requisite showing of interest having been found in accordance with Section 1210.80 of the Board's rules, an Order Scheduling Hearing on the issues raised by the Employer's Objection was issued on May 3, 2019. A hearing was held pursuant to the scheduling order on

June 28, 2019 and thereafter was continued to July 26, 2019. Both parties appeared at the hearing and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally, and written briefs were filed by both parties.[1] Accordingly, based on the testimony, evidence and arguments proffered by the parties before, during, and after the hearing, and upon the entire record of this case, I recommend the following.

## I. PRELIMINARY FINDINGS

A. The City of Chicago is a public employer within the meaning of Section 3(o) of the Illinois Public Labor Relations Act. The City operates the City of Chicago Department of Human Resources.

B. The City is a unit of local government subject to the jurisdiction of the Board's Local Panel pursuant to Section 5(b) of the Act.

C. The American Federation of State, County and Municipal Employees, Council 31 is a labor organization within the meaning of Section 3(j) of the Act.

D. On January 11, 2019, the Petitioner filed a representation petition seeking to represent the title of Classification and Compensation Analyst for the purpose of collective bargaining.

[1] After initial briefs were filed, the Petitioner sought to file an amended brief in order to address the Employer's contention that the employees at issue were confidential employees under the labor-nexus test as well as under the authorized access test. In its Motion, Petitioner's counsel candidly admitted that he sought leave to file the amended brief because he "somehow missed the City's argument…that it considered the Analysts to be confidential under both the labor nexus test and the authorized access test." In a ruling dated November 7, 2019, I denied the motion because the proposed amended brief was in fact a reply brief, for which there is no provision in the Board's rules and allowance for which was not included in the briefing schedule. In addition, to the extent that the Motion sought to file a brief outside the time limits and over the Employer's objection, there was not good and sufficient cause for such a request because the argument to which the Petitioner sought leave to respond was made by the Employer in its Objection to the Petition, a document that was admitted into evidence at the hearing as a Board exhibit and which therefore was available to the parties at the time that post-hearing briefs were being prepared.

E. On February 6, 2019, the City filed Objections to the Petitioner's representation petition on the grounds that: (1) the employees occupying the Classification and Compensation Analyst title are "confidential employees" pursuant to Section 3(c) of the Act; and (2) it would be inappropriate to add the Classification and Compensation Analyst title to Bargaining Unit #3, as proposed by the Petitioner in its representation petition, due to an impermissible conflict of interest.

F. Three City employees currently hold the title of Classification and Compensation Analyst.

G. The three Classification and Compensation Analysts currently work within the City of Chicago's Department of Human Resources, in the Classification and Compensation Unit.

H. The three Classification and Compensation Analysts are all supervised by Leo Burns, the Managing Deputy Commissioner of Human Resources.

## III. ISSUES AND CONTENTIONS

The Employer contends that the three Classification and Compensation Analysts ("CCAs") whose positions are at issue are confidential employees under Section 3(c) of the Act. Even though "the results of the work performed by the CCAs will eventually become public when the CCAs' classification and salary grading recommendations are adopted as final positions of the City," the Employer states, "the work performed in generating the recommendations requires access to and use of confidential labor relations information…." The Employer therefore asserts that the CCAs are confidential employees because they "(a) assist and act in a confidential capacity to those who develop and implement management's labor relations

policies ['the labor-nexus test'] and/or b) have authorized access to information related to the employer's collective bargaining policies ['the authorized access test']."

With respect to the labor-nexus test, the Employer places primary reliance on *City of Chicago*, 26 PERI ¶ 114 (IL LRB-LP 2010) (*Staff Assistants*), in which the Board's Local Panel found that six of 31 petitioned-for employees with the classification title of staff assistant met the labor-nexus test, finding, under varying factual circumstances, that each assisted in a confidential capacity in the regular course of her duties a person who formulated, determined, and effectuated labor relations policy on behalf of the employer. With respect to the authorized access test, the Employer cites *City of Chicago Office of Inspector General*, 31 PERI ¶ 6 (IL LRB-LP 2014) for the proposition that "employees who are privy to an employer's litigation strategy in grievance arbitration cases and related litigation" are confidential employees, and also cites the decision of the Board in *City of Chicago*, 36 PERI ¶ 12 (IL LRB-LP 2019), in which the Local Panel adopted the determination of an administrative law judge that "information relating to matters of contract administration" is information falling within the scope of collective bargaining under the authorized access test.

