

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

American Federation of State, County)	
and Municipal Employees, Council 31,)	
)	
Petitioner)	
)	
and)	Case Nos. S-RC-15-066; S-UC-15-123
)	
State of Illinois, Department of Central)	
Management Services,)	
)	
Employer)	

**DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

On September 28, 2016, Administrative Law Judge (ALJ) Sarah R. Kerley issued a Recommended Decision and Order (RDO) in the above-captioned case, ultimately recommending that the Board dismiss the case. On March 2, 2015, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME, Petitioner, or Union) filed a majority interest representation petition in Case No. S-RC-15-066 (RC petition) with the State Panel of the Illinois Labor Relations Board (Board) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315/1-1 *et seq.* (2014), *as amended* (Act), seeking to include a Public Service Administrator, Option 3 position (PSA, Option 3) employed by the State of Illinois, Department of Central Management Services, Department of Corrections (Employer or CMS), and held by Michael Mitchell (Mitchell), in AFSCME bargaining unit RC-63.

The Employer opposed AFSCME’s RC petition, arguing that Mitchell is not a public employee under the Act, pursuant to the exemptions for supervisory, managerial, and/or confidential employees. The Employer also raised a procedural objection, stating that the petition

was improperly filed as a representation petition, when it should have been filed as a unit clarification petition. At the suggestion of ALJ Kerley, the Union filed a unit clarification petition with the Board in Case No. S-UC-15-123 (UC petition), seeking to include the PSA, Option 3 title in bargaining unit RC-63. Thereafter, ALJ Kerley consolidated Case Nos. S-RC-15-066 and S-UC-15-123. ALJ Kerley conducted a full and complete hearing on these matters on June 11, 2015, and both parties filed timely post-hearing briefs. After the ALJ issued her RDO, AFSCME filed timely exceptions, and the Employer filed a timely response to those exceptions.

With regard to the procedural issues surrounding the petitions filed by AFSCME, the following additional facts are instructive. On May 30, 2014, the disputed PSA, Option 3 position was excluded from the RC-63 bargaining unit after CMS filed a unilateral unit clarification petition asserting that the position was managerial (2014 Unit Clarification petition). This petition was unopposed by AFSCME in 2014; as a result, no hearing was held, and the Executive Director issued a Certification of Unit Clarification.

After reviewing the record, briefs, exceptions, and response, we agree with the ALJ's recommendation that the 2014 Unit Clarification petition was properly certified; we reject the ALJ's conclusion that the RC petition filed in S-RC-15-066 is barred by the Board's administrative rules and instead find that the RC petition filed in S-RC-15-066 is proper; we accept the ALJ's findings of fact regarding the position at issue; and we affirm the ALJ's recommendation on the merits of the position at issue that the position is supervisory and managerial pursuant to the Act and must therefore be excluded from the proposed unit.

I. The 2014 Unit Clarification Petition

With regard to the Unit Clarification petition filed by the Employer in 2014 that resulted in exclusion of the then-vacant PSA, Option 3 position from the bargaining unit, the ALJ found that

the petition was properly certified. Specifically, the ALJ found, and we agree, that AFSCME had an opportunity to object to the petition but failed to do so, thereby waiving its rights to contest the certification. AFSCME argues that the Board should not have issued a certification based on the Employer's UC petition because the position at issue was vacant at the time the UC petition was filed, and that Board precedent cautions against filing and certifying vacant positions. However, as the ALJ correctly notes, the Board historically has certified unilaterally filed UC petitions when they are unopposed. Therefore, regardless of whether the Board's law at that time would have resulted in a hearing on the vacant position, the fact remains that AFSCME failed to respond to the petition. Consequently, we agree with the ALJ that the resulting certification was appropriate, and the PSA Option 3 position was properly excluded at that time.

II. S-RC-15-066

With regard to AFSCME's representation petition in S-RC-15-066, the ALJ correctly found that the petition was not barred by principles of *res judicata*, because the Board did not make a substantive determination that the position at issue was managerial when certifying the position as a result of the 2014 Unit Clarification petition filed by the Employer. However, we disagree with the ALJ that S-RC-15-066 should be barred by the certification bar found in the Board's rules. Section 1210.35(b) of the Board's rules provides: "The Board will dismiss a representation or decertification petition filed within 12 months following the date of Board certification of an exclusive representative for all or some of the employees in the bargaining unit, as a result of certification following a representation petition or voluntary recognition petition." 80 Ill. Admin. Code 1210.35(b). The ALJ recognizes that the Board has not directly addressed application of this rule to unit clarification petitions but reasons that the public policy of labor stability favors extending the bar beyond the language of the rule to unit clarification petitions. However, the

plain language of the rule provides a bar only when certification resulted from a representation or voluntary recognition petition. While we appreciate the need for labor stability and respect for the Board's resources as cited by the ALJ, we are disinclined to accept extension of the bar beyond the language of the rule, both for the sake of consistency and for the sake of fairness.¹ Therefore, we overrule the ALJ's dismissal of the RC petition filed by AFSCME. As such, we do not reach a conclusion about the validity of S-UC-15-123.

III. Statutory Exclusions

We adopt and affirm the findings of fact of the ALJ in reaching her recommendations on the statutory exclusions pursuant to the Act. We further adopt and affirm the conclusions of law of the ALJ as they pertain to the statutory exclusions.

The RDO contains a complete record of the ALJ's findings of fact, which we summarize briefly here. The Illinois Department of Corrections (IDOC) is an agency of the Employer. The Telecommunications Section is an ancillary support unit of IDOC and is divided into two units, Telecommunications Telephone Systems and Radio Systems, with a PSA assigned to each area. Michael Atchinson (Atchinson) is a Senior Public Service Administrator with the working title of Deputy Chief of Operations. He reports directly to the Chief of Operations, Joseph Yurkovich (Chief Yurkovich). Atchinson oversees the entire Telecommunications Section, and he directly supervises Mitchell, the Telecommunications Telephone Systems PSA, Option 3.

The Telecommunications Telephone Systems unit is responsible for the upkeep and functionality of IDOC's telephone systems and cellular devices. This unit provides all services related to the provision of IDOC communications, including procurement and issuance of

¹At the time of the RDO, more than 12 months had elapsed since the certification pursuant to the 2014 Unit Clarification petition; therefore, even if we were to apply the 12-month certification bar, a representation petition would have been ripe at that time.

telephone and cellular equipment, and implementation of contracts regarding such equipment. Mitchell oversees this unit and has supervisory responsibility for three subordinate positions. Mitchell also makes recommendations regarding agency policy and procedure to his superiors, including plans for cost savings and contract administration with vendors.

a. Managerial Exclusion

Under the traditional managerial employee test, the Employer must show that the employee is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices. *Ill. Dep't of Central Mgmt. Serv.*, 12 PERI ¶ 2024 (IL SLRB 1996); 5 ILCS 315/3(j). The ALJ found that Mitchell is a managerial employee pursuant to the traditional test because he is engaged in executive and management functions at IDOC, directs the effectuation of management policies and procedures, and makes effective recommendations to his superiors. As the ALJ found, “Mitchell is a high-level policy maker who makes effective recommendations on behalf of the agency.” (RDO 26). We therefore adopt the ALJ’s findings of fact and conclusions of law as they relate to the managerial exclusion pursuant to Section 3(j) of the Act.²

b. Supervisory Exclusion

Under Section 3(r) of the Act, a petitioned-for employee is a supervisor if he (1) performs principal work substantially different from that of his subordinates; (2) possesses authority in the interest of the employer to perform one or more of the 11 indicia of supervisory authority enumerated in the Act; (3) consistently exercises independent judgment in exercising supervisory authority; and (4) devotes a preponderance of his employment time to exercising that authority.

² With respect to the alternative managerial test, the ALJ correctly found that Mitchell is not a managerial employee under the alternative test, because the Employer did not present sufficient evidence to prove that Mitchell is a managerial employee as a matter of law.

City of Freeport v. Ill. State Labor Rel. Bd., 135 Ill. 2d 499, 512 (1990). The Employer, as the party seeking to exclude the petitioned-for employee from the bargaining unit, has the burden of proving by a preponderance of the evidence that the petitioned-for employees satisfy these four elements. *Cnty. of Boone and Sheriff of Boone Cnty.*, 19 PERI ¶ 74 (IL LRB-SP 2003); *Chief Judge of the Cir. Court of Cook Cnty.*, 18 PERI ¶ 2016 (IL LRB-SP 2002).

In this case, the parties stipulated that Mitchell’s principal work is substantially different from that of his subordinate, Halpin; therefore, the first prong of the supervisory test is met. Second, under the second and third prongs of the test, Mitchell satisfied those prongs because he directed the work of his employees using independent judgment. In considering the fourth prong of the test, Mitchell satisfies the preponderance requirement both quantitatively and qualitatively. In terms of quantity, Mitchell spends the bulk of his time – more than 50% - directing the work of his subordinates and performing supervisory functions. Moreover, Mitchell satisfies the qualitative measure because his supervisory functions are more significant than his non-supervisory functions. Therefore, because Mitchell meets all four prongs of the supervisory test, he is a supervisory employee and should be excluded under the Act. We therefore adopt the ALJ’s findings of fact and conclusions of law as they relate to the supervisory exclusion pursuant to Section 3(r) of the Act.

c. Confidential Exclusion

The ALJ briefly considered whether Mitchell was a confidential employee under the Act, noting that, under the Act, a “confidential employee” is defined as one 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 access to information relating to the effectuation or review of the

employer's collective bargaining policies." 5 ILCS 315/3(c). The record does not contain adequate evidence to allow us to analyze Mitchell's position under either the labor nexus test or the authorized access test. Therefore, the Employer failed to prove that Mitchell was a confidential employee under the Act. We adopt the ALJ's findings of fact and conclusions of law as they relate to the confidential exclusion pursuant to Section 3(c) of the Act.

Order

Based on the foregoing, the Public Service Administrator, Option 3 position at issue in this case is excluded from the proposed RC-63 bargaining unit represented by AFSCME.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ John J. Hartnett
John J. Hartnett, Chairman

/s/ Michael G. Coli
Michael G. Coli, Member

/s/ Kathryn Zeledon Nelson
Kathryn Zeledon Nelson, Member

/s/ John R. Samolis
John R. Samolis, Member

/s/ Keith A. Snyder
Keith A. Snyder, Member

Decision made at the State Panel's public meeting held in Chicago and Springfield, Illinois (via video conferencing) on February 7, 2017; written decision approved at the State Panel's meeting in Springfield Illinois, on April 11, 2017, and issued on this date.

