STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

American Federation of State, County, and Municipal Employees, Council 31,	)	
Charging Party,	)	
and	)	Case No. S-RC-18-003
Chief Judge of the Circuit Court of Cook County,	)	
Respondent.	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

On August 23, 2017, Petitioner American Federation of State County and Municipal Employees, Council 31 (AFSCME) filed a majority interest petition seeking to represent employees in the title Investigator III employed by Respondent Chief Judge of the Circuit Court of Cook County (Chief Judge) and to add the Investigator III positions to an existing bargaining unit described in Case No. L-AC-10-008. After an investigation and evidentiary hearing, on January 9, 2019, Administrative Law Judge (ALJ) Michelle Owen issued a Recommended Decision and Order (RDO) finding the Investigator IIIs were confidential employees under Section 3(c) of the Illinois Public Labor Relations Act, 5 ILCS 315/1 et seq., as amended (2018) (Act), and recommending dismissal of AFSCME's majority interest petition. AFSCME timely filed exceptions to the ALJ's RDO and the Chief Judge timely filed a response.

After reviewing the RDO, the record, the exceptions and responses thereto, we find as follows:

ALJ's Findings and Recommendations

ALJ Owen provides a thorough description of the facts in her RDO so we summarize her findings for context.

The Investigator IIIs at issue work in the Office of Professional Responsibility (OPR) within the Cook County Juvenile Detention Center (JTDC). The primary job of the Investigator IIIs is to conduct investigations into allegations of JTDC employee misconduct or incidents

involving detainees at the JTDC. When the allegations involve a JTDC employee, the Investigator IIIs review the allegations, review relevant documents and reports, obtain witness statements, and interview the employee. Once an investigation is completed, the Investigator IIIs draft reports which include their findings to sustain or unsustain the allegations. The Investigator IIIs' reports are reviewed by their supervisor James Wrightsell who reviews the reports and either requests clarification or more information or closes the matter. Wrightsell then sends the report to the Superintendent Leonard Dixon and the appropriate deputy director. Superintendent Dixon has discretion to overturn the Investigator's findings but there was no evidence that the Superintendent had ever done so. The Investigator IIIs do not impose or recommend discipline and are not informed whether any discipline has been imposed as a result of their findings.

A sustained finding involving JTDC employee misconduct is sent to the Office of Legal Affairs which sends out a notice to the appropriate manager to recommend discipline. The employee's manager is responsible for recommending discipline be imposed and the level of discipline.

ALJ Owen recommended dismissal of the petition based on her determination that the four petitioned-for Investigator III positions are confidential employees as defined by Section 3(c) of the Act. Although the ALJ concluded the Employer failed to establish the Investigator IIIs are confidential employees under the labor nexus test, she found there was enough evidence to confer confidential status under the authorized access test. Specifically, the ALJ found the Investigator IIIs have advance knowledge of employee discipline by virtue of their ability to substantiate allegations of JRDC employee misconduct which could lead to employee discipline. Relying on the State Panel's decision in State of Ill. Dep't of Central Mgmt. Servs. (Dep't of Corrections), 33 PERI ¶ 121 (IL LRB-SP 2017), aff'd by unpub. order 2018 IL App (1st) 171322-U (CMS/DOC 2017), the ALJ concluded the Investigator IIIs, who substantiated or unsubstantiated allegations of misconduct after conducting an investigation, had advanced knowledge of employee discipline and thus satisfied the authorized access test.

AFSCME's Exceptions and Employer's Response

AFSCME timely filed exceptions to the ALJ's findings and conclusions that the Investigator IIIs are confidential employees under the Act. The Employer timely responded.

AFSCME advances two alternative arguments in support of its exceptions. AFSCME's exceptions take issue with ALJ Owen's reliance on CMS/DOC 2017. First, AFSCME urges the

Board to follow its prior decisions in State of Ill. Dep't of Central Mgmt. Servs., 24 PERI ¶ 33 (IL LRB-SP 2008) and City of Chicago Office of the Inspector General, 31 PERI ¶ 6 (IL LRB-LP 2014), which it claims both require advance knowledge of actual discipline imposed as opposed to following CMS/DOC 2017 which it claims only required advance knowledge of potential discipline.

