STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

American Federation of State, County, And Municipal Employees, Council 31,	)	
Petitioner,	)	
	)	Case No. L-RC-19-023
and	)	
City of Chicago,	)	
Employer.	)	

ORDER

On December 4, 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 March 12, 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the parties have waived their exceptions to the Administrative Law Judge's Recommended Decision and Order, and this non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.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 12th day of March 2020.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

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

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ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On April 10, 2019, the American Federation of State, County and Municipal Employees, Council 31 ("AFSCME" or the "the Union" or "the Petitioner") filed a majority interest representation/certification petition with the Local Panel of the Illinois Labor Relations Board ("the Board") seeking to add the position of Assistant Payroll Administrator ("APA") in the City of Chicago's Department of Finance and the City's Fire Department to the list of positions represented by AFSCME in the Administrative and Clerical bargaining unit (Bargaining Unit #1).

On May 7, 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") and that one of the employees is a "supervisor" within the meaning of Section 3(r) of the Act.

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 28, 2019. A hearing was held pursuant to the scheduling order on

July 23, 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. 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 is a public employer within the meaning of Section 3(o) of the Act. The City operates the Chicago Fire Department and the Department of Finance.

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 Petitioner is a labor organization within the meaning of Section 3(i) of the Act.

D. On April 10, 2019, the Petitioner filed a representation petition seeking to represent the employees holding the title of Assistant Payroll Administrator for the purpose of collective bargaining.

E. Three City employees currently hold the title.

F. One Assistant Payroll Administrator, Maria Ayala, works in the Chicago Fire Department.

G. Ms. Ayala's direct supervisor is Payroll Administrator Margie Bradford. Ms. Bradford reports to Director of Finance Katreina York.

H. Two Assistant Payroll Administrators, Marshall Iacono and Madonna Ortiz, work in the Department of Finance.

I. Both Mr. Iacono and Ms. Ortiz report directly to Payroll Administrator Filiberto Almendarez III. Mr. Almendarez reports to Deputy Controller John Arvetis.

J. On May 7, 2019, the City filed its objections to the Petitioner's representation petition, objecting as follows: (1) all three of the Assistant Payroll Administrators are "confidential employees" pursuant to Section 3(c) of the Act; and (2) the Chicago Fire Department's Assistant Payroll Administrator is a "supervisor" pursuant to Section 3(c) of the Act.

II. ISSUES AND CONTENTIONS

The City contends that all three employees at issue are "confidential employees" under the "authorized access" test derived from Section 3(c) of the Act and are therefore excluded from collective bargaining for that reason. The City contends that Maria Ayala is a confidential employee by virtue of her role in the disciplinary process and the grievance resolution process. With respect to Marshall Iacono and Madonna Ortiz, the City contends that they, likewise, have authorized access to confidential labor relations information by virtue of their roles in the disciplinary and grievance resolution processes.

The City also contends that Ayala is a supervisor within the meaning of Section 3(r) of the Act, asserting that: (1) Ayala's work is substantially different from that of her subordinances; (2) she performs one or more of the supervisory functions listed in the Act, including functions related to hiring, direction, discipline, and adjustment of grievances; (3) she exercises independent judgment in the performance of her supervisory duties; and (4) she spends the preponderance of her time performing supervisory functions.

The Union contends that the three employees are not confidential employees under the Act and that Maria Ayala is not a supervisor within the meaning of the Act. As to Ayala's alleged confidential status, the Union asserts that the evidence does not establish that she has advance knowledge of contemplated discipline. With respect to Iacono and Ortiz, the Union contends that, even if, for the sake of argument, the evidence could be construed as being sufficient to implicate what it alleges to be an expanded definition of authorized access as it relates to advance knowledge of contemplated discipline, used by the Board to find confidential employee status in *City of Chicago*, 36 PERI ¶ 12 (IL LRB-LP 2019) (*City of Chicago 2019)* and *City of Chicago Inspector General*, 31 PERI ¶ 6 (IL LRB-LP 2014) (*Inspector General)*, the Board should not expand the definition further to create what the Union calls a "Supervisor Lite" exclusion.

With respect to the claimed supervisory status of Ayala, the Union contends that she does not perform any of the supervisory functions listed in the Act. Thus, there is no evidence that Ayala has the authority to transfer, lay off, recall, promote, or reward the employees reporting to her. Ayala testified that she does not have the authority to approve time off, and while she allowed one employee to leave early, she did so only because the Payroll Administrator was not there. Finally, while the City contends that Ayala has the authority to direct employees, the Union asserts that she does not have discretionary authority in the assigning, monitoring, or reviewing work to affect her subordinates' terms and conditions of employment.

III. FINDINGS OF FACT

Chicago Fire Department Payroll Administration

The Chicago Fire Department ("CFD"), the second-largest department in the City, is responsible for fire suppression, fire inspection, and emergency medical response on behalf of the City of Chicago. Payroll for the CFD is handled by that Department's Payroll Unit.

Katreina York is the Director of Finance for the CFD, reporting to the Commissioner of the Fire Department. In that capacity, she manages the Finance, Payroll, and Contract Units of the Department. The Payroll Unit is headed by Payroll Administrator Margie Bradford, assisted by Assistant Payroll Administrator Maria Ayala. Subordinate to the Payroll Administrator and Assistant Payroll Administrator are six Payroll Auditor positions, one of which was vacant at the time of the hearing.