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

State of Illinois, Department of Central)	
Management Services (Department of)	
Corrections),)	
)	
Employer,)	
)	Case Nos. S-RC-15-066
and)	S-UC-15-123
)	
American Federation of State, County and)	
Municipal Employees, Council 31,)	
)	
Labor Organization/Petitioner.)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On March 2, 2015, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Union) filed a majority interest representation petition (Representation Petition) in Case No. S-RC-15-066 with the State Panel of the Illinois Labor Relations Board (Board) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315/1-1 *et seq.* (2014), as amended (Act). The Respondent seeks to include the Public Service Administrator Option 3 position (PSA, Option 3), employed by the State of Illinois, Department of Central Management Services, Department of Corrections (Employer or CMS), and currently held by Mr. Michael Mitchell (Mitchell), in bargaining unit RC-63.

The Employer opposed AFSCME’s Representation Petition, arguing that Mitchell is not a public employee under the Act, pursuant to the exemptions for supervisory, managerial, and/or confidential employees. CMS also raised a procedural objection, stating that the petition was improperly filed as a representation petition, and should have been filed as a unit clarification petition. At the suggestion of undersigned Administrative Law Judge, the Union filed a unit clarification petition with the Board in Case No. S-UC-15-123, seeking to include the PSA, Option 3 title in bargaining unit RC-63. Thereafter, I consolidated Case Nos. S-RC-15-066 and S-UC-15-123. In accordance with Section 9(a) of the Act, an authorized Board agent conducted an investigation and determined that there was reasonable cause to believe that questions concerning representation and certification existed. A hearing on these matters was conducted on June 11, 2015, and both parties filed timely post-hearing briefs.

After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of this case, I recommend the following:

I. Preliminary Findings

The parties stipulate and I find:

1. The Employer is a public employer within the meaning of Section 3 (o) of the Act and the Board has jurisdiction over this matter pursuant to Sections 5 (a-5) of the Act.
2. The Union is a labor organization within the meaning of Section 3(i) of the Act.
3. Mr. James Halpin's (subordinate of Mitchell) work is different from Mitchell's work such that the first prong of the supervisory test is met.

II. Issues and Contentions

The parties each make several arguments. The Employer contends the Representation Petition is barred by *res judicata*; in the alternative, if the Representation Petition is not barred by *res judicata*, then the case should be properly heard as a unit clarification petition with the burden of proof on the Union. CMS also argues that Mitchell is a supervisory, managerial, and confidential employee under the Act.

The Union contends that the unit clarification petition filed by the Employer in 2014 is void; therefore, the previously filed unit clarification petition does not bar the Representation Petition. Further, AFSCME contends that Mitchell is a public employee within the meaning of the Act. Finally, in the event the Board decides that a unit clarification petition is procedurally the appropriate petition vehicle, AFSCME's unit clarification petition is appropriate given the actual duties of the PSA, Option 3 position.

III. Findings of Fact

A. Organization of IDOC Telecommunications Section

The Illinois Department of Corrections (IDOC) is an agency of the Employer. IDOC is comprised of 25 facilities, including prisons, work camps, and satellite units. The Telecommunications Section is an ancillary support unit of IDOC. The Telecommunications Section is divided into two units, Telecommunications Telephone Systems and Radio Systems, with a PSA assigned to each area.

Mr. Michael Atchinson (Atchinson) is a Senior Public Service Administrator with the working title of Deputy Chief of Operations. He has served in this role for two and a half years. He reports directly to the Chief of Operations, Joseph Yurkovich (Chief Yurkovich). Atchinson

oversees the entire Telecommunications Section, and he directly supervises Mitchell, the Telecommunications Telephone Systems PSA, Option 3, as well as Mr. Frank Hughes (Hughes), the Radio Systems PSA, Option 8d. Hughes is a licensed radio operator and included in the RC-63 bargaining unit.

B. Duties of Michael Mitchell Per His Job Description and the Testimony of Atchinson

The Telecommunications Telephone Systems unit is responsible for the upkeep and functionality of IDOC's telephone systems and cellular devices. This unit provides all services related to the wiring and provision of IDOC communications, including the procurement and issuance of telephone and cellular equipment, as well as the implementation of contracts regarding such equipment.

The Telecommunications Telephone Systems unit PSA, Option 3 has a working title of Telecommunications Manager. This position is currently held by Mitchell. Mitchell's direct supervisor, Atchinson, provided testimony regarding Mitchell's duties as described in his CMS 104 position description. Atchinson testified that in 2013, he was personally involved in the drafting of the CMS 104 position description for this position. According to Atchinson, this position was commissioned with the specific intention of hiring someone who could ". . . run that unit . . . with an iron fist and be able to get it done and no worries by anyone at the executive level." Atchinson further elaborated, stating that the position was created with the intent of it requiring ". . . a high-level manager that is not in a bargaining unit." Prior to the creation of this position, the Illinois Auditor General released a report identifying agency-wide deficiencies in inventory and accountability, including within the Telecommunications Section. Atchinson testified that these problems partially occurred due to a lack of supervision. The Telecommunications Manager position was created in response to the reported deficiencies.

According to the CMS 104 job description, the Telecommunications Manager is a professional position requiring four years of college education and experience in telecommunications or networks. This role also requires extensive knowledge of public and business administration; principles and practices; agency programs and service objectives, activities and operational systems; agency policies and procedures. Atchinson testified that the Telecommunications Manager position required an advanced level of technical expertise and managerial skills.

At hearing Atchinson testified that the time allotments for each duty articulated in the CMS 104 were accurate, and Mitchell did not contest them. According to the job description, the Telecommunications Manager serves as an administrator for the total administrative process of the statewide Agency Telecommunication Program (ATP). Approximately 25% of the Telecommunications Manager's time is spent directing and coordinating the Agency Telecommunications Equipment Program. This includes implementing policy for the administrative processes of the program, directing management studies of the ATP administrative procedures, and aligning program operations across the state of Illinois.

Atchinson testified that his interpretation of "directing management studies" meant that Mitchell would conduct a review of agency policies and practices. Atchinson testified that as part of this duty, Mitchell, without being directed to do so, revised IDOC Administrative Directive (AD) 02.15.101. On March 4, 2015, the Policy and Directive unit emailed Mitchell's revised AD to several of his superiors with the instruction to "Please review and return your comments/approval by 3/20/2015." No one submitted edits to Mitchell's revised AD, and it was accepted without change by the agency and is now IDOC policy.

Atchinson also testified that Mitchell directed, Ms. Mandy Page (Page), administrative assistant to Chief Yurkovich, to send out to the entire agency, an email that he drafted on April 29, 2015. This email directed IDOC employees to not use state-issued personal devices for personal business, movies, games, etc. The email directed recipients to comply with IDOC ADs, and warned that abuse and mismanagement would be monitored. Atchinson testified that he did not approve the email before it was sent to Page for review and approval¹ before being sent out on the agency-wide distribution list. Atchinson also testified that Mitchell has the authority to direct staff to adhere to ADs. Furthermore, Atchinson testified that Mitchell had the authority to create guidelines and policies regarding the class of employees who received cellular devices within IDOC. According to Atchinson, Mitchell has used this authority without interference from his supervisors.

In addition to conducting a review of agency policies and practices, the Telecommunications Manager is also charged with directing IDOC's Video Conferencing

¹Testimony indicates that Page ensures only that emails are appropriate to be sent out agency-wide via the Notify distribution list.

Program, which includes coordinating the installation of video and equipment at various sites for trainings, court appearances, and any other needs.

Approximately 20% of the Telecommunications Manager's time is spent serving as the staff assistant to the Telecommunication Administrator. In this role, the Telecommunications Manager assists in the implementation of statewide telecommunication services that impact systems installation, adjustment and maintenance for the IDOC. The Telecommunications Manager responds to telecommunication services and contracts budget allocation requests from his supervisor, director, or fiscal administration. This requires the Telecommunications Manager to conduct research and compile information and data for the requesting party. As a result, the Telecommunications Manager assists with setting the budget for IDOC telecommunications.

Atchinson testified that Mitchell has the authority to contact Jared Brunk (Brunk), the Chief Financial Officer (CFO), regarding budget adjustments that Mitchell believes are necessary based on his research. According to Atchinson, Mitchell "is very good at being a frugal manager" and often contacted the CFO. Mitchell does not require permission from Atchinson before he contacts the CFO, and Mitchell has the authority to do so without Atchinson's knowledge.

Atchinson testified regarding Mitchell's various cost-savings actions as well as his unfettered contact with the CFO, Brunk. On one occasion Mitchell proposed to the CFO a plan to save \$18,000 per year on telecommunications at Graham Correctional Center if the agency made changes to its phone system. Mitchell went directly to the CFO without first requesting approval for the plan, or permission to contact the CFO, from Atchinson. Mitchell's plan was well received and readily approved by the CFO. Atchinson learned of Mitchell's plan and interaction with the CFO after the fact.

In June of 2015, Mitchell sent Atchinson an email identifying cost-savings that he found in telecommunications which would potentially save the department approximately \$5 million over the course of a decade. In order to realize these savings, Mitchell recommended that IDOC switch to the Mobius billing system which would allow for more efficient and streamlined online billing procedures. Atchinson testified that Mitchell came up with this idea on his own, and was never directed to address any perceived issue with billing procedures. Mitchell's recommendation regarding switching to Mobius was accepted without change from his superiors.

Overall, according to an email sent by Mitchell to Atchinson on June 2, 2015, all of Mitchell's cost savings measures would ultimately save the agency nearly \$500,000 if implemented over a 12-month period. If implemented over a 10-year period, these costs savings would reach nearly \$5 million. Atchinson estimated that 90% of the time Mitchell's cost savings recommendations were accepted by IDOC.

The CMS 104 job description states that if necessary, the Telecommunications Manager is empowered to represent the administrator at meetings and explain and interpret any changes in contracts and services that affect IDOC's communication systems. Atchinson testified that IDOC has an existing and fairly new contract with Global Tel Link and Mitchell evaluates the feasibility of portions of the contract, and expresses any concerns to the project manager. Mitchell also monitors IDOC's contracts with Securus Company, the inmate telephone system vendor. Accordingly, Mitchell has had direct contact with Amy Hewitt, the Securus representative. Atchinson testified regarding an email that demonstrated Mitchell's authority to make decisions affecting the Securus contract.

Atchinson testified that Mitchell has the authority to make financial decisions on behalf of IDOC when he meets with other agencies. The Telecommunications Manager also serves as the liaison between CMS and other State agencies regarding communication system matters. In fact, Atchinson stated that Mitchell has met with CMS in an attempt to persuade them that IDOC would be better off using a traditional phone system instead of the voice over IP (VOIP) system. Atchinson testified that Mitchell had the authority to meet with CMS and speak on behalf of IDOC regarding telecommunications issues without his prompting, approval or knowledge.

The Telecommunications Manager is also charged with meeting with other telecommunications staff and providing guidance and advice on changes in processes and procedures related to telecommunications. The Telecommunications Manager has the authority to commit staff to specific courses of action, such as special projects and the implementation of new processes related to telecommunication services and contract issues. Atchinson testified that Mitchell has committed the electrician foreman, his subordinate, to specific courses of action.