Finally, the Employer asserts that, even if the Board should find that the confidential exclusion does not apply to the employees at issue, the CCAs should not be included in Bargaining Unit #3 "or any other bargaining unit in which the members would have a conflict of interest with the CCAs." The Employer does not suggest, however, a bargaining unit other than Bargaining Unit #3 that would be appropriate for the CCAs in the event that they are not excluded from bargaining by virtue of the confidential exclusion.

The Petitioner contends that the CCAs are not confidential employees, and hence are not excluded from collective bargaining, citing and placing primary reliance on *County of Cook, 31*

*PERI ¶ 154 (IL LRB-LP 2015), aff'd sub nom. Health and Hospital System of County of Cook v. Illinois Labor Relations Board, Local Panel*, 2015 IL App. (1st) 150794 (2015) (*Health and Hospital System*), a case dealing with employees in the position of Recruitment and Section Analyst ("RSA") at Cook County Hospital. "As in this case," the Petitioner asserts, "the RSAs rendered technical assistance to the employer on issues that were of interest to unions and their members, and their work could be crucial in determining the result of grievances." Nevertheless, the Board in *Health and Hospital System* found that the RSAs were not confidential employees under either the labor-nexus or the authorized access test. The Petitioner urges the Local Panel to adopt the what it asserts is the reasoning of the Local Panel and the Appellate Court in *Health and Hospital System*, rather than to rely upon what the Petitioner contends is an "expanded definition of the confidential exclusion" allegedly used by the Local Panel in *City of Chicago Office of Inspector General*.

## IV. FINDINGS OF FACT

The City of Chicago Department of Human Resources ("HRD") is responsible for facilitating the establishment and delivery of human resources services to the government of the City. It is comprised of six functional divisions, including Employment Services, Information Services, Strategic Services, Finance and Administration, the Human Resources Board, and Diversity and Equal Employment Opportunity. The Employment Services Division ("ESD") governs the hiring and promotion process for all City of Chicago departments and carries out job classification and compensation functions, as well as developing and implementing recruitment and retention programs, on behalf of the City. The head of the ESD's Classification and Compensation Unit ("CCU") is Managing Director Leo Burns, who reports to Deputy Commissioner Chris Owen, who in turn reports to HRD Commissioner Soo Choi.

The positions at issue in this representation proceeding are three Classification and Compensation Analyst ("CCA") positions, occupied by Bronz Brantley-Kirby, Benjamin Anson, and Adam Bowman. According to the job description for the CCA position, which Managing Director Burns testified was an accurate description of the job duties of the position, the essential duties of the position are the following:

- Conducts position classification audits to ensure appropriateness of job classification;
- Gathers and analyzes data regarding job duties and responsibilities and the utilization of positions throughout the city service;
- Writes detailed reports to summarize audit findings and recommends the classification of new and existing positions using standard methods of job evaluation;
- Participates in the maintenance of the classification and compensation pay plans for City class titles;
- Prepares class specifications, examination announcements and related job documentation;
- Designs and conducts salary surveys and studies regarding compensation and other human resource issues;
- Responds to requests for salary data from outside agencies;
- Evaluates salary survey data and recommends compensation levels for class titles and positions that reflect the city's compensation practices;
- Submits changes to salary appropriation ordinances to the City Council for approval;
- Coordinates work efforts with the department managers on matters relating to recruitment, hiring procedures, labor relations, and other areas of personnel administration;

- Advises departmental managers on initiating, responding to, and resolving issues relating to classification and employment compensation;
- Testifies at union arbitration hearings to validate and justify classification audit findings;
- Explains human resource policies and procedures to departmental liaisons;
- Participates in special compensation projects;
- Prepares various reports on the status of work and productivity for use by management.

