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

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| Laborers' International Union of North America, | ) | |
| | ) | |
| Charging Party, | ) | |
| | ) | |
| and | ) | Case No. S-RC-19-018 |
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| County of Clinton (Highway Department), | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | |

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

On July 31, 2019, Administrative Law Judge (ALJ) Matthew Nagy issued a Recommended Decision and Order (RDO) in the above-referenced case, dismissing a majority interest petition filed by Petitioner Laborers' International Union of North America, Local 773 (Union) seeking to represent two employees working as Engineering Technicians in Respondent Clinton County's (County) Highway Department in the petitioned-for stand-alone bargaining unit. The ALJ found the petitioned-for bargaining unit to be inappropriate under the factors set forth in Section 9(b) of the Act. The Petitioner timely filed exceptions to the RDO, and the County timely filed its response.

After reviewing the record, the RDO, the exceptions, and responses thereto, we find the Petitioner's exceptions to have merit and reject the ALJ's findings and conclusions with respect to the inappropriateness of the bargaining unit for the reasons discussed below:

The Clinton County Highway Department (Highway Department) is responsible for the construction and maintenance of roadways within the County. The Highway Department does not

have any other divisions or department within it. Dan Behrens, the County Engineer of the Highway Department, oversees the operations of the Highway Department and is responsible for supervising the department's employees. Of the ten employees in the Highway Department, nine hold one of two job titles or classifications: Engineering Technician (Engineering Technicians) or Highway Maintenance employee (Maintainers). The Maintainers are currently represented by Petitioner in a bargaining unit (Maintainer Unit) which is the only bargaining unit within the Highway Department. Currently there are two Engineering Technicians employed by the Highway Department.

**ALJ's Findings and Recommendations**

The ALJ considered two broad issues: (1) whether one of the Engineering Technician positions falls within one of the Act's exclusions; and (2) whether the petitioned-for unit is an appropriate bargaining unit.

Regarding the first issue, he concluded that the position occupied by Engineering Technician Neal Richter was not statutorily excluded as claimed by the Union. Neither party has filed exceptions regarding the ALJ's findings on this subject. Thus, pursuant to Section 1200.135(b)(5) of the Board's rules, the ALJ's recommendations regarding Richter's position will stand as a non-precedential determination, binding only on the parties.

Turning to bargaining unit appropriateness, the ALJ concluded the petitioned-for unit is inappropriate and recommended dismissal of the Petitioner's majority interest petition. The ALJ reached his conclusion after finding that the presumption of inappropriateness did not apply in this case. The presumption of inappropriateness applies where (1) the employer has an established centralized personnel system and (2) the petitioner has sought only a portion of employees in the same job classification or, alternatively, only a portion of employees who

perform similar duties. County of McHenry and McHenry County Recorder of Deeds, 31 PERI ¶ 8 (IL LRB-SP 2014); DuPage Cnty. Bd., 1 PERI ¶ 2003 (IL SLRB 1985).

The ALJ reasoned that even though the County has an established centralized personnel system, the Petitioner was seeking all of the employees in the Engineering Technician classification, not just a portion of them. He also found the Engineering Technicians and the Maintainers did not perform the same job duties generally but there was some overlap.

The ALJ then found the petitioned-for unit was inappropriate under Section 9(b) of the Act. He first found historical recognition did not favor either party. Next, he applied the Section 9(b) factors not only to the petitioned-for unit but also to the Maintainers who are represented by the Petitioner in a different unit, noting the Board's preference for broad-based bargaining units. The ALJ determined that the Engineering Technicians and Maintainers have similar wages, hours, and working conditions, common supervision, similar skills and functions, have contact with each other, are interchangeable, and are functionally integrated. The ALJ also determined that the desire of the Engineering Technicians failed to weigh in favor of appropriateness. He found that, although fragmentation is a factor to be considered, the Board has previously rejected proposed units seeking to represent only a narrow slice of employees, citing City of Rolling Meadows, 16 PERI ¶ 2022 (IL SLRB 2000), Cook County (Department of Supportive Services), 2 PERI ¶ 3027 (IL LLRB 1986), and Village of Bartlett, 3 PERI ¶ 2010 (IL SLRB 1986).

**Petitioner's Exceptions**

Petitioner takes exception to the ALJ's findings and conclusions that the statutory factors weighed in favor of the inappropriateness of the petitioned-for unit. Petitioner contends the ALJ improperly required the petitioned-for unit to be the *most* appropriate unit rather than to be *an* appropriate unit. Petitioner next challenges the ALJ's determination that the Engineering

Technicians and Maintainers are functionally integrated and interchangeable. It claims the ALJ incorrectly found the Engineering Technicians and Maintainers work the same hours for most of the year pointing to testimony from one of the Engineering Technicians, Neal Richter, that he works at remote locations for up to eight months at a time and has little interaction with Maintainers. Petitioner further contends any interchangeability and functional integration are negligible.

The Petitioner also claims the ALJ improperly discounted the desires of Richter to be in a stand-alone unit. The Petitioner contends that although the ALJ determined that the 9(b) factors must be applied to the Engineering Technicians as well as the Maintainers, he failed to take into account the unrebutted testimony of the Maintainers' desire to exclude the Engineering Technicians from the Maintainer bargaining unit.

Finally, the Petitioner contends the ALJ's reliance on Board cases expressing a preference for a large broad-based unit is misplaced. It contends more recent Board decisions demonstrate a shift away from that preference and the Board's openness to the appropriateness of smaller units, citing City of Chicago, 23 PERI ¶ 172 (IL LRB-LP 2007) and Dept. Central Mgmt. Servs. (Dept. Healthcare and Family Servs.) v. Ill. Labor Relations Bd., State Panel, 338 Ill. App. 3d 319 (4th Dist. 2009).

We find Petitioner's exceptions to have merit and the petitioned-for unit to be an appropriate bargaining unit under Section 9(b) of the Act. Although the ALJ correctly found the presumption of inappropriateness did not apply in this case, we reject his recommendations that the unit is inappropriate under the Section 9(b) factors.

Section 9(b) of the Act states:

> The Board shall decide in each case, in order to assure public employees the fullest freedom in exercising the rights guaranteed by this Act, *a* unit

> appropriate for the purpose of collective bargaining, based upon but not limited to such factors as: historical pattern of recognition; community of interest including employee skills and functions; degree of functional integration; interchangeability and contact among employees; fragmentation of employee groups; common supervision, wages, hours and other working conditions of the employees involved; and the desire of the employees. For purposes of this subsection, fragmentation shall not be the sole or predominant factor used by the Board in determining an appropriate bargaining unit."

5 ILCS 315/9(b) (emphasis added). Section 9(b) of the Act simply requires the Board determine *an* appropriate unit and does not require that a proposed unit be the most appropriate or the only appropriate unit. Cnty. of Cook (Provident Hosp.), 369 Ill. App. 3d 112, 118 (1st Dist. 2006).

