ILLINOIS PUBLIC LABOR RELATIONS ACT: RECENT DEVELOPMENTS

Board and Court Decisions
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Jessica Kimbrough, Board Member, State Panel
Jerald S. Post, General Counsel
Illinois Labor Relations Board
160 North LaSalle Street, Suite S-400
Chicago, Illinois 60601-3103

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CASE SUMMARIES

I. Jurisdiction

In Service Employees International Union. Local 73, and City of Chicago Office of Emergency Management and Communications, __ PERI ¶ __ (IL LRB-LP, Oct. 4, 2010)(Case No. L-CA-10-042), the charging party filed an unfair labor practice charge against the Employer alleging that the Employer unilaterally assigned supervisory duties normally performed by full-time Supervising Traffic Control Aids to part-time "Hourlies." The Executive Director dismissed the charge as untimely and the Board upheld the dismissal. Considering the evidence, the Executive Director found that a letter from the Employer dated July 2, 2009 was sufficient evidence that the charging party had knowledge of the Employer's intent to change the policy, and therefore a response dated January 6, 2010, failed to meet the six-month limitation period established in Section 11(a) of the Act.

The Board reiterated in Urszula T. Panikowski/PACE Northwest Division, 25 PERI ¶188 (IL LRB-SP 2009)(Case No. S-CA-05-217), appeal pending, No. 1-09-2582 (Ill. App. Ct., 1st Dist.)(argued Oct. 13, 2010), that although it is limited to remedying unfair labor practices to those occurring within six months of the charge, a charging party may properly use events outside the limitations period, set forth in Section 11(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2008), to show the true nature of the event timely pled. However, the Board noted that a charging party cannot prove the timely pled event simply by proving that the occurrences outside the six-month limitations period were in fact a series of unremedied unfair labor practices, citing the distinction made by the United States Supreme Court in Bryan Manufacturing Co., 362 U.S. 411, 416-17 (1960). The Board issued a similar ruling in Kelvin Brown and Amalgamated Transit Union, Local 241, 26 PERI ¶57 (IL LRB-LP May 28, 2010)(Case No. L-CB-09-020).

In City of Pekin and Illinois Fraternal Order of Police, Labor Council, 25 PERI ¶176 (IL LRB-SP 2009)(Case No. S-CB-08-006), the Board upheld the Executive Director's dismissal of an employer's charge against the union. The Employer's charge alleged that the Union violated Section 10(b)(4) and (1)

of the Act by attempting to relitigate a grievance that had previously been denied. The Union filed a grievance in 2005 based on the Employer's denial of a bargaining unit employee's request for tuition reimbursement. The arbitrator found that the grievance was untimely because the Union had not filed a written request for arbitration within 30 days of the denial of the grievance as provided by the collective bargaining agreement. Two years later the Union again filed a grievance on behalf of the same employee after the employee sought tuition reimbursement for additional coursework and was denied. After the City denied the grievance, the Union filed a request for arbitration. The City then requested a Stay of the Arbitration and filed this unfair labor practice charge. The Executive Director determined that the charge was untimely filed and dismissed it.

In City of North Chicago and North Chicago Fire Fighters Association, IAFF Local 3271, 25 PERI ¶162 (IL LRB-SP 2009)(Case No. S-UC-08-013), the Board upheld the dismissal of a UC Petition. The Board had previously certified a unit in Case No. S-RC-90-061. At issue in this case was whether a newly created title, Fire Prevention Officer, was part of the existing unit. The ALJ found that the position at issue was created in 2005 and, given the lapse in time, the UC petition filed by the employer to remove the title from the unit was untimely and any subsequent petition filed by the Union to include the title in the unit would also be untimely. The Board noted that it would be "more accurate to say that no determination as to whether the title itself is in or out of the unit was ever made." In so finding, the Board noted that at no time had the Union petitioned for the title to be included in the Unit and, the work of the title at issue does not involve bargaining unit work such that there was no obstacle to a non-bargaining unit employee holding the position.

In Debra Braxton and State of Illinois (Case No. S-CA-09-220) and Debra Braxton and SEIU Local 880 (Case No. S-CB-09-036), 25 PERI ¶173 (IL LRB-SP 2009), the charging party filed an unfair labor practice charge against the employer and the union alleging that the fair share provision in the collective bargaining agreement violated the Act. The Executive Director dismissed the charges and the Board upheld the dismissals. The Union represented a unit composed of Child and Day Care Home Providers and the charging party is a member of that unit. Approximately two years prior to filing these

charges, she had filed virtually identical charges alleging the same violation. Those charges were dismissed as insufficient to raise an issue of law or fact on which to conduct a hearing. In the instant case, charging party was unable to identify new evidence to support the filings and only supported the charges with the argument that she and others no longer want to be represented by the Union.

After initially remanding the Executive Director's direction of an election in Chicago Joint Board, Local 200, Retail, Wholesale, Department Store Union and County of Cook, 25 PERI ¶55 (IL LRB-LP 2009)(Case No. L-RC-09-012), because of the potential implications of the dissolution of the County's Bureau of Health Services and the creation of the Cook County Health and Hospitals System (System), in Chicago Joint Board, Local 200, Retail, Wholesale, Department Store Union and County of Cook, 26 PERI ¶1 (IL LRB-LP 2010)(Case No. L-RC-09-012), the Local Panel upheld the Executive Director's direction of an election. The Board rejected the argument of the County and the System that the petition was invalid because they were joint employers and the petition named only the County. The Board found that the purported joint employers failed to demonstrate that the System exerts significant control over the terms and conditions of the employees' terms and conditions of employment, and also that there was no evidence the System has a sufficient level of independent authority to be considered a separate and joint employer with the County. The Board declined to consider the County's argument that the petitioned-for employees should be excluded as confidential employees or supervisors, noting that in its earlier decision it had found the County had failed to take advantage of its opportunity to support its contentions, and that it had remanded the matter expressly for the purpose of determining the proper employer. Member Anderson dissented.

II. Representation issues

A. Showing of interest

In Metropolitan Alliance of Police, Barrington Hills Police Chapter 576, and Village of Barrington Hills (Police Department), 26 PERI ¶59 (IL LRB-SP 2010)(Case No. S-RC-10-049), an employer sought to have the sufficiency of the showing of interest accompanying a majority interest petition reconsidered on the basis that cards had been obtained through coercion or fraud. Following

Board precedent from unfair labor practice cases involving coercion, the Executive Director applied an objective standard to determine whether, from the standpoint of an employee, the challenged conduct would reasonably have a coercive effect. Considering the evidence, he found no conduct that would *reasonably* coerce an officer to sign a card. The Board agreed that the objective standard was appropriate, and that it had been applied properly in this case.

