STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

State of Illinois, Department of Central Management Services (Department of Corrections), Petitioner,	)	
and	)	Case No. S-UC-16-050
Metropolitan Alliance of Police, Chapter 294 Respondent.	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

On January 25, 2017, Administrative Law Judge (ALJ) Anna Hamburg-Gal issued a Recommended Decision and Order (RDO) recommending that the State Panel of the Illinois Labor Relations Board (Board) grant a unit clarification petition filed by the State of Illinois, Department of Central Management Services (Department of Corrections) (Employer). The petition sought to exclude the titles Internal Security Investigator (ISI) I and II from the bargaining unit represented by Metropolitan Alliance of Police, Chapter 294 (MAP), certified by the Board on July 23, 2008 in Case No. S-RC-05-090. The ALJ found that the ISI Is and IIs are confidential employees excluded from collective bargaining under Section 3(c) of the Illinois Public Labor Relations Act (Act). 5 ILCS 315/1 *et seq.* (2014), as amended.

MAP filed timely exceptions to the RDO. The Employer filed a response along with cross-exceptions, and MAP filed a response to those cross-exceptions.

After reviewing the RDO, exceptions, cross-exceptions, responses, and the record, we accept the ALJ's RDO granting the unit clarification petition, except to the extent we modify the ALJ's RDO as set forth below.

The nineteen employees at issue in the titles of ISI Is and IIs work as investigators in the Investigations and Intelligence Division (External Investigations Unit) of the Illinois Department of Corrections (IDOC). The ISIs are responsible for conducting investigations into employee misconduct and for substantiating allegations of misconduct in their final reports. These final reports are relied on by management in making decisions regarding whether to impose discipline and in responding to grievances.

ALJ Hamburg-Gal recommended granting the unit clarification petition filed by the Employer because the employees in the title of ISI I and II should be excluded from the collective bargaining unit as confidential employees within the meaning of Section 3(c) of the Act. Because she found the employees at issue should be excluded pursuant to the confidential employee exclusion, the ALJ found it unnecessary to consider the managerial exclusion under Section 3(j) of the Act as asserted by the Employer.

Before making her substantive recommendation, the ALJ found that the unit clarification petition was procedurally appropriate. She rejected MAP's assertion that Dep't of Cent. Mgmt. Servs. (Department of Corrections) v. Ill. Labor Relations Bd., 364 Ill. App. 3d 1028 (4th Dist. 2006) was distinguishable and found the petition timely filed and appropriate.

Applying the authorized access test, the ALJ found ISI Is and IIs to be confidential employees excluded from the bargaining unit under Section 3(c) of the Act. The ALJ found that the ISI Is and IIs had more than incidental authorized access to confidential material and that the ISIs' broad authority to review emails containing the Employer's collective bargaining and contract administration strategies during their investigations conferred confidential employee status. The ALJ, rejecting the Employer's arguments to the contrary, found that the investigators' role in consulting with the Chief of Labor Relations on grievances did not give them confidential

employee status. Similarly, the ALJ found that the fact that the investigators were responsible for substantiating allegations that could lead to employee discipline also did not confer confidential employee status.

MAP excepted to both the procedural and substantive findings by the ALJ. Regarding the procedural finding, MAP takes issue with the ALJ's conclusion that the petition was appropriately filed. MAP's exception is based on the exclusion of the entire bargaining unit rather than a small number of positions, the lack of any change in the ISIs' duties, and on the Employer's failure to raise any concerns during the eight years the ISIs were in the bargaining unit. MAP urges the Board to "make a distinction that when an employer seeks to eliminate all members of a union based on alleged confidential status, the [e]mployer must do so in an expeditious manner and not sit idle for 8 years before filing a unit clarification petition."

We reject MAP's exception to the procedural issue. MAP made a similar argument in its post-hearing brief which was considered and rejected by the ALJ in reaching her conclusion. The ALJ noted that MAP failed to cite to any Board case in which it made a distinction between petitions seeking to eliminate an entire bargaining unit from those that sought only to remove a few positions. MAP also failed to provide in its brief supporting its exceptions any Board cases or other caselaw in support of this distinction it wishes the Board to make.

MAP also excepted to the ALJ's finding that the ISIs authorized access to confidential collective bargaining-related emails warrants their exclusion from the bargaining unit. The gist of this exception is grounded in the lack of evidence that an ISI *actually* reviewed any materials or emails revealing confidential labor relations materials and that the ISIs' responsibilities to review emails during their investigation is a regular part of their duties. MAP contends that the ALJ's

findings in this regard are based more on speculation that an ISI could review an email revealing confidential labor relations information.

We find that MAP's exceptions on this front also lack merit. The ALJ's analysis of the ISIs' authorized access to confidential labor relations emails was not only appropriate and correctly applied relevant and established caselaw, but was also supported by record evidence. We find none of the arguments or citations to the record provided by MAP in its exceptions and supporting brief persuasive. Accordingly, we reject MAP's exceptions to the substantive issues.

