2013 IL App (4th) 120507-U

NO. 4-12-0507

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 3, 2013
Carla Bender
4th District Appellate
Court, IL

THE DEPARTMENT OF CENTRAL MANAGEMENT SERVICES/DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES, Petitioner, v. THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL; JACALYN J. ZIMMERMAN, PAUL S. BESSON, JAMES BRENNEWALD, MICHAEL COLI, and ALBERT WASHINGTON, the Members of Said Board and Panel in Their Official Capacity Only; JERALD S. POST, Executive Director of Said Board in His Official Capacity Only; Administrative Law Judge MARTIN KEHOE, in His Official Capacity Only; and THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, Respondents.	)	Direct Administrative Review of the Illinois Labor Relations Board, State Panel No. S-RC-08-130

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Steigmann and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The Board did not err in granting the union's petition to include administrative law judges with the job title public service administrator, option 8L, in the collective-bargaining unit where its findings the employees were not managers within the meaning of the statute was not clearly erroneous.

(2) The Board erred in finding one of the petitioned-for employees was not a supervisor within the meaning of the statute.

¶ 2 The Department of Central Management Services and Illinois Department of

Healthcare and Family Services (DHFS) (collectively, CMS) bring this action for direct review of a decision by the Illinois Labor Relations Board, State Panel (Board), declaring the American Federation of State, County, and Municipal Employees, Council 31 (Council 31), to be the exclusive bargaining representative of three administrative law judges (ALJs) with the job title public service administrator (option 8L), employed at DHFS.

¶ 3 The Board, adopting its ALJ's findings, concluded the option 8Ls were public employees within the meaning of section 3(n) of the Illinois Public Labor Relations Act (Act) (5 ILCS 315/3(n) (West 2008)) and not managerial employees or supervisors within the meaning of sections 3(j) and 3(r) of the Act (5 ILCS 315/3(j), 3(r) (West 2008)) and thus were eligible for inclusion in the collective-bargaining unit.

¶ 4 CMS appeals, arguing the ALJs in question are exempt where (1) the ALJs are managerial employees and (2) one of the ALJs is a supervisor. We affirm in part and reverse in part.

¶ 5 I. BACKGROUND

¶ 6 Because the parties are familiar with the facts, we discuss them only to the extent necessary to put the parties' arguments in context.

¶ 7 A. Procedural History

¶ 8 On May 15, 2008, Council 31 filed a majority interest petition with the Board to include six DHFS ALJs in the existing RC-10 collective-bargaining unit. See 5 ILCS 315/9(a)(1) (West 2008). Council 31 is the exclusive collective-bargaining representative for RC-10. We note while the petition sought representation of six ALJs, only the following three ALJs are at issue in this appeal: Thomas Fischer, Dora McNew-Clarke, and William Kurylak.

¶ 9 On June 11, 2008, CMS filed its objection to Council 31's petition, arguing, *inter alia*, the ALJs are not eligible public employees because they are managerial or supervisory employees under the Act.

¶ 10 In a January 28, 2009, letter sent to CMS, an ALJ of the Board stated she found no issues of law or fact in the case necessitating a hearing and was therefore recommending the Board certify the bargaining unit.

¶ 11 On January 29, 2009, the Board certified Council 31 as the exclusive representative of the ALJs employed at DHFS and ordered their inclusion in the existing RC-10 bargaining unit.

¶ 12 Petitioner appealed, arguing (1) certifying the bargaining unit without first conducting an evidentiary hearing denied them due process, (2) the ALJs are exempt managerial employees, and (3) one of the ALJs is an exempt supervisor.

¶ 13 On appeal, this court found while CMS had no right to due process, the Board still had to follow its own administrative rules, which it failed to do. *Department of Central Management Services/Department of Human Services v. Illinois Labor Relations Board, State Panel*, Nos. 4-09-0233, 4-09-0234 cons. (December 28, 2010) (unpublished order under Supreme Court Rule 23). On remand, an evidentiary hearing was held.

¶ 14 B. The Hearing

¶ 15 1. *Kyong Lee's Testimony*

¶ 16 During the July 13, 2011, evidentiary hearing on Council 31's petition, Kyong Lee, a deputy general counsel for DHFS testified regarding the organizational structure of the agency's bureau of administrative hearings. According to Lee's testimony, the agency is in charge

of administering the Medicaid program in Illinois. The agency is also in charge of health care purchasing and administering the state's child-support program. According to Lee, the Medicaid program is the "larger part" of the agency's responsibility. The bureau is in charge of hearing administrative cases and is divided into two sections: vendor hearings and fair hearings, both of which are run by the chief ALJ, Ryan Lipinski. The three ALJs in this case all hear vendor cases. The vendor hearings section handles cases brought by DHFS's office of the Inspector General, who is charged with ensuring federal and state funds are properly spent to provide services to Medicaid patients.

¶ 17 According to Lee's testimony, the ALJs act as impartial hearing officers and function as "fact-finders." They conduct hearings pursuant to the Illinois Administrative Code. Following the conclusion of a hearing, an ALJ performs legal research, applies the applicable rules and law, and writes a draft recommended decision and order. After the recommended decision is completed, it is reviewed by Kurylak, the supervising ALJ, who then meets with the individual ALJ to discuss it. The draft then advances to Lipinski, the chief ALJ, who reviews it and makes recommendations. Lee testified many of the changes involve grammar and presentation. Lee also noted the record needs to be as complete as possible because the case can be taken up for administrative review. After it leaves Lipinski, the recommended decision is then sent to Dale Cone, an assistant general counsel, for review. If Cone disagrees with the decision, she will draft a document for the director explaining her reasons. In vendor cases, the Director of DHFS (director) makes the "ultimate decision" and issues the final administrative decision on behalf of the agency.

¶ 18 2. *Ryan Lipinski's Testimony*

¶ 19 Lipinski testified she works as the chief ALJ and as the bureau chief of administrative hearings. She acts as the liaison between the counsel's office and the bureau. When Lipinski first became chief ALJ, the three petitioned-for ALJs were included in a bargaining unit. Thereafter, however, these positions were decertified and removed from the unit. According to Lipinski's testimony, ALJs in the vendor hearings section are responsible for conducting administrative hearings and preparing recommended decisions. ALJs have "a certain amount of time to prepare their first draft." Lipinski testified she thought the first draft needed to be submitted to Kurylak, the supervising ALJ, within 30 days. Lipinski testified she gets involved if permission is sought to submit the draft late due to vacation or sick time. In such situations, Kurylak can make a recommendation to Lipinski.