Next, AFSCME argues in the alternative that our predecessors in CMS/DOC 2017 had changed course and inappropriately expanded the authorized access test by including advance knowledge of discipline because discipline, it claims, is not related to collective bargaining strategies. AFSCME urges this Board to abandon relatively recent Board decisions holding that employees who have advance knowledge of contemplated disciplinary action against other employees are confidential employees under the Act, in favor of the holding in State of Ill., Dep't of Cent. Mgmt. Servs., 25 PERI ¶ 184 (IL LRB-SP 2009) (SOI 2009), in which AFSCME claims the State Panel declined to confer confidential employee status based on an employee's advance knowledge of discipline. AFSCME contends that under the authorized access test, the information accessed must be related to collective bargaining strategies rather than contemplated discipline of an employee. AFSCME asserts that following the precedent in SOI 2009 also would be consistent with NLRB precedent.

The Employer filed a response contending the ALJ appropriately relied on the CMS/DOC 2017 and supporting the ALJ's findings, analysis, and conclusions.

We agree with AFSCME's contentions regarding the inappropriate expansion of the authorized access test to include advanced knowledge of contemplated discipline. Nevertheless, we accept the ALJ's recommendations and adopt the RDO as a decision of the Board. There is adequate evidentiary support as well as legal authority for her findings and conclusions, and AFSCME points to no flaw in her reasoning and analysis. She correctly applied and followed Board precedent in CMS/DOC 2017 as the facts involve employees with similar duties and functions.

Although AFSCME presents its arguments in the alternative, because the functions of the Investigator IIIs relating to their findings are strikingly similar to the investigators in CMS/DOC 2017, our decision turns on whether we are willing to abandon the Board's recent precedent in CMS/DOC 2017. The Board in that case discussed the "work product" of the DOC investigators and found that when an "employee's work product forms the basis of the employer's decision to

discipline… the confidential exclusion analysis should consider the employee's duties that result in the work product, because these duties create a substantial risk of divided loyalty between management and the union." State of Ill. Dep't of Central Mgmt. Servs. (Dep't of Corrections), 33 PERI ¶ 121 (IL LRB-SP 2017), aff'd by unpub. order 2018 IL App (1st) 171322-U

Here, the petitioned-for employees investigate allegations of misconduct and then render finding of sustained or unsustained. The Employer made it clear that it relies on those investigative findings in issuing discipline, but there was no further connection to the disciplinary process which we would in most cases consider to be necessary to confer confidential employee status. We recognize that we must be careful in the consideration of employee "work product" as a means to exclude employees from bargaining units under confidential status. Expansions on what type of work can be used to secure an exclusion from bargaining rights may lead to a direct conflict with the notion that the preclusion of rights guaranteed by the Act should be narrowly construed. Therefore, cases of confidentiality based upon work product of an employee should be cautiously viewed and limited in scope. For instance, an employer may rely on a time keeper's records to demonstrate that an employee has been late to work numerous times. Those records could then lead to an employee's discipline. Many collective bargaining agreements have clauses regarding affirmative attendance and those policies will most often include a discipline schedule based on the number of times an employee is late. Thus, the time keeper's records would result in "work product" that an employer relies on exclusively to determine if an employee has engaged in wrongdoing which results in discipline. Are the time keeper's records then enough to confer "confidential" status and exclude said employee from collective bargaining rights under the Act? The answer should unequivocally be "No" for if it were enough, many more employees would be excluded from the Act, denying them collective bargaining rights.

Despite our agreement with AFSCME on the issue of the inappropriate expansion of the authorized access test, deviating from CMS/DOC 2017 under the facts present in the instant case poses challenges because the decision in CMS/DOC 2017 was affirmed by the Illinois Appellate Court in an unpublished ruling. See State of Ill. Dep't of Central Mgmt. Servs. (Dep't of Corrections), 33 PERI ¶ 121 (IL LRB-SP 2017), aff'd by unpub. order 2018 IL App (1st) 171322-U. Because the court's ruling is unpublished pursuant to Rule 23 of the Rules of the Illinois Supreme Court, we cannot cite to the court's rationale in affirming to meaningfully distinguish the court's analysis to change course. In addition, most recently, the Board's Local Panel in City of

Chicago, 36 PERI ¶ 12 (IL LRB-LP 2019), considered similar arguments made by AFSCME but declined to abandon prior Board decisions on the issue of advanced knowledge of discipline, one of which was CMS/DOC 2017. Although we are not bound to follow the Local Panel's decisions, abandoning this particular precedent in CMS/DOC 2017 as urged by AFSCME may result in contradicting decisions on this issue.