City of Chicago Department of Finance Payroll Administration

The City's Finance Department is responsible for management of the City's fiscal resources, including collection and disbursement of revenue. John Arvetis is Deputy Comptroller for the Department. Three Payroll Administrators and one Project Administrator report to him. Payroll Administrator Phil Almandarez supervises two Assistant Payroll Administrators – Madonna Ortiz, who is responsible for distribution (third party payments, insurance, union dues) and Marshall Iacono, who is responsible for handling garnishments. Ms. Ortiz is assisted by Administrative Assistant III Maridolores Getz, while Mr. Iacono's direct reports are Leo Inclan, Accounting Tech II, and Thomas O'Sullivan, Project Coordinator.

Essential Duties of the Assistant Payroll Administrator Position

According to the job description for the Assistant Payroll Administrator ("APA") position, the essential duties of the position include:

- Monitoring the work of subordinate staff engaged in the preparation, processing, and distribution of departmental payrolls;
- Reviewing submitted payroll registers for accuracy, reconciling errors and making adjustments;
- Reviewing and approving third party payroll deductions from employee paychecks (*e.g..,* taxes, pension contributions, union dues, charitable contributions, optional insurance coverage);
- Interpreting labor contracts, federal regulations, and municipal ordinances in order to respond to inquiries regarding salary administration;
- Overseeing special check handling for processing stop payment orders and submitting requests to the Comptroller's Office, Office of Budget and Management, and the Department of Human Resources to facilitate the processing of payrolls;
- Providing payroll information to departmental management for the preparation of budgets, monitoring of payroll expenses, and collective bargaining agreement negotiations;
- Responding to employee inquiries regarding lost or stolen paychecks.

Maria Ayala

CFD Director of Finance Katreina York testified that Maria Ayala's principal duties as APA for the CFD Payroll Unit are to supervise subordinates, to ensure that sworn personnel are paid properly, and to solve payroll issues. Director York testified that Ayala monitors and reviews the work of subordinates. According to Director York, Ayala can assign work, for example by reallocating work when Payroll Auditors are off, and that Ayala does not need to check with Director York or Payroll Administrator Bradford before doing so. Ayala will have a

role in the hiring process, Director York testified, in that she will be part of a hiring panel that will conduct interviews and review resumes of candidates. Ayala does not conduct performance evaluations but has a role in training employees.

Director York testified that Ayala has the authority to begin the steps of the disciplinary process by making recommendations to James Sullivan, Labor Relations Supervisor for the CFD, and by making sure that all necessary documents are available to the process. According to Director York, Ayala has the authority to have a verbal counseling discussion with an employee. If the behavior that is the subject of the counseling continues, then Ayala can speak with Labor Relations and move forward with a hearing with the employee's Union representative and either Director York or Payroll Administrator Bradford. If Ayala makes a disciplinary recommendation, Director York testified, that recommendation is typically followed, although Director York also testified that Ayala has never made a recommendation as to specific discipline to be imposed. According to Director York, both the Payroll Administrator and APA Ayala would know the discipline to be imposed before the employee being disciplined would know it. However, on the one occasion when discipline beyond counseling was administered, Ayala had nothing to do with it because the disciplinary action was already complete when Ayala started on the job.

With respect to approval of time off, Director York testified that both Payroll Administrator Bradford and Ayala have the authority to approve a request to leave early. With respect to other kinds of time off, such as vacation time, Director York testified that Ayala is involved with providing guidance or actually approving time off.

Labor Relations Supervisor James Sullivan testified that grievances from the Fire Department union are usually about pay. In the case of such a grievance, Ayala checks payroll

records and gets back to him. He instructs her as to what should be paid, per the collective bargaining agreement. As to vacation scheduling, Labor Relations Supervisor Sullivan testified that Ayala had a question about vacation scheduling, to which he responded by sending her a copy of the City of Chicago Personnel Rules.

Maria Ayala testified that she has no authority to approve time off. On one occasion, she testified, an employee wanted to leave early when Payroll Administrator Bradford was not there, so Ayala let her go because "I couldn't say they couldn't", and then e-mailed her superiors. According to Ayala, employees who call in sick do not call her; rather, they call Payroll Administrator Bradford.

Ayala testified that she has never made a recommendation as to discipline, nor has she ever made a recommendation regarding hiring. On one occasion, she counseled an employee, which resolved the issue at the time. The employee, she testified, was one who presented an ongoing problem and, in her opinion, should have been disciplined. But Ayala never expressed her opinion because the employee had been counseled.

With respect to grievances, Ayala testified that she supplies payroll information when an issue arises as to an employee's pay entitlement – for example, when an employee has been paid overtime but claims entitlement to time and one-half -- but has no role in negotiating resolutions to grievances. She testified that she speaks to Labor Relations Supervisor Sullivan about collective bargaining agreement provisions when a question arises as to an employee's pay entitlement and answers questions from Payroll Auditors about payroll matters.