¶ 20 According to Lipinski's testimony, the ALJ will submit the draft to Kurylak, "who will review it, make changes, suggest edits, and they will go back and forth." Disagreements regarding those changes are presented to Lipinski. If there are no disagreements, and Kurylak determines the decision is "good to issue," then it is submitted to Lipinski, who also reviews it. Lipinski testified she has in the past changed recommended decisions "for clarification, to kind of flush out some thoughts, and perhaps add a finding of fact where there is a conclusion." She did not think she was changing the "intent of the ALJ." Instead, Lipinski testified she was "just sort of flushing it out." Lipinski had never personally changed an ALJ's conclusion or ultimate finding. She also had never changed an ALJ's finding of fact. She had, however, suggested additional findings of fact.

¶ 21 After the recommended decision is reviewed and approved by Lipinski, it is issued under her signature and copies are sent to the parties and to the DHFS director. The

parties then have an opportunity to file exceptions prior to the time the director issues the final administrative decision. During this time, the director's designee, Dale Cone, an assistant general counsel for DHFS, reviews the exceptions and the recommended decision.

¶ 22 According to Lipinski, Kurylak's role as a supervising ALJ is "to monitor the assignment of cases and to review the first drafts of the recommended decisions." Kurylak is also responsible for training new ALJs. However, Lipinski testified no new ALJs had started since she had been there, so she did not know what Kurylak's involvement in the training would entail. She speculated "he would put together a training program including the new statutes that are involved in these cases, shadowing, providing them with their objectives, and developing *** courses for a new ALJ once they begin." According to Lipinski, Kurylak is also responsible for preparing first drafts of probationary evaluations for new ALJs. Kurylak also prepares and signs the first draft of the performance evaluations for the two ALJs.

¶ 23 On cross-examination, Lipinski testified Kurylak is not currently approving ALJ time-off requests, including benefit time and sick time. Lipinski testified she took that function away from him and is currently doing it herself. Lipinski also testified Kurylak was not involved in any interviews to hire new ALJs.

¶ 24 3. *Dale Cone's Testimony*

¶ 25 Dale Cone, an assistant general counsel for DHFS, testified she reviews the ALJs' recommended decisions and prepares a summary for the director, who makes the final administrative decision. Cone testified she has reviewed approximately 200 decisions since 2008. Of those decisions, approximately 50 percent of them were defaults. The director has accepted the ALJ's decision in default cases a "[v]ast majority of times." According to Cone,

"[t]here has [*sic*] been just two or three [times] where, for one reason or another, it has been sent back to the ALJ." In contested decisions, the director has accepted the ALJ's recommended decision 90 to 95 percent of the time. Where the recommended decision is not accepted, Cone's "summary will be longer, because [she] will put in why the proposed action would be not to accept the recommended decision." If the director then finds the action is not warranted, she can dismiss the action. The director can also remand the case back to the ALJ for more findings.

¶ 26 Cone testified she looks at the conclusion to see if it is supported by the rules and whether it makes sense. Cone also substantively reviews each recommended decision to make sure the decision is correct. Cone testified neither she nor the director make changes to the ALJs' findings of fact.

¶ 27 4. *William Kurylak's Testimony*

¶ 28 Kurylak testified he is the supervising ALJ in the vendor hearings section in DHFS's bureau of administrative hearings. He has been the supervising ALJ since 1988. While he carries his own caseload, Kurylak considers the main function of his job to be supervising the other two ALJs. However, he also does other things, which he characterized as "whatever I'm told to do." Kurylak testified he had previously been responsible for approving leave time. However, he was told to stop doing so and was not currently approving leave requests.

¶ 29 Kurylak also testified he prepares "first evaluations" of the ALJs. Examples of these evaluations were admitted into evidence (exhibit Nos. 5A, 5B, 5C) and are contained in the record on appeal. Kurylak testified the evaluations have to be approved by Lipinski before they can be given to the ALJ. While Kurylak could not recall an incident where Lipinski made him change employee ratings, Kurylak had been told by previous supervisors to do so. Kurylak

testified he was told not to discuss evaluations with one of the ALJs (presumably McNew-Clarke, as Kurylak refers to that ALJ as "she"). This admonishment stemmed from an incident where the ALJ walked out of his office during a review session because she disagreed with his comments on a recommended decision. Kurylak testified he believed the issue arose out of a personality conflict.

¶ 30 Kurylak testified he reviews recommended decisions of the other ALJs. The amount of time he spends reviewing depends on the length of the decision and how frequently he gets interrupted. A short, 20-page decision takes Kurylak "a half to three-quarters of a day" to review. For longer decisions, he takes three to five days to review them. Kurylak reviews the recommended decisions to make sure they will be upheld if appealed. Kurylak makes minor changes in grammar and punctuation and also looks at the organizational flow of the decision. While he would never instruct an ALJ to change a finding of fact, he has talked with them about why they found what they found or what they based their finding on. Kurylak also reviews the conclusions to make sure they reflect a proper application of the law to the facts. In evaluating the ALJs, his review of their recommended decisions is a "priority objective."

¶ 31 Although Kurylak testified he probably has instructed an ALJ to change their conclusion, he could not recall a specific incident in which he did so. Kurylak qualified his testimony and stated "up until about two months ago" he would have discussed the recommended decisions with both ALJs. However, "pursuant to another instruction," he now just makes comments on the draft and hands it to his supervisor without discussing it with McNew-Clarke first. Instead, Kurylak has been instructed to just give his marked-up version of McNew-Clarke's draft directly to Lipinski.

¶ 32 Kurylak testified he has "issued counseling" to the other ALJs. Kurylak explained counseling is the first level of discipline for "merit comp" employees. According to Kurylak, "[y]ou simply talk to the employee, tell the employee what was done that was improper, mention that the conduct has to be changed, and that if the conduct is not changed, there will be progressive discipline, meaning going to oral reprimand, written reprimand, and so forth." He is required to issue a notice to the employee counseling has occurred and he sends a copy to personnel. He has issued oral warnings and written reprimands in the past.

¶ 33 However, on cross-examination, Kurylak testified he has not been involved in making any discipline decisions since Lipinski has been his supervisor. Instead, she is the only one who determines whether discipline is warranted. Kurylak explained that even in the past he would never have disciplined someone unless his supervisor agreed. While Kurylak testified he has the authority to discipline, he is not currently issuing any discipline because he was told not to. Prior to going into the bargaining unit, Kurylak was responsible for approving leave for the ALJs. Kurylak testified he currently did not have any authority to approve employee time-off requests because that responsibility was taken away from him by Lipinski. If an employee wants to take time off, they contact Lipinski. If the employee wants to take vacation or a sick day, they have to call Lipinski.