B. Unit determination/appropriateness

In City of Chicago v. Ill. Labor Relations Bd., 396 Ill. App. 3d 61, 918 N.E.2d 1103 (1st Dist. 2009), the court affirmed the Board's certification of a bargaining unit containing only two of the City's eight nursing titles. The court noted that the Board has recently reconsidered its preference for large, functionally based units in cases like Int'l Bhd. of Teamsters, 23 PERI ¶ 172 (IL LRB-LP 2007), and that the Illinois Appellate Court has approved of that move in State of Illinois v. Ill. Labor Relations Bd., 388 Ill. App. 3d 319, 902 N.E.2d 1122 (4th Dist. 2009), there noting that the Board's prior practice of applying a presumption of inappropriateness to smaller units was difficult to square with the language in Section 9(b) of the Act which states that "fragmentation shall not be the sole or predominant factor used by the Board in determining an appropriate unit." The court here found the record contained sufficient evidence in support of the appropriateness of the proposed unit.

In Illinois Council of Police v. Ill. Labor Relations Bd., __ Ill. App. 3d __, Nos. 1-09-1859 and 1-09-1860 (Ill. App. Ct., 1st Dist., Sept. 30, 2010), aff'g Illinois Council of Police/City of Chicago, 25 PERI ¶77 (IL LRB-LP 2009)(Case No. L-RC-07-032), the court affirmed the Board's certification of a unit of aviation security sergeants employed by the City. The court consolidated appeals by the City of Chicago and the Illinois Council of Police (ICOP). The City argued the Board erred in certifying the sergeant's stand-alone unit as an appropriate bargaining unit. The court affirmed the Board's certification and expressed its approval of the Board's reconsideration of its preference for large units and its certification of small, stand-alone units in recent years. The court stated that "the Board's decisions to certify smaller units were anything but arbitrary and capricious. The Board made the decisions consciously and with clear consideration of the past preference for larger bargaining units. The Board recognized that,

although the elevation of the fragmentation factor may have had a place when the Act first came into effect, time and the changes it has wrought in the City's bargaining landscape meant that fragmentation, more so than ever, should not be the predominant factor in an appropriateness determination under section 9(b)." The court went on to consider the other section 9(b) factors to determine whether the Board's certification of the sergeants was clearly erroneous, and determined that it was not. ICOP's petition was granted by the Board, yet it appealed arguing the Board erred in finding the sergeants were not "peace officers." The court dismissed ICOP's appeal because ICOP received the relief it has requested from the Board. As such, it was not an "aggrieved party" and had no standing to appeal.

In AFSCME, Council 31 and City of East Moline, 25 PERI ¶175 (IL LRB-SP 2009)(Case No. S-CA-08-188), the Board upheld the Executive Director's dismissal of a union's unfair labor practice charge alleging an employer violated Section 10(a)(4) of the Act by refusing to implement a grievance award that required it to place three newly created job titles in an historical bargaining unit. The Executive Director dismissed the charge because he found that, under Section 9(b) of the Act, only the Board can determine an appropriate bargaining unit, and the grievance procedure was an inappropriate means of determining the appropriateness of the unit. The Executive Director noted the union could file a representation petition to include the new titles.

In Laborers International Union of North America, Local 362 and Town of Normal (Employer) and David Olson, Keith Simpson, Craig Tackett and Jarod Windhorn (Objectors), __ PERI ¶__ (IL LRB-SP, Oct. 4, 2010)(Case No. S-RC-10-234), the Board sustained the Executive Director's dismissal of a petition filed by Objectors. A majority interest representation petition had been filed to represent 40 employees in the Employer's Public Works Department. The Employer had no objection, but four mechanics within the Equipment Maintenance Division of the Public Works Department objected to the appropriateness of the proposed unit because their duties differed from those of the other employees. The Executive Director found differing duties an insufficient basis for finding the unit inappropriate. In their appeal, the Objectors complained about aspects of the majority interest process, but the Board found it was required to apply the statute as written.

C. Section 3(c) confidential employees

In AFSCME, Council 31 and State of Illinois (Dep't of Cent. Mgmt. Serv.)(Case No. S-RC-07-048) and ISEA and Laborers' Int'l Union, Local 2002 and SEIU, Local 73 and State of Illinois (Dep't of Cent. Mgmt. Serv.)(Case No. S-RC-08-074), 25 PERI ¶161 (IL LRB-SP 2009), appeal pending, No. 4-09-0966 (Ill. App. Ct., 4th Dist.), AFSCME filed a majority interest petition seeking to include approximately 530 employees in the Public Service Administrator, Option 2, job title in an already existing bargaining unit. ISEA/SEIU filed a petition for an election to represent the same employees in a stand-alone bargaining unit. The Employer sought to exclude approximately 150 of the petitioned-for employees as supervisory, confidential and/or managerial employees, and maintained that it was entitled to a hearing on each of the exclusions it raised. In upholding the ALJ's Intermediate Order, the Board stated that, where an employer has not put forth facts that, even if proven, would entitle it to prevail, the Board need not convene a hearing. Regarding the managerial issue, the Board rejected the Employer's position that the importance of the employees' work rendered them managerial employees under the Act. The Board stated that the record did not show that an employee alleged to be managerial established policy and procedures, but rather that the employee created materials to explain policies and procedures established by others. With respect to the confidential issue, the Board found that the Employer did not meet the labor-nexus test because the persons that the PSA Option 2's at issue assisted were not primarily responsible for labor relations matters. The Board also held that the Employer failed to satisfy the authorized access test, explaining that, in a PSA Option 2's costing out of bargaining unit proposals, access to statistical information upon which an employer's labor relations policy was based was insufficient to confer confidential status. Addressing the supervisory issue, the Board held that the PSA Option 2's oversight authority was not supervisory within the meaning of the Act because it did not affect their subordinates' terms and conditions of employment. In particular, the Board found many instances where the disputed employees evaluated their subordinates, but no evidence that those evaluations had an impact on their terms and conditions of employment. Chairman Zimmerman issued an opinion dissenting in part. She disagreed with the Board's determination that certain employees were not supervisors

because their employment actions were taken in consultation with, or reviewed by, higher management officials. Chairman Zimmerman also felt that a hearing was warranted for other employees at issue. Finally, she would have found that one of the petitioned-for employees at issue had sufficient access to collective bargaining proposals prior to the time they were presented to the union to render the employee confidential under the Act.

In AFSCME, Council 31, and State of Illinois, Dep't of Cent. Mgmt. Serv., 26 PERI ¶34 (IL LRB-SP 2010)(Case No. S-UC-08-460), the Board largely affirmed an ALJ's finding that certain employees in the title Executive Secretary III were not confidential employees within the meaning of the Act. The Board rejected the employer's contention that performance of confidential duties on a "sporadic" basis meets the statutory standard. It also clarified that the opinions of the employees' supervisors that their inclusion in the unit would not cause a conflict of interests could constitute evidence that they were not supervisors, but could not serve as a "shortcut" to reach that conclusion.

