ILLINOIS LABOR RELATIONS BOARD
SELECTED CASE SUMMARIES

I. Jurisdiction

The six-month limitations period

The Board reiterated in Urszula T. Panikowski/PACE Northwest Division, 25 PERI 188 (IL LRB-SP 2009) (Case No. S-CA-05-217), 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 (Act), 5 ILCS 315 (2009), 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).

II. Representation issues

A. Showing of interest

In County of DuPage v. Ill. Labor Relations Bd., 231 Ill. 2d 593, 900 N.E.2d 1095, 24 PERI ¶124, 2008 WL 5246054, 185 LRRM 2728 (2008) (County of DuPage), the Illinois Supreme Court concluded that the Act does not require both dues deduction authorization cards and some other form of evidence in support of majority interest petitions. Instead, the court found sufficient the Board's rules requiring "authorization cards, petitions, *or* any other evidence" demonstrating a majority interest. Additionally, the court upheld the Board's finding that whether a union enjoys majority support may not be litigated and further, upheld its determination that the employer is not entitled to review a union's evidence of majority support.

Relying on County of DuPage, the Board upheld the administrative law judge's refusal to allow the employer to review the union's evidence of majority support in International Union of Operating Engineers, Local No. 150/City of Peru, 25 PERI ¶7 (IL LRB-SP 2009) (Case No. S-RC-08-091). Citing Section 1210.80(e) (1) of the Board's Rules and Regulations (Rules), 80 Ill. Admin. Code §§1200-1240, the Board determined that the employer is not permitted to review the showing of interest: "[t]he Board shall maintain the confidentiality of the showing of interest. The evidence submitted in support of the showing of interest shall not be furnished to any of the parties." In addition, the Board concluded that pursuant to the decision in County of DuPage, and Section 1210.80(e) (3) of the Rules, the employer may not "confirm" that the ALJ "correctly tabulated" the showing of interest: "[t]he adequacy of the showing of interest shall be determined administratively by the Board or its agent."

B. Contract bar

In Illinois Fraternal Order of Police Labor Council/County of Pulaski/Sheriff of Pulaski County/Laborers International Union of North America, Local No. 773, 25 PERI ¶115 (IL LRB-SP 2009) (Case No. S-RC-09-104), Illinois Fraternal Order of Police Labor Council (FOP) sought a representation election and certification to represent a bargaining unit consisting of all persons jointly employed full- and part-time by the County of Pulaski (County) and the Sheriff of Pulaski County (Sheriff), in the rank or title of Deputy. At the time, the unit was represented for purposes of collective bargaining by the Incumbent, Laborers International Union of North America, Local No. 773 (Laborers). Laborers opposed the FOP's petition, contending it was barred pursuant to Section 9(h) of the Act—the "contract-bar" doctrine—which in pertinent part, reads as follows: "No election shall be directed by the Board in any bargaining unit where there is in force a valid collective bargaining agreement." The Incumbent argued that it entered into a valid collective bargaining agreement with the County and Sheriff on January 22, 2009, the same day, but prior to the time the FOP filed its petition. The FOP disagreed, arguing that it filed its petition prior to the collective bargaining agreement being fully executed. The administrative law judge (ALJ) recommended an election on the petition, finding the collective bargaining agreement was never fully executed so as to constitute a bar to the FOP's petition. Citing its decision in City of Calumet City, 21 PERI ¶98 (IL LRB-SP 2005), the Board upheld the ALJ, concluding that as the Sheriff, a necessary party to the collective bargaining agreement, failed to sign it, the agreement was never fully executed and cannot bar the FOP's petition.