The Employer submitted cross-exceptions to the ALJ's determination that the ISI's involvement in the grievance and disciplinary process did not render them confidential employees. Specifically, the Employer takes issue with the ALJ's finding and reasoning that the ISIs substantiation of allegations of employee misconduct does not confer confidential status because ISIs do not have advance knowledge of any disciplinary charges that will be issued. The ALJ also found that the substantiation of allegations does not dictate whether discipline will issue. This finding was based on the wardens' considerable discretion in imposing discipline and their ability to choose not to impose discipline even in the face of an investigator's report substantiating the allegations.

The Employer takes issue with the ALJ's reasoning and asserts that because the disciplinary process begins with an investigation into the allegations, an investigation that does not reveal any misconduct will foreclose any possibility of discipline. In support, the Employer points to testimony by one of MAP's witnesses admitting that he was not aware of any case where unsubstantiated allegations of misconduct lead to discipline.

The Employer makes similar arguments in support of its contention that the investigator's role in the grievance process confers confidential employee status. The Employer asserts that in

cases where an employee files a grievance over discipline or discharge imposed based on allegations substantiated by an investigator's report, that report eliminates the need for the labor relations office to investigate the grievance and provides a guide for management's response to the grievance.

The Employer's exceptions regarding the discipline and grievance process have merit and thus, we reject the ALJ's findings and recommendations with respect to these issues. Instead, we find that when an employee's work product forms the basis of the employer's decision to discipline or forms the basis of its grievance arbitration litigation strategy, such as the case with ISIs' reports, 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.

Board precedent provides that employees who are privy to an employer's litigation strategy in grievance arbitration cases and related litigation are confidential employees because they have 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. City of Chicago Office of Inspector General, 31 PERI ¶ 6 (IL LRB-LP 2013); State of Ill., Dep't of Cent. Mgmt. Servs., 29 PERI ¶ 12 (IL LRB-SP 2015). Similarly, employees who have prior knowledge of contemplated disciplinary action against an employee are confidential. State of Ill., Dep't of Cent. Mgmt. Servs., 30 PERI ¶ 38 (IL LRB-SP 2013).

The primary purpose of an investigation into employee misconduct is to provide the foundation for discipline and discharge should the investigation substantiate the allegations. If the allegations of employee misconduct are not substantiated by an investigation, there is no such foundation and we cannot envision any scenario in which the Employer could justly impose

discipline. Furthermore, as most collective bargaining agreements provide for a just cause standard for imposing discipline and discharge, upholding such discipline or discharge after an employee or union files a grievance and advances the grievance to arbitration, would be next to impossible. Logically, an ISI that did not substantiate allegations of misconduct would in effect have advance knowledge that discipline or discharge would not be imposed because there would be no just cause.

Similarly, we find that the ISIs' role in the grievance process confers confidential employee status. We find there is sufficient evidence that the ISIs involvement in the grievance process makes them privy to the Employer's grievance strategies. Like the disciplinary process, the grievance process lies at the core of labor relations functions and is inextricably related to discipline and discharge. As such, the evidence indicates the investigators' reports play a crucial role in how management responds to grievances. Should an employee file a grievance over discipline or discharge imposed based on allegations substantiated by an investigator's report, that report provides a guide for management's response to the grievance, and as in the discipline, the investigator would in effect have advance knowledge of how management would respond to the grievance.

For all the reasons stated above, we accept the ALJ's RDO granting the unit clarification petition and finding the ISI Is and IIs to be confidential employees pursuant to Section 3(c) of the Act. We reject, however, her findings and recommendations that the ISI Is and IIs' role in the Employer's discipline and grievance processes do not also confer confidential employee status, and modify the RDO accordingly as stated above.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

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

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

/s/ Kathryn Zeledon Nelson
Kathryn Zeledon Nelson, Member

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

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

Decision made at the State Panel's public meeting held in Springfield, Illinois on April 11, 2017; written decision approved and issued in Chicago, Illinois, on May 16, 2017.

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State of Illinois (Department of Corrections),	)	
	)	
Petitioner	)	
	)	Case No. S-UC-16-050
and	)	
	)	
Metropolitan Alliance of Police,	)	
Chapter 294,	)	
	)	
Labor Organization	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On April 22, 2016, the State of Illinois, Department of Corrections (Employer) filed a unit clarification petition with the Illinois Labor Relations Board (Board) seeking to exclude the titles Internal Security Investigator I and II from the bargaining unit represented by Metropolitan Alliance of Police, Chapter 294 (Union), certified by the Board on July 23, 2008 in Case No. S-RC-05-090. The Employer asserts that the Internal Security Investigator Is and IIs are excluded from coverage under the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2014), as amended, pursuant to the exemption for confidential and managerial employees. 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 September 1, 2016. Both parties elected to file post-hearing briefs.