Madonna Ortiz and Marshall Iacono

The two APA's who work in the City's Finance Department handle work schedules and performance evaluations for their subordinates. According to Deputy Comptroller John Arvetis,

the APA's have input on discipline, in that they are involved in the investigation of the situation potentially leading to discipline and conduct the pre-disciplinary hearing. With respect to disciplinary recommendations from the APA's, Deputy Comptroller Arvetis testified: "I've had occasion to follow [a recommendation], and I 've had occasion not to follow it, but I couldn't say, you know, that I always follow it." When asked how often he follows the disciplinary recommendations of the APA's, he testified that he follows the recommendations of the APA's "probably" 50% of the time. He also testified that notices of disciplinary actions are available to the APA before they are issued to the employee.

Deputy Comptroller Arvetis testified that the APA's have a role in the grievance procedure, including the resolution of grievances, at Step 1 but not beyond that step. He testified that the APA's would have conversations with Labor Relations, but those conversations are more likely to be about the City's Personnel Rules than about a collective bargaining agreement.

IV. DISCUSSION AND ANALYSIS

Findings and Recommendations: The incumbents of the Assistant Payroll Administrator position at issue are not "confidential employees" within the meaning of Section 3(c) of the Act, and Assistant Payroll Administrator Maria Ayala is not a "supervisor" within the meaning of Section 3(r) of the Act.

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) (*Chief Judge*).

The City asserts that the incumbents of the Assistant Payroll Administrator classification in the Fire Department and the Finance Department are "confidential employees" within the meaning of the above definition. As the party seeking to exclude these APA positions from collective bargaining, the City has the burden of proving its contention. *Health and Hospital System of the County of Cook v. Illinois Labor Relations Board, Local Panel,* 2015 IL App (1st) 150794 ¶ 51 (*Health & Hospital System*); *County of Cook v. Illinois Labor Relations Board, Local Panel,* 369 Ill. App. 112, 123 (1st Dist. 2006). And since confidential employees are precluded from collective bargaining rights otherwise guaranteed by the Act, the exclusion must be interpreted narrowly. *Health and Hospital System*, 2015 IL App (1st) 150794 ¶ 51; *American Federation of State, County and Municipal Employees, Council 31 v. Illinois Labor Relations Board*, 2014 IL App 1st 132455 ¶ 31.

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.[1] Satisfying the elements of either test establishes confidential employee status. *Chief Judge,* 153 Ill.2d at 523. The City does not contend that the petitioned-for employees meet the labor-nexus

[1] 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,* ¶ 56. This test does not apply to the facts of this case.

test, but does contend that the job functions of the petitioned-for employees satisfy the authorized access test. The Union contends that these employees do not meet either test and are therefore "public employees" under Section 3(n) of the Act.

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 confidential information concerning matters specifically related to the collective bargaining process. Satisfaction of this test requires that the access occur in the regular course of his or her duties, that it be authorized, that the information so accessed be confidential, and that the information relate to collective bargaining. *Health & Hospital System*, ¶ 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 (*State Police 2012)*; *City of Evanston v. State Labor Relations Board*, 227 Ill.App.3d 955, 978 (1st Dist. 1992).

Mere access to information contained in personnel files, to information related to general personnel matters, or to statistical information relating to the employer's labor relations policies, however, does not establish confidential status, even if that information is confidential. *City of Chicago*, 25 PERI ¶ 2 (IL LRB-LP 2009); *State of Illinois, Department of Central Management Services*, 25 PERI ¶ 5 (IL LRB-LP 2009). Employees' access to information "*which may be used in but is not related to* labor relations does not indicate that they are confidential employees." *American Federation of State, County and Municipal Employees, Council 31 v.*

Illinois Labor Relations Board, *State Panel,* 2014 IL App (1st) 132455, *quoting Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31*, 218 Ill.App.3d 682, 702 (1st Dist., 1991) (*Chief Judge 1991)* (emphasis in original).

Maria Ayala

The City did not carry its burden to show that Maria Ayala is a "confidential employee" under Section 3(c) of the Act. Although the City contends that Ayala has authorized access to confidential information relating to collective bargaining in the regular course of her duties, the evidence, including the job description for the APA classification, establishes that her primary function in this regard is to gather and transmit payroll information in aid of the City's contract administration function. But that information is not confidential information; rather, it is public information. In this regard, Article VIII, Section 1(c) of the Illinois Constitution provides that "reports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law." And the Illinois Freedom of Information Act, 5 ILCS 140/2(c) provides that "all information in any account, voucher, or contract dealing with the receipt or expenditure of public or other funds of public bodies" are public records.

As in *Department of Central Management Services v. Illinois Labor Relations Board, State Panel*, 2011 IL App (4th) 090966 ¶ 148, the fact that Ayala supplies payroll information to the Labor Relations Unit in aid of that Unit's response to a grievance or question concerning application of the collective bargaining agreement, even if she processes that information or performs calculations with respect to it in the course of supplying it, does not establish that Ayala is a confidential employee. Although such information may have some relevance to the

collective bargaining process, it does not reveal collective bargaining strategies, nor would the premature revelation of it compromise management's position in collective bargaining or contract administration. *Health & Hospital System*, ¶¶ 73, 75.