The CMS 104 job description states that the Telecommunications Manager spends approximately 15% of his time administering the statewide radio systems contracts for inmate communications through phone, video, and electronic messaging contracts. To achieve this, the

Telecommunications Manager reviews, modifies, and monitors vendor contracts to ensure they are effective and that vendors are in compliance with IDOC's inmate communication policies and procedures. Atchinson testified that if a vendor is not in compliance Mitchell has the authority to initiate a process, involving the agency's legal department, which imposes sanctions on a vendor for breach of contract.

Approximately 10% of the Telecommunications Manager's time is spent directing, coordinating and supervising the installation, alteration, and maintenance of electrical systems for computer equipment and IDOC telephone systems. This is done to ensure all systems adhere to IDOC policies and procedures. In furtherance of this, the Telecommunications Manager provides any required technical support and supervises the ordering of new communication and cabling systems, as well as upgrades to existing systems. The CMS 104 job description states, and Atchinson testified that the Telecommunications Manager does not require permission prior to ordering and purchasing new communication and cabling systems. This includes purchasing off of the CMS master contract. Atchinson also testified that Mitchell has a direct role in the technical input of the Request For Information process where the department identifies a need for purchasing equipment or a system.

Atchinson testified that 10%, possibly more, of the Telecommunications Manager's duties include serving as a working supervisor of his subordinates. In this capacity, the Telecommunications Manager assigns and reviews work, provides guidance and training, counsels staff regarding work performance, reassigns staff to meet day-to-day operating needs, establishes annual goals and objectives, approves time off, prepares and signs performance evaluations, and reviews activity reports. Mitchell has three subordinate positions including an Electrician (Foreman) James Halpin (Halpin); Electrician David Veith (who has been on an extended Leave of Absence); and a vacant Information Technology/Communications Systems Specialist I position. Atchinson testified that Sandra Myers (Myers), an Office Administrator III who is not listed on Mitchell's CMS 104 or Telecommunications Section organizational chart, reports to Mitchell to some extent. Myers was detailed to work in the Telecommunications Section, in addition to other sections, by Atchinson.

Atchinson testified that Mitchell completed performance evaluations for both Halpin and Myers without his input or direction. While Atchinson did not complete Myers's evaluation, he electronically signed it because she is technically listed as his subordinate on paper, even if not

in practice. The performance evaluation includes, but is not limited to, sections detailing employee objectives for the next reporting period and supervisor remarks.

Atchinson testified that Mitchell is vested with the authority to approve and deny time-off for Halpin and Myers, although Myers sometimes sends her requests to everyone, including Atchinson and administrative assistant Page.

Further, Atchinson stated that Mitchell has the authority to direct or assign Halpin's and Myers's work. Atchinson testified that Halpin is "in the field" splicing wires and doing the work of a foreman and electrician while Mitchell is "doling out the assignments" to him. Atchinson testified regarding a June 10, 2015 email where Mitchell directed Halpin to reschedule a previously planned site visit to install wiring. Atchinson stated that Mitchell has the authority, without prior approval, to send his subordinate Halpin to facilities across Illinois, and he has done so. Atchinson also testified regarding Mitchell's direction of Myers. Specifically, Atchinson discussed a June 8, 2015 email, where Mitchell directed Myers to check into outage situations at the Lincoln and Logan facilities. Two days later, in another email, Mitchell directed Myers to block a texting feature on an IDOC agent's cellphone. Atchinson testified that Myers does not have the authority to unilaterally block texting on a cellphone because her job function is clerical in nature, and she is not a supervisor of anyone in the unit. Myers requires Mitchell's permission before taking such an action.

While Mitchell has not yet had occasion to issue discipline, Atchinson testified that Mitchell has the authority to do so. Mitchell also has the authority to hear and settle grievances at Steps 1 and 2, although he has not had occasion to do so thus far.

Approximately 10% of the Telecommunications Manager's time is spent organizing, planning, and executing ATP services. This includes planning for the effective utilization of fiscal resources, and resolving billing issues between CMS, IDOC, and communications vendors. The Telecommunications Manager also works with management to resolve administrative and budgetary problems and improve program functionality.

Approximately 5% of the Telecommunications Manager's duties include coordinating with Operations, Intel and facility staff on requests and repairs related to equipment and software. In this capacity the Telecommunications Manager prepares forms and coordinates all additions, moves, and changes to the general office telephone system; and monitors and directs

the same for all facilities statewide, as well as provides guidance and technical direction to facility staff.

The approximately 5% of the Telecommunications Manager's remaining time is spent performing other miscellaneous duties that are reasonably within the scope of the Telecommunications Manager's duties, discussed above, as they arise.

Atchinson testified that if a strike appeared imminent, he would consult Mitchell for plans regarding telecommunications because Mitchell is the head of the department and would know how IDOC would be adversely affected by a strike. Atchinson stated that there is no one else in Mitchell's unit who could be consulted to provide strike planning. By the date of hearing, Atchinson had not yet conferred with Mitchell regarding a strike plan. Furthermore, Atchinson testified that he would not contact Hughes, the Radio Systems PSA, Option 8d regarding a strike plan. Atchinson explained that he would not contact Hughes, not only because he is a bargaining unit member, but also because there is a distinct difference between Mitchell and Hughes' duties. According to Atchinson, Hughes is out in the field programming radios, running lines, and working hands-on with vendors, while Mitchell is an administrator in the ultimate sense of the word, making decisions on behalf of the agency much more than Hughes would.

C. Mitchell's Testimony

Mitchell testified that he has been employed with IDOC on two separate occasions. During his initial employment with IDOC he was with the agency approximately 14 years, and most recently he has been employed with the agency in the Telecommunications Manager position for almost a year. During Mitchell's first period of employment with IDOC he served as a Communications Equipment Tech (CET) I in the telecommunications office handling videoconferencing. Eventually, following a grievance filed by Hughes, Mitchell was promoted to a CET II. Mitchell testified that he was a member of AFSCME's RC-14 bargaining unit at this time. In 2009, Mitchell was once again promoted at the agency and became an Information Technology Communications Systems Specialist (ITCSS) II.

Mitchell testified that in his role as a unionized-ITCSS II his job duties included, but were not limited to, the ordering and provisioning of telecommunications service, data, and the installation of telephone equipment, and surveillance for IDOC. Mitchell had contact with vendors during his tenure as an ITCSS II, and he also spent time out in the field surveying rooms for video installations two to four times per month.

During Mitchell's gap in his employment with IDOC, he was employed by CMS as an ITCSS II in the telecommunications group. Mitchell testified that he spent time in the field as a CMS ITCSS II, meeting with customers such as IDOC or the State Police and conducting site acceptances. According to Mitchell, while at CMS, he monitored the price of equipment ordered from vendors to ensure that the pricing was consistent with the vendor contract.

When Mitchell moved from CMS back to IDOC, he returned in his current role, as a PSA, Option 3. Mitchell testified that he reviewed the CMS 104 position description for the PSA, Option 3 prior to interviewing for the position. Mitchell testified that when he started as a PSA, Option 3 with IDOC, he saw that the agency was in complete disarray and while his official job description stated one thing, the reality of what he would actually be required to do was very different. Mitchell testified that he immediately began going for the "low-hanging fruit and got started cleaning" up several telecommunications projects that had not been done correctly. Mitchell testified that he was aware of the Illinois Auditor General's findings regarding deficiencies in the Telecommunications Section, and it was evident that there was negligence occurring at IDOC, such as bills being ignored and telecommunications equipment not being used appropriately or properly accounted for in inventory.

Mitchell testified that CMS's master contract controls the various plans available to employees who use telecommunications equipment. Periodically, CMS receives IDOC employee usage reports from Verizon, a cellular vendor, and looks to see if anything out of the ordinary is occurring usage-wise. Mitchell testified that he and Myers routinely monitored the data usage of employees. Sometimes Myers monitored the data usage of her own volition and other times, Mitchell stated that he directed her to monitor it. When Mitchell or Myers became aware of any abuse of resources, Mitchell testified that he alerted Atchinson about any employee suspected of abusing resources and asked his supervisor if he wanted to open a case on the employee.

In the event that an employee is not abusing resources, but simply using more than their cellular plan's minute allotment, Mitchell or Myers could unilaterally choose to roll the employee into a more appropriate plan. Mitchell testified that this was rather routine work and not something that he would consider bothering Atchinson about. Mitchell stated that he believed that Halpin had to also be unilaterally switching cellular plans before Myers was assigned to the Telecommunications Section, and before Mitchell arrived. Mitchell also testified

that initially, when he first started as a PSA, Option 3, Myers asked for his permission before placing employees in different cellular plans. However, Mitchell later testified that Myers still requested his permission on one occasion seven months after he started at the agency.

Mitchell stated that he splits the cellular work with Myers. Myers does not exclusively assist the Telecommunications Section, and routinely assists other sections. As a result, she can get incredibly busy and not have the time to address every issue in the Telecommunications Section. Mitchell stated that Myers handles the bulk of cellular billing, but frequently issues arise that she does not have the experience to handle, and he takes over at that point. The issues handled by Mitchell and Myers are not limited to billing; they also include monitoring inventory. Mitchell testified that he gave Myers a few “voice things” so that she can learn how to correctly complete Telecommunications Service Requests (TSRs) and send them to CMS for ordering. Generally, Mitchell handles the TSRs because Halpin is too busy to work on them. According to Mitchell, Halpin spends so much time on the road visiting sites that the TSRs might go unaddressed for a week if Mitchell did not handle them.

Mitchell testified that he does contact the CFO, Jared Brunk, for approval if he receives a TSR that will require him to order equipment from a vendor in excess of “\$500 to a thousand dollars”; for any item less than that, the CFO has instructed Mitchell not to bother him. For items costing less than \$500, Mitchell testified that he sends the orders directly to CMS to be fulfilled. Mitchell is essentially the final DOC approval for purchases that are less than \$500. Mitchell testified that he has the authority to make purchases off of the CMS master contract without Atchinson’s approval and only requires the CFO’s approval. However, Mitchell will alert Atchinson of a purchase if the project will require Atchinson’s involvement or influence. Mitchell testified that the majority of his purchases off of the master contract are for cellular equipment, bandwidth, and phone systems. Thus far, the largest purchase made by Mitchell off of the master contract was the phone system for a Joliet mental health unit which cost \$180,000. Mitchell testified that once he completed the Procurement Business Case for Offender 360, IDOC’s new offender tracking database, his largest purchase would be in the millions.

Mitchell stated that he recently had a brand new, \$120,000 system, installed at the East Moline facility. According to Mitchell, “. . . he scoped out the whole thing . . . took inventory of all the lines at East Moline, showed East Moline what they were paying for and that a PRI would serve them better . . .” As a part of this process Mitchell collected data, received a quote from

CMS, and then went to the CFO to propose the East Moline project. Brunk approved the project proposal, without change, and then provided the necessary funding for the project.