I. Preliminary Findings

The parties stipulate and I find:

1. The Illinois Department of Corrections Investigations Unit is comprised of 19 Internal Security Investigator IIs and one Internal Security Investigator I.
2. The Internal Security Investigators are employed by the State of Illinois
3. The Internal Security Investigators are represented by the Metropolitan Alliance of Police, Chapter 294.

4. The Metropolitan Alliance of Police, Chapter 294 is a labor organization within the meaning of the Act.

II. Issues and Contentions

The issues are (1) whether the Internal Security Investigator Is and IIs (ISIs) are confidential employees within the meaning of Section 3(c) of the Act under the authorized access test and (2) whether the ISIs are managerial employees within the meaning of Section 3(j) of the Act.[1]

As a threshold matter, the Employer asserts that the unit clarification petition is appropriately filed because the Employer seeks to exclude confidential and managerial employees from the unit. On the merits, the Employer argues that the ISIs are confidential because they have unlimited, unrestricted access to labor-related materials during the course of their investigations, as part of their routine job performance. The Employer notes that they must have access to and review emails sent by high-level management officials, who have regular contact with the office of Labor Relations. These emails would unavoidably include confidential communications related to labor relations. Next, the Employer asserts that the ISIs also have authorized access to confidential disciplinary information because they create the investigative file that the Employer uses to justify discipline against unit employees, which in turn serves as the basis for grievances.

The Employer further claims that the ISIs are managerial employees because they further management's goals by identifying rule violations and making findings that lead to the imposition of discipline. The Employer asserts that the ISIs have a wide range of discretion in determining the course of an investigation and the individuals investigated. The Employer further claims that they make effective recommendations on issues of guilt (substantiated finding) or innocence (unsubstantiated finding). These effective recommendations, in turn, influence the imposition of discipline because a substantiated finding often leads to discipline.

The Union asserts that the unit clarification petition is untimely filed where the unit has existed for eight years. It also asserts that the unit clarification petition is inappropriate where it seeks to eliminate an entire unit. On the merits, the Union argues that the ISIs cannot be

[1] The Employer has argued only that the ISIs are managerial as a matter of fact and not that they are managerial as a matter of law.

confidential where the Employer failed to demonstrate that emails reviewed by the ISIs contain confidential collective bargaining-related information or, alternatively, that the ISIs had ever in fact seen such information.

Next, the Union asserts that the ISIs are not managerial because they do not have "carte blanche" in determining the course of an investigation and commonly consult their superiors. The Union also denies that they play a role in the disciplinary process, noting that there have been cases in which a warden has declined to impose discipline notwithstanding an ISI's finding that charges were substantiated. The Union also notes that a warden has discretion to issue discipline even in cases where an ISI finds that the charges were unsubstantiated.

III. Facts

1. Organizational Structure of the Department of Corrections

A director heads the Department of Corrections. The organizational structure below the director is the following: assistant director, division chiefs, deputy directors, and wardens. Each division chief oversees one of the following divisions: Investigations and Intelligence, Labor, Operations, Parole, and Legal.

The Operations Division controls the prisons. There are three deputy directors within operations who oversee one of three areas, north, south, and central. A warden oversees each prison and is the highest ranking employee within the prison facility. Within each prison, the chain of command is the following: warden, assistant warden, major, lieutenant, sergeant, and correctional officer.[2] Majors, lieutenants, sergeants and correctional officers are uniformed employees. All uniformed employees are bargaining unit members.

Each prison facility has an Internal Affairs and Intelligence Unit ("Internal Investigations Unit"). The employees in these units are correctional officers, correctional sergeants, and correctional lieutenants. They work within the prison facility and cannot conduct investigations outside the prison.

Mark Delia is the Division Chief of Investigations and Intelligence ("External Investigations Unit"). Delia oversees Wade Seaborn, the Acting Commander of Investigations, who oversees two Deputy Commanders. One Deputy Commander oversees Northern Region

[2] The major is also termed shift commander or shift supervisor.

Investigations and another Deputy Commander oversees Southern Region Investigations. Each Deputy Commander oversees a number of investigators.

There are a total of 19 Internal Security Investigator IIs (ISI IIs) and one Internal Security Investigator I (ISI I) within the External Investigations Unit. MAP represents the ISI Is and IIs.

The ISI IIs work in offices located around the state, outside the prisons. The ISI I works within a prison facility. The Department assigns ISIs to particular geographical areas and the ISIs receive investigations that originate from the areas to which they are assigned.

2. External Investigations Unit Investigatory Process

The External Investigations Unit investigates allegations of criminal or administrative wrongdoing by the state or its agents. Unlike the Internal Investigations Unit, the External Investigation Unit has statewide authority and its members can travel anywhere within the state to conduct interviews.

External Investigations cases may originate from the prison facilities. For example, the External Investigations Unit receives all cases involving prison suicide, unnatural death, staff-on-inmate sexual assault, and socialization.[3] External Investigations also receives any case that involves an individual who holds a rank higher than major. In addition, a lieutenant informs Delia of all pending internal investigations and Delia has authority to determine whether to transfer the case to External Investigations. External Investigations may also originate from the Office of the Executive Inspector General, the State police, or the office of a local state's attorney. Investigations that stem from employee misconduct begin with an allegation of misconduct against an employee.