For the above reasons, we accept the ALJ's recommendations and adopt them as a decision of the Board.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ John S. Cronin
John S. Cronin, Member

/s/ Kendra Cunningham
Kendra Cunningham, Member

/s/ Jose L. Gudino
Jose L. Gudino, Member

/s/ William E. Lowry
William E. Lowry, Chairman

/s/ J. Thomas Willis
J. Thomas Willis, Member

Decision made at the State Panel's public meeting in Chicago and Springfield, Illinois (via videoconference) on August 13, 2019, written decision approved at the State Panel's public meeting in Chicago and Springfield, Illinois (via videoconference) on September 10, 2019, and issued on September 12, 2019.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

American Federation of State, County and Municipal Employees, Council 31 Petitioner, and Chief Judge of the Circuit Court of Cook County, Employer.	)	Case No. S-RC-18-003

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On August 23, 2017, American Federation of State, County and Municipal Employees, Council 31 (Union) filed a majority interest representation/certification petition in the above-captioned case with the State Panel of the Illinois Labor Relations Board (Board) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2014), as amended (Act). The Union seeks to represent individuals in the title of Investigator III employed by the Chief Judge of the Circuit Court of Cook County (Employer) at the Juvenile Temporary Detention Center ("JTDC") in an existing bargaining unit represented by the Union.[1] The Employer filed a timely response and objection to the petition asserting that the positions sought to be represented are confidential within the meaning of the Act.

In accordance with Section 9(a) of the Act, an authorized Board agent conducted an investigation and determined that there was reasonable cause to believe that a question concerning representation existed. A hearing on the matter was conducted on August 28, 2018, by the undersigned. Both parties elected to file post-hearing briefs. After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following:

I. PRELIMINARY FINDINGS

[1] The petitioner seeks to add the petitioned-for employees to the bargaining unit described in Case No. L-AC-10-008. The L-AC-10-008 bargaining unit includes all caseworker II, III, and IVs employed at the JTDC.

The parties stipulate and I find:

1. The Employer is a public employer within the meaning of Section 3(o) of the Act.
2. The Union is a labor organization within the meaning of Section 3(i) of the Act.
3. The Board has jurisdiction over this matter pursuant to Section 5(a) and 10(b) of the Act.

II. ISSUES AND CONTENTIONS

The issue in this case is whether the petitioned-for employees in the title of Investigator III are confidential employees within the meaning of Section 3(c) of the Act. The Employer contends that the petitioned-for employees are confidential employees under the authorized access test and the labor-nexus test. The Union disputes these contentions.

III. FINDINGS OF FACT[2]

A. Overview of JTDC

JTDC is divided into several divisions and offices including the division for administration; division for resident advocacy and quality of life; division for programs and professional services; division for admissions, security and control; division for resident daily life; office of professional standards and responsibility; and office of legal affairs, compliance, public and media relations.

The petitioned-for employees work in the office of professional standards and responsibility. The office of professional standards and responsibility is composed of a director of investigations and four Investigator IIIs. Michael Bernardini, Paris White, and Monica Collier currently hold the position of Investigator III. One Investigator III position is currently vacant. Bernardini and Collier have been employed as Investigator IIIs since October 2012. The Investigator IIIs report to the acting director of investigations, James Wrightsell. Wrightsell has held the position for approximately six months. Wrightsell reports to the superintendent of JTDC, Leonard Dixon. Prior to becoming the acting director of investigations, Wrightsell was an Investigator III for approximately eight months.