Under the City of Chicago Personnel Rules, a Position Classification Plan provides for the grouping of positions into classes. According to the Personnel Rules, "[e]ach Class shall include those Positions sufficiently similar in duties and responsibilities so that similar requirements as to training, experience, knowledge, skill, and the same rates of compensation are applicable to the Class." A written Class Specification is established for each established class based upon a review of the duties and responsibilities. All classified positions are included in a Classification and Pay Plan that includes the salary grade or designation assigned to each class title or position.

The record establishes that a review, or "audit", of the duties and responsibilities of a position may be performed by the CCA's in the following circumstances:

(1) by means of the Position Control system prior to the initiation of the hiring process to fill a vacant position;

(2) when new positions are proposed in order to (a) determine the need for the position, (b) allocate the proposed new position to the appropriate class, or (c) create a new class of positions;

(3) by means of the Reclassification process in order to ensure that the positions subject to the process are properly classified and, if necessary, to reclassify the positions;

(4) when it is proposed that position titles be consolidated;

(5) when a department wants to use a vacancy in a job title for another type of job;

(6) in the event of an appeal or grievance concerning a reclassification or denial of a reclassification request;

(7) in collective bargaining, when the CCU is asked by the City's Labor Relations Unit to review one or more positions for proper grading.

Several types of audits are performed by the CCA's. A pre-intake audit is conducted before a position is filled and when the position titles may be overly broad – such as "Program Manager" or "Program Coordinator" -- or when the duties of the position have shifted over time, thus giving rise to differing interpretations concerning the nature and scope of the duties to be required of the person to be hired for or appointed to fill the position. A reclassification audit is conducted in connection with the City's annual reclassification process for City positions. It involves review of job descriptions, organizational charts, pay scales, labor market and internal equity information, and possibly telephone information obtained from incumbents or supervisors. A desk audit is more detailed and requires the CCA, in addition to obtaining basic classification audit information, to meet with the incumbents of the positions under review and to work with supervisors to put together the resulting recommendations. As of the date of the hearing, 92 requests were made during the current year for position audits.

The Personnel Rules provide that a department may modify the duties of a position in order to meet operational needs, provided that the Personnel Rules or operative collective bargaining agreements are not violated. The department head is required to report to the Commissioner of Human Resources whenever a significant and permanent change is made in the duties of a position, whether it involves the addition of new duties or the modification of existing

duties. If such a change is made, the department head must submit a Position Description Questionnaire to the Commissioner of Human Resources for Position Clarification review and evaluation. The review may result in the position's being reclassified and, under certain circumstances, reposted for filling under the City's Hiring Plan.

Managing Director Burns testified that the reclassification process is annual. In the annual application of the process, department heads submit positions that they think should be reclassified – for example, because of a change in duties -- to the CCU for review. An employee can request that the department head submit his/her position to the CCU for review, although the department head is not required to do so. When such a submission is made, the CCA assigned to that department will conduct an audit of the position and make a recommendation as to whether the position should be reclassified and, if so, whether other changes -- including title, pay grade, and bargaining unit assignment -- will be required.

Whenever the City decides to establish a new job classification arguably falling within the scope of the collective bargaining agreement between the City and the Union – including a position assigned to the bargaining unit having been categorized as a non-represented position -- or to merge job classifications at least one of which falls within the bargaining unit, the collective bargaining agreement requires that the City notify the Union. At the request of the Union, the City is then required to meet and discuss the pay grade or pay rate assigned to the position by the City and the placement of the position within the Employer's promotional lines. If there is an unresolved dispute as to the unit placement of the position, the matter is then referred to the Illinois Labor Relations Board for final resolution. If there is an unresolved dispute as to the pay grade or rate, the Union has the right to appeal the matter to grievance arbitration.