ISIs may also investigate matters related to grievances filed by unit members. For example, if a member of management failed to adequately respond to a matter referenced in a grievance and the basis for the failure to respond was an alleged inappropriate relationship with another employee, then the ISI might investigate the matter.

Every ISI may handle any type of case. Delia cannot designate certain investigators to handle certain types of cases, or cases that involve high-ranking individuals, because the number of investigations is too high in relation to the number of investigators. ISI Is cannot perform

[3] The External Investigations Unit is statutorily obligated to refer certain cases to the state police, including rape, murder, and the smuggling of drugs into the facilities. The state police may choose to investigate the matter or refer the matter back to External Investigations.

investigations against a major or an administrator and, in some cases, cannot interview administrative staff at all.[4] However, cases sometimes expand after they have begun. For example, an investigation into a correctional officer may expand so that even a deputy director is under investigation. The investigator who started the case remains with the case even if it expands to include higher-level employees. ISIs can investigate other union members. ISI IIs have authority to investigate any level of employee within the Department including the director, the deputy directors and the Chief of Labor Relations, Edward Jackson. ISIs do not need permission to investigate such high level employees; however, Delia asks that ISIs inform him when they interview a chief or a deputy director. Delia never instructs ISIs not to interview such high-level employees.

All the ISIs have a background in investigations. Delia testified that an ISI does not normally receive instruction from his supervisor as to how he should proceed with a case. The ISIs exercise discretion in determining how to conduct their investigations. Their supervisors do not tell them what materials to gather, what questions to ask, what direction their investigation should take, or what outcome the investigation should have (substantiated versus unsubstantiated). ISI II Marc Hodge testified that it is common for investigators to consult with their supervisors about the nature of a case, the path of the investigation, and the method of investigation. If an ISI takes a step during investigation for an inappropriate reason such as personal or monetary gain, a supervisor has authority to inquire into the appropriateness of that course of action. An ISI has discretion to refer some matters under investigation to the State's Attorney, which may in turn lead to criminal prosecution.

The investigators may review telephone records, emails, or bank records as part of their investigation. Delia testified that he never limits the materials that ISIs may review. ISIs request subpoenas for information outside the department's control. To obtain a subpoena, the investigators draft the subpoena and send it to Delia's secretary, who edits it for typos. Delia signs it electronically, and the ISIs serve the subpoena. Delia has never refused to sign a subpoena.

To obtain email records, the ISI sends Delia an emailed request through the Deputy Commander. The email sets forth the scope of the request and may include a subject matter, the

[4] Some facilities are covered by memoranda of understanding that prohibit ISI Is from interviewing staff altogether.

name of the individual whose emails are sought, and a time frame. The Deputy Commander does not limit the scope of the requests. Delia has never denied approval of a request for email records. The Department then sends the results directly to the investigator and does not filter the results. The investigator receives a link that acts as a password for the requested information. There have been times when an investigator must ask for all email records generated by an individual because filtered requests produce no results. Delia testified that ISIs "got away from" using filters on email requests because they do not work to retrieve the needed information. He stated "you've got to give them everything and let them cipher through it and see what they need and what they don't need." The subject of the investigation cannot limit the materials provided to the ISIs or the answers that they give to inquiries. Furthermore, there is no way to exclude labor-related emails from a request for emails that covers a particular time period.

The ISIs see the emails in the same format as they view their own emails, and they have a choice as to how much of the main messages they initially see. Delia recommends that investigators read an entire email to see if it includes information relevant to their investigation. Delia does not instruct the ISIs to skip reading certain messages.

Edward Jackson, Chief of Labor Relations for the Department of Corrections, communicates via email with the director, the chiefs, the deputy directors, and the wardens. In fact, most of Jackson's communication with these individuals occurs through email. Jackson has weekly contact with the director, the chiefs, and the deputy directors, and more frequent contact with the wardens. Jackson has daily contact with the Department of Central Management Services (CMS) related to employee grievances and the negotiation of collective bargaining agreements, most of which likewise occurs by email. Jackson's communications with director, the chiefs, the deputy directors, the wardens, and CMS include confidential, labor-related matters intended only for those individuals to whom Jackson sends the communication.

Jackson routinely fields questions from the deputy directors, chiefs, and wardens on matters of contract interpretation, contract administration, and employee grievances. For example, a warden may describe a situation pertaining to a bargaining unit, inform Jackson of the course of action he took, and inquire whether that action violated the contract. If Jackson receives similar questions of contract interpretation from various facilities, he sends the answers to a distribution group that includes all the wardens, deputy directors, and the chief of operations. Jackson sends emails to the wardens on various labor-related topics on at least a monthly basis.