C. Unit determination/appropriateness

International Brotherhood of Electrical Workers, Local 51 (Local 51), sought a representation election and certification as the exclusive representative of a bargaining unit consisting of approximately 12 persons employed full-time by the City of Peru (Employer) in its Electric Department. International Brotherhood of Electrical Workers, Local 51/City of Peru, 25 PERI ¶6 (IL LRB-SP 2009) (Case No. S-RC-08-081). Approximately a month and one-half after Local 51 filed its petition, the International Union of Operating Engineers, Local 150 (Local 150), filed a petition in Case No. S-CA-08-091, pursuant to a showing of majority interest, seeking certification as the exclusive representative of a bargaining unit consisting of approximately twenty-two persons employed by the City in its Department of Public Works. International Union of Operating Engineers, Local No. 150/City of Peru, 25 PERI ¶7 (IL LRB-SP 2009) (Case No. S-RC-08-091). The Employer opposed both petitions, asserting that the smallest appropriate unit would consist of all blue-collar personnel employed by the City, essentially a combination of the units sought by Local 51 and Local 150. Upholding the ALJs'

results, the Board reviewed each of the petitioned-for units in light of the considerations set forth in Section 9(b) of the Act, and determined that only the fragmentation concern favored dismissal and that, by itself, was insufficient to deny the petitions. The Board further noted that although the Employer established that a combined unit of the employees in Electric and Public Works, in all likelihood, would be appropriate, it proffered nothing to demonstrate that the petitioned-for units were inappropriate. Citing Rend Lake Conservancy District, 14 PERI ¶2051 (IL SLRB 1998), the Board noted that the proper inquiry is not whether the petitioned-for units or the combined unit urged by the Employer is more appropriate, but rather whether each of the petitioned-for units is *an* appropriate unit.

In Illinois Council of Police/City of Chicago, 25 PERI ¶77 (IL LRB-LP 2009) (Case No. L-RC-07-032, Member Anderson dissenting on the appropriate unit issue), Petitioner, Illinois Council of Police (ICOP) sought pursuant to a showing of majority interest, certification as the exclusive representative of a bargaining unit consisting of the approximately thirty persons employed by the City of Chicago (City or Employer) in its Department of Aviation, in the title or classification of "Aviation Security Sergeant." The petitioned-for employees were unrepresented for purposes of collective bargaining. The City argued that a stand-alone unit composed solely of its thirty petitioned-for security sergeants was inappropriate and that the only appropriate unit for their inclusion would be the existing Unit II, a pre-Act unit represented by a coalition of labor unions that does not include ICOP. Upholding the ALJ's decision, the Board found the petitioned-for unit appropriate, reviewing it in light of the factors set forth in Section 9(b).

Affirming the Board's decision, the court in Illinois Council of Police v. Ill. Labor Relations Bd., 387 Ill. App. 3d 641, 899 N.E.2d 1199, 24 PERI ¶125, 185 LRRM 3011 (1st Dist. 2008), noted that "to warrant severance from an existing bargaining unit, the petitioning group must not only establish that the proposed unit is appropriate, but also that the existing bargaining unit is not."

D. Section 3(c) confidential employees

In Southern Illinois Laborers' District Council/Union County State's Attorney, 25 PERI ¶1 (IL LRB-SP 2009) (Case Nos. S-CA-07-154, S-CA-07-204, and S-UC-08-002), the Board upheld the ALJ's dismissal of the Employer's unit clarification petition, finding that the three employees at issue did not qualify as “confidential” employees within the meaning of Section 3(c) of the Act, and thus, were not excluded from collective bargaining. In so doing, the Board noted the lack of any evidence whatsoever that the three employees acted in a confidential capacity to anyone regarding labor relations or collective bargaining matters, or that in the

regular course of their duties, had authorized access to information relating the effectuation or review of the Employer's collective bargaining policies.