While Mitchell planned the logistics of the East Moline project, he testified that he never visited the facility during the installation. Halpin was already on-site for other duties and took care of the install. Although Mitchell did not visit the East Moline site, he testified that he has gone out into the field on one occasion when he went to Marion for a Securus meeting.² Mitchell testified that he is so busy constantly “putting out fires” that he cannot make it out into the field and that is why he routinely asks Halpin to visit sites instead. Mitchell testified that these “fires” include completing and fulfilling TSRs, addressing cellular issues, providing more bandwidth, and other issues. According to Mitchell, his duties as a PSA, Option 3 do not differ much from his prior duties as an ITCSS II at CMS and IDOC.

Regarding his subordinate, Halpin, Mitchell testified that Halpin is for the most part self-sufficient. Mitchell gives Halpin some of his assignments, but not all of them. Mitchell testified that he will “hand him stuff from time to time” but for the most part, Halpin generates and completes his work on his own because he is a foreman. Mitchell only intervenes if he notices a problem or his superior alerts him to a project that needs to be handled quickly. Mitchell also testified that Halpin keeps him apprised of all of his projects, even the projects that Mitchell did not assign him. Additionally, Halpin keeps Mitchell informed of when and where he is travelling for site visits, and sometimes asks him for permission before going on a site visit. Furthermore, Mitchell testified that if Halpin has competing priorities, Mitchell prioritizes Halpin’s projects.

Mitchell testified that Hughes, the Radio Systems PSA, Option 8d, is the manager of the radio group and three shops are under him. According to Mitchell, Hughes is a very hands-on guy who is both in the field and the office. Mitchell believes that he and Hughes have similar equipment ordering duties, as Hughes also orders equipment and goes to the CFO for approval.

Mitchell provided testimony regarding his revisions to AD 02.15.101. According to Mitchell, his attention was first drawn to the directive by IDOC’s policy and directive unit. Mitchell did not dispute that he authored the revised AD 02.15.101 and that it was implemented without change. Additionally, regarding the June 8, 2015 email that requested compliance with

² However, later in his testimony Mitchell testified that he has not traveled to any facilities during his time as a PSA, Option 3.

other ADs and warned against abuse of telecommunications resources, Mitchell stated that this email was sent to administrative assistant Page for approval only after a prior discussion with Atchinson. According to Mitchell, during that discussion he and Atchinson agreed that it would be good practice to send out these notifications twice a year to curtail abuse of telecommunications. Mitchell testified that the June 8, 2016 email was simply a reminder to abide by policies that were already established. To Mitchell's knowledge, at the time of hearing, the email had not yet been approved by Page for agency-wide distribution, and had not yet been sent out.

Mitchell also provided testimony regarding a spreadsheet that he prepared that detailed potential agency savings if the VOIP phone system was put into use. According to Mitchell, AT&T was sun-setting a certain type of phone line that they had offered for many years. IDOC and CMS's hands were forced because they used the Centrex system provided by AT&T. Thereafter, Mitchell conducted research to identify any unused lines that could be eliminated in order to recoup money and also looked at different ways to replace the lines that were going to be eliminated with the VOIP phone system. Mitchell testified that he discussed this project with Atchinson. He also testified that he informed the CFO of his proposal. After discussing the project's costs with the CFO, Mitchell put together a comparative spreadsheet and approached the Chief of Parole with his proposal. The Chief of Parole reviewed the spreadsheet and stated that he did not have a problem implementing Mitchell's seemingly cost-effective proposal. Thereafter, Mitchell and the Chief of Parole decided to implement a pilot to reduce lines at the Springfield parole office, and eight or nine lines were reduced and considerable money saved.

Mitchell also testified regarding the plan he proposed to the CFO to save \$18,000 per year on telecommunications at Graham Correctional Center. Under Mitchell's proposal, he would decide what lines to port, to cancel, what lines are not needed, and other matters related to Graham Correctional Center's telecommunications system. Mitchell stated that he informed the warden at Graham Correctional Center about his proposal and received approval from the warden as well as the CFO. Mitchell then sent the proposal to Atchinson. Mitchell testified that after this point, he no longer let Atchinson know about his projects and would go straight to the CFO because he assumed that Atchinson was busier with other matters.

Mitchell testified that occasionally he compiled a spreadsheet report for the Chief Information Officer (CIO) that detail what IDOC was paying for bandwidth and network gear.

As part of this report, Mitchell completed equipment and circuit searches in the expense management system. Mitchell stated that neither the CFO nor CIO request this report from Halpin or Myers because Mitchell is the only network guy at Corrections so they naturally come to him for this information. Furthermore, Mitchell testified that neither Halpin nor Myers would know how to produce this type of report because they do not have any IT experience.

Mitchell also testified about his implementation of the new online billing system, Mobius. According to Mitchell, he noticed a stack of bills on the then absent CIO's desk and brought the bills to the attention of IDOC's fiscal unit. Mitchell stated that he gave the bills to the fiscal unit to handle. Thereafter, he approached Atchinson and requested access to Mobius, a program that allows agencies to look at IT bill electronically. Mitchell testified that as of the date of hearing, CMS had not yet provided him with access to Mobius.

Mitchell testified that he occasionally reviews his subordinate Halpin's time slips. Mitchell also stated that he has the authority to approve or deny Halpin's time off requests, however he has never denied any time off requests. Mitchell testified that he also has the authority to approve overtime work for Halpin. Regarding Myers's time off requests, Mitchell testified that ". . . she may slip one to me, but I don't recall. I don't do hers on a regular basis." According to Mitchell, he does not normally approve her time off requests. Mitchell discussed his authority to discipline his subordinates, and stated that he has never had occasion to issue any discipline. He also never addressed any grievances as none had been filed to date. Mitchell did not dispute that if an issue arose, he would be authorized to issue discipline or adjust grievances.

Mitchell testified that he completed a performance evaluation on his subordinate, Halpin. Mitchell authored the entire evaluation, including filling out the remarks of supervisor section and signing the evaluation. Additionally, Mitchell set Halpin's objectives for the next reporting period and met with him to discuss his performance evaluation. Mitchell testified that Halpin is a member of the IBEW bargaining unit and Mitchell does not believe a positive performance evaluation has any effect on his pay raises. Mitchell stated that Halpin's pay scale is set by IBEW. Mitchell also testified that he was unaware if performance evaluations had an impact on discipline for Halpin.

Mitchell testified that he completed a performance evaluation for Myers after administrative assistant Page asked him to do so. However, Mitchell testified that he did not sign

Myers's performance evaluation and that she helped populate some of the fields in her performance evaluation because he did not have experience with her duties for other sections.

Mitchell provided testimony regarding two emails where he interacted with Myers. In a June 8, 2015 email Mitchell stated "Sandy can check into it." Mitchell testified that although he made this statement, Halpin ultimately ended up taking care of the outage issues at the Lincoln and Logan facilities, not Myers. Mitchell further testified that the June 10, 2015 email where he instructed Myers to block a text message plan was due to a billing discrepancy. Also, Mitchell testified that Myers first asked him if she could block the text message plan because she knew it was on a cellular phone in violation of an IDOC anti-texting policy.

During the hearing Mitchell had the opportunity to review his CMS 104 job description. He testified that other than his revision of AD 02.15.101, he cannot say that he actually studied any administrative procedures thus far. Mitchell stated that he does not ". . . know whether you want to call it study or knowledge I already possess." Mitchell did not identify any other discrepancies between his CMS 104 and his duties.

Mitchell testified regarding the June 2, 2015 email that detailed potential savings of approximately \$500,000 over a 12-month period and approximately \$5 million over a 10-year period if IDOC instituted his cost savings measures. Mitchell stated that this savings update was merely a running tab of the savings that could be realized based solely on things that were discovered that were not being used, abused, or retired. Mitchell testified that one of his job duties was to review the bills for telecommunications and see where savings can be achieved. According to Mitchell, the items used to compute the cost savings figures in this email were "low-hanging fruit" that he addressed when he was hired. Mitchell testified that Myers is also proficient at reviewing the bills for potential savings and was doing so at the time of the hearing. Mitchell confirmed that he has directed Myers to review the bills for cost-savings in the past.

During the hearing, Mitchell was provided with the position description of an ITCSS II, and asked to review the duties of the position. According to Mitchell, the position description accurately detailed the duties of an ITCSS II and Mitchell stated that currently, as a PSA, Option 3, he performed the same duties as an ITCSS II. In fact, Mitchell testified that the majority of his job duties as a PSA, Option 3 are similar to his prior duties as an ITCSS II. Mitchell stated that

the only new duty that he has is to sign Halpin's time slips.³ He also testified that he is now approached by higher level staff in his role as a PSA, Option 3.

According to Mitchell, while he used to do the same type of work done by the Radio Systems unit, he does not currently do so and no longer has the required licensure. He initially also testified that while he was at CMS he had direct contact with vendors; however, at IDOC he cannot go directly to the vendor and must go through CMS to communicate with vendors. After being shown an email between himself and Amy Hewitt, an account representative for IDOC vendor Securus, wherein he not only contacted her but instructed and directed her to complete a task, Mitchell clarified his testimony. However, Mitchell does have contact with vendors after a contract has been awarded to address technical issues, but he does not have contact with vendors during the formation of a contractual relationship.

Mitchell testified that he is aware of other PSA, Option 3s that are bargaining unit members. According to Mitchell, these PSA, Option 3s perform the same level of work that he does, and they also have subordinates.

IV. Discussion and Analysis

A. Validity of the 2014 Unit Clarification Certification

On May 30, 2014, the disputed PSA, Option 3 position was excluded the RC-63 bargaining unit after CMS filed a unilateral unit clarification petition asserting that the position was managerial (2014 Unit Clarification Petition). This petition was unopposed by AFSCME in 2014 and, as a result, no hearing was held, and the Executive Director issued a Certification of Unit Clarification (Certification).

The 2014 Certification of Unit Clarification is valid. AFSCME contends that based on current Board law, the unit clarification petition on a vacant position should have been dismissed by the Board regardless of any objections. However, this argument is unpersuasive.

It has been the Board's consistent and regular practice to issue unit clarification certifications when a unilaterally filed unit clarification petition is unopposed. This practice applies to positions that are both vacant and filled. AFSCME received appropriate and timely notice of CMS' unilaterally filed 2014 Unit Clarification Petition, yet for reasons unknown did not respond in any form to the filing. In the Certification, the Executive Director stated that "no

³ Later in his testimony, Mitchell states that the only difference between the PSA, Option 3 position and his old ITCSS II position at IDOC is that he would now have subordinates.

interested parties have filed objections with the Illinois Labor Relations Board . . . and the Illinois Labor Relations Board being satisfied that the clarification is consistent with the Illinois Public Labor Relations Act, the Illinois Labor Relations Board HEREBY CERTIFIES that the revision referenced above has been made to the bargaining unit.”