In finding the presumption of inappropriateness did not apply, the ALJ found the duties of the Engineering Technicians and Maintainers to be sufficiently different despite some overlap in duties. This finding is consistent with the record but at odds with his subsequent findings regarding interchangeability and functional integration when he considered unit appropriateness under the factors of Section 9(b) of the Act. In both instances, the ALJ acknowledged some overlap in functions but only found the overlap significant in weighing the 9(b) factors in favor of inappropriateness. The ALJ addressed this inconsistency by noting the Board has previously held that differences in job duties or schedules are not sufficient to establish a unique community of interest among the petitioned-for group, but those decisions cited are distinguishable. The Board in those decisions had also found the presumption of inappropriateness applied and required evidence of a unique community of interest to overcome that presumption. See, *e.g.*, City of Rolling Meadows, 16 PERI ¶ 2022 (IL SLRB 2000) (finding proposed unit inappropriate where there was insufficient evidence of strong indentifiable community interest to overcome presumption). Indeed, in another cited decision, Rend Lake Conservancy District, 14 PERI ¶ 2051

(IL SLRB 2000), the Board rejected the administrative law judge's finding that the petitioned-for unit was inappropriate and noted that the "pertinent inquiry was whether the petitioned-for bargaining unit was [an appropriate unit] within the meaning of the Act." Id.

The cases cited by the ALJ in which the Board rejected small units in favor of larger broad-based units are similarly distinguishable and were considered at a time when the Board expressed a preference for larger broad-based units. See City of Rolling Meadows, 16 PERI ¶ 2022 (IL SLRB 2000) (finding presumption of appropriateness applied); Cook County (Department of Supportive Services), 2 PERI ¶ 3027 (IL LLRB 1986) (acknowledging preference for broad-based bargaining units); and Village of Bartlett, 3 PERI ¶ 2010 (IL SLRB 1986) (acknowledging preference of broad-based units over department only units). As Petitioner rightly notes, however, in more recent cases, the Board has expressed a willingness to certify smaller units. See City of Chicago, 23 PERI 172 (IL LRB-LP 2007) (finding stand-alone unit of 23 communications operators was appropriate); and Dept. Central Mgmt. Servs. (Dept. Healthcare and Family Servs.) v. Ill. Labor Relations Bd., State Panel, 338 Ill. App. 3d 319 (4th Dist. 2009) (affirming Board decision finding proposed unit of six attorneys appropriate).

Here, the ALJ found the presumption of inappropriateness did not apply and found the petitioned-for unit was presumptively *appropriate.* Despite this finding of unit appropriateness, he then applied the 9(b) factors to a unit including the Engineering Technicians along with the Maintainers who were not petitioned-for but included in a bargaining unit certified by the Board on S-RC-06-120. By doing this, the ALJ in effect was comparing the existing Maintainer Unit to the petitioned-for unit and determining that the Maintainer Unit was more appropriate. See City of Rolling Meadows, 16 PERI ¶ 2022 (IL SLRB 2000) ("although petitioned-for employee groups might be included in a more comprehensive bargaining unit, the Board will not determine

whether a unit not petitioned-for is possibly more appropriate). But where the presumption does not apply, the inquiry is whether the unit *as petitioned-for* is appropriate. Compare City of Chicago v. Ill. Labor Relations Bd., Local Panel, 396 Ill. App. 3d 61, 70 (1st Dist. 2009) (where presumption does not apply, the proper inquiry is whether the petitioned-for unit is appropriate) with County of McHenry and McHenry County Recorder of Deeds, 31 PERI ¶ 8 (where presumption applies, the inquiry is whether a legitimate and rational basis for the smaller unit exists or whether employees in the broader classification do not have the same functions and community of interest).

Applying the 9(b) factors to the unit *as petitioned-for*, we find the stand-alone unit to be an appropriate unit. As the ALJ found, historical patterns of bargaining do not weigh in favor of either party. For the reasons stated by the ALJ in his presumption analysis, employees in the Engineering Technician classification share a community of interest in that they have similar skills and functions, have common supervision, hours, benefits and working conditions. In addition, the Petitioner rightly notes that the desire of the employees weighs in favor of certification because both the petitioned-for employees signed cards indicating they wish to be represented by Petitioner in a stand-alone unit. Only the fragmentation factor weighs against certification of the unit, but fragmentation does not warrant dismissal of the petition. In fact, the Act mandates that "fragmentation shall not be the sole or predominant factor used by the Board in determining an appropriate bargaining unit." 5 ILCS 315/9(b). Moreover, without sufficient legal justification, the ALJ found the proposed unit was presumptively *appropriate* but nevertheless proceeded with the application of Section 9(b) factors to determine if a unit other than the one proposed by the Petitioner was an appropriate unit.

Notably, the conclusion that the petitioned-for unit is inappropriate and the recommendation to dismiss the representation petition effectively leaves the employees in the Engineering Technician classification without representation, dependent on the Petitioner to file another representation petition or on another labor organization to seek to represent them. In either case, as the Board has previously stated, this is "fundamentally at odds with the Act itself to place the petitioned-for employees' right to organize completely under the control of a third party." City of Chicago, 23 PERI ¶ 172 (IL LRB-LP 2007).

For the above reasons, we reject the ALJ's recommendations and grant the majority interest petition. To that end, we direct the Executive Director to certify Petitioner as the exclusive representative of the Engineering Technicians in a unit consistent with the description in the majority interest petition and this decision and order.

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, Illinois on November 14, 2019, written decision approved at the State Panel's public meeting in Chicago, Illinois on December 10, 2019, and issued on December 11, 2019.

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

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| Laborers' International Union of North America, Local 773,<br><br>Petitioner<br><br>and<br><br>County of Clinton (Highway Department),<br><br>Respondent | ) | Case No. S-RC-19-018 |

**ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER**

On September 7, 2018, Laborers' International Union of North America, Local 773, (Petitioner or Union) filed a majority interest representation petition with the Illinois Labor Relations Board (Board) seeking to represent a unit of employees of the County of Clinton Highway Department (County or Respondent). On September 21, 2018, Respondent filed its response to the petition, objecting on the basis that the petitioned-for unit was not an appropriate unit under Section 9 of the Illinois Public Labor Relations Act (Act).

The matter was set for hearing on April 4, 2019 by Administrative Law Judge Michelle Owen. Subsequently, the matter was re-assigned to the undersigned Administrative Law Judge in order to hold the hearing in Springfield on the same date. At hearing, each party had the opportunity to call, examine, and cross-examine witnesses; introduce documentary evidence; and present arguments. 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, that:

1. At all times material, Respondent has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, Charging Party has been a labor organization within the meaning of Section 3(i) of the Act.
3. At all times material, Respondent has been subject to the jurisdiction of the State Panel of the Board pursuant to Section 5(a-5) of the Act.
4. There is no contract bar to the proceeding.

5. The petition is filed on behalf of two employees in the Respondent's Highway Department.
6. The total number of employees in the Respondent's Highway Department is ten.
7. Seven of the ten employees in the Respondent's Highway Department are represented by the Charging Party in a bargaining unit certified by the Board on February 8, 2006 in case number S-RC-06-120, which includes "[a]ll employees in the classification of Maintenance Employee (Class M) employed at the County of Clinton Highway Department," and excludes "[t]he Foreman/Supervisor, all other employees of the County of Clinton and all supervisors, managerial and confidential employees as defined by the Act."