Likewise, the evidence does not support the City's assertion that Ayala works with Management to initiate the disciplinary process with respect to the Payroll Auditors. While Director York testified that Ayala has the authority to recommend discipline and that she would know of the discipline before it is imposed, she also testified that Ayala has never made a recommendation as to specific discipline. In the one case wherein discipline could have been imposed, and wherein Ayala believed the employee should have been disciplined, Ayala refrained from expressing her opinion because, she testified, the employee had been counseled.

Moreover, as the Union points out, there is no definitive evidence that Ayala has advance knowledge of disciplinary actions. When asked if Ayala would be aware of a PA's discipline before the PA knew of it, Director York testified that "It's a possibility that she would know." When asked if a disciplinary document would be available to Ayala before the employee would be served with it, Director York testified that "Yes. That's a possibility, yes."

The "possibility" that Ayala would have advance knowledge of a disciplinary action does not establish that she, in fact, obtains such knowledge in the regular course of her duties. While the Union argues against expansion of the authorized access test, it is unnecessary to discuss such alleged expansion in the context of Ayala's duties because the evidence is insufficient to establish that she meets the test, with or without expansion.

Madonna Ortiz and Marshall Iacono

The evidence of confidential status on the part of Madonna Ortiz and Marshall Iacono is slightly stronger than the evidence of confidential status on the part of Maria Ayala but

nonetheless does not establish confidential status as a matter of law. Deputy Comptroller Arvetis testified that he receives recommendations of disciplinary action from Ortiz and Iacono and follows them about half the time. And, he testified, disciplinary actions are available to Ortiz and Iacono before they are issued to the employee being disciplined. He also testified that Ortiz and Iacono have a role in the resolution of grievances at Step 1 of the grievance procedure.

The testimony of Deputy Comptroller Arvetis is less than compelling, however, as to what the APA's actually do in the course of carrying out their roles in regard to discipline and grievance processing. With respect to discipline, Deputy Comptroller Arvetis testified as follows:

> Q. (from the Employer's counsel): Do they have any disciplinary responsibilities for those folks [Accountant Technician II Leo Inclan and Project Coordinator Thomas O'Sullivan]?
>
> A. I'd say for discipline, you know, I'm the overall person that would decide, but they would have input to me on any discipline that gets meted out.
>
> Q. When you say "input", do you mean – what do you mean by "input"?
>
> A. So I would – if there was an incident that was brought to my attention, you know, I would listen to their narrative of what happened and after the proper investigation would determine if any discipline was warranted.
>
> Q. Would the assistant payroll administrators be involved in the investigation?
>
> A. Yes.
>
> Q. How so?
>
> A. You know, if there was any subsequent interview or materials to be gathered, they would probably do that.
>
> Q. Would there be a predisciplinary hearing conducted?
>
> A. There would.
>
> Q. Who would do that?

A. So the assistant payroll administrators would do that.

Q. Would – would the assistant payroll administrator have any opportunity to give input to you about the appropriate level of discipline?

A. They would.

Q. Would you take their recommendations into account?

A. I would.

Q. About how often would you follow their recommendation?

A. You know, I've – I've had occasion to follow it, and I've also had occasion not to follow it, but I couldn't say, you know, that I always do follow it.

Q. Is there like a ballpark figure for about how often you follow it?

A. Luckily we haven't had a whole lot of disciplinary issues, but I would say about 50/50.

Q. In situations where you've decided to issue discipline, do you do that through issuing a document to the affected employee?

A. Yes.

Q. Is the document available to the assistant payroll administrators before it's available to the affected employees?

A. It is.

With respect to grievance processing, Deputy Comptroller Arvetis testified that the APA's would be involved in grievance processing, including involvement in the resolution of grievances at Step 1 of the contractual grievance procedure "because they're the first supervisor." Since the City does not contend that the APA's in the Department of Finance are "supervisors" within the meaning of the Act, it is clear that the witness was not using that term in the statutory sense. Indeed, both Ortiz and Iacono report to Payroll Administrator Filiberto Almendarez III, who appears to have a role in the organization that is comparable to the role that

Margie Bradford has in the Fire Department. Bradford's position was found to be supervisory by the Board's Local Panel in *City of Chicago*, 31 PERI ¶ 29 (IL LRB-LP 2012) (*City of Chicago 2012)*.

The question then becomes whether the evidence relating to the employees in the APA position in the Department of Finance is sufficient to meet the City's burden to show that those employees should be excluded from collective bargaining. The record is deficient in this regard. According to Deputy Comptroller Arvetis, the disciplinary process includes an investigation, but there is no evidence as to who conducts the investigation in the regular course of his or her duties or what the investigation entails, nor is there evidence as to what kinds of rule infractions are the subjects of investigation. For example, are the investigations limited to attendance rule violations, where the information needed to establish a violation are likely to be found in time records and where the penalty for an infraction is likely to be spelled out in the City's Personnel Rules, or do they include investigations into violations involving the exercise of a greater degree of discretion on the part of management? Moreover, while the testimony indicates that the APA's have a role in a disciplinary investigation, the description given by the witness of what an APA would do in such an investigation suggests that the primary role would be to supply information to the investigator or decision-maker. This function alone does not confer confidential status on the supplier of the information. *See Health & Hospital System*, ¶ 67 (information relating to collective bargaining but not to bargaining strategy is not confidential information).