¶ 34 Kurylak testified he also reviews procurement business cases, which are assigned by Cone. He makes comments on the procurement cases and forwards those comments on to Cone. "[Cone] reviews them and she might make a correction and she might say okay but she reviews [Kurylak's] comments."

¶ 35 Kurylak also testified he is responsible for preparing first drafts of the general

counsel office's maintenance budget. In doing so, he asks departments about their costs and whether they are going to use the same contracts as the previous year. With regard to preparing the budget, Kurylak testified, in relevant part, as follows:

> "The budget *** consists of six or seven spreadsheets that I have to complete, each with numerous tabs, not all of which are applicable.
>
> And I also complete a cover memo with justifications and assumptions, and I simply go through it spreadsheet by spreadsheet, tab by tab. To a large extent I look at what I did last year. Frequently[,] I will look at it and there will be something different in it and I have to call finance and say, [']What is this?['] And I wait for a response and I will get a response.
>
> They have been very helpful. Then I will just pump in the numbers, and it was revised recently such that we are limited in the dollars we can spend. They tell us what we spent last year. And you can make a change in [the] current year, but if you go above a certain number, a whole column turns red. If you go below that number, it turns green. And then there is another column for the budget year."

Kurylak testified after he finishes with "all the spreadsheets and the memo and the assumptions and justifications," he sends everything to Kyong Lee for approval. If Lee approves, Kurylak "put[s] it in the folder that they have created and the department then takes those proposed

budgets for the proposed areas and [D]HFS and puts them together into a larger spreadsheet." The department then "puts them together and sends them to the legislature."

¶ 36 Kurylak also prepares a monthly status report, which lists all the pending cases and shows the case name, docket number, the date it was issued, case type, the ALJ who handled the case, and the age of the case. The ALJs update that report monthly and Kurylak proofreads it to ensure it is complete. He also makes a report of pending decisions, which he cross-references with the monthly status report to make sure they are consistent. He also prepares an activity report, which lists the number of cases they have received in a month, the number pending with the director, the number of cases issued, and the total number of cases.

¶ 37 On redirect, Kurylak testified "When we were in the union I did not have authority to discipline and I did not have authority to hear grievances." Now that he is, "momentarily anyway," not in the union, he has the authority to discipline and hear grievances. Kurylak testified he would not discipline or hear grievances without first "going through [his] supervisor" because "she would be upset with [him] if [he] did it without her knowing, and because she's very helpful." Kurylak testified he would "probably get in trouble if [he] did either one of them without her advice." In addition, Kurylak attributed his difficulties with McNew-Clarke to being in the same bargaining unit as her. Kurylak did not have these issues with her prior to going into the union. Afterward, however, she refused to recognize Kurylak as her supervisor and implied to him she did not have to recognize his authority.

¶ 38 In response to a question from the hearing officer, Kurylak said at one point he was supervising six ALJs. At the moment, he was spending less time supervising than he had in the past because there were only two ALJs under him. However, he noted that was going to

change with the expected hiring of two new ALJs, who would be shared with the fair hearings section.

¶ 39 5. *Thomas Fischer's Testimony*

¶ 40 Fischer testified he has worked for DHFS for 37 years as a hearing officer, hearing referee, and now an ALJ. Fischer handles cases involving vendors who are participating in the Medicaid program. He also hears cases involving individuals holding a state license, such as real estate brokers, who owe child-support payments.

¶ 41 After Fischer conducts a vendor hearing, he drafts a recommended decision. With regard to drafting that decision, Fischer testified as follows:

> "[E]ven though you are intended to be an impartial judge, the department also has kind of an interest in winning the case, so to speak, well, certainly winning the case on administrative review. So they don't want anything to go up that most people would look at and say this is a loser.
>
> So you have to—they have a requirement where the recommended decision is somewhat of a comprehensive document where it identifies almost everything that was of any materiality—or any potential materiality that occurred within the hearing and kind of addresses those things."

Fischer testified he has a fixed amount of days to finish a draft. After finishing the draft, he sends it to Kurylak and waits for his opinion. Fischer testified he has to be careful to make sure the draft is in good shape before you "hand it in" because "if it is in bad shape, you are in trouble"

and "asked to rewrite it." Fischer testified Kurylak will usually have a comment or question, which they will discuss and resolve.

¶ 42 However, Fischer testified he and Kurylak have had significant disagreements in the past. Fischer testified about an instance where "they didn't like my decision at all." Early in Lee's tenure, Fischer recommended suspending a physician rather than terminating him and "they thought the violations proved were significantly egregious to warrant termination." Fischer ended up getting written up on his performance evaluation "as rotten or poor draftsmanship." According to Fischer, a disagreement is an area "you have to be careful about."

¶ 43 Fischer testified it is common to end up making changes or rewriting a recommended decision during the review process before it gets sent out. As a result, Fischer has "developed a certain preset style" in order to become "a little more successful." Even with his new style, Fischer testified he still has to make changes, albeit "very few." Fischer still has disagreements with Kurylak about how to handle certain matters. Such disagreements are submitted to Lipinski. In one instance, Lipinski asked Fischer to do additional research on potentially precedential cases. Fischer's recommended decision will not go on to the director until Lipinski says so. Fischer testified in one instance, the director's final administrative decision completely reversed Fischer's decision without issuing any additional findings.

¶ 44 Fischer testified he also works as a notice agent for recipients involving vendor bankruptcies. He receives the notice of bankruptcies and forwards them onto the general counsel's office. Fischer also testified he "can always be called on to do something else" due to his "job description." For example, Fischer testified "sometimes they have things like huge amounts of legislation or something and they want people to review those. If they don't have

enough people, they feel free to give some to me."

¶ 45 6. *Dora McNew-Clarke's Testimony*

¶ 46 McNew-Clarke testified she has been an ALJ for 15 years and has a current case load of between 46 or 47 cases. McNew-Clarke testified she works in the "vendor hearing section" and handles "vendor hearing cases, which are suspension cases, denial of application cases, termination for reasonable quality care, recruitment issues, termination based on recruitment issues, child-support cases, paternity cases, administrative paternity cases, and fair hearings cases." McNew-Clarke testified a majority of her cases end in default decisions.

¶ 47 The majority of McNew-Clarke's time is spent holding hearings and writing recommended decisions. After drafting a recommended decision, she gives it to Kurylak. McNew-Clarke testified "Mr. Kurylak reviews it and he indicates what changes he wants to be made, and when we have either come to an agreement on it or we have decided that we can't come to an agreement on it, then it goes to the Bureau Chief." The bureau chief then sits down with one or both of them to discuss what should be included in or excluded from the decision. Once an agreement is reached "it goes out." However, McNew-Clarke testified the "Bureau Chief has the final say about how it goes out though."