With respect to grievances concerning pay grade or rate for new or merged job classifications, the applicable collective bargaining agreement provides (at Section 13.1):

> If the Union objects to the Employer's established pay grade/rate, it may appeal the Employer's decision within thirty (30) days after said meeting to Step IV of the grievance procedure. The Employer's decision of a new or merged job's placement within the Employer's promotional lines shall not be subject to arbitration, except if the Employer's decision is arbitrary or capricious.
>
> The arbitrator shall review the Employer's decision as to the pay grade/rate of the job duties, by comparing it to the responsibilities and working conditions of other like, or if none, similar jobs within the unit and the labor market generally, provided that the sole issue for the arbitrator shall be whether or not the Employer's decision was reasonable in light of the said factors. If the arbitrator determines that the Employer was reasonable in light of said factors, he/she shall not overturn the Employer's decision. The pay grade/rate established by the Employer shall remain in effect pending the arbitrator's decision….

The record establishes that the initial pay grade/rate decision, attributed to the Employer by the collective bargaining agreement and thereafter potentially the subject of a grievance by the Union, is made or effectively recommended by the CCA who conducted the audit of the new or merged position.

Another decision or effective recommendation of a CCA that is subject to resolution by means of the collectively-bargained grievance procedure is one relating to Section 12.9 of the collective bargaining agreement, which is titled "Acting In A Higher-Rated Job". That section provides that an employee who works in a higher-rated job for four working days shall be paid at the higher rate for all time worked in the higher-rated job, retroactive to the first day, and also provides that employees who are paid for acting in a higher-rated job are to be paid as if they had been promoted to the job. If a grievance is filed by an employee who claims that he or she was working in a higher-rated job but was not paid accordingly, the resolution of such a grievance may depend on a job audit conducted by a CCA. Thus, Section 12.9 provides that "[i]f a job audit by the Employer results in a finding that the employee has been acting in a higher-rated

job, the job shall be filled as a permanent vacancy and the provisions of Section 12.7 of this Agreement (Filling of Permanent Vacancies) shall apply."

The record contains a grievance filed by an employee claiming that she was in fact working in a higher-rated job and thus was entitled to the higher rate of pay. In response to the grievance, the City department involved, the Chicago Department of Public Health, submitted to the Department of Human Resources a position description questionnaire and organizational chart for the purpose of enabling a review of the position. A desk audit was then conducted by CCA Adam Bowman. The result was a single-spaced eight-and-one-half page Memorandum to Managing Director Burns containing an analysis of the duties of the position, as well as benchmark comparison positions, and concluding that the position in question was properly classified. The CCA's recommendation, therefore, was that no change in the classification level or pay grade was warranted. The recommendation was adopted by Commissioner of Human Resources Soo Choi, who sent a letter (drafted by CCA Bowman for the Commissioner's signature) to the Commissioner of the Department of Public Health stating, in pertinent part, that "[t]he incumbent's current class title of Public Health Administrator 1, B12, continues to appropriately define the nature, level and scope of the position's duties and responsibilities. Given the preponderance of job responsibilities, no change in class or grade level is recommended." The letter concludes that "[i]f there are any questions, the Personnel Administrator may contact Adam Bowman of the Employment Services Division…."

In a case such as the one presented by the grievance, the Section 12.9 of the collective bargaining agreement provides that "[i]f a job audit by the Employer results in a finding that the employee has been acting in a lower-rated or equal rated job, the employee shall have the option of remaining in said job or be assigned a position in his/her current classification within the

department provided such a position has been determined to be vacant by the Employer and the employee has the then present ability to perform the work required without further training." Section 12.9 also provides that "[t]he results of any desk audit conducted shall be made known within thirty (30) days of completion."

An employee wishing to challenge the audit result is required to work through the Union to do so. In most cases, Managing Director Burns testified, the Employer and the Union agree to accept the audit result. However, he testified, there are about 10 to 15 appeals per year from departments regarding classification/reclassification decisions and about 4 to 5 grievances from the Union. In the case of a department appeal, the appeal is resolved by having a different Analyst review the audit results. In the case of a grievance, the Analyst may consult with the Human Resources Department's Labor Relations Unit to determine the position the Employer will take in responding to the grievance or in any resulting arbitration proceedings. In one case, according to Managing Director Burns, the Employer did not go forward with a proposed reclassification based on conversations between the CCU and Labor Relations.