With respect to access to disciplinary actions, much of the testimony is conclusory, rather than explanatory, and relates to what the Deputy Comptroller or the alleged confidential employees "would do" as opposed to what they have done. And while the Deputy Comptroller

testified that, in disciplinary situations, a disciplinary notice is issued to the affected employee and the notice is "available" to the APA before the employee sees it, no evidence was submitted as to how many times this has occurred or who the APA was in each case. An illustrative example of such a notice was not introduced into evidence, and there was no testimony as to what the notice typically says. In addition, no testimony was given as to what "available" means in this context. Is the notice given or delivered to the APA, or is it placed in a file to which the APA has access, or is it simply "available" to the APA if he or she asks to see it? Such summary and conclusory evidence is not sufficient to establish confidential status. *State of Illinois, Department of Central Management Services*, 25 PERI ¶ 5 (IL LRB-SP 2009); *Village of Bolingbrook*, 19 PERI ¶ 125 (IL LRB-SP 2003) *(Village of Bolingbrook)*.

In support of its position, the City relies upon *City of Chicago 2019* for the proposition that advanced knowledge of contemplated disciplinary action is sufficient to satisfy the authorized access test. A closer examination of the facts of that case, however, shows that the City's reliance is misplaced. Each of the individuals found to be confidential employees in *City of Chicago 2019* held the title of Supervisor of Personnel Services (SPS) for a City department. The facts contained in the ALJ's Recommended Decision and Order (RDO), affirmed by the Local Panel, show that each had labor relations functions, including responsibility for responding to inquiries from and providing advice to managers regarding employee discipline and, in several cases, serving as the department's liaison with the City's Labor Relations, Human Resources, or EEO department, drafting and issuing notices of discipline, attending pre-disciplinary meetings, and informing employees as to why they were disciplined. In addition, the ALJ found that the job description for the SPS classification listed as an essential duty "advis[ing] departmental

managers on initiating, responding to, and resolving issues relating to disciplinary action procedures." No such essential duty is listed in the job description for the APA classification.

While the ALJ in *City of Chicago 2019* summarized her RDO as finding confidential employee status because the employees in question had advanced knowledge of contemplated disciplinary action, this was a legal conclusion based on the record in that case. In this case, the record does not support the same legal conclusion.

Another recent Board case likewise involves a confidential status determination based on more compelling evidence than is present here. In *State of Illinois Department of Central Management Services (Department of Corrections)*, 33 PERI ¶ 121 (IL LRB-SP 2017) *aff'd by unpub. order* 2018 IL App (1st) 171322-U *(Department of Corrections)*, the employees found to be confidential employees were investigators in the Investigations and Intelligence Division (External Investigations Unit) who were "responsible for conducting investigations into employee misconduct and for substantiating allegations of misconduct in their final reports." In *Department of Corrections*, the investigation and substantiation of employee misconduct was department-wide and central to the duties performed by the Investigators. Indeed, the Board found in that case that the investigators "had more than incidental authorized access to confidential material." In the instant case, any authorized access to confidential material that the APA's may have is at best "tangential and incidental to their regular job duties." *American Federation of State, County and Municipal Employees, Council 31 v. Illinois Labor Relations Board, State Panel*, 2014 IL App (1st) 132455 (2014), at ¶ 41.

As the party seeking to exclude the APA's from collective bargaining on the basis of confidential employee status, the City has the burden of proving by a preponderance of the

evidence that APA's Ayala, Ortiz, and Iacono are confidential employees within the meaning of Section 3(c) of the Act. I find that the City has not met that burden.

Supervisory Employees

The Act establishes a four-part test to determine whether a non-peace officer employee is a supervisor within the meaning of Section 3(r) of the Act and therefore is excluded from the definition of "public employee" contained in Section 3(n) of the Act. *City of Freeport v. Illinois State Labor Relations Board,* 135 Ill. 2d 499, 512 (1990) (*City of Freeport*); *Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31,* 153 Ill.2d 508, 515 (1992) (*Chief Judge*). Under that test, an individual is a supervisor if he or she (1) performs principal work substantially different from that of his or her subordinates; (2) possesses authority in the interest of the employer to perform one or more of the 11 indicia of supervisory authority enumerated in Section 3(r); (3) consistently uses independent judgment in exercising supervisory authority; and (4) devotes a preponderance of his or her employment time to exercising that authority. *City of Freeport*, 135 Ill.2d at 512.

As in the case of other exclusions from collective bargaining, the party claiming a supervisory exclusion has the burden of proving the exclusion by a preponderance of the evidence. *Secretary of State v. Illinois Labor Relations Board, State Panel,* 2012 IL App (4th) 111075, ¶ 55 (*Secretary of State)*; *Village of Homewood,* 25 PERI ¶ 137 (IL LRB-SP 2009). All four parts of the statutory test must be met in order for the party claiming the exclusion to establish supervisory status.

The City argues APA Maria Ayala should be excluded from collective bargaining because she is a supervisor under Section 3(r) of the Act. In support of this contention, the City

argues that Ayala's duties and responsibilities are such that all four parts of the test for supervisory status are met. The facts show otherwise.