¶ 48 McNew-Clarke testified only one decision in the 15 years she has been working there has gone out without any changes made to it. The changes can range from punctuation to typos to rewriting entire sections of the decision. McNew-Clarke testified Kurylak has been the one who asked her to make changes. However, McNew-Clarke also testified regarding an occasion where one of her decisions was rejected by the director.

¶ 49 C. ALJ and Board Decisions

¶ 50 On January 23, 2012, the Board's ALJ issued his recommended decision and order, concluding the petitioned-for ALJs were public employees and thus eligible for inclusion in the collective-bargaining unit. Specifically, the Board's ALJ found Fischer, McNew-Clarke, and Kurylak are not managers and Kurylak is not a supervisor under the Act.

¶ 51 With regard to the three ALJs' managerial status, the Board's ALJ specifically found they do not exercise independent authority in drafting the recommended decisions. Instead, they work "entirely within a fairly rigid system of rules, statutes, and 'checks and balances' " and thus do not formulate policies or rules. The Board's ALJ stated the petitioned-for employees' drafts do not broadly affect DHFS goals. Instead, their decisions, which lack precedential value, affect just the respondent in a specific case. The Board's ALJ also found that, given the large size of DHFS, the three petitioned-for employees cannot be fairly described as "the whole game," *i.e.*, the record does not clearly indicate their hearings and draft recommended decisions are the "primary means by which [DHFS] fulfills its various statutory mandates." The Board's ALJ concluded Fischer, McNew-Clarke, and Kurylak are not managers under the Act.

¶ 52 With regard to Kurylak's supervisory status, the Board's ALJ found although his principal work differs from that of the other two ALJs, the record does not show he has the authority to direct or discipline them or approve leave requests. The Board's ALJ characterized Kurylak's role in recommending changes to the other ALJs' drafts as more of a "lead worker" with superior skills, rather than a supervisor within the meaning of the Act. Further, the Board's ALJ found Kurylak does not spend a preponderance of his time on supervisory tasks. The Board's ALJ concluded Kurylak is not a supervisor under the Act.

¶ 53 On February 9, 2012, CMS filed its exceptions to the recommended decision. On

February 15, 2012, Council 31 filed its response to CMS's exceptions.

¶ 54 On May 1, 2012, the Board issued its final decision and order, which agreed with the ALJ's recommended decision. With regard to Kurylak as a supervisor, the Board specifically found the following:

> "[W]e agree that William Kurylak, a supervising [ALJ], is not a supervisor within the meaning of Section 3(r) of the Act. This is true not only for the reasons stated by the ALJ, but also because the undisputed record testimony reveals that Kurylak's supervisors have told him he can no longer issue discipline or approve requests for leave for either of his subordinate [ALJs] and have also limited his responsibility to review work of one of those subordinates. The record fails to establish that Kurylak exercises independent judgment in performing supervisory duties, and he certainly does not spend a preponderance of his employment time supervising his two subordinates."

The Board then directed the issuance of a certification adding the ALJs to the RC-10 collective-bargaining unit.

¶ 55 This direct appeal followed.

¶ 56 II. ANALYSIS

¶ 57 On appeal, CMS argues the Board erred in determining Fischer, McNew-Clarke, and Kurylak were public employees within the meaning of the Act where the evidence showed (1) all three ALJs are managerial employees and (2) Kurylak is also a supervisor. We disagree

with CMS's first argument but agree Kurylak is a supervisor.

¶ 58 A. Standard of Review

¶ 59 The Administrative Review Law (735 ILCS 5/3-101 to 3-113 (West 2008)) governs the judicial review of a decision by the Board certifying a labor organization as the exclusive bargaining representative of a group of employees. 5 ILCS 315/9(i) (West 2008); *County of Cook v. Illinois Labor Relations Board-Local Panel*, 351 Ill. App. 3d 379, 385, 814 N.E.2d 1107, 1113 (2004). According to section 3-110 of the Administrative Review Law, our "hearing and determination shall extend to all questions of law and fact presented by the entire record." 735 ILCS 5/3-110 (West 2008).

¶ 60 This court may apply three standards of review when reviewing the Board's decision, depending on the nature of the question we are considering. If the question is one purely of fact, we deem the Board's findings and conclusions to be "*prima facie* true and correct" (735 ILCS 5/3-110 (West 2008)), and we will overturn such findings only if they are against the manifest weight of the evidence. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210, 886 N.E.2d 1011, 1018 (2008). A factual determination is against the manifest weight of the evidence if the opposite conclusion is clearly evident or if the finding is unreasonable, arbitrary, or not based on evidence. *Cinkus*, 228 Ill. 2d at 210, 886 N.E.2d at 1018.

¶ 61 If, however, the question is one purely of law, we give the Board no deference unless it resolved a genuine ambiguity in a statute or regulation it was charged with administering. See *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 362 Ill. App. 3d 652, 656, 840 N.E.2d 704, 708 (2005). We decide legal questions *de novo*. *City of St. Charles v.*

Illinois Labor Relations Board, 395 Ill. App. 3d 507, 509, 916 N.E.2d 881, 883 (2009).

¶ 62 We review mixed questions of fact and law by asking whether the agency's decision is clearly erroneous. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 392, 763 N.E.2d 272, 280 (2001). Under the clearly erroneous standard of review, we give some deference to the Board's decision, but not as much deference as if the question were one purely of fact. *AFM*, 198 Ill. 2d at 392, 763 N.E.2d at 280. A finding is clearly erroneous if, despite the existence of some evidence to support the finding, the evidence in its entirety leaves the reviewing court with the definite and firm conviction that the finding is a mistake. *AFM*, 198 Ill. 2d at 393, 763 N.E.2d at 280-81.

¶ 63 In this case, CMS does not challenge the ALJ's or the Board's findings of facts or the applicable statutory law. Instead, CMS contends the ALJ and the Board erred in their application of the law to the facts. Thus, CMS's argument raises mixed questions of fact and law, to which we apply a clearly erroneous standard of review.

¶ 64 B. Employees Excluded From Right To Bargain Collectively

¶ 65 Employees of the State of Illinois "have, and are protected in the exercise of, the right of self-organization, and may form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment." 5 ILCS 315/6(a) (West 2008). For purposes of the Act, "employee[s]" are "individual[s] employed by a public employer ***[,] excluding *** managerial employees *** and supervisors[.]" 5 ILCS 315/3(n) (West 2008). Thus, under the Act employees who qualify as managers or supervisors are excluded from the statutory right to bargain collectively.