## II. FINDINGS OF FACT

### a. Clinton County and the Highway Department

Clinton County has a population of approximately 37,000. The Clinton County Highway Department (Highway Department) is responsible for the construction of roadways within Clinton County, as well as for the maintenance of the approximately 118 miles of roadways within the county under its jurisdiction. The Highway Department does not have any other divisions or department within it.

Dan Behrens (Behrens) is the County Engineer of the Highway Department and has served in that role since approximately 2006. Prior to that, he worked for the Highway Department as a licensed Engineer starting in 1999. In his capacity as County Engineer, Behrens oversees the operations of the Highway Department and is responsible for supervising the department's employees. Of the ten employees in the Highway Department, nine hold one of two job titles or classifications: Engineering Technician (Engineering Technicians) or Highway Maintenance employee (Maintainers).

The Highway Department has a uniform, centralized personnel system. One individual handles the implementation of, and compliance with, the Highway Department's personnel policies. Both the Engineering Technicians and Maintainers are under this centralized personnel system. In addition, the Highway Department has a centralized payroll system which calculates hours worked, issues payroll checks, and tracks benefit time accrued and used. Both the Engineering Technicians and Maintainers are under this centralized payroll system.

The Maintainers are currently in a bargaining unit represented by the Union, which is the only bargaining unit in the Highway Department. Behrens testified as to the composition of other bargaining units within Clinton County, stating that the following offices or departments within the county only have one bargaining unit: Treasurer, Clerk, Assessor, Zoning, and Health Department. The only other department Behrens could point

to that had two separate bargaining units was the County Sheriff's department, but he noted that those bargaining units were represented by two separate unions.

**b. Job Duties**

The Highway Department works on projects involving the creation of new roads and bridges in the county as well as the maintenance and repair of existing county roads. The Engineering Technicians and Maintainers work together on projects involving the maintenance and repairs of county roads, but Maintainers do not work on projects involving creation of new roads and bridges as the Engineering Technicians do. Behrens testified that during the summer it is more often than not that Engineering Technicians and Maintainers do not work on the same projects.

The job description for the Maintainers lists twenty-two essential job functions, and Behrens testified that the Maintainers perform each of them. Although Behrens noted that Engineering Technicians do not perform most of these essential functions, they do perform some, including serving as a rodman or chainman in a surveying crew, climbing ladders to repair signs and bridges, perform weed eating work, and operating loaders. In addition to essential functions, the Maintainer job description lists eight other functions that the Maintainers may be expected to perform, and Behrens testified that that Maintainers perform these as well. Although Behrens testified that the Engineering Technicians do not perform most of these functions, they do perform one: setting grade stakes and taking roadway cross-sections using a level.

The job description for the Engineering Technicians lists three essential job functions with several sub-functions under each, which total eighteen. Behrens testified that the Engineering Technicians perform each of the listed essential job functions and sub-functions. Although the Maintainers do not perform most of these duties, Behrens testified that they have performed some, including from setting culvert and ditch grades, taking cross-sections on existing roads, and investigating complaints.

Neal Richter (Richter) is employed by the Highway Department as an Engineering Technician. In addition, he was designated Assistant County Engineer by the County's Board in 2006. Richter holds several certifications issued by the Illinois Department of Transportation (IDOT), including bridge inspector, right-of-way negotiator, and document-certified. Richter testified that the County has approximately 125 bridges that he is directly in charge of inspecting. In addition to inspecting bridges, he is responsible for filing certain paperwork associated with bridge inspection. Richter testified that he utilizes each of these certifications in the course of his employment with the Highway Department. Although Behrens testified that none of the Maintainers hold any of these certifications or perform these functions, he made clear that none of these certifications or functions that Richter performs are required to be employed by the Highway Department

as an Engineering Technician. Behrens did concede that if Richter did not perform the IDOT-certified work, the County would need to hire an individual with those certifications to perform those duties.

Richter is also an unlicensed surveyor proficient in surveying work and performs this work in the course of his employment with the Highway Department, which includes providing cost estimates and bid documentation. After surveying, Richter will draft up bridge plans in a computer aided design (CAD) program called AutoCAD. The bridge plans he creates in AutoCAD are submitted to IDOT for approval. He also uses the AutoCAD program for right-of-way plats and easements and does courthouse research for legal documents such as easements, deeds, and plats. Richter testified that he performs each of the job duties listed on the Engineering Technician Job Description.

Richter testified that he performs certain of the job duties listed on the Maintainers' Job Description. Specifically, Richter has a Commercial Driver's License (CDL) and has operated a tandem dump truck on at least two occasions: once involving a snowstorm, and another involving a Maintainer who was sick or otherwise unavailable. Richter clarified that he has not operated a tandem dump truck for work in over ten years. In addition, Richter has also operated a loader when there is a delivery at the office and no Maintainer is around to operate one. Richter has also lifted fifty pounds occasionally and ten pounds continuously, as well as set grade stakes and took road cross sections using a level. He testified that he believed that the Engineering Technicians' work is generally different than the Maintainers', as the Engineering Technicians are more of a technical or educational field whereas the Maintainers are more manual labor-focused.

**c. Wages, Hours, and Terms and Conditions of Employment**

With respect to pay, Behrens testified that he believed the pay rate for the Engineering Technicians is, on average, $28.81, and the pay rate for the Maintainers is, on average, $25.77. Richter testified that his hourly rate is $37.04, which is more than the average hourly rate for Engineering Technicians, due to his additional designation as Assistant County Engineer. Both Engineering Technicians and Maintainers have the same status under the Fair Labor Standards Act (FLSA) regarding hourly rate of pay and overtime, and both groups receive a rate of time-and-a-half for overtime worked.

Regarding the work day, Behrens testified that both the Maintainers and Engineering Technicians work for a majority of the year under the same work shift, which is 7:30a.m.-4:00p.m. There is never a day on which an Engineering Technician is scheduled to work that that a Maintainer is not, and vice versa.[1] During certain days in the summer when the heat is particularly excessive, Maintainers would be allowed to alter their

[1] This is aside from when an employee takes a sick or personal day.

work shift to 6:30a.m.-3:00p.m. For most of the year, both Engineering Technicians and Maintainers work out of and through the same facility and work within 100 yards of each other while at that facility. However, Behrens clarified that over the course of the summer, the Engineering Technicians may report directly to a remote job site and may do so for extended periods of time. Richter testified that Engineering Technicians working on a construction job would work the hours of the contractor, which could range from 6:00 a.m. to 6:00 p.m., although he did not specify how often this occurred in practice. Richter clarified that construction season can last anywhere from two months to eight months, during which time he may not report to the office at all. The Maintainers, by contrast, always report to the office. Richter testified that his office is in the same building as the Maintainers, but that he is not familiar with the duties of the Maintainers and does not frequently interact with them.

Behrens testified that, in his time as County Engineer, both the Engineering Technicians and Maintainers have worked, and currently work, under the same personnel policies and work rules, including the same probationary period, discipline policy, and resignation policy. Both have the same vacation, personal day, and sick leave accrual schedules. Both also have the same holidays. In addition, Behrens testified that both Engineering Technicians and Maintainers have the same benefits plans. For health insurance, both have the same health insurance plans, coverage, premiums, deductibles, and copays. In addition, both Engineering Technicians and Maintainers participate in the same retirement fund plans through the Illinois Municipal Retirement Fund (IMRF). Both Engineering Technicians and Maintainers can make the same contributions toward that retirement plan, and the same amounts or percentages are taken out of their pay for the employer's portion of the IMRF retirement contribution. Richter confirmed that he has the same health insurance plan, premium, copay, and prescription drug copay as the Maintainers; the same vacation, holiday, personal, and sick day policies as the Maintainers; the same treatment under the IMRF as the Maintainers; and that he operates under the same personnel policies and work rules as the Maintainers.

