STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

Service Employees, Int'l Union, Local 73,	)	
	)	
Petitioner	)	
and	)	Case Nos. L-UC-19-001
	)	L-UC-19-002
County of Cook, (Department of Transportation	)	L-UC-19-003
And Highways),	)	L-UC-19-004
Employer	)	
	)	

ORDER

On May 21, 2019, Administrative Law Judge Sharon Purcell, 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 August 13, 2019 public meeting, the Board, having reviewed the matter, declined to take it up on its own motion.

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the parties have waived their exceptions to the Administrative Law Judge's Recommended Decision and Order, and this non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.

Issued in Chicago, Illinois, this 13th day of August 2019.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

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

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
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County of Cook (Department of Transportation and Highways),	)	
Petitioner,	)	Case Nos. L-UC-19-001
	)	L-UC-19-002
and	)	L-UC-19-003
	)	L-UC-19-004
Service Employees International Union, Local 73, CTW,	)	
Respondent.	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

I. Background

In June 2008, the Board certified the Service Employees International Union, Local 73 (Union or Local 73) as the exclusive representative of a bargaining unit of employees of the Cook County Highway Department (County or Employer) that includes the following job titles: District Maintenance Supervisor; GIS Analyst IV; Highway Engineer IV & V; Road Maintenance Supervisor; Senior Project Engineer; and Technical Services Supervisor. The certification excludes all supervisory, managerial and confidential employees as defined by the Act.

On August 10, 2018, the County filed unit clarification petitions in each of the above enumerated cases. Each petition seeks to remove a position from the bargaining unit on the basis that the position is managerial within the meaning of Section 3(j) of the Act, 5 ILCS 315/3(j), *as amended*, and supervisory within the meaning of Section 3(r) of the Act, 5 ILCS 315/3(r), *as amended*. The County seeks to remove the following positions: Case No. L-UC-19-001 – Highway Engineer IV (Job Code 2206); Case No. L-UC-19-002 – Highway Engineer V (Job Code

2207); Case No. L-UC-19-003 – District Maintenance Supervisor (Job Code 4409) (Employed in Maintenance Bureau); Case No. L-UC-19-004 – Road Maintenance Supervisor (Job Code 2375) (Employed in Maintenance Bureau). The unit currently includes approximately 31 employees. The petitions would remove from the unit approximately 11 employees in the position of Highway Engineer IV, 9 employees in the position of Highway Engineer V, 5 employees in the position of District Maintenance Supervisor, and 4 employees in the position of Road Maintenance Supervisor.

Local 73 filed objections to each petition and contends that they must be dismissed. It asserts that the petitions are not appropriately filed because they do not fall within any of the Board's criteria for unit clarification. It also contends that none of the job positions are managerial or supervisory within the meaning of Sections 3(j) or 3(r) of the Act.

II. The Unit Clarification Petitions are Consolidated for Resolution

Section 1200.105 of the Board's Rules and Regulations provides:

> The Board shall consolidate two or more representation or unfair labor practice cases when the following three conditions are met:
>
> a) The cases involve common parties or issues of law or fact and/or grow out of the same transaction or occurrence;
>
> b) Consolidation would not prejudice the rights of the parties; and
>
> c) Consolidation would result in the efficient and expeditious resolution of cases.

80 Ill. Admin. Code § 1200.105.

All the positions at issue in these four petitions are within the County's Department of Transportation and Highways. And all have been included since June 2008 in the same bargaining unit represented by Local 73. Petitioner and Respondent each submitted their position statements

as if the petitions are consolidated. That is, the parties have not submitted separate position statements for each individual case, but rather each submitted one statement presenting its arguments which are applicable to all four cases. Plainly, consolidating the petitions will not prejudice the parties' rights and it will result in the efficient and expeditious resolution of these cases. Accordingly, consolidation is appropriate, and these cases are consolidated for resolution.

III. Whether unit clarification is appropriate in these circumstances.

The issue here is whether the unit clarification petitions are appropriately filed.

In *State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Children & Family Servs., Dep't of Emp. Sec.)*, 34 PERI ¶ 79 (IL LRB-SP 2017), the Board's State Panel held that unit clarification petitions seeking to exclude from bargaining units employees who are managerial or supervisory within the meaning of the Act may be filed at any time. In so doing the Board relied on the appellate court's decisions in *State, Dep't of Cent. Mgmt. Servs. (Dep't of Corr.) v. State, Ill. Labor Relations Bd.*, 364 Ill. App. 3d 1028 (4th Dist. 2006) (*AFSCME Drug Screeners*) and *Niles Twp. High Sch. Dist. 219, Cook Cnty. v. Ill. Educ. Labor Relations Bd.*, 369 Ill. App. 3d 128 (1st Dist. 2006), which hold that unit clarification petitions seeking to exclude confidential employees from bargaining units may be filed at any time. Specifically, the Board found "as with employees who are confidential under the Act, the unit clarification procedure is also appropriately used to remove employees who are managerial or supervisory within the meaning of the Act from a bargaining unit and that a unit clarification petition seeking to do so can be brought at any time." *Dep't of Cent. Mgmt. Servs. (Dep't of Children & Family Servs., Dep't of Emp. Sec.)*, 34 PERI ¶ 79.