¶ 66 C. ALJs as Managerial Employees

¶ 67 CMS argues Fischer, McNew-Clarke, and Kurylak, all ALJs, are managers under the Act and, thus, should not be included in the petitioned-for bargaining unit as managers have no right to organize and bargain collectively. See 5 ILCS 315/3(n), 6(a) (West 2008).

¶ 68 Both the Board and the appellate court have applied two tests to determine whether an employee is a managerial employee: (1) the traditional test, which considers whether the employee is a managerial employee as a matter of fact and (2) the alternative test, which considers whether the employee is a managerial employee as a matter of law. *Department of Central Management Services/Department of Healthcare and Family Services v. Illinois Labor Relations Board, State Panel*, 388 Ill. App. 3d 319, 330, 902 N.E.2d 1122, 1130 (2009) (hereinafter *Department of Healthcare and Family Services*). CMS argues the traditional test shows Fischer, McNew-Clarke, and Kurylak are managerial employees as a matter of fact. We note CMS in its brief on appeal specifically states, it "makes no argument that McNew-Clarke, Fischer[,] and Kurylak are 'managerial employees' as a matter of law." Accordingly, we will not address the alternative test and whether the ALJs in question are managerial employees as a matter of law.

¶ 69 The traditional test considers, factually, whether an employee conforms to the definition of a "managerial employee" in section 3(j) of the Act. The statute defines "[m]anagerial employee" as "an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices." 5 ILCS 315/3(j) (West 2008).

"Although the Act does not define 'executive and

management functions,' we have noted that 'these functions amount to running an agency or department, such as by establishing policies and procedures, preparing the budget, or otherwise assuring that the agency or department operates effectively.' *Department of Central Management Services*[*/Illinois Commerce Comm'n v. Illinois Labor Relations Board, State Panel*], 406 Ill. App. 3d [766,] 774, 943 N.E.2d [1136,] 1143 [(2010) (hereinafter *Illinois Commerce Comm'n*)]. In other words, executives and managers run the agency or department by, for example, formulating policies and procedures and preparing the budget. [*Illinois Commerce Comm'n,*] 406 Ill. App. 3d at 774, 943 N.E.2d at 1144.

The second part of the statutory definition of managerial employee relates to how the agency or department is run. 'A managerial employee not only has the authority to make policy but also bears the responsibility of making that policy happen.' [*Illinois Commerce Comm'n*,] 406 Ill. App. 3d at 774-75, 943 N.E.2d at 1144. That is, managerial employees do not merely recommend policies or give advice to those higher up the employment chain, 'they actually direct the governmental enterprise in a hands-on way.' [*Illinois Commerce Comm'n,*] 406 Ill. App. 3d at 775, 943 N.E.2d at 1144. The touchstone of such

> status is the independent authority to establish and effectuate policy. [*Illinois Commerce Comm'n,*] 406 Ill. App. 3d at 775, 943 N.E.2d at 1144. However, managerial status can also include those who make 'effective recommendations'—that is, those employees who make recommendations that are almost always implemented. [*Illinois Commerce Comm'n,*] 406 Ill. App. 3d at 775, 943 N.E.2d at 1144-45." *Department of Central Management Services v. Illinois Labor Relations Board*, *State Panel*, 2011 IL App (4th) 090966, ¶¶ 134-35, 959 N.E.2d 114.

¶ 70 "If the employee's role is advisory and subordinate, the employee is not a managerial employee because it is the final responsibility and independent authority to establish and effectuate policy that determines management status." *Department of Central Management Services v. Illinois State Labor Relations Board*, 278 Ill. App. 3d 79, 87, 662 N.E.2d 131, 136-37 (1996) (hereinafter *Department of Corrections*). However, an advisory employee who makes "effective recommendation[s]" can be managerial. *Chief Judge of the Sixteenth Judicial Circuit v. Illinois State Labor Relations Board*, 178 Ill. 2d 333, 340, 687 N.E.2d 795, 798 (1997) (hereinafter *Chief Judge*) (citing *National Labor Relations Board v. Yeshiva University*, 444 U.S. 672, 683 n.17 (1980)).

¶ 71 In *Yeshiva*, the faculty members of a university not only controlled the academic policy of the university, but the central administration followed their advice on personnel matters almost all the time. *Yeshiva*, 444 U.S. at 677. The Supreme Court noted "the fact that the administration holds a rarely exercised veto power does not diminish the faculty's effective

power in policymaking and implementation." *Yeshiva*, 444 U.S. at 683 n.17. Therefore, the recommendations of the faculty members "effectively control[led] or implement[ed] employer policy" and they were managerial employees. *Yeshiva*, 444 U.S. at 683.

¶ 72 According to our supreme court, the definition of a "managerial employee" in section 3(j) of the Act is "very similar" to the definition of a "managerial employee" in *Yeshiva*. *Chief Judge*, 178 Ill. 2d at 339, 697 N.E.2d at 797. In addition, our supreme court has made it clear the concept of "effective recommendation[s]" applies to the managerial exclusion under the Illinois statute. *Chief Judge*, 178 Ill. 2d at 339-40, 687 N.E.2d at 798.

¶ 73 Thus, an ALJ is arguably a managerial employee if he is the "whole game" with regard to the agency's mission. *Illinois Commerce Comm'n*, 406 Ill. App. 3d at 778, 943 N.E.2d at 1146. If the agency makes and implements its policy through the issuance of orders which are recommended by the ALJ and almost always accepted by his superiors, the ALJ is exercising managerial authority through the issuance of his orders. *Illinois Commerce Comm'n*, 406 Ill. App. 3d at 780, 943 N.E.2d at 1148.

¶ 74 In this case, the evidence presented failed to demonstrate the petitioned-for ALJs were predominantly engaged in executive and management functions. Clearly, the ALJs do not run DHFS or the administrative hearings bureau within DHFS. The evidence presented shows the ALJs neither formulate agency policies, nor possess the independent discretion to make policy decisions. While "it is not absolutely essential that a managerial employee formulate policy," it is essential they direct the effectuation of existing policies. *Illinois Commerce Comm'n,* 406 Ill. App. 3d at 780, 943 N.E.2d at 1148 (quoting 5 ILCS 315/3(j) (2008)) (noting the ALJs appear to direct the effectuation of policy because their recommended orders were

"almost always accept[ed]" by the Commission "without modification").

¶ 75 Here, none of the petitioned-for ALJs oversee or coordinate policy implementation. While the ALJs' orders are frequently accepted by the Board, they do not go directly from the ALJs' desk to the Board. Instead, they are also almost always modified during the review process. According to the evidence presented, the ALJs' recommended decisions are subject to review, change, and outright reversal. For example, McNew-Clarke testified in 15 years only one of her recommended decisions had gone out without any changes made. Likewise, Fischer testified it is common to make changes or even rewrite a recommended decision during the review process prior to sending it out.