The office of legal affairs, compliance, public and media relations is composed of a general counsel, assistant general counsel, legal affairs coordinator, labor relations analyst II, and a hearing officer. This office handles labor relations, employee discipline, employee grievances, and litigation. Zenaida Alonzo has held the position of general counsel since 2015. She is responsible

[2] Zenaida Alonzo, James Wrightsell, and Michael Bernardini testified on behalf of the Employer. Monica Collier testified on behalf of the Union.

for overseeing the office.

There are currently 28 caseworkers at JTDC. The caseworkers are represented by the Union. The Union and the Employer are parties to a collective bargaining agreement covering the caseworkers. The Union also represents some of the office support staff at JTDC. Teamsters, Local 700 represents some of the other employees at JTDC.

B. Investigator III Job Description

According to the job description, Investigator IIIs conduct investigations into allegations, rumors, and reported incidents of impropriety involving staff and/or youth at the JTDC and are responsible for conducting authoritative, in-depth, and confidential inquiries into reported incidents, complaints, or suspected improprieties involving staff, or incidents among detainees which have implications for the institution and its population management and care; interviewing witnesses, employees, visitors, detainees, and other parties such as family, employees of other Cook County agencies, police, social/community agencies, and assembling testimony and facts to arrive at a reasonable and/or reliable assessment of each case; conducting background checks as needed; determining the scope and nature of the investigation based on preliminary inquiries and consulting with the superintendent of JTDC to determine the course of action; inspecting work locations throughout the facility and observing and evaluating work methods which have generated complaints from staff, detainees, or others; preparing both written and verbal progress reports and detailed final analysis/presentations for the executive director; participating in various disciplinary hearings, police investigations, Department of Children and Family Services' ("DCFS") investigations, and recommending an appropriate course of action in resolving potential and actual problems, infractions, and violations; and performing other special and confidential projects as may be required.

C. Investigative Process

Allegations of misconduct by residents, JTDC employees, and visitors are referred to the office of professional standards and responsibility for investigation. The allegations may involve employee misconduct, sexual abuse, physical abuse, and visitors entering the facility with contraband. Criminal allegations are referred to the appropriate law enforcement agency. Allegations involving physical abuse are referred to the Department of Children and Family Services.

When an allegation is referred to the office of professional standards and responsibility,

Wrightsell assigns the matter to an Investigator III. The Investigator III is responsible for investigating the matter and acts as a fact-finder. When the allegation involves a JTDC employee, the Investigator III reviews the allegations, reviews incident reports and any pertinent documents, obtains witness statements, interviews the employee, and reviews any video footage. At the interview with the employee, the employee may have union representation.

After completing his or her investigation, the Investigator III determines whether any policies were violated, compiles a report, and makes a finding of sustained or unsustained. The Investigator III does not recommend discipline. According to JTDC policy, the Investigator III's report shall not offer recommendations for discipline, nor shall the Investigator III have the ability to impose discipline or take administrative action. Additionally, the Investigator III is not informed whether an employee is disciplined or not as a result of his or her investigation.

Once the Investigator III finishes their report, the matter is submitted to Wrightsell for review. Wrightsell either requests more information and clarification or he closes the matter. After Wrightsell reviews the matter, he then submits it to Superintendent Dixon and the appropriate deputy director. Superintendent Dixon can overturn the Investigator III's findings. However, Wrightsell is unaware of this ever occurring.

The Investigator IIIs have been involved in approximately 104 investigations this year. Investigator IIIs have investigated matters involving caseworkers, administrative staff, residents, contractors, and volunteers. Bernardini has investigated five to six caseworkers. In 2015, Bernardini investigated a caseworker and made a sustained finding. During his investigation, he interviewed the caseworker. At the interview, the caseworker had Union representation. Bernardini also investigated a caseworker in 2013.

Investigator IIIs are expected to keep their investigations confidential. The Investigator IIIs are not allowed to inform the Union about anything they learn in the course of their investigations. Investigator IIIs are also expected to complete their investigations in an unbiased manner.