Additionally, in that case, the Board accepted the Administrative Law Judge's recommendation that the three unit clarification petitions at issue there, which sought to remove positions from a bargaining unit on the basis that they were supervisory and/or managerial within

the meaning of the Act, were appropriate under Section 1210.170 of the Rules, 80 Ill. Admin. Code § 1210.170, because they were filed following a significant change in the Board's caselaw and a substantial change in the duties of an existing job title. *Dep't of Cent. Mgmt. Servs. (Dep't of Children & Family Servs., Dep't of Emp. Sec.)*, 34 PERI ¶ 79. And, on the merits, the Board accepted the ALJ's recommendation that the employees at issue were managers under the Act and excluded from the bargaining unit. *Id*. Having found that the positions were managerial, the ALJ did not address whether any also were supervisory, and neither did the Board on review of her recommended decision.

Two Board members dissented from the majority's holding applying *AFSCME Drug Screeners* and *Niles Township* to petitions seeking to remove managerial and/or supervisory employees from bargaining units. The dissent observed that in *AFSCME Drug Screeners* and *Niles Township* the court identified concern over the "unique circumstance" of the inclusion of confidential employees in a bargaining unit as the basis for holding that unit clarification was appropriate at any time to remove such employees from the unit. *Dep't of Cent. Mgmt. Servs. (Dep't of Children & Family Servs., Dep't of Emp. Sec.)*, 34 PERI ¶ 79 (dissent). The dissent explained that the record in the case before it did not demonstrate the existence of the unique circumstances those cases contemplated. It further stated that the majority's decision invited employers to seek the removal of employees from bargaining units at any time on the basis that the Act statutorily excludes them, and thereby "risks undermining established collective bargaining relationships and, more broadly, the stability of the collective bargaining process that the Act seeks to provide." *Id*.

On appellate review, the court agreed with the dissenting members' reasoning "that *AFSCME Drug Screeners* and *Niles Township* are strictly limited to confidential employees

and that expanding that exception to managerial employees risks undermining the stability of the collective bargaining process." *Am. Fed'n of State, Cnty. & Mun. Emps. v. Ill. Labor Relations Bd.*, 2018 IL App (1st) 172476, ¶ 34 (*AFSCME*). It stated, "[t]he Board did not provide a compelling reason to apply this court's reasoning on confidential employees to managerial employees." *Id*. The court continued, "to the extent that the Board based its procedural ruling regarding the filing of the petitions related to managerial employees on this court's rulings regarding confidential employees, that was erroneous." *Id*. The court vacated the Board's holding that the unit clarification petitions were appropriate based on its extension of the court's reasoning with respect to confidential employees to managerial employees. *Id*. at ¶ 35. The court affirmed the Board's holdings that the petitions were appropriate under Rule 1210.170, and that the positions were managerial and therefore excluded from the bargaining unit. *Id*.

At my request, the parties provided their positions on the appropriateness of the petitions at issue here in light of the court's decision in *AFSCME*.

IV. Discussion and Analysis

The Board's Rules permit unit clarification under four circumstances: 1) substantial changes occur in the duties and functions of an existing title, raising an issue as to the title's unit placement; 2) an existing job title that is logically encompassed within the existing unit was inadvertently excluded by the parties at the time the unit was established; 3) a significant change takes place in statutory or case law that affects the bargaining rights of employees; and 4) when processing a majority interest petition. 80 Ill. Admin. Code §§ 1210.100(b)(7)(B), 1210.170. Caselaw presents additional circumstances: when a newly-created job title has duties similar to those already covered in the bargaining unit, *City of Evanston v. State Labor Relations Bd.*, 227 Ill. App. 3d 955, 969-70 (1st Dist. 1992), and, as explained above, at any time to remove from a

bargaining unit employees in positions that are confidential within the meaning of the Act, *AFSCME Drug Screeners*, 364 Ill. App. 3d 1028; *Niles Twp.*, 369 Ill. App. 3d 128.