¶ 76 Moreover, the ALJs' recommended decisions relate to one area within DHFS, involve a single respondent, and are nonprecedential. As such, their decisions impact a limited area when compared to the agency's overall scope. Thus, although professional judgment and technical expertise is required of the ALJs, they do not have the ability to determine the extent to which agency objectives are achieved, *i.e.*, they do not effectuate existing policies. Instead, the ALJs are involved only in carrying out agency policy. As a result, we cannot reasonably say these ALJs are "the whole game" with regard to DHFS policy.

¶ 77 While an argument could be made that simply coming to work and doing their jobs ensures the agency or hearings bureau operates effectively, the same could be broadly said of any employee acting in their employer's best interest. To show the petitioned-for ALJs were managers, however, CMS needed to provide evidence they did more than merely perform "duties essential to the employer's ability to accomplish its mission." (Internal quotation marks omitted.) See *Department of Healthcare and Family Services*, 388 Ill. App. 3d at 331, 902 N.E.2d at 1131.

¶ 78 With regard to Kurylak's duties as an ALJ, CMS presented little evidence to show any difference between the way he and the other ALJs hear cases and draft recommended decisions. Absent evidence to the contrary, we will assume Kurylak's duties in that regard parallel those of the other two ALJs. Although his work lacks review from a supervising ALJ, Kurylak's work is equally subject to Lipinski's review and the director's approval. In this regard, the above recited analysis and conclusion is as applicable to Kurylak as it was to Fischer and McNew-Clarke.

¶ 79 Further, Kurylak's additional secondary duties also do not demonstrate managerial status under the Act. While Kurylak reviews the ALJs' work, it appears the ALJs can disagree with Kurylak's recommended changes. Such disagreements are settled by Lipinski. In addition, Kurylak reviews their work on a case-by-case basis. As stated, the cases individually have no precedential value. Moreover, Kurylak's review of their work is subject to Lipinski's approval. As a result, Kurylak's review of the ALJs' work does not directly effect agency policies or serve to directly carry out the agency's mission.

¶ 80 Kurylak also testified, unlike Fischer and McNew-Clarke, he prepares a "first draft" of the administrative maintenance budget as part of his duties. However, Kurylak described the process as largely mechanical whereby he "simply go[es] through it spreadsheet by spreadsheet, tab by tab" and "just pump[s] in the numbers." Moreover, Kurylak's draft is subject to Lee's approval as well as potential modification from the department. While preparing the budget is the type of thing one could reasonably expect to be included in a manager's responsibilities, we cannot say Kurylak's drafting of a preliminary budget, by itself, amounts to managerial authority. See *Illinois Commerce Comm'n,* 406 Ill. App. 3d at 774, 943 N.E.2d at

1144 ("Formulating policies and procedures and preparing the budget are among the types of things that executives or managers typically would have the authority to do.").

¶ 81 In sum, CMS failed to present sufficient evidence to show, under the traditional test, the petitioned-for ALJs are managerial employees as a matter of fact. Accordingly, the Board's finding the petitioned-for employees are not managers under the Act is not against the manifest weight of the evidence.

¶ 82 D. Kurylak as a Supervisor

¶ 83 Section 6 of the Act provides "[e]mployees of the State *** have, and are protected in the exercise of, the right to self-organization, and may form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment." 5 ILCS 315/6(a) (West 2008). The Act defines "employees" as "individual[s] employed by a public employer, *** excluding *** supervisors." 5 ILCS 315/3(n) (West 2008). CMS argues ALJ Kurylak meets the statutory definition of a supervisor. Specifically, CMS contends Kurylak engages in at least two supervisory functions enumerated in the Act: he directs the other ALJs and he issues discipline. As such, CMS maintains Kurylak should be excluded from participating in collective bargaining.

¶ 84 1. *Supervisory Status*

¶ 85 "In order to ensure that a pro-union bias will not impair a supervisor's ability to apply the employer's policies to subordinates in accordance with the employer's best interests, the Act provides that a bargaining unit may not contain both supervisors and nonsupervisors." *Department of Corrections*, 278 Ill. App. 3d at 83, 662 N.E.2d at 134. The Act excludes supervisors from bargaining units that contain their subordinates, in order to avoid the conflict of

interest that arises when supervisors, who must apply the employer's policies to the subordinates, are subject to control by the same union representing the subordinates. *City of Freeport v. Illinois State Labor Relations Board*, 135 Ill. 2d 499, 517, 554 N.E.2d 155, 164 (1990).

¶ 86 Section 3(r) of the Act defines a "supervisor" as follows:

> " 'Supervisor' is an employee whose principal work is substantially different from that of his or her subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend any of those actions, if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment. Except with respect to police employment, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising that authority, State supervisors notwithstanding." 5 ILCS 315/3(r) (West 2010).

We note this court has previously found the "State supervisors notwithstanding" language of section 3(r) "does not exempt State supervisors from the 'preponderance' requirement." *Department of Central Management Services (Department of Children and Family Services) v. Illinois State Labor Relations Board*, 249 Ill. App. 3d 740, 745, 619 N.E.2d 239, 243 (1993).

¶ 87 Our supreme court has set forth the following four-part test to determine whether an employee meets section 3(r)'s definition of "supervisor":

> "The test requires that (1) the supervisory employee must perform principal work substantially different from that of her subordinates; (2) the supervisory employee must have authority to perform some or all of the 11 functions enumerated in section 3(r); (3) the supervisory employee must consistently use independent judgment in the performance of these 11 enumerated functions; and (4) generally, the supervisory employee must devote a preponderance of her time to exercising the authority to handle these 11 functions." *Chief Judge of the Circuit Court of Cook County v. American Federation of State, County & Municipal Employees, Council 31, AFL-CIO*, 153 Ill. 2d 508, 515, 607 N.E.2d 182, 186 (1992) (hereinafter *AFSCME*).

¶ 88 In this case, the parties agree Kurylak's principal work is different from that of the other two ALJs' work. Indeed, unlike the other ALJs, he spends only a few days per month running hearings and spends a substantial amount of time dealing with bankruptcy and procurement matters at certain times of the year. As a result, only the second, third, and fourth elements of supervisory status are at issue in this appeal.