The Executive Director’s Certification, issued without a hearing, is procedurally proper and consistent with longstanding Board practice and precedent. The Board has held that a representation hearing will not be conducted in the “absence of sufficient credible facts reasonably indicating that a petition may not be appropriate.” *Vill. of Mahomet*, 26 PERI ¶ 150 (IL SLRB 2011), *citing Pace South Div.*, 13 PERI ¶ 2037 (IL SLRB 1997). AFSCME failed to object to the 2014 Unit Clarification Petition, and the Board had no reason to believe that hearing was desired or warranted regarding the managerial exclusion of the vacant PSA, Option 3 title. Furthermore, the Board has held that a party’s failure to make such a showing may result in a waiver of objections to the petition itself or to the scope of the sought-for-bargaining unit. *Vill. of Mahomet*, 26 PERI ¶ 150 (IL SLRB 2011). In this case, AFSCME failed to provide a response setting forth its position and/or objections.

Additionally, the Board also sent AFSCME a letter of warning on April 18, 2014. This letter made it abundantly clear that if AFSCME did not respond, the Union risked waiver of any objections to the Certification. On April 18, 2014, Board Case Manager, Lori Novak, mailed a letter to AFSCME, which explicitly stated the following:

If you have any objections to the unit clarification requested in the petition, you must file a response within 20 days of service of this petition. If the Board fails to receive such response setting forth your position, you will have waived your objections and your right to hearing.

After an investigation of this petition, the Executive Director will either issue orders clarifying the units, dismiss the petitions or set the matter for hearing.

AFSCME’s failure to provide a response setting forth its position and/or objections constitutes a waiver of any objections. AFSCME cannot, nearly a year after the Certification, now argue that the Certification is invalid. The time to make such an argument was when CMS filed the petition and AFSCME received notice. At that time, AFSCME was provided with the opportunity to respond and chose not to. Thus, I find that the 2014 Certificate of Unit Clarification issued by the Executive Director is valid.

B. AFSCME's Representation Petition and the Applicability of Res Judicata

On March 2, 2015, AFSCME filed a majority interest Representation/Certification petition, S-RC-15-066, seeking inclusion of the PSA, Option 3 position in its RC-63 bargaining unit. CMS argued that the Representation Petition must be dismissed due to *res judicata*.

According to CMS, the Board already determined that the PSA, Option 3 position should be excluded from the RC-63 bargaining unit when the Executive Director issued a Certificate of Unit Certification on May 30, 2014, in S-RC-15-066, the 2014 Certification earlier discussed. The Union responded that the 2014 Certification was void because Board precedent has held that unit clarification hearings are not appropriate in cases involving vacant titles. Furthermore, AFSCME stated that even if the Certification was proper, the Representation Petition was not barred by principles of *res judicata*, because the Representation Petition does not involve the same facts and issues as those in the 2014 Certification.

As an initial matter, I recognize that the Board has held “[h]earings concerning such vacant titles ... necessarily result in a lack of evidence as to the actual duties of an employee who may someday hold the disputed title.”⁴ *State of Ill., Dep’t of Cent. Mgmt. Servs.*, 20 PERI ¶ 105 (IL LRB-SP 2004) (emphasis added). However, the key word to notice in Board precedent regarding vacant titles is *hearing*. A hearing was not held in this matter. And though a hearing would not have been held in 2014, AFSCME cannot now complain when it did not respond in any way to CMS’s unilaterally-filed unit clarification petition. Board precedent does not require a hearing to be conducted when a party fails to respond or object to a properly filed petition. It has been the Board’s consistent practice to issue unit clarification certifications when a unilaterally-filed petition is unopposed, as the 2014 Unit Clarification Petition was. In light of AFSCME’s failure to respond, the Executive Director properly issued the 2014 Unit Clarification Certification.

Although the 2014 Certification is appropriate, CMS’s argument that the Representation Petition is barred by *res judicata* is unavailing. In order for the doctrine of *res judicata* to apply, three things must occur: 1) a final judgment on the merits by a court of competent jurisdiction, 2) identity of causes of action, and 3) identity of parties. *Grchan v. ILRB*, 315 Ill. App. 3d 459;

⁴ *State of Ill. Dep’t of Cent. Mgmt. Servs.*, __PERI__, Case Nos. S-UC-16-032, -033, -034 (IL LRB-SP September 2, 2016) (Board remanded for hearing a unit clarification petition for vacant positions, when evidence can be presented that “clearly and specifically defines the duties that prospective employees will be expected to perform.”)

Cook Cnty. (Oak Forest Hosp.), 2 PERI ¶ 3009 (IL LLRB 1986); *County of Adams*, 15 PERI ¶2024 (IL SLRB 1999). Put another way, *res judicata* prevents the same two parties from re-litigating the same cause of action after a final judgment on the merits has been entered. *Cnty. of Cook v. ILRB*, 214 Ill. App. 3d 979 (1st Dist. 1991) *Res judicata* also extends to those issues that could have been fully litigated in a former proceeding, as well as those actually litigated. *Grchan*, 315 Ill. App. 3d at 465-6.

AFSCME's Representation Petition is not barred by *res judicata* because the facts and issues in the 2014 Unit Clarification Certification and the Representation Petition are not the same. In 2014, when CMS unilaterally filed the Unit Clarification Petition that gave rise to the 2014 Unit Clarification Certification, the PSA, Option 3 position was vacant. In 2015, when AFSCME filed the Representation Petition, the PSA, Option 3 position was filled by Mitchell. The facts and issues are demonstrably different now that there are actual duties, responsibilities and other evidence, outside of information provided by the job description, which can be analyzed to determine the supervisory, confidential, or managerial status of the position.

Whereas in 2014, because AFSCME never objected to the 2014 Unit Clarification, the Board did not make a substantive determination that the position was managerial. Now, the position is filled and there is an abundance of evidence available to make a decision regarding exclusion from or inclusion in, the bargaining unit. The facts and issues in the 2014 Unit Clarification Petition and the Representation Petition are very different, and for this reason I conclude that *res judicata* is inapplicable here.

C. AFSCME's Unit Clarification Petition is the Appropriate Petition

AFSCME filed two petitions in this matter, first a representation petition, and, at my request, later a unit clarification petition. I find that the unit clarification is the appropriate petition in this matter. AFSCME's representation petition, filed March 2, 2015, was filed less than 12 months after the Board's certification excluding the at-issue position was issued on May 30, 2014. Rule 1210.35(b) establishes a certification bar, and indicates that representation petitions filed within 12 months of the Board's certification will be dismissed.⁵

⁵The Board will dismiss a representation or decertification petition filed within 12 months following the date of Board certification of an exclusive representative for all or some of the employees in the bargaining unit, as a result of certification following a representation petition or voluntary recognition petition. 80 Ill. Adm. Code §1210.35(b).

The Board has not specifically addressed whether the certification bar is applicable where, as here, the exclusive bargaining representative failed to respond to a unit clarification petition to exclude a position, then, a few months later sought to include the very same position. However, the Board has applied the certification bar to dismiss a representation petition seeking to represent employees who were subject to a recent unit clarification petition. *See Plainfield Fire Prot. Dist.*, 23 PERI ¶ 105 (IL LRB-SP 2007). I find that application of the certification bar to preclude AFSCME's representation petition serves the Act's purpose of labor stability, and is mindful of the Board's limited resources. As such, the Union's representation petition is dismissed.

That, however, does not end the inquiry. As stated above, AFSCME's unit clarification petition must also be considered. AFSCME bears the burden of showing that one of the established triggers for use of the unit clarification process exists. Should it satisfy that burden, the burden would then be on the State to prove that Mitchell is statutorily excluded. *State of Ill. (CMS) v. ILRB*, 382 Ill. App. 3d 208 (2008); *Chief Judge of the Cir. Court of Cook Cnty.*, 18 PERI ¶ 2016 (IL LRB-SP 2002).

There are five circumstances under which a unit clarification petition is appropriately filed. Three of those are articulated in Section 1210.170(a) of the Board's Rules. An exclusive representative or an employer may file a unit clarification petition to clarify or amend an existing bargaining unit when: (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; and (3) a significant change takes place in the statutory or case law that affects the bargaining rights of employees. 80 Ill. Admin. Code § 1210.170(a).

In addition, the Board has historically allowed parties to use a unit clarification petition to include newly created job classifications entailing job functions already covered in the unit. *City of Evanston v. State Labor Rel. Bd.*, 227 Ill. App. 3d 955, 969-70 (1st Dist. 1992), *citing State of Ill. (Dep't of Cent. Mgmt. Servs. & Public Aid)*, 2 PERI ¶ 2019 (IL SLRB 1986). More recently the Board has also permitted a union to file a unit clarification petition to include titles that the Board excluded as objected-to when certifying a majority interest petition that had majority support without consideration of the objected-to titles. 80 Ill. Admin. Code § 1210.100(b)(7)(B); *City of Washington v. Ill. Labor Rel. Bd.*, 383 Ill. App. 3d 1112 (3d Dist. 2008); *Treasurer of the*

State of Ill., 30 PERI ¶ 53 (IL LRB-SP 2013) *rev'd on other grounds by Am. Fed'n of State, Cnty. & Mun. Employees, Council 31 v. Ill. Labor Rel. Bd.*, 2014 IL App (1st) 132455. In addition to a union using the unit clarification petition to accrete into a bargaining unit, the petition can also be used to exclude statutorily exempt positions. *See Chief Judge of Cir. Court of Cook Cnty. v. Am. Fed'n of State, Cty & Mun. Employees, Council 31*, 153 Ill. 2d 508, 521 (1992) (The employer could file a unit clarification petition to remove a statutorily exempt employee from a bargaining unit at any time).

Here, the Union contends that its unit clarification petition is appropriate on the first basis set out in Rule 1210.170(a), namely a substantial change in the duties and functions of the position since the 2014 Certification such that it raises an issue as to the title's unit placement. As earlier discussed, the PSA, Option 3 position was vacant at the time of the 2014 Certification. Additionally, AFSCME did not object to the Employer's unit clarification petition and as a result it was unopposed. Also, as previously explained, even if AFSCME had objected, at that time a hearing on vacant titles was not allowed by the Board's prior precedent.

To decide whether or not AFSCME's current unit clarification petition is appropriate due to there being a substantial change in the duties and functions of the PSA, Option 3 position since the 2014 Certification, we consider the job description, hearing testimony, and all other evidence in the record. Based on the evidence at hand, I am not convinced that there has been a substantial change in the duties and functions of the PSA, Option 3 and the Union's unit clarification petition is dismissed.

AFSCME argued that a substantial change occurred when the disputed position went from being vacant to occupied by Mitchell. While the Board has very recently decided that hearings can indeed be held for vacant positions, the Board has not yet specifically addressed the question of whether or not the filling of a previously vacant and excluded position, constitutes a "substantial change." The Union has not provided me with sufficient evidence to make such a determination here. From the record, including the testimony of Atchinson and several supporting exhibits, it appears that the duties described in Mitchell's CMS 104 job description, and the duties that he actually completes as a PSA, Option 3, are not very different at all. I have taken Mitchell's testimony into account as well; however there were multiple instances when his testimony was unreliable and he later contradicted his earlier testimony regarding his duties.