The Maintainers operate under the terms of a collective bargaining agreement between the Union and the County. Behrens testified that the provisions of that agreement apply to the Engineering Technicians as well, except for the provision on wage rates and the provision which requires Maintainers to have a valid CDL; Engineering Technicians are not required to possess a CDL. Behrens testified that since he began employment with the County in 1999, the Engineering Technicians have operated under the terms of a document called an Employee E Agreement.[2] Behrens testified that he has met with

[2] Although Behrens testified that the provisions of the Maintainers' CBA generally apply to the Engineering Technicians, it is unclear whether the Employee E Agreement simply recites the provisions of the

Engineering Technicians over the years to discuss potential changes the County wished to make to the Employee E Agreement, and Engineering Technicians are invited to attend the meetings of the County's Board in which those changes are discussed. Richter testified that both Engineering Technicians meet with the County Board's Personnel Committee when their Employee E Agreement is up to discuss raises and benefits that will be given to the Engineering Technicians in the next agreement. The last of these meetings occurred in approximately 2016.

Behrens noted that the only differences in terms of job procedures and policies between the Maintainers and the Engineering Technicians are the wage differences and the CDL requirement for the Maintainers. Other than those two differences, Behrens stated that the working conditions, practices, policies, and procedures are the same for both groups.[3] Richter conceded that the only differences between the Engineering Technicians and the Maintainers, aside from their job duties, were the requirements of a CDL and different wages.

For the past thirteen years, Behrens has helped the County's Board negotiate all the collective bargaining agreements that cover the Maintainers. Behrens's input and recommendations regarding non-financial aspects of employment for the Maintainers, including hours of operation, working conditions, sick leave policies, and CDL requirements, have always been accepted by the County's Board. Although Behrens testified that he would stipulate to the filing of a joint petition for unit clarification to include the Engineering Technicians in the Maintainers bargaining unit, he acknowledged that he does not possess the authority to determine whether to stipulate to the filing of the joint petition, and that such authority lies with the County's Board.

Behrens stated that he believed it would be more cost-effective to bargain one singular contract to cover both the Engineering Technicians and Maintainers as opposed to two separate contracts. With one bargaining unit, there would be only one negotiation that the County would need to pay for. Further, the members of the County's Board sit on the negotiation committee and get paid a per diem for doing so, a cost which could rise if there were two separate negotiations. In addition, Behrens testified that the possibility of administering separate benefits for two groups of employees may be costlier. Finally, he pointed out that time spent at a second negotiation is time taken away from his other duties, including the supervision of the Highway Department employees.

**d. Richter's Authority as Assistant County Engineer**

Maintainers' CBA, or if the CBA provisions apply to the Engineering Technicians on matters where the Employee E Agreement is silent.

[3] Both Engineering Technicians have a take-home vehicle, whereas the Maintainers do not. However, the Engineering Technicians are not required to take home their take-home vehicles.

Richter testified that he spends most of his work day performing the duties of an Engineering Technician. He noted that his duties as Assistant County Engineer only arise when Behrens is out of the office or otherwise unavailable, during which time he fills in for Behrens in a limited capacity. Richter's fill-in duties are limited to dealing with members of the public who come into the office requesting right-of-way plats as well as receiving calls from the public regarding complaints about roads or ditches. Richter testified that does not believe he is ultimately in charge while Behrens is out of the office, and that he is not in charge of the employees in terms of both managing and supervising them. Richter stated that he does not give employees direction during Behrens's absence when the absence is known in advance. In these situations, such as when Behrens takes vacation, Behrens will first give the Maintainers and Engineering Technicians their duties to be fulfilled while he is gone, and the two groups would just complete those assignments. Richter testified that he was unsure if he would take over as County Engineer, either on an interim or permanent basis, if Behrens was suddenly unable to perform his duties. Rather, he noted that the hiring of employees must go through the Highway Committee, which is comprised of members of the County's Board.

Richter testified that he has never hired, fired, promoted, or transferred any employee, and stated that no one had given him—or told him he had—the authority to do so. He has never been involved in setting policies for the County, has never been involved in collective bargaining negotiations between the County and the Union, and has never provided employees with direction, discipline, re-called laid off discharged employees, rewarded employees, or performed performance evaluations of employees.

**e. Organizing and Filing of the Petition**

Bill Troutt (Troutt) is employed by the Union as a Union Representative and has worked for the Union for the last twelve years. In his capacity as Union Representative, he represents public employees, negotiates contracts, and argues grievances for around sixty separate bargaining units, one of which is the Maintainers unit. Troutt negotiated the current CBA between the County and the Maintainers.

Troutt testified that he was contacted by the Engineering Technicians at some point and was asked about organizing. Troutt testified that he did not file the representation petition for the Engineering Technicians in this case, but he understood petition intended to create a stand-alone unit, and that there was never any intent to include the Engineering Technicians in the Maintainers' unit.

Charley Ferguson (Ferguson) is employed by the Union as a Field Representative. In that capacity, he negotiates contracts, organizes groups of employees, and handles disputes between labor and management. Ferguson initially met with the Engineering Technicians in September of 2018 and filed the instant petition on behalf of the

Engineering Technicians later that month. In addition, Ferguson accompanied Troutt to a meeting with two Maintainers around six weeks or a month before the hearing, on a date uncertain, to discuss whether they would be willing to accept the Engineering Technicians into their bargaining unit. Ferguson testified that he made the decision to not include the Engineering Technicians in the Maintainer unit because the two groups have different job titles and responsibilities.

Richter testified that it is his desire to be represented by the Union in a stand-alone bargaining unit of Engineering Technicians because he does not want to be an at-will employee. Richter also noted that there is not much in the way of negotiation when it comes time to sign a new Employee E Agreement; the Engineering Technicians present their feelings on what is fair to the County Board, and the Board comes back with the terms and conditions of employment the Engineering Technicians will get under the agreement. In addition, Richter desires a stand-alone unit because the he believes that Engineering Technicians' job duties are so different than the Maintainers such that the only way to get represented fairly is in a stand-alone unit. Richter testified that he believes Engineering Technicians would not be represented at all if they were to join the Maintainers' unit because the Maintainers would be able to out-vote the Engineering Technicians since they outnumber them. Richter also believes that the difference in wages between the two groups, as well as the occasional difference in working hours, warrant a stand-alone unit.

Richter testified that he and the other Engineering Technician contacted either Ferguson or Troutt to ask the Union to represent them. Richter's understanding from his conversation with the Union was that the instant petition would be for a stand-alone unit, independent of the Maintainers unit.

## III. ISSUE AND CONTENTIONS

There are two issues in this case. The first is whether one of the petitioned-for employees, Richter, is a statutorily excluded employee under the Act. The second is whether the petitioned-for unit is an appropriate bargaining unit.