¶ 89 2. *Indicia of Supervisory Authority and Independent Judgment*

¶ 90 We note CMS, as the party seeking to exclude Kurylak from the union, has the burden of proving, by a preponderance of the evidence, he is a "supervisor" within the meaning of the Act. *Department of Central Management Services (State Police) v. Illinois Labor*

Relations Board, State Panel, 382 Ill. App. 3d 208, 220-21, 888 N.E.2d 562, 575 (2008) (hereinafter *State Police*). To meet that burden, CMS had to prove Kurylak had the authority to perform 1 or more of the 11 supervisory functions listed in section 3(r), while exercising independent judgment in doing so. " 'Independent judgment' has been defined generally by the Board to mean that 'the alleged supervisor must make choices between two or more significant courses of action without substantial review by superiors.' " *AFSCME*, 153 Ill. 2d at 516, 607 N.E.2d at 186 (quoting *St. Clair Housing Authority*, 5 Pub. Employee Rep. (Ill.) par. 2017, at 156, No. S-RC-88-108 (ISLRB March 30, 1989)).

¶ 91 However, independent judgment is not implicated where an alleged supervisor's direction is derived from superior skill, experience, and technical expertise. See *City of Freeport*, 135 Ill. 2d at 532, 554 N.E.2d at 171. Further, the exercise of supervisory authority must not be routine and clerical in nature, but must involve the consistent use of independent judgment. *City of Freeport*, 135 Ill. 2d at 520, 554 N.E.2d at 166. An employee uses independent judgment whenever he or she must choose between two or more significant courses of action. *City of Freeport*, 135 Ill. 2d at 521, 554 N.E.2d at 166. Here, CMS argues Kurylak exercises independent judgment in directing and disciplining employees.

¶ 92 a. Supervisory Authority and Independent Judgment To Direct Subordinates

¶ 93 The term "direct" encompasses a number of distinct, yet related, functions when reviewing and monitoring work activities, scheduling work hours, approving time off and overtime, assigning duties, and formally evaluating job performances when the evaluation is used to affect employees' pay and employment status. See *State Police*, 382 Ill. App. 3d at 224, 888

N.E.2d at 578. To "direct" employees within the meaning of the Act, supervisors must have the authority to affect the employees' terms and conditions of employment. *State Police*, 382 Ill. App. 3d at 225, 888 N.E.2d at 579. This court has found the "authority to independently *assign and monitor work*, evaluate employees, and approve time off for *** subordinates *** clearly satisfies the requirement under the Act that a supervisor 'direct' his subordinates with independent judgment." (Emphasis in original.) *Department of Central Management Services*, 2011 IL App (4th) 090966, ¶201, 959 N.E.2d 114. We have also found exercising independent judgment in training subordinates as well as reviewing their work product shows supervisory authority. See *Department of Central Management Services/The Department of Public Health v. Illinois Labor Relations Board, State Panel*, 2012 IL App (4th) 110013, ¶¶ 61, 66, 71, 979 N.E.2d 603 (hereinafter *Public Health*).

¶ 94 CMS argues Kurylak has the authority to direct the other ALJs by assigning hearings, training new ALJs, approving vacation and sick time requests, and completing annual performance evaluations.

¶ 95 i. *Assigning Hearings*

¶ 96 Lipinski, the current chief ALJ, testified Kurylak assigns cases as part of his role as supervising ALJ. Kurylak also keeps a spreadsheet about who received the last case. While Lipinski testified the assignment of cases is "sort of automatic" she also testified Kurylak "will monitor the rotation of the type of cases to [the other two ALJs] to try to make it as fair as possible." Lipinski testified quality-of-care cases "are much more comprehensive, so you don't want to give an ALJ five in a row." Lipinski testified Kurylak monitors the assignments so as not to overwork the other two ALJs. Thus, Kurylak exercises independent judgement in assigning

the cases, *i.e.*, he makes choices regarding whether to assign a certain case to a certain ALJ without having to obtain further approval in doing so.

¶ 97 ii. *Training ALJs*

¶ 98 Lipinski testified Kurylak is responsible for training the ALJs. However, because no new ALJs have started work since Lipinski has been at DHFS, she did not know what that training would entail. Lipinski imagined Kurylak "would put together a training program including the new statutes that are involved in these cases, shadowing, providing them with their objectives, and developing *** courses for a new ALJ once they begin." This court has found inherent authority, whether exercised or not, demonstrates supervisory authority. See *Public Health,* 2012 IL App (4th) 110013, ¶73, 979 N.E.2d 603 ("Whether exercised or not, the inherent authority to choose whether to grant or deny overtime requests without having to obtain further approval demonstrates independent judgment on the part of option 8Es."). The testimony presented shows Kurylak possesses independent authority to train ALJs in a manner he designs and implements.

¶ 99 iii. *Approving Time Off*

¶ 100 Lee testified when he was chief ALJ, Kurylak would sign off on employee sick or vacation time-off requests. According to Lee, Kurylak would determine time-off requests based on workload and whether the ALJs had available time off. Lee thought Kurylak had, in the past, denied time-off requests but could not recall how many times that had happened. As stated, however, Lee's testimony pertains to when Lee was the chief ALJ. Kurylak testified he currently has no responsibility for approving sick or vacation time-off requests. Kurylak was specifically told not to approve such requests. When someone wants to take vacation time or a sick day, the

procedure is to call Lipinski. If Lipinski is not available, Kurylak testified he would refer the employee to Lee. Thus, CMS failed to present evidence to demonstrate Kurylak was responsible for approving employee sick and vacation time-off requests. We note, however, its appears Kurylak was told to stop approving such requests as a result of his entering, with the ALJs, into the same bargaining unit. When the group was decertified following our initial decision in this case, it appears Kurylak's full authorities have not been restored during the pendency of this case. We further note the fact these responsibilities were taken away from Kurylak once he entered the bargaining unit serves to show he indeed supervises the other ALJs.

¶ 101 iv. *Evaluating Job Performance*

¶ 102 Kurylak testified he prepares annual performance evaluations for both ALJs. The evaluations, contained in the record on appeal, show Kurylak makes salary increase recommendations as part of his evaluation of the ALJs' performance. An "acceptable," "accomplished," or "exceptional" rating can result in a $100, $150, or $200 per-month bonus respectively for the subordinate. The ability to affect pay raises through employee evaluations demonstrates supervisory authority. *Public Health*, 2012 IL App (4th) 110013, ¶77, 979 N.E.2d 603. After Kurylak completes the evaluations he gives them to Lipinski, who approves the evaluations before they are given to the ALJs.