In AFSCME, Council 31, and State of Illinois, Dep't of Cent. Mgmt. Serv., 26 PERI ¶83 (IL LRB-SP 2010)(Case No. S-RC-10-052), the employer sought to exclude a total of five employees in the title Public Service Administrator Option 8L (PSA 8L) from the existing RC-10 bargaining unit: three as supervisors under the Act and two as managers under the Act. The ALJ concluded that the employer failed to offer enough evidence to raise a question of fact or law to warrant a hearing on whether any of the PSA 8L's met these statutory exclusions. The Board adopted the ALJ's recommendations with respect to four out of five employees and remanded the case of the fifth employee for hearing. The Board affirmed the ALJ's findings that the legal duties of two PSA 8Ls involved professional discretion and technical expertise, but not managerial authority. The employer contended that one disputed PSA 8L was managerial because he "drafts legislation, regulations and executive and administrative orders" but there was only evidence that he might assist his superiors in those tasks. The Board held this did not amount to "final responsibility and independent authority to establish and effectuate policy" necessary to establish managerial authority. With regard to the confidential status of the employees, applying the labor nexus test the Board affirmed the ALJ's finding that the duties of three PSA 8L's did not qualify them for

exclusion as confidential because there was no evidence that they assist in a confidential capacity in the regular course of their duties a person or persons who formulates, determines and effectuates labor relations policies. The Board found these employees were more akin to employees who provide financial information that may be relevant to collective bargaining strategy, which does not make them confidential under the Act. Regarding the fifth employee, the Board found an issue of fact or law exists concerning whether her duties in representing of State agencies before the Civil Service Commission in cases against AFSCME satisfy the labor nexus or labor access test qualifying her for exclusion as a confidential employee. As such the Board remanded that issue for hearing.

In AFSCME, Council 31, and City of Chicago, __ PERI ¶__ (IL LRB-LP, Oct. 18, 2010)(Case Nos. L-RC-09-018 and L-UC-09-008), the Board rejected the ALJ's recommended decision with respect to the confidential status of seven employees, but adopted her recommendation that the remaining 31 employees should be added to an existing bargaining unit. The Board found under the labor-nexus test that six employees had superiors who formulated, determined and effectuated labor relations policies, and that they assisted these superiors in a confidential capacity in the regular course of their duties. In doing so, the Board rejected the notion that the superiors had to be the persons who are primarily responsible for formulation, determination or effectuation of labor relations policies before the labor-nexus test could be applied. It also explained that infrequency of assistance does not necessarily mean that the assistance is not given in the regular course of duties. The Board further found that five of six employees who met the labor-nexus test also met the authorized access test, and it held that one employee who did not meet the labor-nexus test met the authorized access test because she has access to contract negotiation files. The Board found no merit in the Employer's argument that two other employees met either the labor-nexus test or the authorized access test when they had access to information that was confidential only in a general sense and not with regard to labor relations. Regarding the supervisory status of one employee, the Board determined that, although this employee has the authority to direct and discipline, she was not a supervisor according to the Act because she did not spend a preponderance of her employment time performing supervisory functions.

See also AFSCME, Council 31 and State of Illinois, CMS and Illinois State Employees Association, Laborers' International Union, Local 2002 and SEIU, Local 73, 25 PERI ¶184 (IL LRB-SP 2009)(Case No. S-RC-08-036), in Part V(A) below.

D. Section 3(j) managerial employees

In AFSCME, Council 31/State of Illinois, Dep't of Cent. Mgmt. Serv., 25 PERI ¶68 (IL LRB-SP 2009)(Case No. S-RC-07-174), appeal pending, No. 4-09-0438 (Ill. App. Ct., 4th Dist.)(argued April 28, 2010), AFSCME sought, pursuant to a showing of majority interest, to represent in its existing RC-63 bargaining unit, approximately 16 persons in the job title or classification of Senior Public Service Administrator, Option 8P (hereinafter referred to as "pharmacy directors"), employed by the State of Illinois in its Department of Human Services. The Employer opposed the petition on several grounds, one of which was the employees sought were statutorily excluded from bargaining as managerial employees under Section 3(j) of the Act. The ALJ found that the Employer failed to establish that any of the petitioned-for pharmacy directors were managerial employees within the meaning of Section 3(j), concluding that none of them met either part of the managerial test. Agreeing with the ALJ's determination, the Board noted that in support of its position, the Employer reviewed and cataloged the significant responsibilities it entrusts to the pharmacy directors, yet nowhere in the record was there evidence that the disputed employees possessed and exercised a level of authority and independent judgment sufficient to broadly effect the organization's purposes or its means of effectuating these purposes. Nor, the Board found, was the other half of the managerial test met, as there was no evidence that the disputed employees direct the effectuation of management policy in that they oversee or coordinate policy implementation by developing the means and methods of reaching policy objectives, and by determining the extent to which the objectives will be achieved. The Board noted that as it has long held (and the courts have agreed) that, with regard to the first part of the test, executive functions require more than simply the exercise of professional discretion and technical expertise, and where the employee's role in establishing policy is merely advisory and subordinate, the employee is not managerial. Likewise, the Board pointed out, as it has in the past (with the approval of the courts), that to

meet the second part of the test an employee must be empowered with a substantial measure of discretion to determine how policies will be effected.

In AFSCME, Council 31, and State of Illinois, Dep't of Cent. Mgmt. Serv. (Illinois Commerce Commission), 26 PERI ¶40 (IL LRB-SP 2010)(Case No. S-RC-10-046) the Board rejected an employers' contention that employees in the title of Administrative Law Judge V employed at the Illinois Commerce Commission were managerial employees under either the "traditional" test or as a matter of law, noting that under ICC rules the ALJ-Vs issue only recommended decisions.

See also AFSCME, Council 31 and State of Illinois (Dep't of Cent. Mgmt. Serv.)(Case No. S-RC-07-048); ISEA and Laborers' Int'l Union, Local 2002 and SEIU, Local 73 and State of Illinois (Dep't of Cent. Mgmt. Serv.)(Case No. S-RC-08-074), 25 PERI ¶161 (IL LRB-SP 2009), and AFSCME, Council 31, and State of Illinois, Dep't of Cent. Mgmt. Serv., 26 PERI ¶83 (IL LRB-SP 2010)(Case No. S-RC-10-052), discussed in Part II(C) above, and AFSCME, Council 31 and State of Illinois, CMS and Illinois State Employees Association, Laborers' International Union, Local 2002 and SEIU, Local 73, 25 PERI ¶184 (IL LRB-SP 2009)(Case No. S-RC-08-036), discussed in Part V(A) below.

E. Section 3(k) peace officer

In County of DuPage v. Ill. Labor Relations Bd., 395 Ill. App. 3d 49, 916 N.E.2d 566 (2d Dist. 2009), the court approved the Board's finding that corrections officers in the DuPage County Sheriff's Office were not peace officers. The court agreed with the Board that "the proper focus in determining peace officer status is upon the individuals' primary responsibilities and the authority actually exercised in the regular course of their duties." The court further explained that the required inquiry was "whether the actual duties performed by the corrections deputies…were police duties, instead of focusing upon hypothetical powers with which the deputies were endowed as a result of being sworn deputy sheriffs."