Regarding the first issue, the County, at hearing, objected to Richter's inclusion in the petitioned-for unit because Richter was a statutorily excluded employee.[4] The County did not so argue in its post-hearing brief. The Union, at hearing and in its brief, argues that Richter does not meet any of the tests for managerial, supervisory, or confidential employee and should be properly included in the stand-along unit of Engineering Technicians.

[4] Initially, the County asserted that Richter was apparently "supervisor/managerial employee" (Tr. 141) by virtue of his title as Assistant County Engineer, but later, that the position was "possibly" managerial, supervisory and confidential (Tr. 148).

Regarding the second issue, the County initially avers that the petition is presumptively inappropriate under the Board's case law because the County has a centralized personnel system the Union is seeking to represent only a portion of employees that perform similar duties under that centralized personnel system. Further, the County argues that the petitioned-for unit is not an appropriate unit under the Board's statutory test for unit appropriateness. Specifically, it asserts that the Engineering Technicians share several similarities with the Maintainers, including: work under the same personnel policies and work rules within the single-division Highway Department, have the same schedule, work out of the same facility, do work on the same road construction projects, have common supervision, share the same payroll system, and have the same benefit plans. Based on these common interests, the County concludes that it would be impractical and costly to bargain two separate contracts covering employees in a single department.

The Union, in its brief, did not argue its position with respect to whether the unit is presumptively inappropriate under the Board's case law, but it does argue that the petitioned-for unit is an appropriate stand-alone unit under the Act. Specifically, it argues that the petitioned-for employees perform distinctly different skills and functions than the Maintainers, have different start times and locations, and have different wages than those in the Maintainers unit. Further, it argues that there does not exist functional integration between the petitioned-for employees and the Maintainers, there does not exist fragmentation substantial enough to dismiss the petition, and the desire of the Engineering Technicians is to be represented in a stand-alone bargaining unit.

## IV. DISCUSSION AND ANALYSIS

### a. Statutorily Exclusions

At hearing, and for the first time, the County objected to the petition on the basis that one of the Engineering Technicians, Richter, was a statutorily excluded employee. Specifically, it argued that because Richter holds the title of Assistant County Engineer, he must be excluded from the proposed bargaining unit. Although the County does not flesh out this argument in its post-hearing brief, for the sake of completeness, and putting aside the appropriateness of the objection,[5] I will apply the proper analytical framework to determine whether Richter is a managerial, supervisory, or confidential employee.

[5] The County passed a resolution appointing Richter to the title of Assistant County Engineer on September 14, 2006. Accordingly, the County was aware of Richter's employment status on that date. It was also aware of Richter's employment status on the date the petition was filed in this case, on the date it filed its Response and Objections to the petition, on the date it filed its Pre-Hearing Memorandum, and at the moment the hearing commenced. However, despite its knowledge of Richter's employment status at all of those times material, it did not assert its statutory exclusion argument until the Union sought to enter the September 14, 2006 resolution into evidence during the hearing.

As the party asserting the statutory exclusions in this matter, the County carries the burden of proving that the position at issue satisfies at least one of those exclusions. 80 Ill. Admin. Code 1210.107(a); County of Cook v. ILRB, 369 Ill. App. 3d 112, 123 (1st Dist. 2006). As the Board and the Court have repeatedly held, in order to satisfy this burden, a party seeking exclusion must provide specific examples to support its arguments. Vill. of Broadview v. ILRB, 402 Ill. App. 3d 503, 508 (1st Dist. 2010); City of Peru v. ISLRB, 167 Ill. App. 3d 284, 290 (3d Dist. 1988). Simply relying upon "vague, generalized testimony or contentions as to an employee's job function" is insufficient. City of Chicago, Dep't of Water Mgmt., 32 PERI 181 (IL LRB-LP 2016); County. of Cook, 28 PERI 85 (IL LRB-LP 2011).

I note at the outset that the fact that Richter contemporaneously holds the job title of Assistant County Engineer in addition to Engineering Technician does not necessarily render him a statutorily excluded employee, as the focus in the analysis is on an individual's duties, not his or her job title. See State of Illinois, Department of Central Management Services (DCMS), 30 PERI 38 (ILRB ALJRDO 2013) (noting that individual's status as a supervisor is determined by individual's functions and authority in the workplace, not by job title); see also T. K. Harvin & Sons, Inc., 316 NLRB 510, 530 (1995) (noting the same under the National Labor Relations Act is determined "by an individual's duties, not by his title or job classification.").

**i. Confidential Exclusion**

The purpose of the confidential exclusion is to prevent employees from having their loyalties divided between the employer, who expects confidentiality in labor relations matters, and the union, which may seek disclosure of management's labor relations material to gain an advantage in the bargaining process. City of Evanston v. ISLRB, 227 Ill. App. 3d 955, 978 (1st Dist. 1992). Under the Act, a confidential employee is 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). Since confidential employees are precluded from exercising the bargaining rights guaranteed by the Act, the exclusion is narrowly interpreted. AFSCME, Council 31 v. ILRB, 2014 IL App (1st) 132455, ¶ 31.

The Act sets forth two tests to determine whether an employee in an existing collective bargaining unit is subject to the confidential exclusion: the labor nexus test and the authorized access test. Under the labor nexus test, an employee is a "confidential employee" 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); Health & Hosp. Sys. of Cty. of Cook v. ILRB, 2015 IL App (1st) 150794, ¶ 58. Thus, the party seeking to classify 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 employee subject to the classification 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 v. IELRB, 387 Ill. App. 3d 58, 71 (1st Dist. 2008). The person assisted by the purported 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 County v. AFSCME, 153 Ill. 2d 508, 523 (1992); State of Illinois, Dep't of Cent. Mgmt. Serv. (DHFS), 28 PERI 69 (IL LRB-SP 2013). To satisfy the labor nexus test, the assistance that the employee provides must relate "specifically to the field of labor relations." Community Consolidated High School Dist. 230 v. IELRB, 165 Ill. App. 3d 41, 56 (4th Dist. 1987). Further, the assistance must provide the employee with advance information about bargaining positions. Health & Hosp. Sys. of Cty. of Cook v. ILRB, 2015 IL App (1st) 150794, ¶¶ 55-59; Community Consolidated, 165 Ill. App. 3d at 61; Niles Township, 387 Ill. App. 3d at 71.

The purpose of the authorized access test is to guard against the premature disclosure of an employer's ongoing or future labor relations positions, which would undermine an employer's ability to negotiate on an equal basis with a union. Vill. of Homewood, 8 PERI 2010 (ISLRB 1992). An employee is confidential under the authorized access test if, in the regular course of his or her duties, he or she "ha[s] authorized access to information concerning matters specifically related to the collective-bargaining process between labor and management." Chief Judge, 153 Ill. 2d at 523. Information related to the collective-bargaining process includes (1) the employer's strategy in dealing with an organizational campaign, (2) actual collective-bargaining proposals, and (3) information relating to matters dealing with contract administration. Dep't of Cent. Mgmt. Serv. (Dep't of State Police) v. ILRB, 2012 IL App (4th) 110356; City of Evanston, 227 Ill. App. 3d at 978. Mere access to confidential information does not create confidential status within the meaning of the Act when such information is not related to collective bargaining or contract administration. Niles Township, 387 Ill. App. 3d at 71; City of Burbank, 1 PERI 2008 (IL SLRB 1985). An employee's access to information concerning the general workings of the department or to personnel or statistical information upon which an employer's labor relations policy is based is insufficient to confer confidential status. Dep't. of State Police, 2012 IL App (4th) 110356; City of Evanston, 227 Ill. App. 3d at 978.