The Board upheld the ALJ's decision in American Federation of State, County and Municipal Employees, Council 31/State of Illinois, Department of Central Management Services, 25 PERI ¶5 (IL LRB-SP 2009) (Case No. S-UC-08-062), finding no merit to the Employer's argument that six of the petitioned-for employees were confidential within the meaning of Section 3(c) of the Act, under either the labor nexus test or the authorized access test. With regard to two of the six employees, the ALJ found, and the Board agreed, that although they functioned as budget analysts and had access to confidential personnel and/or statistical information, this was insufficient to confer confidential status, relying on Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31, AFL-CIO, 153 Ill 2d 508, 607 N.E.2d 182, 9 PERI ¶4004 (1992) (mere access to personnel files, "confidential information" concerning the general workings of the department, or to personnel or statistical information upon which an employer's labor relations policy is based is insufficient to confer confidential status). As to the labor nexus test, the ALJ and the Board concluded that the disputed employees did not, in the regular course of their duties, act in a confidential capacity to a person who formulates, determines, and effectuates management policies with regard to labor relations. The Employer contended that four of the disputed employees served as equal opportunity investigators in the State's Department of Human Services, and thereby assist their Bureau Chief in effectuating the Department's equal employment opportunity policies. However, as the ALJ and the Board concluded, there was no evidence that the Bureau Chief formulated, determined, and effectuated management policies with regard to labor relations, that is, had primary responsibility for labor relations matters, made recommendations with respect to collective bargaining policy and strategy, drafted management proposals and counterproposals, evaluated union proposals, or participated in collective bargaining negotiations.

In, American Federation of State, County and Municipal Employees, Council 31/State of Illinois, Department of Central Management Services, 25 PERI ¶139 (IL LRB-SP 2009) (Case No. S-UC-08-210), the Employer opposed the inclusion of seven positions in the Human Resources Representative title to Petitioner's existing RC-62 bargaining unit of State personnel, arguing that the disputed positions were "confidential" within the meaning of Section 3(c) of the Act. Relying on the court's decision in Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31, AFL-CIO, 153 Ill 2d 508, 607 N.E.2d 182, 9 PERI ¶4004 (1992), the Board determined that the disputed

employees failed the labor nexus test, as none of them, in the regular course of their duties, acted in a confidential capacity to a person who formulated, determined, and effectuated management policies with regard to labor relations, finding no evidence that the person being assisted by the allegedly confidential employees had primary responsibility for labor relations matters, made recommendations with respect to collective bargaining policy and strategy, drafted management proposals and counterproposals, evaluated union proposals, or participated in collective bargaining negotiations. As to the authorized access test, although the disputed employees had access to some confidential personnel information, such as employee social security numbers, there was no evidence that in the regular course of their duties, that they had authorized access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations, and accordingly, the Board upheld the ALJ's determination.

E. Section 3(j) managerial employees

American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed two petitions, seeking to represent pursuant to a showing of majority interest, fifteen persons in the job title or classification of Recruiter I employed by the City of Chicago (Employer). American Federation of State, County and Municipal Employees, Council 31/City of Chicago, 25 PERI ¶2 (IL LRB-LP 2009) (Case Nos. L-RC-08-040 and L-RC-08-041). The Employer opposed the petitions, asserting that the employees sought were "managerial" within the meaning of Section 3(j) of the Act and therefore, must be excluded from bargaining. The ALJ granted the petitions, and the Board upheld her decision. In so doing, citing City of Evanston v. Illinois State Labor Relations Board, 227 Ill. App. 3d 955, 592 N.E.2d 415, 8 PERI ¶4013 (1st Dist. 1992) (to be deemed managerial, the disputed employees must satisfy a two part test: (1) be engaged predominately in executive and management functions; and (2) exercise responsibility for directing the effectuation of such management policies and functions), the Board determined that at most, the recruiters at issue exercised professional discretion and technical expertise. The Board found no evidence that these employees possessed final responsibility and independent authority to establish and effectuate policy for the Employer. Nor was there any indication, the Board found, that the petitioned-for employees had substantial discretion, or even a role, in developing the means and methods of reaching the agency's policy objectives or responsibility for determining the extent to which such objectives will be achieved. The Board concluded that the petitioned-for employees were not managerial within the meaning of Section 3(j) of the Act.

In American Federation of State, County and Municipal Employees, Council 31/State of Illinois, Department of Central Management Services, 25 PERI ¶68 (IL LRB-SP 2009) (Case No. S-RC-07-174), American Federation of State, County and Municipal Employees, Council 31, sought pursuant to a showing of majority interest, to represent in its existing RC-63 bargaining unit, approximately sixteen 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 (Employer) 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 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, 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.

F. Section 3(k) peace officer

In Illinois Council of Police/City of Chicago, 25 PERI ¶77 (IL LRB-LP 2009) (Case No. L-RC-07-032), 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.