Should the Board disagree with me, I will address the substantive issues, especially because a representation petition is now ripe.

D. The Managerial Exclusion

The Employer asserts that the petitioned-for PSA, Option 3 position is subject to the “managerial” exclusion found in Section 3(j) of the Act. A “managerial employee” is one who “is engaged predominately in executive and management functions and is charged with the responsibility of directing the effectuation of such managerial policies and practices.” 5 ILCS 315/3(j).

The Act excludes managerial employees from the class of employees who are entitled to engage in collective bargaining. *Chief Judge of the Sixteenth Judicial Circuit v. Ill. State Labor Rel. Bd.*, 178 Ill. 2d 333 (1997). The burden falls on the Employer, as the party seeking to exclude the PSA, Option 3, to prove by a preponderance of the evidence that the petitioned-for position is excluded from the Act’s protections. *State of Ill. (CMS) v. ILRB*, 382 Ill. App. 3d 208 (2008); *Chief Judge of the Cir. Court of Cook Cnty.*, 18 PERI ¶2016 (IL LRB-SP 2002). Two tests have been developed to determine if an employee falls into the managerial exclusion: the traditional test, which considers whether the petitioned-for employee is a managerial employee as a matter of fact, and the alternative test, which considers whether the petitioned-for employee is managerial as a matter of law. *State of Ill. (CMS) v. ILRB*, 388 Ill. App. 3d 319, 330 (4th Dist. 2009). I take each test in turn below.

1. The Traditional Managerial Employee Test

Under the traditional managerial employee test, the Employer must show that the employee is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices. *Ill. Dep’t of Central Mgmt. Serv.*, 12 PERI ¶ 2024 (IL SLRB 1996).

Regarding the first element of the traditional test, “executive and management functions” is not defined in the Act, however “. . . the Board and the Illinois Appellate Court has explained that these ‘functions’ amount to running an agency or department, whether that be by establishing policies and procedures, preparing the budget, or otherwise assuring that the agency or department operates efficiently and effectively.” *State of Ill. (CMS) v. ILRB*, 406 Ill. App. 3d 766 (4th Dist. 2010); *Ill. Dep’t of Central Mgmt. Serv.*, 21 PERI ¶ 205 (IL LRB-SP 2005). Put plainly, managers run a department through their performance of these managerial functions.

Turning to the second element of the traditional managerial employee test, a managerial employee must not only have the authority to make policy, but also bear the responsibility of taking action to reach the policy objectives. The Illinois Appellate Court has held that an individual directs the effectuation of management policies and practices if he “. . . oversees or coordinates policy implementation through development of means and methods of achieving policy objectives, determines the extent to which the objectives will be achieved, and is empowered with a substantial amount of discretion to determine how policies will be effected.” *State of Ill. (CMS) v. ILRB*, 278 Ill. App. 3d 79, 87 (4th Dist. 1996). Put plainly, a managerial employee does not simply serve in an advisory and subordinate capacity. A managerial employee does not merely recommend policies or provide advice that a superior can take or leave. A managerial employee is hands-on and actually directs an agency or department. *Id.*

Notably, an advisory employee who makes “effective recommendations” may still be deemed managerial. *Ill. Dep’t of Central Mgmt. Serv./Ill. Commerce Comm’n v. Ill. Labor Relations Bd. (CMS/ICC)*, 406 Ill. App. 3d 766 (4th Dist. 2010). In *CMS/ICC*, the managerial status of Illinois Commerce Commission administrative law judges was evaluated under the traditional managerial employee test. The *CMS/ICC* court addressed the first prong of the traditional test, holding that an employee may be managerial *even if he does not formulate policy* because policy formation is only one of many possible managerial functions. *Id.* The *CMS/ICC* court stated that it is more important to determine whether the employee helps “run” an agency. *Id.* The court continued, emphasizing that the “procedure by which the ALJs hold hearings and issue recommended orders, *which the Commission adopts almost all the time*, is the primary . . . if not the exclusive means, by which the Commission fulfills its statutory mandate of regulating public utilities. *Id.* Therefore, the ICC ALJs helped run the ICC through their “effective recommendations” that are encompassed in their recommended orders. The *CMS/ICC* court also addressed the second prong of the traditional managerial employee test, stating that “by their recommended orders, which the Commission almost always accepts without modification, the ALJs appear to be directing the effectuation of the State’s policies regarding public utilities.” *Id.* As a result, while traditionally courts have separately addressed the two prongs of the traditional managerial test, the *CMS/ICC* holding indicates that an employee’s effective recommendation can satisfy both prongs as long as the recommendations are the means by which the agency fulfills its statutory functions. *Id.* at 1149. An effective recommendation satisfying the Act’s

managerial requirements is one that is almost always implemented. *Dep't of Cent. Mgmt. Servs. v. Ill. Labor Rel. Bd., State Panel*, 2011 ILL App 4th 090966 ¶ 193 (4th Dist. 2011).

According to the testimony of Atchinson, Mitchell's direct supervisor, the Telecommunications Manager position was created with the specific intent of the eventual occupant being a high-level manager that is not a member of a bargaining unit. While intentions alone do not hold considerable weight, it is worth noting that Atchinson was intimately involved in the drafting of the actual CMS 104 position description for the at-issue position and that the position was created to fulfill a specific IDOC need, one that was, at least in part, also identified by the Office of the Illinois Auditor General.

As detailed earlier, Atchinson testified at hearing that the CMS 104 is an accurate representation of the percentage of time Mitchell engages in the listed job duties; and Mitchell did not directly dispute Atchinson's statements regarding the percentage of time that he engages in the listed job duties. When reviewing the CMS 104 position description alone, it is apparent that if the incumbent performed even *some* of his duties in accordance with the CMS 104, the PSA , Option 3 position is managerial under the traditional managerial employee test.

The CMS 104 position description, which was earlier discussed in great detail, states that Mitchell spends 25% of his time directing and coordinating the Agency Telecommunications Equipment Program, implementing administrative policies, planning, directing and implementing the video conferencing program, and carrying out other strictly administrative functions. Atchinson testified regarding the accuracy of the duties and time allotments described in the CMS 104, and once again Mitchell did not directly refute this assessment.

During the hearing, Atchinson testified that it is the duty of the Telecommunications Manager to review and revise ADs. Mitchell, without being directed to do so, reviewed and revised AD 02.15.101. The summary of the AD states that Mitchell made "substantial changes" to the AD. It is reasonable to state that this AD is an important administrative tool. It is telling that Mitchell had the authority to review, revise, and issue such an agency-wide directive without requiring permission to embark upon this considerable project. Notably, Mitchell's revisions were readily accepted, with no changes. The AD is now an official IDOC policy.

Both Atchinson and Mitchell testified regarding several occasions where Mitchell's recommendations regarding policy, cost-savings initiatives, or a new telecommunications project have been readily accepted without change, even when the changes were subject to review and

final approval. In fact, Atchinson testified that 90% of Mitchell's recommendations are accepted by the agency. This is conclusive evidence of Mitchell's effective recommendation of multiple agency-wide policies and practices.

As stated above, Mitchell has presented IDOC with multiple recommendations and taken policy-making action without having his recommendations and policies altered by the agency. For example, IDOC recently implemented a pilot program for parole phone lines as a result of Mitchell's research and resulting recommendation. Testimony revealed that Mitchell's research was extensive, and he undertook this activity without being directed to do so. In another instance, Mitchell admits that he played an integral part in the purchase and installation of a \$120,000 digital voice circuit telecom system at the East Moline Correctional Center. At hearing, when asked about his involvement with this six-figure system, Mitchell admitted that he "scoped out the whole thing," gathered data, and recommended changes and new products that would better serve the agency. Mitchell presented his findings directly to Jared Brunk, the Chief Financial Officer of IDOC, to request funding for the new system. IDOC approved Mitchell's request based on his recommendation, once again, without change. This is another example of an effective recommendation.

In yet another instance, Mitchell recommended that IDOC switch to the Mobius online billing system. According to Mitchell, this system would allow for a more efficient and streamlined method of viewing and paying bills online, as well as provide the agency with additional cost savings. Atchinson testified that this recommendation was in response to Mitchell finding stacks of unpaid IT bills on the former CIO's desk and deciding of his own volition to address them. Mitchell's testimony did not dispute Atchinson's account of events. Mitchell's recommendation to switch to the online Mobius system was accepted, like all of his other recommendations, without change. The fact that Mitchell had not yet received access to Mobius does not alter this analysis. His recommendation was effective, and the record reflects that implementation was ongoing.

These events, as discussed above, make it clear that Mitchell is engaged in executive and management functions at IDOC. Mitchell establishes policies and makes recommendations to ensure that the agency runs in a cost-effective and efficient manner. Mitchell overwhelmingly takes these actions of his own initiative, without being instructed to do so by his supervisor, Atchinson. Mitchell is not merely serving in an advisory role, and actually directs the

effectuation of management policies and practices, such as when Mitchell authored an agency-wide AD providing direction to all IDOC employees on how to use their state-issued devices.

Alternatively, even if Mitchell were considered an “advisory employee,” he is an advisory employee who makes effective recommendations that are accepted the vast majority of the time, without change, as evidenced by the record. It is apparent that Mitchell’s recommendations are well-regarded, trusted, and granted a high degree of deference. Neither the testimony of Mitchell nor Atchinson indicates a time when Mitchell’s recommendations have actually been subjected to revision by his superiors. Mitchell is a high-level policy maker who makes effective recommendations on behalf of the agency. Based on this evidence presented in the record, Mitchell is a managerial employee under the traditional managerial employee test. As a result, the PSA, Option 3 position should be excluded from collective bargaining.

2. The Alternative Managerial Exclusion Test

In addition to the traditional managerial employee test, an alternative managerial employee test exists. The alternative managerial employee test considers whether or not the employee is a managerial employee as a matter of law. *Chief Judge of the Sixteenth Judicial Circuit*, 178 Ill. 2d 333 (1997); *State of Ill., Depts. of Central Mgmt. Servs. and Healthcare and Family Servs.*, 23 PERI ¶ 173. Put simply, under this test the Board and courts consider whether an employee serves as a surrogate for an office holder. *Office of the Cook Cty State’s Attorney v. ILRB*, 166 Ill. 2d 296 (1995).