Jackson testified that he communicated with virtually every warden regarding labor relations matters in the six months that preceded the hearing in this case. Jackson's interactions with the chiefs on these matters are similar but take place on a "higher level."

During contract negotiations, Jackson communicates via email with the director, the deputy directors, the chiefs, and the wardens. He asks them whether there are any changes that they would like made to the contract and he asks them to explain their motivation for seeking the changes. Jackson and these members of management evaluate the importance of the requested changes and determine what the employer might be willing to give up in exchange for the changes. Jackson's discussions with the directors, the deputy directors, and the chiefs include discussions about collective bargaining strategy and policy matters. In addition, Jackson sometimes asks the wardens for additional information to support the employer's position at the table during collective bargaining. When he receives the information, he does not always convey it to the union during negotiations.

The Director approaches Jackson with changes he would like to implement in the Department. He asks Jackson about his obligations under collective bargaining agreements and how they impact his desired changes.

Delia testified that he was not aware of an instance, during his 13 or 14 year employment with the Department, in which the Employer's confidential negotiating positions or collective bargaining proposals were disclosed to an ISI. He similarly testified that he was unaware of any instance in which an ISI obtained confidential information during an investigation related to the Employer's preparation for contract negotiations. However, Delia also stated that he does not look at every email that is responsive to an ISI's investigative request for emails. Jackson similarly testified that he was not aware of any instance in which the Union had advance notice of the Employer's bargaining position. He likewise stated he was unaware of any instance in which an ISI came into possession of a "management email regarding labor relations."

ISI II Hodge testified that, during his two year employment as an ISI, he has never come across an email in the ordinary course of his investigation that contained confidential collective bargaining information from the employer.[5] Furthermore, none of Hodge's coworkers ever informed him that they had received such information. ISI II Jack Bradley Thomas testified that

[5] The transcript contains an error and states the question as follows: "In the process of your employment, have you ever been exposed to or come across an email in the course of any investigation that contained confidential or positioning information by your employers?" Tr. p. 140.

he agreed with Hodge's testimony. He further stated that he had not made many requests for emails in his 13 years as an ISI and that when he did receive emails in response to a request, he did not read every email he received. Hodge has never received any email or electronic file during the course of his employment that disclosed confidential information from the employer that would have been helpful to the Union in collective bargaining.

The record includes an investigative report addressing a charge from January 2016 that a chief had misused the state's wi-fi services. ISI Sims[6] reviewed the chief's emails and internet usage covering the preceding six months to determine whether the chief had used the departments email and internet for legitimate work purposes. I take notice of the fact that ISI Sims reviewed emails spanning the period of time between the expiration of the parties' collective bargaining agreement on June 30, 2015 and the Union's Demand for Compulsory Interest Arbitration, received by the Board on February 3, 2016.[7]

The record also includes an investigative report addressing a charge from January 2015, which alleged that a lieutenant, a shift supervisor, and a deputy director had shared confidential crime scene photographs via email with an individual who was not permitted to see them. ISI Stanhouse[8] reviewed the email records of the lieutenant, the shift supervisor, and the deputy director to determine whether these individuals had violated the Department's Rule of Conduct by forwarding the photographs to individuals not authorized to see them. The ISI found that the charges in that case against all the individuals were substantiated. The investigative report indicates that the ISI attached four emails to his report in support of his findings.

At the conclusion of an investigation, the ISI writes a report which states that the charges are either substantiated or unsubstantiated. The report contains a summary of the evidence and the analysis performed by the ISI. The ISI sends the report to his deputy commander. The deputy commander reviews it to determine whether the investigation is complete. If the deputy commander deems the investigation complete, he reviews it for typos and sends it to Delia. If the deputy commander deems the investigation incomplete, he sends the report back to the ISI so that the ISI can collect more information and add it to the report.

When Delia receives the report, he reads it to ensure that it is complete and then signs off on it. Delia has never changed an ISI's finding that the charges were substantiated or

[6] The ISI's first name does not appear on the Investigative Report.
[7] The Union dated its demand on February 1, 2016.
[8] The ISI's first name does not appear on the Investigative Report.

unsubstantiated. However, he has instructed ISIs to perform additional investigation where the record of interviews does not contain sufficient information to support the conclusion.

If the ISI finds that the charges are substantiated, and Delia signs off on the report, the External Investigations Division sends the investigative report to the Chief Administrative Officer (a.k.a. the warden) of the facility at which the investigated employee works.[9] The warden must accept the ISI's finding that the charges were substantiated.

Following investigation, the warden may refer the matter for discipline. A warden generally refers a matter for discipline if the report states that the charge is substantiated. However, the warden has discretion to refer a matter for discipline even if the report states that the charge is unsubstantiated. The employee subject to discipline is entitled to a hearing prior to the imposition of discipline. A hearing officer hears the facts of the case and issues a recommendation to the warden as to whether he should issue discipline, and what level of discipline he should impose. The warden can accept or reject the hearing officer's recommendation. If the warden imposes discipline and the employee grieves it, Chief of Labor Relations Jackson may consult the ISI who investigated the matter, to respond to the grievance.