D. Discipline

After receiving a sustained finding, if the matter involves an employee, the labor relations analyst II in the office of legal affairs, compliance, public and media relations sends a notice to the appropriate manager to draft a recommendation for discipline. Generally, the managers are responsible for recommending discipline and the level of discipline to be imposed. However, in

some cases, the managers are directed to write up a disciplinary recommendation. The labor relations analyst also informs General Counsel Alonzo of sustained findings. Alonzo attends one or two disciplinary hearings each quarter. The labor relations analyst II is also responsible for scheduling the pre-disciplinary hearing with the employee. The hearing officer in the office of legal affairs, compliance, public and media relations then decides what level of discipline will be imposed. Wrightsell is unaware of any situations where an Investigator III made a finding of sustained and the employee was not disciplined as a result.

E. Testifying

Investigator IIIs can be called to testify at pre-disciplinary hearings, grievance hearings, Illinois Department of Employment Security ("IDES") hearings, Illinois Department of Human Rights investigations, DCFS investigations, and hearings in state and federal court. However, Wrightsell could not recall an Investigator III testifying in state or federal court in the past nine years. Wrightsell could also not recall any specific instances of Investigator IIIs testifying at grievance hearings. Further, Wrightsell, Bernardini, and Collier have never been asked to testify at grievance hearings.

Investigator IIIs have been called to testify at DCFS investigations, pre-disciplinary hearings, IDES hearings, and state and federal court. At pre-disciplinary hearings, Investigator IIIs have been asked to clarify information in their reports. In the instances when Collier testified at a pre-disciplinary hearing, she was asked to do so by JTDC hearing officer, Bruce Berger. Collier was asked to testify at an IDES hearing by the director of human resources.

F. Access to resident information, incident reports, shift reports, caseworker notes, investigations, personnel files, prior discipline, time records, emails, phone records, and video footage

JTDC maintains a computerized system called Resident Management Information System ("RMIS"). RMIS contains JTDC resident information including resident grievances, resident discipline, resident biographical information, and resident court statuses. RMIS also contains incident reports, employee shift reports, and caseworker notes. In addition, RMIS contains a log of all investigations.

All JTDC employees have access to RMIS. However, employees have varying degrees of access. Investigator IIIs have access to resident information, incident reports, employee shift reports, caseworker notes, and investigations. Caseworkers, however, do not have access to

investigations.

The Investigator IIIs can access pending and past investigations through RMIS. RMIS displays the case number; the date the matter was assigned; the investigator assigned to the matter; whether the case is active or closed; the nature of the investigation, e.g., employee misconduct, use of force; the subject type, e.g., staff, resident, visitor; the subject's name; the subject's status, e.g., caseworker; the final investigation finding, i.e., sustained or unsustained; and the date the case was closed. An investigation is contained on RMIS before an employee is notified that he or she is under investigation. RMIS does not contain disciplinary records or show whether an employee was disciplined as a result of an investigation. RMIS also does not contain employee grievances. Rather, employee grievances are kept in employees' personnel files.

As part of their investigations, Investigator IIIs can request access to an employee's personnel file and prior disciplinary records. Those requests are granted as a matter of course. Investigator IIIs are only allowed access to personnel files of employees that the Investigator IIIs are currently investigating.

The Investigator IIIs can also request access to an employee's time records, work emails, and work phone records as part of their investigations. Before an Investigator III can access an employee's work emails, the Investigator III must submit a request to the acting director of investigations. Those requests are granted as a matter of course, and Wrightsell is unaware of any requests being denied. Requests to access an employee's work phone records are also granted as a matter of course.

The Investigator IIIs also have access to JTDC video footage. There are approximately 734 cameras at JTDC. To view video footage, the Investigator III must sign in to a log with his or her initials, the date, and the time.

G. Grievances

The labor relations analyst II in the office of legal affairs, compliance, public and media relations receives grievances at the second step of the grievance procedure. The chief of staff of JTDC receives grievances at the third step. General Counsel Alonzo attends one to two grievance hearings per quarter. At grievance hearings, the supervisor or deputy executive director may also attend on behalf of the Employer. At the grievance hearings that Alonzo has attended, no Investigator IIIs have been called to testify.

Investigator IIIs have investigated allegations involving employee grievances. If an

Investigator III investigates an allegation concerning an employee grievance, the Investigator III is allowed access to the grievance.