CCA's also are involved in the City's Civilianization Project. That project involves identification of positions in the uniformed services (*e.g.*, police officer and firefighter positions) with respect to which the incumbents are performing work that could be performed by civilian personnel. Once such a position is identified, the reclassification process is used. If the CCA determines that the duties and responsibilities of the position are amenable to reclassification, the CCA will identify the bargaining unit and pay grade for the reclassified position. The same information is used as in the regular reclassification process, including information derived from consultation with personnel in the Labor Relations Unit.

With respect to collective bargaining, Managing Director Burns estimated that the CCU has been asked by the Labor Relations Unit to review 4 to 5 job titles during negotiations occurring in the last two to three years. When such a request is received, the CCA assigned to respond to the request will perform an audit to determine the proper grading of the position in question.

## IV. DISCUSSION AND ANALYSIS

*Findings and Recommendations: The incumbents of the Classification and Compensation Analyst positions at issue are "confidential employees" within the meaning of Section 3(c) of the Act.*

**Legal Standards – Confidential Employees**

The term "confidential employee is defined in Section 3(c) of the Act as follows:

> "Confidential employee" means an employee who, 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 or who, in the regular course of his or her duties, has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies.

Confidential employees are excluded from the definition of "public employee" under Section 3(n) of the Act and are thus excluded from collective bargaining. "The purpose of excluding confidential employees is to keep employees from 'having their loyalties divided' between their employer and the bargaining unit which represents them." *Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31*, 153 Ill.2d 508, 523 (1992).

The City asserts that the incumbents of the Classification and Compensation Analyst positions are "confidential employees" within the meaning of the above definition. As the party

seeking to exclude the CCA position from collective bargaining, the City has the burden of proving its contention. *Health and Hospital System,* ¶ 51; *County of Cook v. Illinois Labor Relations Board, Local Panel,* 369 Ill.App.3d 112, 123 (1st Dist. 2006).

The Act's definition of "confidential employee" embodies two tests for determining whether the exclusion applies: (1) the labor-nexus test and (2) the authorized access test.[2] Satisfying the elements of either test establishes confidential employee status. *Chief Judge,* 153 Ill.2d at 523. The City contends that the job functions of the petitioned-for employees satisfy both statutory tests; the Union contends that these employees do not meet either test.

**Application of the Legal Standards to the Facts of this Case**

1. *The Labor-Nexus Test*

*The CCA's are not confidential employees by virtue of the labor-nexus test.*

An employee is considered to be a confidential employee 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 in regard to labor relations." The person(s) assisted by the employee must perform all three functions before a finding of confidentiality can be made. *Id.*

Under the labor-nexus test, the focus initially is on whether or not the person(s) assisted by the employee in question is one who formulates, determines, and effectuates management policies in regard to labor relations. If the answer to that question is in the affirmative, then the inquiry shifts to the question as to whether or not the employee in question assists that person in

[2] The Board also has adopted the reasonable expectation test, which applies only when a collective bargaining unit is not in place and employees are expected to assume confidential duties once the bargaining unit is established. *Health and Hospital System of the County of Cook v. Illinois Labor Relations Board, Local Panel*, 2015 IL App (1st) 150794 ¶ 56. This test does not apply to the facts of this case.

a confidential capacity in the regular course of his or her duties. *City of Rolling Meadows*, 34 PERI ¶ 116 IL LRB-SP 2017).

In this case, the City contends that the persons being assisted in a confidential capacity in the regular course of their duties by the CCA's are Managing Director Burns and Commissioner Choi. With respect to Managing Director Burns, the record is sufficient to establish that he exercises "executive control and administrative oversight" over the CCU, but the record does not establish that he formulates, determines, and effectuates management policies in regard to labor relations. Indeed, the record establishes that Managing Director Burns functions in this regard primarily as a conduit for the transmission of classification and compensation information from the CCA's to the City's Labor Relations unit for that unit's use in connection with collective bargaining and contract administration matters.