The courts evaluate the following three factors when determining if a petitioned-for employee stands in the shoes of a superior: (1) close identification of the office holder with actions of his or her assistants, (2) the unity of their professional interests, and (3) the power of the assistants to act on behalf of the public officer. *Chief Judge of the Sixteenth Judicial Circuit*, 178 Ill. 2d at 344; *Cnty. of Cook*, 19 PERI ¶ 58 (IL LRB-LP 2003). While assessing these factors, courts focus on the statutory powers and duties of the petitioned-for employee, rather than on the specific tasks of any particular individual. *Office of the Cook Cnty. State’s Attorney*, 166 Ill. 2d 296. As a result, without a “detailed statutory apparatus” that “clothes the employees with all the powers and privileges” of the office holder, the petitioned-for employee will not be deemed managerial as a matter of law. *Dep’t of Cent. Mgmt. Servs./Dep’t of Healthcare and Family Servs.*, 388 Ill. App. 3d at 333, *quoting Cook County State’s Attorney*, 166 Ill. 2d at 305.

CMS has presented no evidence of a statutory scheme that clothes Mitchell with the powers and privileges of the DOC. It is also unclear who CMS is identifying as the “office holder” as required by the test. It appears that CMS is arguing that Mitchell would stand in the shoes of the Telecommunications Administrator; however, that position is vacant. As such, I am unable to ascertain whether or not Mitchell fulfills the second or even third elements of the alternative managerial exclusion test. Furthermore, no statutory duties have been identified in this matter. Based on the record, I find that CMS has failed to prove that Mitchell is a managerial employee as a matter of law.

E. The Supervisory Exclusion

Section 2 of the Act grants public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours, and other conditions of employment. Supervisors as defined by Section 3(r) of the Act are not public employees and are therefore excluded from the Act’s coverage. *City of Freeport v. Ill. State Labor Rel. Bd.*, 135 Ill. 2d 499, 512 (1990).⁶

Under Section 3(r) of the Act, a petitioned-for employee is a supervisor if he (1) performs principal work substantially different from that of their subordinates; (2) possesses authority in the interest of the employer to perform one or more of the 11 indicia of supervisory authority enumerated in the Act; (3) consistently exercises independent judgment in exercising supervisory authority; and (4) devotes a preponderance of his employment time to exercising that authority. *Id.* The Employer, as the party seeking to exclude the petitioned-for employee from the bargaining unit, has the burden of proving by a preponderance of the evidence that the petitioned-for employees satisfy these four elements. *Cnty. of Boone and Sheriff of Boone Cnty.*, 19 PERI ¶ 74 (IL LRB-SP 2003); *Chief Judge of the Cir. Court of Cook Cnty.*, 18 PERI ¶ 2016 (IL LRB-SP 2002).

The parties in this case stipulated that the principal work of Mitchell is substantially different from that of his subordinate, Halpin. Therefore, the first prong of the supervisory test has been met. Therefore I turn to the questions of whether Mitchell performs any of the 11 indicia of supervisory authority with independent judgment and whether he devotes a preponderance of his work time to exercising supervisory authority.

⁶ Section 3(s)(2) of the Act allows a public employer to collectively bargain with a unit comprised of supervisory employees. That exception is not relevant to this case.

1. The Indicia of Supervisory Authority

With respect to the second and third prongs of the Act's supervisory definition, the employer must establish that the petitioned-for employee has the authority to perform, or effectively recommend, any of the 11 indicia of supervisory authority listed in the Act. These indicia include the following: the authority to hire, transfer, suspend, lay-off, recall, promote, discharge, direct, reward, discipline, or adjust grievances, and consistently exercise that authority with independent judgment. The use of independent judgment must involve a consistent choice between two or more significant courses of action and cannot be routine or clerical in nature, or be made merely on the basis of the alleged supervisor's superior skill, experience, or knowledge. *Chief Judge of the Circuit Court of Cook Cnty v. Am. Fed. of State, Cnty and Mun. Empl., Council 31*, 153 Ill. 2d 508, 531 (1992); *Freeport*, 135 Ill. 2d at 531. An effective recommendation satisfying the Act's supervisor requirements is one that is adopted by the alleged supervisor's superiors as a matter of course with very little, if any, independent review. *City of Peru v. Ill. State Labor Relations Bd.*, 167 Ill. App. 3d 284 (3rd Dist. 1988); *Peoria Hous. Auth.*, 10 PERI ¶2020 (IL SLRB 1994); *Vill. of Justice*, 17 PERI ¶2007 (IL LRB-SP 2000).

While Mitchell's job description is replete with language that might at a glance cause one to believe that his job function entails several of the indicia of supervisory authority, job descriptions alone are insufficient evidence to establish an employee's duties or supervisory status. *City of Carbondale*, 27 PERI ¶ 68 (IL LRB-SP 2011); *State of Ill., Dep't of Cent. Mgmt. Servs. (PSA Option 1)*, 25 PERI ¶ 184 (IL LRB-SP 2009); *Cnty of Union*, 20 PERI ¶ 9 (IL LRB-SP 2003); *Northern Ill. Univ. (Dep't of Safety)*, 17 PERI ¶ 2005 (IL LRB-SP 2000). Additionally, a party asserting a statutory exclusion cannot satisfy its burden by relying on vague, generalized testimony or contentions as to an employee's job function. Instead, the Board requires that a party support its argument with specific examples of the alleged supervisory, managerial, or confidential status. *State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Public Health)*, 24 PERI ¶ 112 (IL LRB-SP-2008); *Cnty. of Union*, 20 PERI ¶ 9. Therefore, the job description and all other evidence in the record will be considered in conjunction with the testimony heard at hearing, but only where specific examples of alleged supervisory authority were provided.

i. Direct

The authority to direct encompasses a wide variety of job functions: giving job assignments, overseeing and reviewing and daily work activities, providing instruction and assistance to subordinates, scheduling work hours, approving time off and overtime, and formally evaluating job performance when the evaluation is used to affect the employees' pay or employment status. *Chief Judge of the Circuit Court of Cook Cnty.*, 19 PERI ¶ 123 (IL SLRB 2003); *Cnty. of Cook*, 16 PERI ¶ 3009 (IL LLRB 1999); *Cnty. of Cook*, 15 PERI ¶ 3022 (IL LLRB 1999); *City of Naperville*, 8 PERI 2016 (IL SLRB 1992). In order to constitute "direction" within the meaning of the Act, an employee's responsibility for his subordinates' work performance must also involve discretionary authority that affects the subordinates' terms and conditions of employment. *Serv. Employees Intern. Union, Local 73 v. Ill. Labor Rel. Bd.*, 2013 IL App (1st) 120279; *Cnty. of Cook*, 28 PERI ¶ 85 (IL LRB-SP 2011); *State of Ill., Dep't of Cent. Mgmt. Serv./Dep't of Public Health v. Ill. Labor Rel. Bd., State Panel*, 2012 IL App (4th) 110209, ¶ 27; *Cnty. of Cook*, 28 PERI ¶ 186 (IL LRB-SP 2009). Additionally, regarding independent judgment, the third prong of the supervisory test, the courts and this Board have held that where a supervisor has an active role in checking, correcting, and giving instructions to subordinates and assesses his subordinates' performance and behavior to ensure compliance with departmental norms, this is evidence of directing subordinates with independent judgment. *Cnty. of Cook*, 15 PERI ¶ 3022, citing *City of Chicago*, 10 PERI ¶ 3017 (IL LLRB 1994); *City of Lincoln*, 5 PERI ¶ 2041 (IL SLRB 1988). In the instant case, the record demonstrates that Mitchell performs the supervisory indicium of directing employees with independent judgment.

Atchinson also provided details of multiple instances where Mitchell exercised the authority to direct or assign work to his subordinates. For example, in one instance, Mitchell emailed Myers directing her to check into a computer network outage at two sites. In another email, Mitchell once again directed Myers when he instructed her to remove a text message plan from an employee's phone. Halpin was also directed and instructed by Mitchell via email to reschedule a site visit with an IDOC warden.

Mitchell testified that Halpin requests permission from Mitchell prior to performing certain tasks or visiting sites or facilities. Additionally, if Halpin has any issue prioritizing his various assignments, Mitchell testified that he steps in and prioritizes Halpin's assignments for him. As earlier discussed, the use of independent judgment involves a consistent choice between

two or more significant courses of action (*Chief Judge of the Circuit Court of Cook Cnty v. Am. Fed. of State, Cnty and Mun. Empl., Council 31*, 153 Ill. 2d 508, 531 (1992); *Freeport*, 135 Ill. 2d at 531); Mitchell prioritizing Halpin's assignments requires him to exercise his independent judgment when he decides which assignment is more important. Therefore, both of these instances, where Mitchell approves tasks/visits and prioritizes Halpin's assignments, are examples of Mitchell exercising independent judgment while giving instructions to his subordinate.

The authority to direct also encompasses approving time off and overtime. Both Mitchell and Atchinson testified that Mitchell also has the authority to approve or deny time off for his subordinate, Halpin. Mitchell admitted that he reviews Halpin's time slips and approves his time off requests. Mitchell has not had occasion to deny any time off requests for Halpin but does not deny he has the authority to do so. Mitchell also testified that he has the authority to approve over time requests for his subordinate, Halpin. Mitchell does not require Atchinson's approval to exercise the authority to deny or approve Halpin's time off or over time requests. Therefore, I find Mitchell directs his subordinate when he reviews and acts on Halpin's over time and time off requests.

Not only does Mitchell have the authority to approve or deny Halpin's time off, he also has the same authority in regards to Myers. Mitchell testified that while he does review Myers's time off requests, this does not occur on a regular basis.⁷

Mitchell and Atchinson also testified that Mitchell completed performance evaluations on both Halpin and Myers. Mitchell completed Halpin's entire performance evaluation, filled out the remarks of the supervisor section, and met with Halpin to discuss his performance evaluation results. Further, Mitchell set performance objectives for Halpin for the next reporting period. Mitchell testified that he also completed a performance evaluation for Myers, although he indicated that he did not sign her evaluation. Additionally, Mitchell testified that Myers populated portions of her evaluation because he was not familiar with her SORT duties.

⁷I also note testimony stating that on paper Myers is technically not Mitchell's subordinate, although Atchinson testified that she reports directly to Mitchell; and Mitchell testified that he completed Myers's performance evaluation. This murkiness came about because Myers is listed on Atchinson's job description as his subordinate, but he assigned her to work in the Telecommunications Section and report to Mitchell.

While the direction can be established through the completion of performance evaluations, the performance evaluation must have the power to affect the employees' pay or employment status. *Vill. Of Plainfield*, 29 PERI ¶ 123 (IL LRB-SP 2013). It is not clear from the record that Halpin or Myers's performance evaluations, whether negative or positive, would affect their pay rate or employment status. Thus, I do not find that Mitchell directed his employees when he completed their performance evaluations.

Based on the record, Mitchell has the authority to direct his subordinates and other IDOC employees with independent judgment.

ii. Discipline

"Discipline" is another indicium of supervisory authority enumerated in the Act. The ability to issue verbal and written reprimands is evidence of the supervisory authority to discipline if the alleged supervisor consistently uses independent judgment in exercising this authority. *Cnty. of Knox and Knox Cnty. Sheriff*, 7 PERI ¶ 2002 (IL SLRB 1990). However, this disciplinary authority is not truly supervisory in nature unless there is evidence that the alleged supervisor's verbal or written warning has any effect on the employees' terms and conditions of employment. *Cnty. of Lake*, 16 PERI ¶ 2036 (IL LRB-SP 2000); *State of Ill., Dep't of Centr. Mgmt. Servs. (Dep't of Employment Security)*, 11 PERI ¶ 2021 (IL SLRB 1995).