The investigatory process described above has remained substantially the same since 1982. The most recent job description for the ISI I position became effective on April 16, 2011. The most recent job description for the ISI II position became effective on November 16, 2011.

ISI Hodge testified that he is not involved in the preparation of the Employer's budget. He is not involved in discussions about the Employer's policy decisions or rules and regulations, and he does not have input into the revision of the Employer's rules and regulations. Hodge further testified that he is unaware of any other ISI who is involved in discussions with management concerning the Employer's policy decisions or its rules and regulations. Hodge testified that he did not recall an instance in which any bargaining unit member had informed him that they had provided input in the revision of the Employer's rules and regulations. Hodge has never been involved in the formulation of management's labor relations policies.

[9] The ISI may administratively close and investigation when he determines it does not warrant a full inquiry. Delia does not look at the investigations that the ISIs have administratively closed. He simply signs off on them.

IV. Discussion and Analysis

The unit clarification petition is appropriate. The ISI Is and IIs are confidential under the authorized access test. In light of this latter finding, it is unnecessary to address the managerial exclusion.

1. Propriety of the Unit Clarification Petition

The unit clarification petition is appropriately filed because it seeks to exclude allegedly confidential employees who were improperly included in the bargaining unit.

"A unit-clarification petition may appropriately be used to sever confidential employees from a bargaining unit." Dep't of Cent. Mgmt. Servs. (Dep't of Corrections) v. Ill. Labor Relations Bd. ("DOC"), 364 Ill. App. 3d 1028 (4th Dist. 2006); Treasurer of the State of Illinois, 30 PERI ¶ 53 (IL LRB-SP 2013)(reversed on other grounds; setting forth all six circumstances under which a unit clarification petition is appropriately filed).

Here, the Employer asserts that the ISI Is and IIs are confidential and must be excluded on these grounds. Accordingly, the unit clarification petition is appropriate.

There is no merit to the Union's claim that the Employer's petition is untimely filed. The Appellate Court in DOC held that "the State can file a unit-clarification petition to remove a confidential employee from a bargaining unit at any time." DOC, 364 Ill. App. 3d at 1036. Accordingly, the Employer's eight-year delay in filing its petition in this case is irrelevant.

The Union's attempts to distinguish the Court's decision in DOC are unpersuasive. First, the Union observes that the Employer here filed its petition eight years after the Board certified the Union as the employees' exclusive representative, whereas the Employer in DOC filed the petition shortly after the positions' inclusion in the unit. Yet, the timing of the unit clarification petition in DOC did not factor into the court's analysis. Id. Indeed, it was referenced only in the facts section of the decision. Id. see also Treasurer of the State of Illinois, 30 PERI ¶ 53 (discussing and interpreting DOC). Accordingly, the unit clarification petition is appropriate despite the Employer's delay in filing it.[10]

[10] The Union also argues that the Board has only allowed unit clarification petitions to exclude an employee where the Employer filed the petition within a short time after the Employer filed or created the position. This is not the case. See Treasurer of the State of Illinois, 30 PERI ¶ 53 (IL LRB-SP 2013)(finding unit clarification appropriate even though employee had been in the unit for 13 years) rev'd on other grounds, Am. Fed'n of State, County & Mun. Employees, Council 31 v. Illinois Labor Relations Bd., 2014 IL App (1st) 132455.

Second, the Union claims that the unique circumstance that justified use of the unit clarification in DOC is not present here, when in fact, it is. The "unique circumstance" referenced by the Court was that allegedly confidential employees were improperly included in a bargaining unit. DOC, 364 Ill. App. 3d at 1030-31. Accordingly, the relevant facts and allegations in this case are the same as those presented in DOC.

Third, the Union asserts that this case is different from the DOC case because the Employer here seeks to eliminate the entire bargaining unit, whereas the Employer in DOC sought to merely to remove some titles. However, the Union cites to no case in which the Board has drawn a distinction on these grounds.

In sum, the Employer's unit clarification petition is appropriately filed.

2. 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. Ill. State labor Rel. Bd., 227 Ill. App. 3d 955, 978 (1st Dist. 1992).

The Act sets forth two tests to determine whether an employee is subject to the confidential exclusion, (1) the labor nexus test and (2) the authorized access test. The Board has also adopted the reasonable expectations test, which applies when no collective bargaining unit is in place. Only the authorized access test is at issue in this case.

a. Authorized Access Test

The ISIs are confidential employees under the authorized access test because, in the regular course of their duties, they have authorized access to emails that contain the Employer's collective bargaining strategies and information concerning contract administration.