In Illinois Council of Police/City of Chicago, 25 PERI ¶77 (IL LRB-LP 2009)(Case No. L-RC-07-032), appeal pending, No. 1-09-1859 (Ill. App. Ct., 1st Dist.), the Board upheld the ALJ's determination that an individual whose arrest powers are circumscribed as to time and place, such as the

petitioned-for employees, is properly considered as either a part-time or "special" police officer and expressly excluded from the meaning of the term "peace officer" under Section 3(k) of the Act.

F. Section 3(r) supervisory employees

In Village of Maryville v. Ill. Labor Relations Bd., 402 Ill. App. 3d 369, 932 N.E.2d 558 (5th Dist. 2010), rev'g Illinois Fraternal Order of Police Labor Council/Village of Maryville, 24 PERI ¶113 (IL LRB-SP 2008), pet. for leave to appeal pending, No. 110830 (Ill.) (Case No. S-UC-06-064), a two-member majority of the court reversed the Board's determination that two sergeants were not supervisors and ordered the Board to deny a unit clarification petition filed to add them to an existing unit of subordinate officers. The Board had found the Village failed to provide evidence of specific instances where the sergeants disciplined, directed, or adjusted grievances in a manner that effected the terms and conditions of their subordinates' employment, but the court found this improperly assigned dispositive weight to the number of times the sergeants had exercised their supervisory authority. The court found the sergeants could deny requests for leave, and also had written authority via a policies and procedures manual to issue oral and written reprimands, conduct oral and written performance evaluations, and memorialize counseling sessions which are placed in personnel files which, axiomatically, have the potential to be used in future discipline. Justice Spomer issued the opinion in which Justice Stewart joined. Justice Chapman dissented, stating that precedent establishes that a written ability to perform indicia of supervisory status is insufficient and that there needs to be actual examples of the exercise of supervisory authority. She further noted that ability to review requests for time off and vacation has been deemed a routine, clerical function that does not mandate the use of independent judgment. And she stated that performance evaluations that do not have any bearing on an officer's pay or employment status fails to establish supervisory direction. While the majority did not discuss Village of Hazel Crest v. Ill. Labor Relations Bd., 385 Ill. App. 3d 109, 895 N.E.2d 1082 (1st Dist. 2008), the sole case relied upon by the Village, Justice Chapman distinguished it on the basis that the employer there did have documented evidence that the disputed employees had actually recommended discipline on two occasions and that, following independent review, one of those recommendations had been accepted.

In Town of Cicero v. Ill. Labor Relations Bd., No. 1-08-3036, 25 PERI ¶150 (Ill. App. Ct., 1st Dist., Oct. 5, 2009), rev'g Metropolitan Alliance of Police, Chapter No. 441/Town of Cicero, 24 PERI ¶111 (IL LRB-SP 2008)(Case No. S-RC-06-015), the court reversed the Board's finding that police lieutenants were not supervisors, albeit in an unpublished, and therefore non-precedential order. Relying on Village of Hazel Crest v. Ill. Labor Relations Bd., 385 Ill. App. 3d 109, 895 N.E.2d 1082 (1st Dist. 2008), (which the court noted was decided after the ALJ issued his recommended decision and order), the court concluded that "[t]he ALJ here has made the same error of law when he looked to whether the recommendations [for discipline] from the lieutenants were 'effective' to assess whether independent judgment was exercised rather than looking to the authority the [department's] general order places in a lieutenant in deciding which disciplinary action he recommends be taken."

In Village of Western Springs v. Illinois Labor Relations Board, No. 1-08-1059, 25 PERI ¶147 (Ill. App. Ct., 1st Dist., Sept. 30, 2009), aff'g Metropolitan Alliance of Police, Chapter No. 456/Village of Western Springs, 24 PERI ¶24 (IL LRB-SP 2008)(Case No. S-RC-06-081), decided five days before Town of Cicero and concerning similar facts concerning police sergeants, the court applied Village of Hazel Crest but found "the fact that the superior officers have the authority to ignore or overrule the recommendations of the sergeants means that those recommendations are not effective recommendations because they do not have to be adopted as a matter of course with little, if any, review by superiors."

In AFSCME, Council 31/State of Illinois, Department of Central Management Services, 25 PERI ¶68 (IL LRB-SP 2009)(Case No. S-RC-07-174), appeal pending, No. 4-09-0438 (Ill. App. Ct., 4th Dist.)(argued April 28, 2010), the Employer contended the petitioned-for employees' authority to place subordinates on "proof status"—forcing them to bring in doctors' notes when they use sick time—supported its position that they possessed the authority to discipline their subordinates within the meaning of the Act, with the requisite independent judgment. The Board disagreed, finding that with regard to putting employees on proof status, the record demonstrated that the petitioned-for employees, in so doing, did not have to choose between two or more significant courses of action, in other words, putting employees on proof status did not require the use of independent judgment, as they did nothing more than

place employees on proof status if they had more absences within a given time period than the Employer had set as an upper limit.

In Illinois Fraternal Order of Police Labor Council/City of Sandwich, 25 PERI ¶91 (IL LRB-SP 2009)(Case No. S-RC-09-061), appeal pending, Nos. 2-09-0800 & 2-09-0985 (Ill. App. Ct., 2nd Dist.) citing among other cases, the decisions in Illinois Department of Central Management Services (State Police) v. Illinois Labor Relations Board, 382 Ill. App. 3d 208, 888 N.E.2d 562 (4th Dist. 2008); and Metropolitan Alliance of Police v. Illinois Labor Relations Board, 362 Ill. App. 3d 469, 839 N.E.2d 1073 (2d Dist. 2005), the Board found that the memorandums or reports submitted by the petitioned-for sergeants to the chief, detailing instances of serious misconduct, as a practical matter, could not have been adopted as a matter of course, as they did not even contain recommendations. Moreover, the Board noted that, to the extent the sergeants decided to include disciplinary recommendations in such reports, the evidence indicated that such recommendations were not effective, as the chief independently investigated the facts reported therein.

In Village of Broadview v. Ill. Labor Relations Bd., 402 Ill. App. 3d 503 (1st Dist. 2010), aff'g Illinois Council of Police/Village of Broadview, 25 PERI ¶63 (IL LRB-SP 2009)(Case No. S-RC-06-177), the court rejected the Board's determination at the first step of the test for supervisory status that police sergeants' duties were not substantially different than that of their subordinates. The court believed the Board had given dispositive weight to the amount of time sergeants patrolled, and state that the appropriate test is qualitative, rather than quantitative. However, the court affirmed the Board's alternative finding at the second step that the police sergeants did not perform any of the statutory indicia of supervisory authority. The Employer had relied primarily on generalized testimony of its chief to establish the sergeant's job functions rather than providing specific examples of their alleged supervisory authority, and in the administrative decision reviewed by the court the Board reiterated that "[i]n representation hearings, a position's incumbents obviously provide the best evidence of that position's duties, for it is these employees who actually perform the tasks at issue. In other words, the testimony of a challenged position's incumbent may well provide a more comprehensive description of his or her actual

day-to-day duties than that of his or her superior. While a superior should be familiar with his subordinates' duties, as well as what he expects of them, testimony of the position's incumbents can be generally more instructive as to the particular means and methods by which those duties are accomplished on a daily basis. This is especially true where the testimony does not come from the position's immediate superior, but from someone several steps removed from actually performing those duties on a day-to-day basis."