Here, the County has not satisfied either prong of the labor nexus test, as there is no evidence that Richter assists any individual who formulates, determines, and effectuates labor relations policies for the County, nor is there evidence that, even if Richter so did assist, that he did so in a confidential capacity in the regular course of his duties. Moreover, the County has not satisfied the requirements of the authorized access test, as there is no evidence that Richter has authorized access, or any access at all, to information concerning matters specifically relating to the collective bargaining process between the County and the Union. Accordingly, Richter is not a confidential employee under the Act.

**ii. Supervisory Exclusion**

An employee classified as a "supervisor" under Section 3(r) of the Act is ordinarily excluded from collective bargaining. City of Freeport v. ISLRB, 135 Ill. 2d 499, 505 (1990); Village of Elk Grove Village v. ISLRB, 245 Ill. App. 3d 109, 115 (2nd Dist. 1993). To protect against the possibility that pro-union bias might impair a supervisor's ability to apply the employer's policies to subordinates in accordance with the employer's best interests, the Act provides that a bargaining unit may not include both supervisors and non-supervisors. 5 ILCS 315/3(s)(l); Chief Judge, 153 Ill. 2d at 516; City of Freeport, 135 Ill. 2d at 505-506.

Under Section 3(r) of the Act, a supervisor is an employee who: 1) engages in principal work that is substantially different from that of his or her subordinates; 2) has the authority, in the interest of the employer, to perform at least one of eleven indicia of supervisory authority enumerated in the Act, or to effectively recommend the performance of such actions; 3) consistently uses independent judgment in the exercise of that supervisory authority; and 4) devotes a preponderance of his or her employment time to the exercise of that authority. See 5 ILCS 315(3)(r) (2012); City of Freeport, 135 Ill. 2d at 512.

Here, Richter testified that he spends most of his work day performing the job duties of an Engineering Technician, and when he does so, he does not have any subordinates. Moreover, he testified that he does not have the authority to hire, fire, promote, transfer, demote, reward, or discipline employees, or give employees direction in any capacity. The County posited at hearing that Richter's role as Assistant County Engineer leads him to be a fill-in as County Engineer when Behrens is out of the office, and that this fill-in role evinces supervisory authority. First, I note that Richter testified that when he performs this fill-in role, he performs simple ministerial tasks, such as responding to queries from the public, and that he does not perform any of the indicia of supervisory authority provided by the Act, and no one has told him that he had the authority to perform those tasks when filling in. Second, the record is unclear as to what Richter's role would be if Behrens was suddenly unable to perform the duties of County Engineer; Richter testified that he did not

know what his role would be in such a situation, as no one had ever told him. Thus, the record evidence is insufficient to conclude that Richter would be vested with supervisory authority in the event Behrens is unable to perform his job.

However, even assuming, *arguendo*, that Richter exercises, or has the authority to exercise supervisory authority, the record is clear that he does not spend a preponderance of his time on such functions. Preponderance of time can be measured quantitatively or qualitatively. State of Ill. Dep' t of Cent. Mgmt. Serv. (Ill. Commerce Comm.), 30 PERI 205 (IL LRB-SP 2014). Measured quantitatively, an employee spends a preponderance of his or her time on supervisory functions when a majority of his or her time is spent engaged in such functions. State of Ill. Dep' t of Cent. Mgmt. Serv. (Dep' t. of Children and Family Serv.) v. ISLRB, 249 Ill. App. 3d 740, 746-747 (4th Dist. 1993). Measured qualitatively, an employee spends a preponderance of his or her time on supervisory functions when these functions are more significant than his or her non-supervisory functions, regardless of the amount of time spent on these supervisory functions. Cnty. of Vermilion v. ILRB, 344 Ill. App. 3d 1126, 1136 (4th Dist. 2003); AFSCME Council 31 v. ILRB, 2014 IL App (1st) 130655, *aff'g* State of Ill. Dep' t of Cent. Mgmt. Serv. (Ill. Commerce Comm' n), 30 PERI 206 (IL LRB-SP 2014).

Here, quantitatively, the record is clear that Richter spends the majority of his time performing Engineering Technician—i.e., nonsupervisory—duties, not filling in for Behrens. Moreover, measured qualitatively, there is nothing to suggest his fill-in role when Behrens is out of the office is more significant than his non-supervisory Engineering Technician duties. Accordingly, I find that the County has failed demonstrate that Richter is a supervisory employee under the Act.

**iii. Managerial Exclusion**

The Act excludes managerial employees from engaging in collective bargaining in order to "maintain the distinction between management and labor and to provide the employer with undivided loyalty from its representatives in management." Chief Judge of 16th Judicial Cir. v. ISLRB, 178 Ill. 2d 333, 339 (1997). Section 3(j) of the Act defines a managerial employee as "an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices." 5 ILCS 315/3(j). A two-part "traditional test" is used to determine managerial status under Section 3(j): first, the employee at issue "must be engaged predominately in the executive and management functions which specifically relate to running a department and include such activities as formulating department policy, preparing the budget, and assuring efficient and effective operations of the department; and second, the employee must direct the effectuation of management policies and procedures."

Vill. of Elk Grove Vill. v. ISLRB, 245 Ill. App. 3d 109, 121–22 (2nd Dist. 1993); City of Evanston v. ISLRB, 227 Ill. App. 3d 955, 974-975 (1st Dist. 1992).

With respect to the first prong, executive and management functions require more than the simple exercise of discretion or specialized expertise; rather, an employee must possess and exercise sufficient authority and autonomy to establish department goals or the means of achieving such goals "on a broad scale." Elk Grove Village, 245 Ill. App. 3d at 122; City of Evanston, 227 Ill. App. 3d at 975. Moreover, an employee is not managerial if he or she serves merely a subordinate or advisory function in the development of policy. Dep't of Cent. Mgmt. Servs./Dep't of Healthcare & Family Servs. v. Illinois Labor Relations Bd., State Panel, 388 Ill. App. 3d 319, 330–31 (4th Dist. 2009).

With respect to the second prong of the test, the employee must have "substantial discretion to determine how and to what extent policies will be implemented and [also] have the authority to oversee and direct that implementation." Elk Grove Village, 245 Ill. App. 3d at 122. It is not enough that an employee merely performs duties that are essential to an employer's ability to accomplish its mission; rather, it "must possess the authority or responsibility to determine the specific methods or means of how the employer's services will be provided." State of Illinois (Dep't of Healthcare & Family Servs.), 388 Ill. App. 3d at 331.

Here, there is no evidence that Richter establishes the goals or objectives of the Highway Department or the means of achieving those goals, or that he serves in a subordinate or advisory function in the development of such policy. Moreover, there is no evidence that Richter has any discretion whatsoever to determine to what extent Highway Department or County policy will be implemented or that he has the authority to oversee or direct the implementation of the same. Accordingly, I find that the County has not demonstrated that Richter is a managerial employee under the Act.