The record in our case reflects that Mitchell has not yet had occasion to issue discipline; however, his supervisor, Atchinson testified that Mitchell has the authority to issue discipline to his subordinates. Although Mitchell may have the authority to issue discipline, the record does not provide any evidence regarding how any oral or written reprimands or warnings might affect an employee's terms and conditions of employment. Because Mitchell has not actually issued discipline I cannot determine whether he will (potentially in the future) do so with independent judgment. As such, with a lack of evidence in this area outside of Atchinson's testimony, I cannot find that Mitchell possesses the authority to issue discipline.

iii. Adjustment of Grievances

The term "grievance" as used in Section 3(r) of the Act refers to any complaint by an employee concerning any aspect of the employment relationship. *City of Freeport*, 135 Ill. 2d 499, 530. The Board has held that grievances are not limited to formal grievances filed pursuant to a collective bargaining agreement. *State of Ill. (CMS)*, 12 PERI ¶ 2032.

CMS argues that Mitchell is a supervisory employee because he is able to participate in Steps One and Two of the grievance procedure. The Employer relies on *Metro. Alliance of Police (Vill. Of Woodridge) v. ILRB*, 362 Ill. App. 3d 469, 479-80 (2nd Dist. 2005), to support its belief that simply having the authority to adjust Step One grievances satisfies the supervisory standard. However, *Metro. Alliance of Police* is not truly on point with the case at hand due to different circumstances. In *Metro. Alliance of Police*, the holding regarding Step One grievances satisfying the supervisory standard rested on the identity of specific types of issues addressed by grievances. These included grievances involving bereavement leave, overtime, and vacation, which the court stated held greater weight than more minor grievance issues. See *Village of Elk Grove*, 245 Ill. App. 3d 109 (2nd Dist. 1993) (holding that sergeants do not adjust grievances according to the definition of the Act, because their authority extends in practice only to minor matters.).

Here, Mitchell has never participated in the grievance procedure, due to none having yet been filed. Additionally, the present case is distinguishable from *Metro. Alliance of Police* because the record provides no evidence regarding the specific types of grievances that Mitchell might address. Therefore, I cannot determine if any grievances brought to Mitchell would automatically satisfy the supervisory standard due to their weight as discussed in *Metro. Alliance of Police*. I also cannot determine whether Mitchell's future potential adjustment of grievances would be done with independent judgment.

2. Preponderance Requirement

Having found that Mitchell directs his subordinates with independent judgment, I turn to the fourth prong of the supervisory test. The Illinois Supreme Court, in *City of Freeport*, interpreted the preponderance requirement quantitatively, meaning that the most significant allotment of the employee's time must be spent exercising supervisory functions. Stated another way, the employee must spend more time on supervisory functions than on any one non-supervisory function. *City of Freeport*, 135 Ill. 2d 499 (1990).

Since the *City of Freeport* decision, two panels of the Fourth District of the Illinois Appellate Court have issued different interpretations of how preponderance may be analyzed. The first interpretation defines preponderance as requiring that the employee spend the majority, or more than 50% of his or her time, exercising supervisory authority. *Dep't of Cent. Mgmt. Serv. v. Ill. State Labor Rel. Bd.*, 249 Ill. App. 3d 740, 746 (4th Dist. 1993). The second

interpretation of preponderance relies on whether the supervisory functions are more “significant” than the non-supervisory functions. *Dep’t of Cent. Mgmt. Serv. v. Ill. State Labor Rel. Bd.*, 278 Ill. App. 3d 79, 85 (4th Dist. 1996).

Reviewing the record and applying the quantitative test, Mitchell spends the bulk of his work time on supervisory tasks. Atchinson testified that Mitchell’s CMS 104 is an accurate representation of the percentage of time Mitchell engages in the listed job duties. At hearing, Mitchell did not directly address Atchinson’s characterization of how his time is spent. Based on the CMS 104 job description, corroborated by Atchinson’s testimony, over 50% of Mitchell’s time is spent performing supervisory functions.

Mitchell also satisfies the qualitative test for proving the preponderance test. Mitchell is given wide-ranging authority in his role as Telecommunications Manager. While in his testimony, Mitchell attempts to at times characterize himself as very similar to his subordinates Myers and Halpin, the record reflects that this is not true. Mitchell and Atchinson testified that Mitchell has never been out in the field or visited a site, as Halpin has to provide hands-on support at sites. Mitchell instead directs Halpin regarding what must be done. Mitchell testifies that he and Myers perform similar work; however, the record reflects that her work at times is more clerical in nature and that Mitchell operates at a higher level, doing the work that Myers is incapable of doing.

The record supports the fact that the bulk of Mitchell’s time is spent directing his subordinates. As discussed earlier, Mitchell monitors his subordinates’ work performance, and approves their time off and over time requests. These are supervisory functions, which are primary duties detailed in Mitchell’s CMS 104 job description. Thus, the duties Mitchell performs and is authorized to perform without permission meet the quantitative review under the second test. Additionally, the Board cannot ignore testimony indicating that Mitchell’s position was created with the specific intent to address problems arising from a lack of oversight in the agency and problems resulting from that lack of oversight. Testimony indicates that the at-issue position was created not just to have another set of hands available to perform work, but for the purpose of having a high level manager to oversee the workforce.

F. The Confidential Employee Exclusion

“Confidential employees” are excluded from bargaining units. Under the Act, a “confidential employee” is defined as one 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 access to information relating to the effectuation or review of the employer's collective bargaining policies.” 5 ILCS 315/3(c). 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. The employer expects confidentiality in labor relations matters but the union may seek access to the confidential materials to gain a bargaining advantage. *City of Wood Dale*, 2 PERI ¶ 2043 (IL SLRB 1986). Based on the statutory definition of confidential employee, the Board has formulated three tests to be applied when determining whether a petitioned-for employee is confidential. If an employee meets the requirements established in any one of the three tests, the employee is found to be confidential. *See Cnty. of Peoria*, 2 PERI ¶ 2022 (IL SLRB 1986).

In the case at hand, CMS argues that Mitchell is a confidential employee under two of the three recognized tests—the labor nexus and authorized access tests.⁸ Under the labor nexus test, if an employee assists in a confidential capacity in the regular course of his duties a person or persons who formulate, determine or effectuate labor relations policies, then the employee holds confidential status. *Chief Judge of Cir. Court of Cook Cnty. v. Am. Fed'n of State, Cty & Mun. Employees, Council 31*, 153 Ill. 2d 508, 523 (1992). The person being assisted by the employee must perform all three functions—formulating, determining and effectuating—before a finding of confidentiality can be made. *City of Wood Dale*, 2 PERI ¶ 2043 (IL SLRB 1986). Under the authorized access test the employee must be proven to have access to information concerning matters specifically related to the collective bargaining process between labor and management. *Id.*

The Employer presents the Board with very little, if any evidence to analyze under either test. CMS only provides the Board with Atchinson's testimony that Mitchell would be consulted about a strike plan if strike was imminent. AFSCME noted in its Post-Hearing brief that Mitchell had yet to be consulted at the time of the hearing, even though at that time, the collective bargaining agreement was due to expire in just a couple of weeks. This is not what one would expect if Mitchell's assistance were truly needed in the event of an imminent strike.

⁸The third test, the “reasonable expectation” test, is not applicable here.

Without more evidence from CMS on this point I cannot find that Mitchell is a confidential employee. Therefore, CMS has failed to prove that Mitchell is a confidential employee.

G. Mitchell and Hughes Have Different Positions

Mitchell testified that because Hughes is at the same level as Mitchell on the Telecommunications Section organizational chart and is a PSA, Option 8d, included in the RC-63 bargaining unit, Mitchell should also be included in the Union. However, this argument fails for two reasons. First, Hughes and Mitchell, while both public service administrators, have vastly different job duties. Second, the Board looks to the at-issue position and applies the law. Hughes's position is not before the Board.

While Mitchell and Hughes are both within the Telecommunications Section, Hughes is a PSA, Option 8d and a member of the Radio Systems unit; and Mitchell is a PSA, Option 3, and head of the Telecommunications Telephone Systems unit. Next, as Mitchell testified at hearing, Hughes is a licensed radio operator. While Mitchell once held the same license several years ago, he does not currently hold this special license. Additionally, both Mitchell and Atchinson testified that Hughes is both in the office and out in the field. Atchinson further testified that when Hughes is in the field he is busy programming radios, helping run lines, and working hands-on with vendors. Both Atchinson and Mitchell agree that Mitchell is never out in the field, and typically directs Halpin to go out in the field to perform the unit's field work. Atchinson, who is the direct supervisor of both Mitchell and Hughes, testified that Mitchell is “. . . an administrator in the ultimate sense of the word, making decisions on behalf of the agency much more than Frank Hughes would.” Furthermore, from the testimony it is apparent that Mitchell and Hughes do not have the same level of purchasing authority. Where Mitchell can bypass seeking permission from the CFO for purchases up to \$1,000, Hughes must get approval from the CFO for all purchases. Finally, the CMS 104s of Mitchell and Hughes are not the same and reflect that both men have different duties. The record is replete with evidence that indicates that Mitchell and Hughes have two very different positions. The fact that both men are PSAs is the extent of the similarities between their positions. Mitchell should not be included in the RC-63 bargaining unit based on the Union's claim that his position is similar to Hughes, and the Union points to no authority for this proposition.

V. Conclusions of Law

1. The 2014 Unit Clarification Certification is not void.
2. The instant Representation Petition is not barred by *res judicata*.
3. The instant Representation Petition is subject to a certification bar.
4. The instant unit clarification petition is not appropriately filed because the Union has not shown that there was a substantial change in duties since the 2014 Unit Clarification Certification.
5. Should the Board reach the merits of the unit clarification petition, I find that Telecommunications Manager Mitchell is a managerial employee within the meaning of Section 3(j) of the Act.
6. Should the Board reach the merits of the unit clarification petition, I find that Telecommunications Manager Mitchell is a supervisory employee within the meaning of Section 3(r) of the Act.
7. Should the Board reach the merits of the unit clarification petition, I find that Telecommunications Manager Mitchell is not a confidential employee within the meaning of Section 3(c) of the Act.

VI. Recommended Order

The petition is dismissed.

VII. Exceptions

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order in briefs in support of those exceptions no later than 15 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 Recommendation. Within five days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, or to the Board's designated email 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 filing must be served on all other parties.

Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. 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 30-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 28th day of September, 2016,

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

/S/ Sarah R. Kerley

**Sarah Kerley
Administrative Law Judge**