As the Board found with respect to Nancy Currier, the Benefits Manager of the City's Department of Finance in the case of *City of Chicago*, 26 PERI ¶ 114 (ILRB-LP 2010), Managing Director Burns "is clearly not the type of superior contemplated by the labor-nexus test." As was true of Currier, who served as an advisor to the City's labor negotiators with respect to benefit packages, Burns serves in an advisory capacity to the City's Labor Relations unit with respect to classification and compensation issues that arise in collective bargaining and contract administration, but the record does not establish that he makes recommendations as to collective bargaining strategy or labor relations policy.

In the case of Commissioner Choi, while she has the title of Commissioner of Human Resources and while one can readily infer that this is a responsible position, very little, if any, evidence was presented as to what the Commissioner actually does and how her duties and responsibilities relate to the performance of the labor relations function of the City. In this

regard, the evidentiary problem presented is not unlike the situation presented in *City of Wood Dale v. Illinois State Labor Relations Board*, 165 Ill.App.3d 640, 644 (2nd Dist., 1988) in which the court deferred to the Board's finding that the City's police department detectives performed investigations at the direction of the police chief or the city manager, but found that "the record is devoid of any evidence concerning the labor relations responsibilities of the City of Wood Dale employees who are purportedly assisted by the detectives." Thus, the court said, "[w]e decline the City's invitation to infer from the evidence presented that the responsibilities of the parties purportedly assisted by the detectives include management decisions relating to labor relations policy." *Id.*

As noted above, the first question to be answered in addressing the labor-nexus test is whether the person(s) assisted by the employee in question is one who formulates, determines, and effectuates management policies in regard to labor relations. Because the first question arising under the labor nexus test is answered in the negative here, it is unnecessary to address the second question – whether the employees in question assist the person allegedly being assisted in a confidential capacity in the regular course of their duties. Accordingly, I find that the CCA's are not confidential employees according to the labor-nexus test.

2. *The Authorized Access Test*

*The CCA's are confidential employees under the authorized access test.*

Under the authorized access test, an employee is considered to be a confidential employee, and hence excluded from collective bargaining, if in the regular course of his or her duties he or she has authorized access to information concerning matters specifically related to the collective bargaining process. Satisfaction of this test requires that the access be authorized and that the information relate to collective bargaining. *Health & Hospital System of County of*

*Cook v. Illinois Labor Relations Board, Local Panel*, 2015 IL App (1st) 150794, ¶ 67. Information related to collective bargaining includes information relating to the employer's strategy in dealing with an organizational campaign, information relating to collective bargaining proposals, and information relating to matters dealing with contract administration. *Id.*; *Department of Central Management Services (Department of State Police) v. Illinois Labor Relations Board, State Panel*, 2012 IL App (4th) 110356, ¶ 27; *City of Evanston v. State Labor Relations Board*, 227 Ill.App.3d 955, 978 (1st Dist. 1992).

With respect to the subject of authorized access to information relating to matters dealing with contract administration, "Board precedent provides that employees who are privy to an employer's litigation strategy in grievance arbitration cases and related litigation are confidential employees because they have information that is not yet known to the union which could hamper the employer's ability to negotiate with the union on an equal footing, if revealed." *State of Illinois, Central Management Services (Department of Corrections)*, 34 PERI ¶ 42 (IL LRB-SP 2017), *aff'd in unpublished opinion* 2018 IL App (1st) 171322-U., citing *City of Chicago Office of Inspector General*, 31 PERI ¶ 6 (IL LRB-LP 2013) and *State of Illinois, Department of Central Management Services*, 29 PERI ¶ 12 (IL LRB-SP 2015). The record in this case establishes that the CCA's are authorized by both the City and the collective bargaining agreement between the City and the Union to receive and develop information on behalf of the Employer relating to the collective bargaining process, including contract administration. Indeed, under the collective bargaining agreement, the CCA's work becomes the Employer's position in several types of collective bargaining and contract administration situations. As noted in the Findings of Fact, the CCA's develop this authorized information in the following circumstances:

- Whenever the City establishes a new position or merges job classifications at least one of which falls within a bargaining unit represented by the Union;
- Whenever a position is reclassified because of a significant and permanent change in the duties of the position and that reclassification affects the pay, grade, or bargaining unit placement of the position;
- Whenever a bargaining unit employee alleges that he or she is performing the duties of a job that is or should be higher-rated and therefore should be paid at the higher rate;
- Whenever the Union files a grievance concerning a decision made by the Employer based on a classification audit performed by a CCA that affects the pay, grade, or bargaining unit placement of the position;
- Whenever the Employer requests that the CCU conduct a position audit for the purpose of enabling the Employer to propose in collective bargaining that that position be assigned a particular pay grade or rate.