In sum, as Richter is not a managerial, confidential, or supervisory employee, I find that he is a public employee under the Act.

**b. Appropriate Bargaining Unit**

Section 9(b) of the Act provides that, "[t]he Board shall decide in each case, in order to assure public employees the fullest freedom in exercising the rights guaranteed by this Act, a unit appropriate for the purpose of collective bargaining, based upon but not limited to such factors as: historical pattern of recognition; community of interest including employee skills and functions; degree of functional integration; interchangeability and contact among employees; fragmentation of employee groups; common supervision, wages, hours and other working conditions of the employees involved; and the desire of the employees. For purposes of this subsection, fragmentation shall not be the sole or

predominant factor used by the Board in determining an appropriate bargaining unit." 5 ILCS 315/9(b).

Section 9(b) does not require that a proposed unit be the most appropriate unit or the only appropriate unit. County of Cook v. ILRB, 369 Ill. App. 3d 112, 118 (1st Dist. 2006). Rather, the Act only requires that a unit be an appropriate unit. Rend Lake Conservancy District, 14 PERI 2051 (ISLRB 1998); see also Sandburg Faculty Ass'n v. IELRB, 248 Ill. App. 3d 1028, 1036 (1st Dist. 1993) (holding same in interpreting analogous provision of Illinois Educational Labor Relations Act). However, the Board requires that the petitioned-for unit must not be an arbitrary or capricious selection of employees. See City of Rolling Meadows, 16 PERI 2022 (ISLRB 2000) (adopting ALJ's dismissal of petition seeking to represent a portion of employees on the basis that the employees did not have an internal shared community of interest apart from other of respondent's employees).

As the County notes, the Board has historically expressed a preference for large, functionally-based bargaining units which cross departmental lines to promote stability in labor relations and economy and efficiency in public bargaining and contract administration. County of Cook and Sheriff of Cook County, 15 PERI 3011 (IL LLRB 1999); County of Cook (Office of the Medical Examiner), 3 PERI 3033 (IL LLRB 1987); City of Chicago (Department of Law), 3 PERI 3026 (IL LLRB 1987); DuPage County Board, 1 PERI 2003 (IL SLRB 1985). To that end, the Board has held that a petitioned-for unit is presumptively inappropriate where 1) the employer has an established centralized personnel system and 2) the petitioner has sought to represent only a portion of employees in the same job classification or, alternatively, only a portion of employees who perform similar duties. County of McHenry and McHenry County Recorder of Deeds, 31 PERI 8 (ILRB-SP 2014); Cnty. of Cook (Medical Examiner's Office), 17 PERI 3005 (IL LLRB 2001).

However, and as the Union correctly points out, the Board has, on occasion, reconsidered and deviated from this long-standing preference to certify smaller bargaining units. See City of Chicago, 23 PERI 172 (ILRB-LP 2007) (reconsidering application of the "large, functionally-based" approach to find a smaller unit of twenty-three employees out of an office of over 1,000, to be appropriate); see also Dept's of Central Management Servs. and Healthcare & Family Servs., 23 PERI 173 (ILRB-SP 2007), *aff'd* Dept. of Central Mgmt. Servs./Dept. of Healthcare & Family Servs. v. ILRB, 388 Ill. App. 3d 319 (4th Dist. 2009) (reconsidering application of same "large, functionally-based" approach to find unit of six of agency's fourteen employees who share the same job classification an appropriate unit). Therefore, I must weigh the important considerations of the Board's

preference for large, functionally-based units against public employees' right to organize granted under the Act. Id.

**i. Presumptive Appropriateness of the Petitioned-for Unit**

The petitioned-for unit is presumptively appropriate.

As stated above, a petitioned-for unit is presumptively inappropriate where 1) the employer has an established centralized personnel system and 2) the petitioner has sought to represent only a portion of employees in the same job classification or, alternatively, only a portion of employees who perform similar duties. County of McHenry and McHenry County Recorder of Deeds, 31 PERI 8 (ILRB-SP 2014); County of Cook (Medical Examiner's Office), 17 PERI 3005 (IL LLRB 2001). Here, the first prong is satisfied, as Behrens's testimony makes clear that the Highway Department has a centralized personnel system under which both Maintainers and Engineering Technicians operate. However, the second prong is not met, as the petition in this case does not seek to represent only a portion of employees in the Engineering Technician classification, it seeks to represent all of them. Further, the record evidence demonstrates that the duties the Maintainers and Engineering Technicians are hired to perform, and in fact do perform, are generally dissimilar. Broadly speaking, the Maintainers perform more manual labor-intensive duties that relate to the maintenance of the County's highways. By contrast, the Engineering Technicians perform more technical duties relating to engineering, including inspecting roads and bridges, preparing contract and maintenance documents, surveying, and performing construction and maintenance inspections. The listed duties on each job description are facially different, and aside from some overlap, Maintainers and Engineering Technicians do not perform the same job duties.

Accordingly, given that the Union does not seek to represent only a portion of the Engineering Technicians, and given the dissimilarity between the duties of the Engineering Technicians and Maintainers, the Board's presumption of inappropriateness does not apply in this case.

**ii. Section 9(b) Factors**

The petitioned-for unit is not an appropriate unit under the factors set forth in Section 9(b) of the Act.

**1. Historical Pattern of Recognition**

The County argues that the historical pattern of recognition factor weighs against the unit's appropriateness as the County's historical pattern of recognition is generally by department. However, the Board's focus in this factor is generally on the historical pattern of recognition of the *petitioned-for employees*, not the employer's recognition practices more broadly. See City of Chicago v. ILRB, 396 Ill. App. 3d 61, 70 (1st Dist. 2009) (no historical pattern of recognition where employees at issue had never been represented by a

union); State of Ill. Dep't of Cent. Mgmt. Servs., 1 PERI 2025 (IL SLRB 1985) (there can be no historical pattern of recognition where the classification has never been represented).

The County correctly notes that the Board has, on at least one occasion, considered historical recognition practices more broadly, citing County of Cook (Provident Hospital), 22 PERI 12 (ILRB-LP 2006) (Provident Hospital) as an example. However, Provident Hospital involved a situation where an employer had repeatedly stipulated to the appropriateness of several smaller bargaining units within a single hospital but refused to stipulate to the appropriateness of the petitioned-for unit in that case, instead arguing it was not an appropriate unit. Id. The Board considered the employer's historical pattern of stipulating to the appropriateness of other units as evidence against its inappropriateness argument, noting that because "[t]he [e]mployer . . . created this pattern, we cannot give credence to its argument that the petitioned-for unit will result in undue proliferation." Id. Here, unlike in Provident Hospital, the County does not have a historical pattern of stipulating to the appropriateness of smaller units within a single department, as most of its departments do not have more than one unit. Further, it is unclear whether either of the units in the County's Sheriff Department—the only County department with two units—were stipulated-to or not. For these reasons, I find Provident Hospital distinguishable and unpersuasive, and see no reason to deviate from the Board's standard approach which focuses on the historical pattern of recognition of the petitioned-for unit. As there is no such historical recognition here, I find the factor does not weigh in favor of any party.