H. Negotiations

Alonzo sat at the bargaining table for the negotiation of the current agreement between the Union and the Employer covering the caseworkers.

I. Meetings with Superintendent Dixon

Wrightsell and the Investigator IIIs have bimonthly meetings with Superintendent Dixon, where Dixon provides updates on the facility and describes his expectations. According to Wrightsell, at one of those meetings, Wrightsell brought up the issue of union representatives being present for interviews with Investigator IIIs. Wrightsell also testified that he raised the issue of "union representative[s] have been consistent of having their constituents not be forthcoming as far as telling the truth about things where they would come with an adage about I don't recall." Collier testified that she did not recall any union issues being discussed at the meetings with Superintendent Dixon.

IV. DISCUSSION AND ANALYSIS

The issue is whether the petitioned-for employees are confidential employees within the meaning of Section 3(c) of the Act, and therefore excluded from the Act's coverage. The Employer contends that the Investigator IIIs are confidential employees under the authorized access test and the labor-nexus test.

Section 3(c) of the Act defines a confidential employee as follows:

> an employee who, in the regular course of his or her duties, assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations or who, in the regular course of his or her duties, has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies.

5 ILCS 315/3(c). Confidential employees are not considered "public employees" or "employees" for purposes of the Act, and therefore they are excluded from the Act's coverage. "The purpose of excluding confidential employees is to keep employees from 'having their loyalties divided' between their employer and the bargaining unit which represents them." Chief Judge of the Circuit Court of Cook Cnty. v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 153 Ill. 2d 508, 523 (1992).

The Board has formulated three tests to determine whether an employee is confidential: the labor-nexus test, the authorized access test, and the reasonable expectations test.[3] Id. If an employee meets any of the tests, the employee is deemed confidential. Id. The employer bears the burden of proving that the petitioned-for employees are excluded from the Act's coverage. Health & Hosp. Sys. of Cnty. of Cook v. Ill. Labor Relations Bd., Local Panel, 2015 IL App (1st) 150794, ¶ 51; Cnty. of Cook v. Ill. Labor Relations Bd., Local Panel, 369 Ill. App. 3d 112, 123 (1st Dist. 2006).

A. Labor-Nexus Test

The petitioned-for employees do not satisfy the labor-nexus test because the Employer has failed to establish that the Investigator IIIs assist in a confidential capacity anyone who formulates, determines, and effectuates labor relations policy.

Under the labor-nexus test, an employee is confidential if he or she "in the regular course of his or her duties, assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations." 5 ILCS 315/3(c). Thus, the party seeking to exclude an employee as confidential under the labor-nexus test must: (1) identify a person who formulates, determines, and effectuates labor relations policies, and (2) show that the alleged confidential employee assists that person in a confidential capacity in the regular course of his or her duties. See, e.g., Niles Township High School Dist. 219, Cook Cnty. v. Ill. Education Labor Relations Bd., 387 Ill. App. 3d 58, 71 (2008). The person assisted by the alleged confidential employee must perform all three functions—formulating, determining, and effectuating—before a finding of confidentiality can be made. Chief Judge of the Circuit Court of Cook Cnty., 153 Ill. 2d at 523; Dep't of Central Mgmt. Servs. (Dep't of Healthcare & Family Servs.), 28 PERI ¶ 69 (IL LRB-SP 2013). Performance of these functions is evidenced when the individual has primary responsibility for labor relations matters, makes recommendations with respect to collective bargaining policy and strategy, formulates and drafts management proposals and counterproposals, evaluates proposals, and participates in collective bargaining negotiations. Vill. of Lombard, 31 PERI ¶ 123 (IL LRB-SP 2015); Vill. of Homewood, 8 PERI ¶ 2010 (IL SLRB

[3] Here, the reasonable expectations test does not apply because there is an existing collective bargaining unit. See Chief Judge, 153 Ill. 2d at 528.

1992).