Principal Work

The Board has described the "principal work" test as follows:

> For an employee to be a supervisor, the employee's main undertaking must differ from the main undertakings of his subordinates. He may, at times, engage in similar work as his subordinates and still be determined a supervisor. However, his foremost activity must not be similar. This is not necessarily a quantitative test. An employee may engage in the same work as his subordinates the majority of his time, but if the essence of his work differs from that of his subordinates, a supervisory determination may result if other indicia are present.

City of Freeport, 135 Ill.2d at 513-14, quoting *Secretary of State*, 1 PERI ¶ 2009 (IL SLRB 1985).

The City contends that Ayala's principal work is substantially different from that of her subordinates. In this regard, the City asserts that the Payroll Auditors, whose work she oversees, are engaged primarily with checking the schedules of Chicago Fire Department (CFD) members and ensuring that they are paid properly for the time they work. Ayala's work, on the other hand, involves overseeing the work of the Payroll Auditors, working with the Manpower Division to ensure that the CFD schedules accessed by the Payroll Auditors are correct, solving payroll issues that arise, and playing a role in training employees in the Unit. According to CFD Director of Finance York, Ayala will have a role in the hiring process, in that she will be part of a hiring panel along with Payroll Administrator (and Unit supervisor) Margie Bradford and the Director or Assistant Director of Finance. The testimony of Director York is that Ayala spends more than 50% of her time performing such "supervisory" duties.

Although, as discussed below, I do not find the alleged "supervisory" duties to be supervisory in fact, the testimony that she spends the majority of her time performing them

indicates that her work is different from that of her subordinates. Indeed, the evidence shows that Ayala's work of "reviewing and monitoring" the work of the Payroll Auditors and solving payroll issues as they arise is substantially different from that of her subordinates. Accordingly, I find that the City has borne its burden of proof to establish that Ayala's work is substantially different from that of her subordinates.

Supervisory Authority with Independent Judgment

The second part of the supervisory definition requires that the individual must have authority, in the interest of the employer, to perform one or more of the 11 functions enumerated in the definition or effectively to recommend the action involved in such function or functions. The 11 functions are the authority to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, or to adjust their grievances. The third part of the definition, which must be read in conjunction with the second part, requires that the exercise of authority to perform one or more of the enumerated functions must not be of "a routine or clerical nature" but that it "requires the consistent use of independent judgment." 5 ILCS 315/3(r).

"Independent judgment" is exercised when an individual must choose between two or more significant courses of action without substantial review by a superior. *City of Freeport,* 135 Ill.2d at 532; *Village of Bolingbrook.* If the decisions involved in the exercise of an allegedly supervisory function are "routine or clerical in nature or made on the basis of an individual's superior skill, experience or knowledge," then those decisions do not involve the exercise of independent judgment. *Village of Bolingbrook.*

The City contends that Ayala performs the enumerated supervisory functions of hiring, direction, discipline, and adjustment of grievances, and that she exercises independent judgment in the performance of these functions. The record, however, does not support these contentions.

With respect to the hiring function, Ayala testified that she does not make recommendations as to hiring. Without directly contradicting Ayala's testimony, Director York testified that Ayala is expected in the future to have a role in hiring as a member of a hiring panel, along with Payroll Administrator Bradford and the Director or Assistant Director of Finance. Even if this expectation materializes, however, Ayala's function would be collective in nature, and any influence she might have is likely to be outweighed by the judgment of a statutory supervisor and an employee who is presumably managerial. *See County of Cook (Health & Hospital System)*, 34 PERI ¶ 154 (IL LRB-LP 2015) (ALJ stated that "all panel decisions are ultimately group decisions, and group decisions are neither independent nor supervisory"). The evidence, therefore, does not support the contention that Ayala performs the enumerated supervisory function of hiring.

With respect to direction, Director York testified that Ayala "monitors and reviews" the work of her subordinates. According to Director York, Ayala does not conduct performance evaluations but can assign work, such as when two employees are off and Ayala redistributes the work among the other employees. Director York testified that if Ayala is the only higher-graded employee at work, and a Payroll Auditor has to leave, Ayala has the authority to grant the time off. Ayala testified that she has no authority to approve time off and that she does not approve absences for those who call in sick because employees who call in sick call Personnel Administrator Bradford rather than Ayala.

In order to establish supervisory status on the basis of direction, the employer must show that the alleged supervisor has the authority "to make operational decisions and exercise sufficient discretionary authority that impacts his subordinates' employment status in areas most likely to fall within their terms and conditions of employment." *State of Illinois, Department of Central Management Services*, 21 PERI ¶ 46 (IL LRB-SP 2005). "[A]bsent such discretionary authority, an individual's responsibility to direct subordinates in the performance of their job duties does not conflict with his membership in a bargaining unit." *City of Bloomington*, 13 PERI ¶ 2041 (IL LRB 1997).