¶ 103 The fact Kurylak's supervisor has to approve the recommendation "does not diminish the fact [his] initial determination is an exercise in judgment between the various ratings choices." See *Public Health,* 2012 IL App (4th) 110013, ¶77, 979 N.E.2d 603 (while an "exceptional" recommendation requires approval, the supervisor still exercises judgment independent from any of his supervisor's input in determining to recommend that rating instead

of an "acceptable" or "accomplished" rating). Kurylak could not recall if Lipinski ever instructed him to change an ALJ's rating on an evaluation. We agree with CMS Kurylak's evaluation of the ALJs amounts to a supervisory function.

¶ 104 v. *Reviewing Subordinates' Work*

¶ 105 While not specifically argued on appeal by CMS to show supervisory authority, Kurylak also reviews the other ALJs' recommended decisions.

¶ 106 In reviewing the ALJs' decisions, Kurylak testified he wants to make sure they will be upheld if appealed. He makes grammatical changes and corrects punctuation. He testified he looks at the decision's organization to make sure it "flows properly." He also reads the findings of fact, which he does not change. However, he does question them. When he does, he puts a question mark next to it and makes comments like "where does this come from" or "why do you find this?" Kurylak testified he also makes sure "the conclusions, when applied to the law and the facts, make sense." If the conclusion does not make sense, he will discuss it with the ALJ. Sometimes the conclusion just needs more support, which Kurylak may not realize until he has discussed the decision with the ALJ. In such instances, he and the ALJ will then come to an agreement to add more support, which Kurylak characterized as "a relatively minor thing." Sometimes an ALJ convinces Kurylak he is wrong and no change is made. Kurylak testified he cannot recall ever telling an ALJ to change a conclusion. In situations where no compromise can be reached and the ALJ completely disagrees with Kurylak, Lipinski gets involved and makes the decision regarding which way to proceed. While Kurylak testified he currently discusses the decisions with Fischer and not McNew-Clarke, Kurylak still reviews McNew-Clarke's work before sending the marked-up decision to Lipinski. Kurylak employs

independent judgment in reviewing the ALJs' work product. Kurylak's review of the ALJs' recommended decisions shows supervisory authority.

¶ 107 b. Supervisory Authority and Independent Judgment To Discipline Subordinates

¶ 108 CMS also argues Kurylak has the authority to discipline employees by issuing oral and written reprimands. Kurylak testified he does have the authority to hear grievances and to discipline subordinates. He testified, as noted above, when he was in the union he did not have authority to discipline or hear grievances. While Kurylak testified he has not issued any discipline since Lipinski became chief ALJ, he initiates the discipline process by bringing the issues to Lipinski. Kurylak testified since Lipinski has been his supervisor, she decides whether discipline is warranted. However, " 'it is the existence of the supervisory authority *** that is essential, not the amount of time such authority is exercised.' " *Public Health,* 2012 IL App (4th) 110013, ¶84, 979 N.E.2d 603 (quoting *City of Peru v. Illinois State Labor Relations Board*, 167 Ill. App. 3d 284, 292, 521 N.E.2d 108, 114 (1988)). Once our decision in this case issues, Kurylak may very well undertake the actual issuance of discipline once again. The existence of Kurylak's inherent authority to discipline subordinates demonstrates his supervisory authority.

¶ 109 3. *Preponderance of Time Element*

¶ 110 Finally, the supervisory definition specifies the employee must also devote the preponderance of his employment time to exercising supervisory authority to qualify as a supervisor. *AFSCME*, 153 Ill. 2d at 515, 607 N.E.2d at 186. In *City of Freeport*, the supreme court considered the "preponderance" test and accepted the Board's interpretation, stating, "The Board has interpreted the term 'preponderance' to mean that the most significant allotment of the

employee's time must be spent exercising supervisory functions. [Citation.] In other words, the employee must spend more time on supervisory functions than on any one nonsupervisory function." *City of Freeport*, 135 Ill. 2d at 532, 554 N.E.2d at 171.

¶ 111 "Our court has rejected the use of a strictly mathematical approach to determine whether the 'preponderance of time' component is met." *Secretary of State v. Labor Relations Board*, 2012 IL App (4th) 111075, ¶110, 988 N.E.2d 109 (citing *Department of Corrections*, 278 Ill. App. 3d at 86, 662 N.E.2d at 136). Whether a person is a supervisor should instead " 'be defined by the significance of what that person does for the employer, regardless of the time spent on particular types of functions.' " *County of Vermilion v. Illinois Labor Relations Board*, 344 Ill. App. 3d 1126, 1136, 800 N.E.2d 875, 882 (2003) (quoting *Department of Corrections*, 278 Ill. App. 3d at 86, 662 N.E.2d at 136).

¶ 112 In this case, Kurylak testified the main function of his job is to supervise the ALJs. According to Kurylak, supervising the other two ALJs is "a major portion of his job." While the evaluations may be annual, "the number of times a supervisor exercises his authority is not dispositive." *Public Health,* 2012 IL App (4th) 110013, ¶84, 979 N.E.2d 603 (citing *Village of Maryville v. Illinois Labor Relations Board, State Panel*, 402 Ill. App. 3d 369, 374-75, 932 N.E.2d 558, 563-64 (2010); *City of Freeport*, 135 Ill. 2d at 518, 554 N.E.2d at 164 (potential for a conflict lies in the supervisor's authority). Instead, " 'it is the existence of the supervisory authority *** that is essential, not the amount of time such authority is exercised.' " *Public Health,* 2012 IL App (4th) 110013, ¶84 (quoting *City of Peru*, 167 Ill. App. 3d at 292, 521 N.E.2d at 114; *City of Freeport*, 135 Ill. 2d at 518, 554 N.E.2d at 164-65 (finding improper the Board's reliance on number of times supervisory authority was exercised)).

¶ 113 In addition, Lipinski testified each ALJ has a caseload of approximately 40 cases. Kurylak testified it takes him "anywhere from three to five days, maybe four days" to review a 150- to 200-page decision. "[A] short one of only 20 pages" takes "half to three-quarters of a day." Kurylak routinely assigns the ALJs work and tracks their cases on a monthly basis. In addition, Kurylak spends time each year evaluating the ALJs, and his review of their work is a primary component of their evaluations. By comparison, little evidence was presented regarding how much time Kurylak devotes to his other nonsupervisory duties, *i.e.*, hearing his own cases, dealing with procurement cases, and preparing the budget. The evidence presented demonstrates Kurylak spends the preponderance of his employment time exercising supervisory authority. Accordingly, the Board's finding Kurylak is not a supervisor under the Act is against the manifest weight of the evidence.

¶ 114 III. CONCLUSION

¶ 115 For the foregoing reasons, we affirm the Board's decision Kurylak, Fischer, and McNew-Clarke are not managerial employees under the Act. However, we reverse the Board's decision Kurylak is not a supervisor under the Act.

¶ 116 Affirmed in part and reversed in part.