An employee is confidential under the authorized access test if, in the regular course of his duties, he "ha[s] authorized access to information concerning matters specifically related to the collective-bargaining process between labor and management." Chief Judge of the Cir. Court of Cook Cnty., 153 Ill. 2d 508, 523 (1992). 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. Ill. Labor Rel. Bd., State Panel, 2012 IL App (4th) 110356 ¶ 27; 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 Twp. H.S. Dist. 219, Cook Cnty. v. Ill. Educ. Labor Rel. Bd. ("Niles"), 387 Ill. App. 3d 58, 71 (1st Dist. 2008) ("'labor relations' does not include hiring, performance or promotion or mere access to personnel or statistical information, even if that information is confidential"); City of Burbank, 1 PERI ¶ 2008 (IL SLRB 1985). An employee's "access to 'confidential' 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 Cent. Mgmt. Serv. (Dep't of State Police), 2012 IL App (4th) 110356 ¶ 27; City of Evanston, 227 Ill. App. 3d at 978. Likewise, merely supplying raw financial data for use in negotiations is insufficient to warrant exclusion under this test. Chief Judge of Circuit Court of Cook Cnty., 218 Ill. App. 3d at 705; but see Dep't of Cent. Mgmt. Serv., 2011 IL App (4th) 090966 ¶ 168, 181 (employee is confidential if he has authorized access to financial data used directly in collective-bargaining negotiations, access to the employer's proposed budget before it is made public, and budget and salary information which would be used by the employer in effectuating its collective bargaining policies).

The ISIs broad authority to review emails during their investigations renders them confidential employees because it gives them authorized access to confidential labor relations materials. It is undisputed that the ISIs have authority to review emails sent and received by individuals who are under investigation. It also clear that the ISIs have authority to investigate all employees within the department, including those of high position—the chiefs, the director, the deputy directors, and the Chief of Labor Relations, Edward Jackson.

In addition, the preponderance of the evidence demonstrates that the emails to which ISIs have authorized access include information concerning the Employer's collective bargaining strategy. Chief of Labor Relations Jackson testified he regularly communicates by email with the director, the chiefs, the deputy directors, and the wardens during contract negotiations. He asks them about the changes they would like to make to the contract and their motivation for seeking such changes. He asks them to evaluate the importance of the requested changes and

inquires as to the concessions that they would make to obtain them. In sum, these communications contain the very information that would give the Union an advantage during collective bargaining, if disclosed.

The ISIs' authorized access to these emails also provides the ISIs with confidential information concerning contract administration. Jackson testified that wardens sometimes describe actions they have taken and ask whether that conduct violated the collective bargaining agreement. Any affirmative response or advice from Jackson would reveal information that the Union could use to initiate a grievance or to support the Union's position in litigation over the identified action. Chief Judge of the Cir. Ct. of Cook Cnty. v. Ill. State Labor Relations Bd., 218 Ill. App. 3d 682, 699 (1st Dist. 1991), aff'd, 153 Ill. 2d 508 (1992)(information that would give unit members advance notice of the department's policies with respect to labor relations is confidential).

Moreover, the ISIs' authorized access to confidential emails is not incidental to the ISIs' work and is instead a function they perform in the ordinary course of their duties. Even a single assignment that confers authorized access to confidential information renders that employee confidential as long as the assignment is a normal task and not an ad hoc assignment. Dep't of Cent. Mgmt. Services/Dept. of State Police v. Illinois Labor Relations Bd., 2012 IL App (4th) 110356, ¶ 30. Here, the ISIs' responsibility to review emails during their investigations is a regular part of their duties. ISI Thomas conceded as much, although he stated that he had not made "many" requests to review emails during his 13 years as an ISI. In addition, the record contains two reports which demonstrate that ISIs request and review managements' emails during the course of their investigations. In one case, ISI Sims investigated a chief's alleged misuse of State's wi-fi service and reviewed six months of his emails to complete that investigation. In another case, ISI Stanhouse reviewed the emails of a deputy director to determine whether he shared confidential photographs via email with unauthorized individuals.

Most importantly, the ISIs not only have authorized access to confidential emails, they also have actual access to them. "When a position has existed for a substantial amount of time, the Board will weigh heavily the employee's actual access to collective bargaining material." Niles Twp. H.S. Dist. 219, Cook Cnty . v. Ill. Educ. Labor Rel. Bd. ("Niles"), 387 Ill. App. 3d 58, 71 (1st Dist. 2008). Here, ISIs have in fact reviewed confidential emails while performing their investigative functions. Indeed, ISI Sims reviewed a chief's emails covering the very

window of time during which the Union and the Employer were negotiating a successor agreement: The parties' contract expired on June 30, 2015, the Union demanded interest arbitration on February 1, 2016, and the ISI's investigation sought emails covering six of the seven months that fell between those dates.[11] Furthermore, Chief of Labor Relations Jackson noted that he customarily solicits confidential information from the chiefs throughout such periods of contract negotiation and that they respond with their bargaining priorities and the concessions they are willing to make. Thus, Sims reviewed such confidential correspondence between Jackson and a chief because he reviewed all of the chief's correspondence during an active period of negotiation. Notably, the Union did not call ISI Sims to testify and deny that he had seen confidential collective bargaining related information. Cf. Am. Fed'n of State, County & Mun. Employees, Council 31 v. Illinois Labor Relations Bd., 2014 IL App (1st) 132455, ¶ 51 (employee's access to collective bargaining information deemed speculative where she testified that she had not been privy to the allegedly confidential information over 13 years; court also noted that the preliminary budget data was not confidential).