The record shows that Ayala has some, limited, authority with respect to the review and correction of the work of Payroll Auditors, but that that authority is not exercised in areas likely to affect subordinates' terms and conditions of employment with the requisite discretion or independent judgment. Director York testified that "the assistant payroll administrator supervises [her] subordinates, as well as ensures that the sworn members [of the Fire Department] as well as the civilian members are paid accurately, as well as solving any payroll issues that may occur…." When asked for an example, Director York cited the example of a sworn member who may not have received overtime pay. The APA would then research the issue and then pay the employee the required overtime. Director York testified that, if she found that the employee had not been paid properly, Ayala could authorize payment without approval from PA Bradford or Director York. There is insufficient evidence in the record, however, to establish that payment of overtime in circumstances illustrated by the example involves anything other than routine application of the overtime pay requirements mandated by statute or a collective bargaining agreement.

Monitoring, review, assistance, and routine correction of subordinates can be part of, but does not in and of itself constitute, a supervisory function. *See Illinois Department of Central Management Services (State Police) v. Illinois Labor Relations Board, State Panel*, 382 Ill.App.3d 208, 224-25 (4th Dist. 2008) (*State Police 2008)*. Likewise, rearrangement of work assignments so as to cover for an absent employee does not, by itself, satisfy the requirements for meeting the statutory "direction" function. "Where the assignment of work merely balances the workload among employees…the assignment does not involve the use of independent judgment." *Service Employees International Union, Local 73 v. Illinois Labor Relations Board*, 2013 IL App (1st) 120279, ¶ 52. The record contains insufficient evidence as to whether Ayala has discretionary authority to assign work beyond balancing the workload of the Payroll Auditors.

The record also is unclear as to Ayala's authority to allow employees to leave early. Although Director York testified that Ayala has the authority to grant requests to leave early when Payroll Administrator Bradford is not there, Ayala testified that she does not have authority to approve time off. In one instance when an employee left early at a time when Bradford was not present, Ayala testified that she let the employee go because "I couldn't say they couldn't" and then sent an e-mail notification concerning the incident to her superiors. Labor Relations Supervisor Sullivan testified about an incident when an employee left early, assertedly without telling Ayala, and that Ayala "felt wronged." Sullivan testified that it was later discovered that the employee had "already been authorized" to leave by "someone else." It is not clear, however, whether the incident that was the subject of that testimony by Sullivan was the same incident as the one that was the subject of Director York's and Ayala's testimony. Because the record is unclear, and the Employer bears the burden of proof, the record does not

support the contention that Ayala has the authority to grant time off or allow employees, using her own discretion, to leave early. I find, therefore, that the evidence is insufficient to establish that Ayala performs the supervisory function of direction.

With respect to discipline, Ayala testified that she has never disciplined an employee or recommended disciplinary action. Director York testified that Ayala has never made a recommendation for specific discipline of an employee and that, while she has authority to initiate the steps of the disciplinary process, she does so with the guidance of Labor Relations Supervisor Sullivan. Director York testified further that Ayala has the authority to have a discussion with the employee but that, if there is a need for corrective action beyond that, Ayala is to speak with Labor Relations and then potentially move forward with a pre-disciplinary hearing in which Ayala would participate along with the Union representative and Payroll Administrator Bradford. As Director York testified, "it would not just be her [Ayala]; it would also be Margie Bradford that would be involved in the disciplinary hearing." Such participation is subject to the superior authority of a statutory supervisor and does not involve the use of independent judgment; it is therefore not an indicator of supervisory status. *Chief Judge,* 153 Ill.2d at 517.

Director York testified that Ayala has the authority to "have a discussion" with an employee. The evidence, however, does not support the City's contention that Ayala has the authority to take corrective action beyond counseling. Ayala testified that, on one occasion, she counseled a Payroll Auditor with respect to an ongoing issue. Ayala further testified that while it was her opinion that the employee should have been disciplined, she did not express her opinion because she already had counseled the employee about the issue. I infer from this testimony that Ayala did not have authority to take corrective action beyond counseling because this testimony

suggests that Ayala would have disciplined the employee instead of counseling that employee if she had the authority to do so.

Furthermore, there is no evidence in the record that Ayala's counseling of the employee in the situation described above resulted in a documented personnel file record that could serve as a basis for further discipline. Indeed, Ayala testified that there was "nothing that has been written down on paper" about the incident. Verbal reprimands without documentation are not discipline within the meaning of the Act. *City of Freeport*, 135 Ill.2d at 518-19; *Metropolitan Alliance of Police v. Illinois Labor Relations Board*, *State Panel*, 362 Ill.App.3d 469, 478-79 (2d Dist. 2005).

The City contends, nevertheless, that Ayala has the authority to "effectively recommend" discipline. Beyond "having a discussion" with an employee, Director York testified that, while no disciplinary action has been initiated against an employee while she and Ayala have been in the Fire Department's Payroll Unit, the decision to take such disciplinary action would come out of a discussion involving Director York, Payroll Administrator Bradford and Ayala. If Ayala were to make a recommendation during the course of such a discussion, "more than likely that would be agreed upon, and then we could move forward with disciplinary action…." This testimony establishes that Ayala has no authority to impose or recommend discipline without authoritative involvement from others "higher in the chain of command." *State Police 2008*. The record, therefore, does not support the City's contention that Ayala has the authority to discipline employees or to effectively recommend such disciplinary action; rather, the record establishes that Ayala's role in the disciplinary process is similar to that of the telecommunications supervisors who were found not to be statutory supervisors in *State Police*

2008 (telecommunications supervisors had no power to impose discipline, such as a written reprimand, without their superiors' approval).