In Village of Oak Brook, 26 PERI ¶7 (IL LRB SP 2010)(Case No. S-RC-09-057), appeal pending, No. 2-10-0168 (Ill. App. Ct., 2d Dist.), the Board upheld the ALJ's determination that police sergeants were not supervisory because they did not exercise any supervisory authority with the requisite independent judgment in matters of adjusting grievances, reward, promote, discipline, and direction.

In Illinois Fraternal Order of Police Labor Council and Village of Willowbrook, 26 PERI ¶36 (IL LRB-SP 2010)(Case No. S-RC-10-027), the Board rejected the ALJ's recommendation to direct certification of a collective bargaining unit of sworn police officers in the rank of commander and sergeant and remanded the case for an evidentiary hearing after finding that evidence submitted by the employer was sufficient to raise a question of law and fact concerning potential supervisory status. Although the ALJ had determined that the sergeants' authority to complete evaluations were "blended" with the input of others, and therefore did not require the use of independent judgment in rewarding subordinates, the Board held that the sergeants' evaluations, which counted for 70% of the final score, combined with the employer's asserted nature of subsequent roundtable discussions for the final evaluation, raised an issue of fact warranting a hearing. The ALJ also found that sergeants counsel subordinates at the request of their superiors, but the Board found an issue warranting a hearing in that the evidence submitted by the employer indicated that there were instances when the sergeants undertook counseling on their own initiative. Finally, the Board found that the ALJ's determination that sergeants do not direct their subordinates was based in part on her erroneous determination that they lack the authority to discipline with independent authority.

In AFSCME, Council 31 and State of Illinois, Dep't of Cent. Mgmt. Serv., 26 PERI ¶39 (IL LRB-SP 2010)(Case No. S-RC-08-048), the Board affirmed an ALJ's finding that employees with the title Activity Therapist Supervisor were not supervisors within the meaning of the Act. Relying on Village of Elk Grove Village v. Illinois State Labor Relations Board, 245 Ill. App. 3d 109, 117-21 (2d Dist. 1993), the Board agreed that the ability to complete performance evaluations that have no role in determining pay or employment status does not constitute evidence of supervisory direction.

In AFSCME, Council 31 and State of Illinois, Dep't of Cent. Mgmt. Serv., 26 PERI ¶58, (IL LRB-SP 2010)(Case No. S-RC-09-196), the Board affirmed the ALJ's finding that there were no issues of fact or law warranting a hearing on whether employees in the title of Nuclear Safety Administrator I were supervisors or managers where, in support of its objections to their inclusion in the unit, the employer had submitted a very brief letter repeating the statutory standards and affidavits from the employees' supervisors that did not "paint a picture of day-to-day duties," as the employer suggested, but merely used terminology from the statute while providing nearly no useful information concerning actual tasks performed by the affiant's subordinates. The Board found that documents attached to the affidavits did not on their face provide any better explanation (and in some respects contradicted the employer's assertions) and, most significantly the employer made no attempt to demonstrate how they could.

In AFSCME, Council 31 and State of Illinois (Dep't of Cent. Mgmt. Serv.), 26 PERI ¶84, (IL LRB-SP 2010)(Case No. S-RC-10-114), the Board adopted the ALJ's recommended conclusion that employees in the title of "Manager" at the Illinois Commerce Commission were not supervisors under the Act. The employer had objected to the inclusion of the Managers in an existing bargaining unit, arguing that they were supervisors based on their authority to perform four of the 11 statutory indicia: 1) hiring and transferring; 2) adjusting grievances; 3) disciplining, suspending and discharging; and 4) directing. The ALJ found there was no issue of law or fact warranting a hearing on the first two statutory indicia. With respect to the third and fourth indicia, although the ALJ found an issue of fact or law regarding whether one of the employees at issue disciplines using independent judgment and whether another employee disciplines and directs using independent judgment, she found there was no issue of fact or law

whether they do so for a preponderance of their time. The employer excepted to the ALJ's findings on authority to direct and adjust grievances, while AFSCME excepted to the ALJ's findings that there were issues of fact or law regarding authority to direct and discipline. The Board found no issue on three out of the four indicia at issue, but in its analysis of the authority to direct, found that although the collective bargaining agreement sets the amount of benefits that derive from a good evaluation, the evaluations that the Managers complete can either lead to the employee's termination or return to his prior position or even loss of a step increase. Thus, the Board found that the ALJ erred in concluding that there was no issue of fact or law as to whether Managers exercise supervisory authority by using independent judgment in performing evaluations of their subordinates that can impact the subordinates' terms and conditions of employment. The Board adopted the ALJ's conclusion despite this finding because in its calculation of whether Managers spent a preponderance of their time exercising supervisory authority, it was inconceivable that the additional time spent conducting evaluations would alter the result.

In AFSCME, Council 31, and State of Illinois, Department of Central Management Services, __ PERI ¶__ (IL LRB-SP, Oct. 15, 2010)(Case No. S-UC-10-014), the Board adopted the ALJ's Recommended Decision that found human casework managers who served as local office administrators for the Department of Human Services' Division of Human Capital Development were supervisors within the meaning of the Act. The ALJ found the local office administrators had the authority to direct, discipline, and adjust grievances and that they spend a preponderance of their employment time performing such tasks. In reaching the latter finding, the ALJ noted the different court interpretations of the preponderance standard, and found adequate support in the record for the regional administrators' assessment of the percentage of time the local office administrators spend on supervisory functions from the fact that they were regularly informed of what the local office administrators are doing, and the fact that two of the regional administrators had formerly been local office administrators.

In AFSCME, Council 31, and Chief Judge of the Circuit Court of Cook County, __ PERI ¶__ (IL LRB-SP, Oct. 15, 2010)(Case No. S-RC-10-007), the Board rejected the Employer's contention that the petitioned-for employees were managers or supervisors where the Employer declined to provide the ALJ

with sufficient information to raise either issue. The Board adopted the ALJ's findings with two modifications: 1) The employees' assignment of cases based on who works well with whom and with specific residents is evidence of independent judgment and is not routine; and 2) The Board disavowed any contention in the RDO that the employees' reliance on skills, knowledge or experience necessarily precludes their exercise of independent judgment. The Board found these modifications did not alter the conclusion that the employees are not supervisors because, in any event, their supervisory tasks could not consume a preponderance of their employment time.