Here, the Employer asserts that the Investigator IIIs satisfy the labor-nexus test due to their assistance of Superintendent Dixon. However, the Employer did not provide sufficient evidence that Superintendent Dixon formulates, determines, or effectuates labor relations policy. See Health & Hosp. Sys., 2015 IL App (1st) 150794, ¶ 62 (although chief of human resources "undoubtedly created and executed certain policies", the testimony provided no evidence of such policies, and thus, the employer failed to establish that the chief formulated, determined, or effectuated labor relations policy). Likewise, the Employer failed to establish that the Investigator IIIs assist Dixon in a confidential capacity in the regular course of their duties. Notably, the Investigator IIIs do not report directly to Dixon. See Id. at ¶ 65 (recruitment and selection analysts did not assist in a confidential capacity the chief of human resources where, among other things, they did not report directly to the chief of human resources). Thus, the Investigator IIIs do not satisfy the labor-nexus test.

B. Authorized Access Test

The petitioned-for employees satisfy the authorized access test because, in the regular course of their duties, they have advanced knowledge of discipline when they make sustained findings in their investigations.

Under the authorized access test, an employee is confidential if, in the regular course of his or her duties, he or she has authorized access to information concerning matters specifically related to the collective bargaining process between labor and management. Chief Judge, 153 Ill. 2d at 523. The access must be authorized, and the information must specifically relate to collective bargaining. Health & Hosp. Sys., 2015 IL App (1st) 150794, ¶ 67. Such information includes the employer's strategy in dealing with an organizational campaign, actual collective bargaining proposals, and information relating to matters concerning contract administration. Id.; Dep't of Central Mgmt. Servs. (Dep't of State Police) v. Ill. Labor Relations Bd., State Panel, 2012 IL App (4th) 110356, ¶ 27; City of Evanston v. State Labor Relations Bd., 227 Ill. App. 3d 955, 978 (1st Dist. 1992). However, mere access to personnel files and information concerning the general workings of a department, general personnel matters, or statistical information upon which an employer's labor relations policy is based, even if that information is confidential, is insufficient to establish confidential status. Chief Judge of Circuit Court of Cook Cnty. v. Am. Fed'n of State, Cnty. and Mun. Emps., Council 31, 218 Ill. App. 3d 682, 699 (1991); City of Chicago, 25 PERI ¶

2 (IL LRB-LP 2009); Dep't of Central Mgmt. Servs., 25 PERI ¶ 5 (IL LRB-SP 2009). Although this information may be relevant to the collective bargaining process, it does not reveal bargaining strategies and is therefore not confidential within the meaning of the Act. Health & Hosp. Sys. of Cnty. of Cook, 2015 IL App (1st) 150794, ¶ 75; Chief Judge, 218 Ill. App. 3d at 702 (employees' access to confidential information "which may be used in but is not related to labor relations does not indicate that they are confidential employees"); Am. Fed'n of State, Cnty. & Mun. Emps., Council 31 v. Ill. Labor Relations Bd., 2014 IL App (1st) 132455, ¶ 48.

Here, the Employer has failed to establish that the Investigator IIIs have authorized access to information concerning matters specifically related to the collective bargaining process through their access to resident information, incident reports, shift reports, caseworker notes, personnel files, time records, work emails, phone records, or video footage. This type of information is not related to labor relations, and therefore it is not confidential within the meaning of the Act. See Chief Judge, 218 Ill. App. 3d at 699, 702. The Employer also failed to establish that the Investigator IIIs' access to past investigations and prior discipline provides them with access to confidential information within the meaning of the Act because the Union would also have access to this information.

Further, the record did not show that the Investigator IIIs have authorized access to confidential information through their responsibility to testify at pre-disciplinary hearings, grievance hearings, IDES hearings, Illinois Department of Human Rights investigations, DCFS investigations, and hearings in state and federal court. The Employer failed to show that the Investigator IIIs' responsibility to testify provides them with access to information that is not yet known to the Union which could hamper the Employer's ability to negotiate with the Union on an equal footing, if revealed. See City Chicago Office of Inspector Gen., 31 PERI ¶ 6 (IL LRB-LP 2013); State of Ill., Dep't of Central Mgmt. Servs., 29 PERI ¶ 12 (IL LRB-SP 2012). Further, Wrightsell could not recall any instances of Investigator IIIs testifying at grievance hearings. Further, Wrightsell, Bernardini, and Collier have never been asked to testify at grievance hearings. Additionally, the record showed that when Investigator IIIs have been called to testify at pre-disciplinary hearings, they were merely asked to clarify information in their investigative reports.