**2. Remaining 9(b) Factors**

A stand-alone unit of Engineering Technicians is not an appropriate unit under the remaining Section 9(b) factors.[6]

It is important to note from the outset that the Board has not confined the application of the remaining 9(b) factors solely to the employees in the petitioned-for unit; rather, it has applied the factors to other employees to determine the appropriateness of the petitioned-for unit. In Cook County (Department of Supportive Services), 2 PERI 3027 (ILLRB 1986), the Board noted that the concepts of community of interest and commonality in wages, hours, and working conditions are given "expansive interpretations [] to yield broad-based bargaining units whenever feasible," and applied those factors not just to the petitioned-for unit, but to other employees of the employer. Id. See also City

[6] The Employer, in its post-hearing brief, emphasizes the relatively small size of both Clinton County, with approximately 37,000 citizens, and its Highway Department, with ten employees. Although not explicitly listed as a 9(b) factor, the size of an employer's operations has been considered, on at least one occasion, by the Board to be of great significance when determining an appropriate unit. See Village of Bartlett, 3 PERI 2010 (ISLRB 1986) (noting that "the most significant fact (in determining unit appropriateness), in our opinion, is the extremely small size of the [e]mployer's operations.").

of Rolling Meadows, 16 PERI 2022 (adopting ALJ's application of the 9(b) factors to both petitioned-for and non-petitioned-for employees to determine unit appropriateness). Accordingly, to determine the petitioned-for unit's appropriateness in this case, I must apply the remaining 9(b) factors not just to the Engineering Technicians, but to the Maintainers as well.

There exists a fair degree of functional integration and contact between both the Engineering Technicians and Maintainers. Although there is some deviation during the warmer months, both groups work under the same work schedule and shift for most of the year, and out of the same facility, where they are in close proximity to each other. During the warmer months, Engineering Technicians and Maintainers work together on projects involving the maintenance and repairs of county roads and on common projects. There is never a day on which an Engineering Technician is scheduled to work that a Maintainer is not, and vice versa. With respect to community of interest, including skills and functions, both Behrens and Richter testified that although the skills and functions of the Engineering Technicians and Maintainers differ, there is occasionally some overlap such that an Engineering Technician may perform Maintainer duties, and vice versa, which demonstrates a certain amount of interchangeability between the two titles.

Perhaps the most critical factor in this case is that both Maintainers and Engineering Technicians have an overwhelming shared interest in areas which involve supervision, wages, hours, and other working conditions, i.e., matters that would fall under the scope of collective bargaining. Both groups have common supervision, as Behrens, the head of the Highway Department, supervises both Engineering Technicians and Maintainers. Regarding work hours, both Engineering Technicians and Maintainers work the same standard shift, 7:30 a.m.- 4:00 p.m., for most of the year. Although Maintainers are sometimes permitted to begin work an hour earlier than their standard shift, this is an occasional practice that occurs only in the summer months when the heat is particularly oppressive. Indeed, during a particularly cool or mild summer, Maintainers and Engineering Technicians may rarely deviate from the same work shift. Likewise, although the Engineering Technicians may occasionally report directly to a job site to start a shift, and may do so for extended periods of time, this is only during the warmer months, and not for the majority of the year, and the frequency of this is unknown.

In addition, the Highway Department has a uniform centralized personnel and payroll system, and as a result, both Engineering Technicians and Maintainers are subject to the same personnel policies and work rules, including the same probationary period and discipline policy. Further, both the Engineering Technicians and Maintainers have the same vacation, sick leave, and personal day accrual schedules; the same holidays and work days; and the same health insurance benefit plans and terms. Even further, both

Engineering Technicians and Maintainers participate in the same retirement fund plan through the IMRF and have the same contribution allowances and withholding percentages. The Union argues that the differences in job duties between the Engineering Technicians and Maintainers, as well as the difference in hours of work during the warmer months, demonstrates that a stand-alone unit of Engineering Technicians is appropriate. However, the Board has consistently held that differences in job duties or schedules are not enough to justify a separate unit when those differences do not rise to a level sufficient to establish a unique community of interest among the petitioned-for group. See Rend Lake Conservancy District, 14 PERI 2015 (ISLRB 1998); City of Rolling Meadows, 16 PERI 2022 (ISLRB 2000); see also Village of Woodridge, 3 PERI 2035 (ISLRB 1987).

Regarding the desire factor, although Richter testified that it is his desire to be represented by the Union in a stand-alone bargaining unit of Engineering Technicians, he noted that that was in part because he did not want to be an at-will employee, and that he was dissatisfied with the negotiation process when it came time to re-negotiate his Employee E Agreement. Both of these concerns do not require the creation of a stand-alone unit, as they can be adequately addressed in a broader-based unit of employees which share common supervision, wages, hours, and terms and conditions of employment, i.e., the Maintainers unit. Further, although Richter pointed to the differences in job duties between Engineering Technicians and Maintainers as a reason for desiring a stand-alone unit, he did not explain why these differences warranted a wholly separate unit apart from the Maintainers unit. Finally, his suggestion that Engineering Technicians would not be represented fairly in the Maintainers unit because the Maintainers could simply out-vote Engineering Technicians is simply speculation, and should I take that rationale to its logical conclusion, every job title which is not the majority in a bargaining unit would be given its own stand-alone unit, thus completely defeating the purpose of labor stability and economy and efficiency in public bargaining and contract administration, which is the basis for the Board's preference for broad-based units.[7]

Further, although fragmentation cannot be the sole or predominant factor in this analysis, it is nonetheless a factor that the General Assembly requires me to consider. Most notably, the Board has not interpreted the fragmentation factor to preclude it from rejecting a petitioned-for unit because it seeks to represent too narrow a slice of employees. See City of Rolling Meadows, 16 PERI 2022 (adopting ALJ's dismissal of petition on the grounds that it sought to represent a limited, "artificial and arbitrary" group of employees); Cook County (Department of Supportive Services), 2 PERI 3027 (finding petitioned-for unit inappropriate where it sought only to represent a portion of administrative employees

[7] Richter was the only Engineering Technician to testify at hearing. Aside from the signed authorization card, there is no evidence to suggest the desire of the other Engineering Technician.

that shared similar supervision, wages, hours, and fringe benefits); Village of Bartlett, 3 PERI 2010 (finding petitioned-for unit of eight employees inappropriate because a unit of twenty-four would be an appropriate unit).

In sum, for the reasons laid out above, the differences between the Engineering Technicians and Maintainers are not so unique as to warrant a stand-alone unit of Engineering Technicians, particularly given the overwhelming commonality between the two titles in issues which would fall under the scope of collective bargaining, and especially in light of the Board's historical preference for large, functionally-based units. Accordingly, I find that the petitioned-for unit is not an appropriate unit under the Act.

## V. CONCLUSIONS OF LAW

The petitioned-for unit of Engineering Technicians employed by the County's Highway Department is not an appropriate unit for the purposes of collective bargaining under Section 9(b) 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 14 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 10 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 5 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board, 160 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 14-day period, the parties will be deemed to have waived their exceptions.

Dated: **July 31, 2019**
Issued: Springfield, Illinois

/s/ *Matthew S. Nagy*
Matthew S. Nagy
Administrative Law Judge

Illinois Labor Relations Board
801 S. 7th Street, Suite 1200A
Springfield, Illinois 62703
Tel. (217) 785-3155 / Facsimile (217) 785-4146