In AFSCME, Council 31, and State of Illinois, Department of Central Management Services, __ PERI ¶__ (IL LRB-SP, Oct. 12, 2010)(Case No. S-RC-10-138), the Board agreed with an ALJ that an Employer had failed to raise an issue as to whether employees with the title of public service administrator, option 8C, were supervisors or managers within the meaning of the Act, despite having been given a second opportunity to do so by means of a response to a detailed show-cause order specifying the requirements for a successful demonstration of the existence of such issues. Most generally, the Board rejected the Employer's position that the standards used under the Civil Practice Act should govern whether the general and conclusory affidavits it submitted were sufficient to raise an issue for hearing. The Board noted that, in contrast to the adversarial court proceedings referenced by the Employer, its certification of bargaining units was a non-adversarial, largely ministerial administrative task. It found no need to deviate from its prior practice, particularly since courts have recently reviewed, and approved of, that practice.

More specifically, the Board found no issue regarding adjustment of grievances because there was no evidence that any of the employees in dispute had the authority to provide substantive relief at the first stage as required by the Act. However, the Board disavowed any implication from the ALJ's recommendation that the employee must be designated to resolve grievances at the final step of the grievance process. The Board rejected the Employer's position that it did not need to present evidence on the employees' authority to train except in response to a defense raised by the petitioner, noting that Employers always bear the burden of demonstrating that their employees are precluded from the

protections of the Act. The Board found there was an issue of fact or law as to whether some of the employees exercise discipline, but that there was no need for a hearing here where there was no evidence that this task could take a preponderance of the employees' time, at least no evidence other than a vague, generalized, and conclusory statement in an affidavit.

Lastly, the Board rejected the Employer's argument that one employee was a manager where the Employer presented evidence that the employee met the first prong of the two-part managerial test, but failed to provide any evidence that the employee was predominantly engaged in directing the effectuation of management policies and functions. The Board rejected the Employer's contention that evidence of supervisory tasks met this aspect of the managerial definition, finding that it had to follow the statutory definitions, and the statute defined managerial employees separately from supervisory employees.

Also see AFSCME, Council 31 and State of Illinois (Dep't of Cent. Mgmt. Serv.)(Case No. S-RC-07-048) and ISEA and Laborers' Int'l Union, Local 2002 and SEIU, Local 73 and State of Illinois (Dep't of Cent. Mgmt. Serv.)(Case No. S-RC-08-074), 25 PERI ¶161 (IL LRB-SP 2009), in Part II(D) above, and AFSCME, Council 31 and State of Illinois, CMS and Illinois State Employees Association, Laborers' International Union, Local 2002 and SEIU, Local 73, 25 PERI ¶184 (IL LRB-SP 2009)(Case No. S-RC-08-036), in Part V(A) below.

III. Employer unfair labor practices

A. Section 10(a)(1) restraint, interference and coercion

In Service Employees International Union, Local 73/Illinois State Toll Highway Authority, 25 PERI ¶76 (IL LRB-SP 2009)(Case No. S-CA-07-155), appeal pending, No. 2-09-0763 (Ill. App. Ct., 2d Dist.), the Board found an employer violated rights established under NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), for one of two employees subjected to investigatory interviews. The Board relied on United States Postal Service v. NLRB, 969 F.2d 1064, 1071 (D.C. Cir. 1992), wherein the court noted "[t]he NLRB determined that the employee's Weingarten recognized right to the assistance of '[a] knowledgeable union representative,' sensibly means a representative familiar with the matter under investigation. Absent such familiarity, the representative will not be well-positioned to aid in a full and

cogent presentation of the employee's view of the matter, bringing to light justifications, explanations, extenuating circumstances and other mitigating factors."). The Board found that Respondent failed to sufficiently apprise either of two employees as to the subject matter prior to commending their interviews. The Board noted the first employee had several days' notice of the investigatory interview, and upon learning what the interview was about during its course, he and his union representative were allowed to privately confer whenever they asked, and in fact, conferred frequently. The Board observed that eventually, the employee, aided by his representative, satisfactorily answered all of Respondent's questions, and escaped any discipline. Essentially, in the case of the first employee, the Board determined that Respondent avoided violating his Weingarten rights by allowing him and his representative, after the interview began, to confer privately whenever and as often as they wanted, thus allowing the representative to effectively give the aid and protection contemplated by Weingarten. In contrast, the Board found the second employee had no advanced notice of her interview, and as a result, unlike the first employee, was unable to secure the services of any particular union representative ahead of time. Like the first employee, the second employee did not know the subject of the interview until she surmised what it was about from Respondent's questioning. However, soon after the interview began Respondent asked the second employee whether she wanted union representation. When she said she did, the Respondent obtained a Union-designated representative to assist her. The Board noted that neither the employee, nor the representative, made a request to confer at any time during the investigatory interview, but the Board found it was not Respondent's duty to offer that option; citing Pacific Telephone and Telegraph Co., 262 NLRB 1048 (1982), enf'd in pertinent part, 711 F.2d 134, 137 (9th Cir. 1983), the Board found a request was necessary. The employee admitted no wrongdoing during the interview, but Respondent nonetheless suspended her at its conclusion. The Board concluded that Respondent violated the second employee's Weingarten rights in that it failed to cure its failure to give prior notice of the subject matter of the interview as the representative had no opportunity to give the aid and protection intended under Weingarten. Although the Board found the failure to provide notice of the subject matter of the investigatory interview constituted an unfair labor practice, it rejected the union's contention that

Respondent violated the Act by failing to provide the second employee with a knowledgeable representative. The Board noted it is the union's responsibility, not Respondent's, to provide experienced, knowledgeable union representatives. The Board determined the appropriate remedy for the violation, was a posting, as there was no evidence the second employee's discharge was due to retaliation for asserting her right to union representation, or "predominantly dependent" upon information obtained through the unlawful interview, as she apparently admitted no wrongdoing during it.

B. Section 10(a)(2) discrimination

In Metropolitan Alliance of Police, Chapter 31 and County of DuPage and DuPage County Sherriff, __ PERI ¶__ (IL LRB-SP, Aug. 23, 2010)(Case No. S-CA-07-175), the Board adopted the ALJ's findings of fact and conclusion that Respondent did not violate Section 10(a)(2) and (1) of the Act. Charging Party failed to demonstrate that Respondent was aware of the union activity of a deputy sheriff, or that Respondent's decision to transfer that deputy sheriff was motivated by such activity.

In Policemen's Benevolent and Protective Association Labor Committee and City of Bloomington, __ PERI ¶__ (IL LRB-SP, Aug. 27, 2010)(Case No. S-CA-04-120)(Member Kimbrough dissenting), the Board granted Charging Party's motion for Attorney's Fees and Costs, which was filed after issuance of the ALJ's Recommended Decision and Order finding Respondent violated Sections 10(a)(2) and (1) by denying a lieutenant a promotion because of his union activity and Sections 10(a)(4) and (1) by refusing to bargain. The ALJ's non-precedential RDO, became final and binding on the parties when neither party filed exceptions and the Board declined to take it up on its own motion. Charging Party's motion for Attorney's Fees and Costs was based on Respondent's denials in response to the complaint which were found to be untrue and made without reasonable cause, as well as on Respondent's factual assertions offered at hearing which were found to be untrue and made without reasonable cause. In analyzing the motion under Section 1220.90(e) of the Board's Rules and Regulations, the Board reiterated that its test for determining whether a party has made factual assertions which were untrue and made without reasonable cause is an objective one – of reasonableness under the circumstances. The Board declined to impose sanctions based on Respondent's denials to the complaint, but did impose

sanctions based on the factual assertions made at hearing because Respondent had full opportunity to understand its case at that point in time and "could be properly criticized for presenting never-before-offered false alternative reasons for its conduct toward [the lieutenant]."