The Employer has also failed to establish how the Investigator IIIs have authorized access to confidential information by their involvement in the grievance procedure or collective bargaining negotiations. As noted, Investigator IIIs have not testified at grievance hearings.

Further, although they have been asked to investigate matters involving employee grievances, the Employer did not show that in doing so the Investigator IIIs have access to information not yet known to the Union. Additionally, the Employer did not present evidence that the investigators' reports play a role in how management responds to grievances. See State of Ill., Dep't of Central Mgmt. Servs. (Dep't of Corrections), 33 PERI ¶ 121 (IL LRB-SP 2017), aff'd by unpub. order 2018 IL App (1st) 171322-U. Moreover, the record did not reveal that the Investigator IIIs have been involved in any way in collective bargaining negotiations. Rather, the record only showed that Alonzo has been involved in negotiations.

In addition, the Employer did not show how the Investigator IIIs have authorized access to confidential information when they meet bi-monthly with Superintendent Dixon. Although the issue of union representatives being present for interviews with Investigator IIIs and the issue of employees not being forthcoming in their interviews may have been brought up during meetings with Superintendent Dixon, the Employer failed to show how this would provide the Investigator IIIs with access to information that is not yet known to the Union which could hamper the Employer's ability to negotiate with the Union on an equal footing, if revealed. See City Chicago Office of Inspector Gen., 31 PERI ¶ 6; State of Ill., Dep't of Central Mgmt. Servs., 29 PERI ¶ 12.

However, individuals who have advanced knowledge of disciplinary action against an employee are confidential under the authorized access test. State of Ill., Dep't of Central Mgmt. Servs., 30 PERI ¶ 38 (IL LRB-SP 2013); State of Ill., Dep't of Central Mgmt. Servs. (Dep't of Corrections), 33 PERI ¶ 121. Here, although the Investigator IIIs do not recommend discipline, impose discipline, nor are they informed whether an employee is disciplined as a result of their investigation, the Investigator IIIs have advanced knowledge of discipline because they investigate allegations of employee misconduct and make a finding of sustained or unsustained. See Id. (investigators who make findings of substantiated or unsubstantiated on allegations of employee misconduct, but do not recommend or know whether the employee is ultimately disciplined, have advance knowledge of discipline and are confidential under the authorized access test). Notably, Wrightsell testified that he is unaware of any situations where an Investigator III made a finding of sustained and the employee was not disciplined as a result.

In addition, the petitioned-for employees' authorized access to discipline is also in the regular course of their duties because the Employer is likely to grant the Investigator IIIs the same access in the future. The Investigator IIIs' primary duty is to investigate allegations of misconduct

by employees, residents, and visitors and then make a finding of sustained or unsustained. See State of Ill., Dep't of Central Mgmt. Servs., 29 PERI ¶ 12 (IL LRB-SP 2012) (employee's access to information was not ad hoc where her position and current duties indicated that she would maintain such authorized access and perform confidential assistance again). As such, the petitioned-for employees are confidential employees under the authorized access test.

In sum, the Employer established that the petitioned-for employees are confidential employees within the meaning of the Act.

V. CONCLUSIONS OF LAW

The petitioned-for employees are confidential employees 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 and Regulations, 80 Ill. Admin. Code Parts 1200-1240, the parties may file exceptions to this recommendation and briefs in support of those exceptions no later than 14 days after service of this recommendation. Parties may file responses to any exceptions, and briefs in support of those responses, within 10 days of service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the recommendation. Within five days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross responses must be filed with the General Counsel of the Illinois Labor Relations Board, to either the Board's Chicago Office at 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. 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. Exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. If no exceptions have been filed within the 14-day period, the parties will be deemed to

have waived their exceptions.

Issued at Chicago, Illinois this 9th day of January, 2019

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/S/ *Michelle N. Owen*

Michelle N. Owen
Administrative Law Judge