In addition, the routine basis on which Jackson fields questions from members of management on matters of contract administration further supports a finding that any larger scale review of management's emails, such as that conducted by ISI Sims, would reveal confidential information.

The testimony provided by ISIs Hodge and Thomas, that they had never seen confidential collective bargaining information in emails, fails to undermine the finding that the ISIs are confidential employees. ISIs, on the whole, do have authorized access to confidential collective bargaining information, as outlined above. Furthermore, there is sufficient evidence in the record that at least some ISIs have in fact viewed confidential collective bargaining emails during the course of their investigative duties. See supra.

Similarly, the testimony offered by the Employer's witnesses Delia and Jackson, cited by the Union on brief, do not preclude a finding that the ISIs are confidential. Although Delia stated that he was not aware of any particular instance in which an ISI had reviewed confidential collective bargaining emails, he also stated that he does not look at every email that is responsive to an ISI's investigative request. Similarly, although Jackson testified that he was not aware of

[11] I take administrative notice of the fact that the Union dated its Demand for Compulsory Interest Arbitration on February 1, 2016 and that the Board received it on February 3, 2016.

any instance in collective bargaining where the union had advance notice of the Employer's position, that testimony is irrelevant to the inquiry, which focuses on the members' authorized access and not the de facto transmission of the information to the Union. As the Employer correctly notes, the purpose of the confidential exclusion is to avoid divided loyalties within the Employer's workforce. The risk of divided loyalties remains when confidential employees are left in the bargaining unit, even if those employees have not yet misused the confidential information to which they are privy.

However, the ISIs' role in providing consultation on grievances does not satisfy the authorized access test because there is insufficient evidence that Jackson reveals grievance litigation strategy when he asks ISIs about their investigation into a grievant's misconduct. Employees who are privy to an employer's litigation strategy in grievance arbitration cases and related litigation are confidential employees because they have 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. State of Ill., Dep't of Cent. Mgmt. Servs., 29 PERI ¶ 12. Chief of Labor Relations Jackson sometimes consults with the ISI about an investigation where the ISI's substantiated finding spurred discipline that an employee later grieved. However, it is not inevitable that Jackson would disclose litigation strategy when asking questions about the investigation. Moreover, the record contains no evidence concerning the questions Jackson asks the ISIs or the information he provides them during their discussions, and the Board has declined to find the authorized access test met under similar facts. See State of Ill., Dep't of Cent. Mgmt. Servs., 24 PERI ¶ 33 (IL LRB-SP 2008) (OIG investigators may be called to testify in arbitration hearings regarding disciplinary actions; no evidence presented concerning their exposure to the employer's litigation strategy); City of Chicago, 2 PERI ¶ 3017 (IL LLRB 1986) (investigators may be called to testify in grievance and criminal proceedings; no evidence presented concerning their exposure to the employer's litigation strategy).

Similarly, the ISIs' duty to issue a finding of "substantiated" or unsubstantiated" on an allegation of employee misconduct does not satisfy the authorized access test because the ISIs do not thereby have advance knowledge of disciplinary charges that the Employer will issue to unit members. Although it is more likely that the Employer will pursue disciplinary charges following a substantiated finding than an unsubstantiated one, wardens have discretion to decline to pursue discipline even where the allegations are substantiated. Similarly, the wardens have

discretion to refer the matter for discipline even when the investigation results in an unsubstantiated finding. Most importantly, the Employer introduced no evidence that the ISIs draft disciplinary charges, or are aware of the decision to pursue discipline, before the warden informs the affected employee. State of Ill., Dep't of Cent. Mgmt. Servs., 24 PERI ¶ 33 (investigators were public employees even though they had authorized access to disciplinary files, files regarding an ongoing investigations, and information regarding possible but not yet imposed discipline); Cf. City of Chicago Office of Inspector General, 31 PERI ¶ 6 (IL LRB-LP 2014) (investigators were confidential where they reviewed draft disciplinary charges from the City's legal department, after the employer decided to pursue disciplinary action but before the employer issued the disciplinary charges to the employee).

In sum, the ISIs' authorized access to confidential collective bargaining-related emails warrants their exclusion from the unit as confidential employees even though some of their other functions, discussed above, do not satisfy the authorized access test. Since these ISIs are excluded as confidential, there is no need to address their managerial status.

V. Conclusions of Law

The ISI Is and IIs are confidential employees within the meaning of Section 3(c) of the Act.

VI. Recommended Order

The Employer's unit clarification petition is granted.

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 25th day of January, 2017

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/S/ *Anna Hamburg-Gal*

Anna Hamburg-Gal
Administrative Law Judge