Finally, the City contends that Ayala plays a role in the adjustment of grievances. The record, however, does not support that contention. The testimony indicates that Ayala's role in the grievance process is to supply payroll information in aid of resolving the grievance but that she does not negotiate grievances or play a role in their adjustment.

Given the evidence on the record, I find that Ayala does not use independent judgment in the performance any of the listed supervisory functions. Accordingly, the second and third parts of the supervisory status test have not been met.

Preponderance of Time

The fourth part of the supervisory test, as it applies to non-police officer employees, involves the determination as to whether the alleged supervisor spends a preponderance of her time engaged in supervisory functions. The term "preponderance" can mean superiority in numbers or importance. *Health & Hospital System*; *Department of Central Management Services v. Illinois State Labor Relations Board*, 278 Ill.App.3d 79, 86 (4th Dist. 1996).

In this case, I find that the preponderance of time part of the supervisory test has not been met. As determined above, the City has failed to demonstrate that Ayala exercises supervisory authority with independent judgement. Therefore, the City has failed to show by either qualitative or quantitative measure that Ayala satisfies the fourth part of the supervisory test because she does not spend a preponderance of her time exercising supervisory authority.

Conclusion Regarding Supervisory Status

Based on the evidence in the record and applicable legal precedent, I find that Maria Ayala is not a supervisor within the meaning of Section 3(r) of the Act.

Appropriateness of the Addition of the APA Title to Bargaining Unit #1

The City contends that, if the APA's are found not to be confidential employees or supervisors, they should not be included in City-AFSCME Bargaining Unit #1 because of an alleged conflict of interest between the APA's and their subordinates. The City does not suggest, however, an alternative bargaining unit that allegedly would be more appropriate for the APA's if they are determined not to be excluded from bargaining.

When, as in this case, 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 Educational Authority v. State Educational Labor Relations Board*, 167 Ill.App.3d 927, 939-40 (4th Dist. 1988) (addressing similar procedure arising under Illinois Educational Labor Relations Act). In a case such as this, the Board considers whether there is sufficient support for the union among the employees that the union seeks to add. *Illinois Department of Central Management Services (Department of Children and Family Services)*, 8 PERI ¶ 2037 n. 2 (ISLRB 1992) (ALJ found "nothing inappropriate in adding employees to an existing unit through a representation petition"; Board affirmed and directed election in petitioned-for group). Here there are three employees in the petitioned-for group and the Union has demonstrated majority support within that group of three.

The City urges that the petitioned-for employees not be placed in Bargaining Unit #1 because "the conflict of interest between APAs and the employees they supervise would be great enough to negate any community of interest," citing *Village of Oak Park v. Illinois State Labor Relations Board*, 168 Ill.App.3d 7, 23 (1st Dist. 1988) and *State of Illinois, Department of Central Management Services (Department of Corrections)*, 21 PERI ¶ 49 (IL LRB-SP 2005) (*Downey).* The cited cases, however, are inapposite.

In *Village of Oak Park*, the conflict argument was one advanced by the Village and rejected by the court. The Village's argument posited an alleged conflict of interest based on the fact that the employees in question, acknowledged to be police supervisors, were represented by the same union that represented the patrol officers, even though the supervisors and patrol officers were in separate bargaining units. *Downey* involved the dismissal by the Board of a unit clarification petition that the Board determined was improvidently brought. The conflict issue was raised, not by the Board, but by the decision of the Acting Executive Director that concluded that drug testers whose duties included testing other employees within the fell "within the spirit of the confidential exclusion." Thus, even had the Board adopted the Acting Executive Director's rationale, it would have been because the employees were excluded from bargaining altogether, not because they were placed in the wrong unit.

In this case, absent any community of interest evidence that would dictate placement of the APAs in a different bargaining unit, there is no basis for placing the petitioned-for employees in a bargaining unit other than Bargaining Unit #1. I find, therefore, that Bargaining Unit #1 is the appropriate unit placement for the APAs.

V. CONCLUSIONS OF LAW

1. The petitioned-for employees are not "confidential employees" within the meaning of Section 3(c) of the Act.

2. Maria Ayala is not a "supervisor" within the meaning of Section 3(r) of the Act.

3. Bargaining Unit #1 is the appropriate unit for the exercise of collective bargaining rights by the petitioned-for employees.

4. The petition has majority support.

VI. RECOMMENDED ORDER

Unless this Recommended Decision and Order is rejected or modified by the Board, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME), shall be certified as the exclusive representative of all the employees set forth below, appropriately placed in AFSCME-represented Bargaining Unit #1, City of Chicago, and found to be appropriate for the purposes of collective bargaining with respect to wages, hours, and terms and conditions of employment pursuant to Sections 6(c) and 9(d) of the Act.

INCLUDED: All full-time employees of the City of Chicago in the following classification: Assistant Payroll Administrator.

EXCLUDED: All managerial, supervisory and confidential employees within the meaning of the Act, and all other employees of the City of Chicago.

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 4, 2019.

Donald W Anderson

_____

Donald W. Anderson
Administrative Law Judge

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