The County does not contend that any of these circumstances exist here. Rather, it asserts that the court's holding in *AFSCME* does not address the appropriateness of unit clarification to exclude allegedly supervisory positions at any time, but rather is limited to the appropriateness of unit clarification to exclude allegedly managerial positions. Therefore, according to the County, the Board's decision in *Dep't of Cent. Mgmt. Servs. (Dep't of Children & Family Servs., Dep't of Emp. Sec.)*, 34 PERI ¶ 79, survives to the extent that it permits unit clarification at any time to exclude employees who are supervisors under Section 3(r), and the petitions at issue here are appropriately filed.

The County's argument is not persuasive. In its decision, the Board did not distinguish between petitions alleging a supervisory exclusion and those alleging a managerial exclusion. Instead, it discussed the appropriateness of unit clarification to remove employees who are statutorily excluded from collective bargaining, *i.e.*, confidential, supervisory, and managerial. Although the Board found that the employees were excluded as managerial and therefore did not address whether the positions at issue were supervisory, it did not limit its holding on the appropriateness of excluding statutory employees from bargaining units to managerial employees. Rather, it held, "the unit clarification procedure is also appropriately used to remove employees who are managerial or supervisory within the meaning of the Act from a bargaining unit and that a unit clarification petition seeking to do so can be brought at any time." *Dep't of Cent. Mgmt. Servs. (Dep't of Children & Family Servs., Dep't of Emp. Sec.)*, 34 PERI ¶ 79.

In vacating the Board's holding, the appellate court agreed with the dissenting Board members' reasoning that "***AFSCME Drug Screeners*** and ***Niles Township*** are *strictly limited to*

confidential employees and that expanding that exception to managerial employees risks undermining the stability of the collective bargaining process." *AFSCME*, 2018 IL App (1st) 172476, ¶ 34 (emphasis added). It is true that the court did not reference the use of unit clarification to remove supervisory employees from a bargaining unit when it held that "to the extent that the Board based its procedural ruling regarding the filing of the petitions related to managerial employees on this court's rulings regarding confidential employees, that was erroneous, *id*." But, in so holding, the court also explicitly indicated that its holdings in those two earlier cases does not extend beyond the confidential exclusion to the managerial exclusion or to the supervisory exclusion. The court's language that *AFSCME Drug Screeners* and *Niles Township* is "strictly limited" to confidential employees is not ambiguous and does not suggest that a path remains under the Board's decision that allows unit clarification to remove allegedly supervisory employees in the circumstances here.

In arguing that *AFSCME* does not prohibit unit clarification with respect to supervisory employees already included in bargaining units, the County also relies on the court's discussion therein comparing the Act's definition of confidential employee with its definition of managerial employee, and the court's determination that the inclusion of managerial employees in a bargaining unit does not present the type of concern over conflict of interest as does the inclusion of confidential employees. As the County points out, the *AFSCME* court observed that unlike the definition of confidential employee, the Act's definition of managerial employee does not mention authorized access to information. Relying on the Act's definition of supervisor set forth in Section 3(r), the County asserts that the inclusion of allegedly supervisory employees in a bargaining unit presents the potential of employee conflict of interest like that posed by the inclusion of confidential employee. It provides no explanation for its contention, but simply states that the

Act's definition of supervisor, "on its face implicates the dangers faced by confidential employees." The County asserts that it should be allowed to present, at hearing, evidence that the inclusion of the employees it alleges are supervisors presents the same type of employee conflict of interest as the inclusion of confidential employees. And it contends it should be allowed to show how maintaining the status quo will undermine the parties' collective bargaining relationship.

Under the Act, a supervisor is an employee who performs duties that are substantially different than his subordinates; has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward or discipline employees, adjust grievances, or to effectively recommend any such action; and does so in the consistent use of independent judgment. ILCS 315/3(r). It is true that the Board has held that an employee may be found to be a confidential employee under the authorized access test if he has advance notice or prior knowledge of the employer's contemplated disciplinary action against its employees. *See City of Chi. Office of Inspector Gen.*, 31 PERI ¶ 6 (IL LRB-LP 2014). Similarly, the Board has held that an employee who, in the regular course of his duties, represents his employer in high-level grievance proceedings might be involved in or privy to significant labor policy formulation, and therefore also could meet the test for confidential employee under the Act. *See e.g., City of Chi. (Law Dep't)*, 4 PERI ¶ 3028 (IL LLRB 1988). But, in each of those cases the employer objected to a representation petition seeking to include employees in a bargaining unit on the basis that the employees were managerial and confidential within the meaning of the Act. And in each case, the Board found that the employees were confidential by applying the test for determining whether employees are confidential under Section 3(c), not the test for determining whether they are managerial under Section 3(j) of the Act. Here, the County is not alleging that the employees

are confidential employees under the Act, only that they are supervisory. And the job descriptions that it provided with the petitions do not suggest that the employees perform any duties, such as discipline or adjustment of grievances, that might render the positions at issue confidential under the Act.