C. Section 10(a)(4) refusal to bargain

In Metropolitan Alliance of Police, Chapter No. 261 and County of Cook and Sheriff of Cook County, 26 PERI ¶13 (IL LRB-SP 2010)(Case No. L-CA-08-015), the Board rejected part of the county employers' exceptions to an ALJ's recommended decision. It agreed with the ALJ's conclusion that the employer violated several IPLRA provisions by repudiating a tentative agreement on a successor contract. The ALJ noted that the parties executed documents setting forth their proposals. The Local Panel found that the evidence supported the ALJ's conclusion that the parties' objective conduct demonstrated that they had a "meeting of the minds" regarding the radio dispatcher's holiday pay provision. However, the Local Panel also granted the county employers' exception to the ALJ's recommended remedy. The Local Panel directed the county employers to properly and expeditiously present the parties' tentative agreement to the county board for ratification and implementation. It also issued cease and desist and make-whole orders.

In Int'l Assoc. of Fire Fighters, Local 95 and Village of Oak Park, 25 PERI 169 (IL LRB-SP 2009)(Case No. S-CA-07-085), the Board upheld the Administrative Law Judge's determination that the Employer did not violate the Act when it ceased paying a 15 percent longevity benefit to eligible bargaining unit members. The Board also found that the Employer did not violate its duty to bargain by obtaining a letter from state officials, which opined that the longevity benefit was inconsistent with the state's pension code. The Board stated that neither party to collective bargaining negotiations may change the status quo during the pendency of interest arbitration without the consent of the other under Sections 10(a)(4) and 14(1) of the Act. The Board agreed with the ALJ that the Employer maintained the status quo in following the express language of a reversion clause. Because the longevity benefit was found by the Illinois Department of Financial and Professional Regulation to be inconsistent with the state's pension code, the Employer reverted to the language in the previous agreement regarding longevity and

sick sell back. The Board upheld the ALJ's determination that the Employer was not prohibited by the language of the parties' agreement or by the Act from seeking an opinion letter from the IDFPR without notifying the Union.

In Oak Lawn Professional Fire Fighters Associations, Local 3405, International Association of Fire Fighters, and Village of Oak Lawn, __ PERI ¶__ (IL LRB-SP, Oct. 29, 2010)(Case No. S-CA-09-007), the Board affirmed the ALJ's recommended decision that an employer violated Sections 10(a)(4) and (1) of the Act by refusing to bargain with a unit of fire fighters over minimum manning. That minimum manning was a mandatory subject of bargaining was, according to the ALJ, clear from the plain language of Section 14(i) of the Act which, in its first paragraph concerning police officers, precludes an arbitration award from addressing manning, but in its second paragraph concerning fire fighters does not contain this same prohibition. The Board also affirmed the ALJ's refusal to issue sanctions against the Employer. The Board's decision primarily addresses exceptions filed by the prevailing charging party regarding the refusal to issue sanctions and aspects of the ALJ's analysis on the merits, and in response to the cross-exceptions filed by the respondent regarding the duty to bargain over manning simply adopts the ALJ's rationale.

In Fraternal Order of Police, Lodge 7 and City of Chicago, __ PERI ¶__ (IL LRB-LP 2010)(Case No. L-CA-09-009), appeal pending, No. 1-10-__ (Ill. App. Ct., 1st Dist.), the Local Panel of the Board rejected an ALJ's recommended finding that the City violated Sections 10(a)(4) and 10(a)(1) by refusing to bargain with the Charging Party over a mandatory subject of bargaining and the effects of its decision concerning that subject. At the second step of the Central City analysis, the Board found that training new employees is a matter of inherent managerial authority, without specifically finding that it was a matter of Employer's organizational structure. At the third step, the Board rejected the City's contention that bargaining would have been of no benefit to the decision-making process, but under the facts of this case found that the burdens imposed on the Employer's authority outweighed such benefit. Lastly, the Board found that whether the Employer had bargained over the effects of its decision had never been in contention and therefore should not have been addressed by the ALJ.

D. Section 10(a)(7) refusal to sign agreement

See Metropolitan Alliance of Police, Chapter No. 261 and County of Cook and Sheriff of Cook County, 26 PERI ¶13 (IL LRB-SP 2010)(Case No. L-CA-08-015), discussed in Part III(C) above.

IV. Union Unfair Labor Practices

In Michelle Gardner and Amalgamated Transit Union, Local 308, 26 PERI ¶33 (IL LRB-LP 2010)(Case No. L-CB-09-064), the Local Panel sustained the Executive Director's dismissal of an unfair labor practice charge brought against a union. The charging party alleged that her union violated Section 10(b)(1) of the Act by allowing her employer to transfer her to a different worksite. Because of a personal dispute, the employer had transferred both the charging party and her co-worker, and the union filed grievances on behalf of both. The Board found a lack of evidence that any adverse conduct the union took toward the charging party was intentional or motivated by illegal bias.

In Adam Gold, et al., Charging Parties and Service Employees International Union, Local 73, Respondent, 26 PERI ¶35 (2010)(Case No. L-CB-09-013), the Local Panel sustained the Executive Director's dismissal of an unfair labor practice charge filed by a group of public employees employed by the City of Chicago in its Department of Aviation as Security/Police Officers and represented by the Service Employees International Union. The group of employees alleged that SEIU violated the Act by intentional misconduct when it stated that Aviation Police Officers were not peace officers. The employees alleged that SEIU took this position to further its own interest rather than that of the members. SEIU maintained that it took this position because the Board has held that the Aviation Police Officers are not peace officers. The Executive Director dismissed the charge because SEIU's conduct was not intentional and because there was no evidence that SEIU took action because of, or in retaliation for the Charging Parties' past actions, or out of animosity. In upholding the dismissal, the Board indicated that SEIU had taken the stance it took deliberately, but could not conclude that SEIU's position regarding the Aviation Police Officers peace officer status was taken in retaliation or out of animosity.

SEIU separately requested sanctions against the labor organization Illinois Council of Police, or ICOP, for its alleged involvement in initiating the unfair labor practice charge which SEIU argued

amounted to frivolous litigation. The Executive Director found that, while Charging Party's position was without merit, it could not be characterized as unreasonable, nor was there any evidence that the Charging Party lacked good faith in pursuing its allegation. The Board agreed with the Executive Director's determinations, but also found that it could not issue sanctions against a non-party.