In each of these cases, the CCA assigned to perform the classification audit is performing work within the regular scope of his or her duties, and the resulting work product is used: (1) to serve as the Employer's initial position as to bargaining unit placement, grade, and rate in collective bargaining and in contractually-mandated mid-term discussions between the City and the Union; (2) to represent the Employer's position as to unit placement if the matter should come before the Illinois Labor Relations Board; (3) to represent the Employer's position as to pay grade or rate if a dispute over the matter should go to grievance arbitration under the collective bargaining agreement and, as suggested by the job description, to testify with respect to the classification audit that he or she performed and that is the subject of the grievance

arbitration proceeding; and (4) to provide classification and pay grade/rate audit information to the Employer during the course of collective bargaining with the Union.

In each of these cases, it is evident that the work of the CCA's forms the basis for a portion of the Employer's collective bargaining or grievance arbitration litigation strategies and that the CCA's have the information before it is known to the Union and, indeed, before it is known to the City's labor relations representatives. Therefore, there is a substantial risk of divided loyalty between the Employer and the Union that conceivably could affect the outcome of the collective bargaining process relating to bargaining unit placement and pay grade or rate.

The Petitioner contends that the outcome of this case should be governed by the Board's decision in the *Health and Hospital System* case, in which the Local Panel accepted the Recommended Decision and Order of the Administrative Law Judge ("ALJ") finding that employees in the RSA classification were not confidential employees. A review of the facts of that case, however, establishes that it is readily distinguishable from the instant case. In the *Health and Hospital System* case, the ALJ found that:

> RSAs have access to personal information about applicants and fellow employees including salaries, benefits, education, certifications, home addresses, and Social Security numbers. They might also know of job openings before they are posted, have advance knowledge of hirings or interview or test questions, or have some unspecified involvement with market studies.

Nevertheless, the ALJ's conclusion, accepted by the Board, was that the information in question, "though possibly sensitive or of interest to a union, has not been shown to be specifically pertinent to the Employer's bargaining strategy." 34 PERI ¶ 154.

In this case, however, the information utilized and produced in the regular course of the CCAs' duties is not personal in nature to any particular employee but relates to information about how the Employer classifies job duties and determines how those jobs should be paid,

making such information relevant to both the Employer's contract administration responsibilities and the Employer's collective bargaining strategies. Therefore, I conclude that, by application of the authorized access test, the CCA's are confidential employees within the meaning of Section 3(c) of the Act.

**The Unit Placement Issue**

Because I find that the employees in question are confidential employees, and thus are excluded from collective bargaining under the Act, it is unnecessary to address the Employer's unit placement arguments.

## VI. RECOMMENDED ORDER

Unless this Recommended Decision and Order is rejected or modified by the Board, the majority interest petition filed by the Petitioner is dismissed.

## VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules and Regulations, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 14 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 10 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommended Decision and Order. Within 5 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 N. LaSalle

Street, Suite S-400, Chicago, Illinois 60601-3103, or to the Board's designated e-mail address for electronic filings, at ILRB.Filing@Illinois.gov in accordance with Section 1200.5 of the Board's Rules and Regulations, 80 Ill. Admin. Code §§1200-1300. All filings must be served on all other parties.

Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

**Issued in Chicago, Illinois on December 11, 2019.**

*Donald W Anderson*

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Donald W. Anderson
Administrative Law Judge

Illinois Labor Relations Board
160 N. LaSalle Street, Suite S-400
Chicago, Illinois 60601-3103
(312) 793-6400