As explained above, in *AFSCME*, the court unambiguously stressed that its holdings in *AFSCME Drug Screeners*, 364 Ill. App. 3d 1028, and *Niles Township High School*, 369 Ill. App. 3d 128, "regarded *confidential employees* and the *unique circumstances* surrounding them" and that those decisions are "strictly limited" to the unit clarifications seeking removal of confidential employees. 2018 IL App (1st) 172476, ¶ 33 (emphasis in original). The court pointed out that it based its holdings in those two cases on the importance of confidentiality in labor-relations matters to which such employees have authorized access. *Id*. The court noted that it reasoned in *AFSCME Drug Screeners* that if unit clarification petitions could be filed only under the existing criteria permitting such, an employer would be barred from removing an employee from a bargaining unit regardless of the information to which the employee had access until a new collective bargaining agreement was negotiated. *Id*. Therefore, a unit clarification petition alleging a confidential exclusion was properly filed even though none of the existing unit clarification criteria applied. *Id*. But the *AFSCME* court stated that managerial employees do not present the same type of conflict of interest with labor relations matters and "simply because managerial employees are statutorily excluded employees does not mean that unit clarification petitions regarding alleged managerial employees can be filed any time outside the limited circumstances set forth in the Board's rules." *Id*. at ¶ 34. It agreed with the dissenting Board members in *Dep't of Cent. Mgmt. Servs. (Dep't of Children & Family Servs., Dep't of Emp. Sec.)*, 34 PERI ¶ 79, who reasoned that

expanding the holdings of *AFSCME Drug Screeners* and *Niles Township* to managerial employees risks undermining collective bargaining stability.

There is no question that supervisors are excluded from collective bargaining because their inclusion presents the possibility of conflicting employee loyalties. *City of Washington v. Ill. Labor Relations Bd.*, 383 Ill. App. 3d 1112, 1120 (3d Dist. 2008) ("[t]he potential for a conflict of interest lies in the supervisor's authority to influence or control personnel decisions in areas most likely to affect the employment of subordinates and, thus, most likely to fall within the scope of union representation.) (emphasis omitted). But conflict of interest is not itself a test for bargaining unit inclusion. And in *AFSCME* the court did not recognize the possibility of conflict of interest in the context of managerial employees as sufficient to permit unit clarification outside of the criteria recognized by the Board's Rules and by caselaw.

The County's argument that permitting allegedly supervisory employees to remain in the bargaining unit will undermine the collective bargaining relationship is unavailing. As explained above, in *AFSCME*, the court rejected the same argument with respect to allegedly managerial employees. And as noted, the job descriptions that the County submitted do not suggest that the employees perform duties that might render the positions at issue confidential under the Act or that their continued inclusion in the bargaining unit might otherwise pose a risk of conflict comparable to that posed by the inclusion of confidential employees. Moreover, the County's position statement does not provide any hint as to how the inclusion of the employees in the bargaining unit has undermined the bargaining relationship or how their continued inclusion will do so. The court's decision in *AFSCME*, stating that its holdings in *AFSCME Drug Screeners* and *Niles Township High School* are strictly limited to petitions seeking exclusion of confidential employees, and vacating the Board's decision with respect to the appropriateness of unit

clarification to remove statutorily excluded employees from bargaining units compels the conclusion that the petitions in these cases are inappropriately filed and, therefore, must be dismissed.

V. Conclusions of Law

The unit clarification petitions filed in these cases are inappropriate.

VI. Recommended Order

The unit clarification petitions are dismissed.

VII. Exceptions

Pursuant to Section 1200.135 of the Board's Rules, the parties may file exceptions to this Recommended Decision and Order and briefs in support of those exceptions no later than 14 days after service of this Recommended Decision and Order. Parties may file responses to exceptions and briefs in support of the response no later than 10 days after service of the exceptions. In such responses, parties who have not previously filed exceptions may include cross-exceptions to any portion of the Recommended Decision and Order. Within 5 days of the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and responses to cross-exceptions must be filed with the Board's General Counsel, at 160 North La Salle Street, Suite S-400, Chicago, Illinois 60601-3103, or to the Board's designated email address for electronic filings at ILRBFiling@Illinois.gov in accordance with Section 1200.5 of the Board's Rules and Regulations. 80 Ill. Admin. Code §§ 1200-1300. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. All filings, including the exceptions and/or cross-exceptions, must be served on all other parties pursuant to Section 1200.20(f) of the Board's Rules.

If no exceptions are filed within the 15-day period, the parties will be deemed to have waived their exceptions, and unless the Board decides on its own motion to review this matter, this Recommended Decision and Order will become final and binding on the parties.

Issued at Chicago, Illinois this 21st day of May 2019

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

/s/ Sharon Purcell

Sharon Purcell
Administrative Law Judge