V. Procedural issues

A. Evidence

In AFSCME, Council 31 and State of Illinois, CMS and Illinois State Employees Association, Laborers' International Union, Local 2002 and SEIU, Local 73, 25 PERI ¶184 (IL LRB-SP 2009)(Case No. S-RC-08-036), appeal pending, No. 4-10-0149 (Ill. App. Ct., 4th Dist.), the Board upheld all but six of the determinations made by the ALJ regarding employer exceptions to the inclusion of 323 PSA Option 1 titled employees in the bargaining unit. The employer argued that the Act required the Board to provide it hearings on each of the disputed positions, however, the Board noted that it need not convene a hearing unless the employer has advanced facts, that if proven, would entitle the employer to prevail at a hearing. The Board also found that the employer's exceptions to the ALJ's rulings regarding the use of sworn affidavits was unfounded as the ALJ reviewed the affidavits and found them to be too vague, generalized or conclusory to support the Employer's assertion of exclusions provided for under the Act. Additionally, the employer excepted to the ALJs determination not to grant a protective order to certain documents and the ALJs refusal to consider certain evidence the employer asserted was protected by the attorney-client privilege. The Board did not find any merit in either of the two exceptions given that the ALJ reviewed the documents that allegedly needed to be protected and found that nothing was contained within them that needed such protection and, as to the information protected by attorney-client privilege, the ALJ could not simply rely on a statement that such information exists without the opportunity to review it. The employer also excepted to the ALJs finding that those employees who were exempt from the Illinois Personnel Code could be organized even though they were considered subject to hire and discharge at will. The Board found that the employer's argument was analogous to the contention that "Shakman exempt" employees should be excluded from the collective bargaining process. However, the

ALJ found and the Board agreed, that if the legislature had intended those who are exempt from the Illinois Personnel Code to also be excluded from organizing under the Act, it would have specified so.

See Urszula T. Panikowski/PACE Northwest Division, 25 PERI ¶188 (IL LRB-SP 2009)(Case No. S-CA-05-217) in Part I above and AFSCME, Council 31, and State of Illinois, Department of Central Management Services, __ PERI ¶__, (IL LRB-SP, Oct. 12, 2010)(Case No. S-RC-10-138) in Part II(F) above.

B. Substitution of administrative law judges

In Welch, McGrew, and Widger/American Federation of State, County and Municipal Employees, Council 31, 25 PERI ¶73 (IL LRB-SP 2009)(Case No. S-CB-07-016), the Board held that substitution of ALJs is irrelevant where the decision turns on a failure of proof rather than credibility. It relied in part on North Shore Sanitary District v. Illinois State Labor Relations Board, 262 Ill. App. 3d 279, 634 N.E.2d 1243, 10 PERI ¶ 4005 (2d Dist. 1994)(wherein the court found that the requirements of due process are met when a substitute hearing officer bases his/her decision not only on the evidence presented before him/her, but also on the evidence contained in the record before a prior hearing officer; the fact that a different hearing officer made the ultimate recommended decision is inconsequential).

C. Credibility determinations

In Urszula T. Panikowski/PACE Northwest Division, 25 PERI ¶188 (IL LRB-SP 2009)(Case No. S-CA-05-217), appeal pending, No. 1-09-2582 (Ill. App. Ct., 1st Dist.)(argued Oct. 13, 2010), the Board reiterated its long and well-established policy that in view of the fact that the ALJ hears the testimony and observes the witnesses, it will accept an ALJ's credibility determinations unless it is convinced, by a preponderance of the evidence, that those assessments are clearly and demonstrably incorrect.

D. Default

In Wood Dale Fire Protection Dist. v. Ill. Labor Relations Bd., 395 Ill. App. 3d 523, 916 N.E.2d 1229 (2d Dist. 2009), aff'g, Wood Dale Professional Fire Fighters Assoc., Local 3594, IAFF and Wood Dale Fire Protection Dist., 25 PERI ¶136 (IL LRB-SP 2008), the Appellate Court, Second District, confirmed the appropriateness of the Board's rule providing for default judgment for failure to answer an

unfair labor practice complaint. The Board had also denied the respondent's request for waiver of that rule, and, reviewing that action under an abuse of discretion standard, the court affirmed that denial where the respondent could not show that application of the default rule would have been unreasonable or unnecessarily burdensome and the respondent failed to show due diligence. Finally, although it again stated the abuse of discretion standard applied, the court reversed the Board's imposition of sanctions, though it agreed that the respondent's argument was "not well founded, or even debatable."

In Christine Johnson and First Transit/River Valley Metro, 26 PERI ¶38 (IL LRB-SP May 4, 2010)(Case No. S-CA-09-037), appeal pending, No. 3-10-0435 (Ill. App. Ct., 3d Dist.), the Board affirmed an ALJ's default finding where an employer failed to timely answer a complaint alleging discriminatory discharge. It also affirmed the make-whole remedy despite the employer's protest that it actually consisted of two entities: a public body that had not employed the charging party and would be incapable of employing her in her former position as a bus driver, and a private company contracted to provide bus services to the public body.

E. Calculation of Due Dates

In City of St. Charles v. Ill. Labor Relations Bd., 395 Ill. App. 3d 507, 916 N.E.2d 881 (2d Dist. 2009), rev'g, Metropolitan Alliance of Police, Chapter No. 28 and City of St. Charles, 24 PERI ¶94 (IL LRB-SP G.C. 2008), the court reversed the determination by the Board's General Counsel that exceptions to an ALJ's recommended decision and order were untimely. The Court found that the Board's rules establish a presumption that a document is presumed to be received three days after mailing, and that, under the wording of those rules, only the recipient is permitted to rebut that presumption with evidence of the actual date of receipt. The General Counsel was not permitted to rely on the certified mail receipt to find that the City had actually received the recommended decision and order on the second day rather than the third day.

F. Delegation of Board Duties

In City of Chicago v. Ill. Labor Relations Bd., 396 Ill. App. 3d 61, 918 N.E.2d 1103 (1st Dist. 2009), the court held that it was appropriate for the Board to delegate to its Executive Director the administrative task of certifying appropriate bargaining units.

VI. Declaratory Rulings

In Village of Skokie and Illinois Fraternal Order of Police Labor Council, 26 PERI ¶17 (IL LRB GC 2010)(Case No. S-DR-10-003), the General Counsel found that the Employer's proposed changes in the successor collective bargaining agreement attempted to foreclose mid-term interest arbitration on some matters not expressly addressed in the agreement. These changes constituted a broad zipper clause and therefore concerned a permissive, not mandatory, subject of bargaining. The General Counsel also found that the exclusive representative has a statutory right to file a grievance, and the Employer's proposal seeking to limit that right by retaining the language used in previous agreements concerned a permissive subject of bargaining.

In City of Danville and Danville Police Command Officers' Association, 26 PERI ¶32 (IL LRB GC 2010)(Case No. S-DR-10-004), the General Counsel found that the Employer's proposed changes to the successor collective bargaining agreement amounted to a waiver of a statutory right to bargain over a mandatory subject of bargaining and therefore was itself a permissive, not mandatory, subject of bargaining. The proposal would have allowed changes to health insurance provisions by reference to provisions applicable to other City employees rather than the prior agreement's reference to health provisions applicable to members of the bargaining unit.