In County of DuPage v. Ill. Labor Relations Bd., Docket No. 2-06-0380, 2009 WL 2992571 (2nd Dist. September 16, 2009), the court approved the Board's finding 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."

The court in Illinois Council of Police v. Ill. Labor Relations Bd., 387 Ill. App. 3d 641, 899 N.E.2d 1199, 24 PERI ¶125, 185 LRRM 3011 (1st Dist. 2008), concluded that Section 3(s)(1) of the Act "does not create a less stringent severance standard that applies specifically to the severance of peace officers from existing bargaining units."

G. Section 3(r) supervisory employees

Illinois Fraternal Order of Police Labor Council/Village of Maryville, 24 PERI ¶113 (IL LRB-SP 2008) (Case No. S-UC-06-064), arose out of an earlier majority interest petition, wherein the Union petitioned to represent all the Village's full-time sworn police officers in the rank of Sergeant and below. The Employer opposed the inclusion of the two sergeants. Pursuant to Section 1210.100(b) (7) (B) of the Board's Rules, the disputed title was excluded from the certification and became subject to the Board's unit clarification procedures. The ALJ found that the sergeants met the principal work requirement, but determined that they lacked the authority to perform any of the statutory indicia with the requisite independent judgment, concluding that the employees in the petitioned-for rank were public employees within the meaning of the Act. The Village disputed the ALJ's decision, contending the ALJ erred in concluding that the petitioned-for employees lack the authority to discipline and direct their subordinates, with the requisite independent judgment. The Board determined that although the record supported that the sergeants had held counseling sessions with employees in the subordinate rank, there was no evidence that such sessions had any effect on the terms and conditions of the subordinates' employment, noting that verbal reprimands may constitute disciplinary authority if 1) the individual has the discretion or judgment to decide whether to issue such a reprimand; 2) the reprimand is documented; and 3) the reprimand can serve as the basis for future disciplinary action, that is, it functions as part of a progressive disciplinary system, citing Illinois Fraternal Order of Police Labor Council/Village of Hinsdale, 22 PERI ¶176 (IL LRB-SP 2006). The Board observed that not only was there no indication that verbal warnings or reprimands "[served] as the basis for future disciplinary action," there was no evidence that the petitioned-for

employees ever issued verbal reprimands. Likewise, the Board further noted the Village provided no evidence that sergeants have ever issued written reprimands, relieved or suspended subordinates from duty, or had made recommendations for more serious discipline, concluding that the Village was unable to support its argument with specific examples of the sergeants' alleged disciplinary authority. The Village also asserted that the sergeants possessed supervisory authority to "direct" the employees in the subordinate ranks, in that they performed the following: determined what must be done on a shift; made assignments; assigned areas to patrol; assigned vehicles; assigned tasks; redirected calls from dispatch; reviewed subordinates' reports; and determined whether to hold over officers or call in additional officers. Concluding the sergeants did not direct within the meaning of the Act, the Board noted that although the record indicated, and the ALJ noted, the sergeants bear some responsibility for their subordinates' proper work performance, there was no record evidence that they possessed significant discretionary authority to affect their subordinates' terms and conditions of employment. The Board also found that the petitioned-for sergeants lacked authority to adjust grievances, or make effective recommendations with regard to the adjustment of grievances, as defined by the Act, and rejected as being without any basis in the Act, the Employer's contention that the petitioned-for employees should be excluded from collective bargaining due to "general supervisory authority" based on the fact that they are paid more than their subordinates, they have use of an office, and they have sergeant's stripes on their uniforms.

In Metropolitan Alliance of Police, Chapter No. 441/Town of Cicero, 24 PERI ¶111 (IL LRB-SP 2008) (Case No. S-RC-06-015), Metropolitan Alliance of Police sought pursuant to a showing of majority interest, certification as the exclusive representative of a bargaining unit consisting of all full-time sworn police officers in the rank of Lieutenant, employed by the Town of Cicero (Employer) in its police department. The Employer opposed the petition, asserting that the six employees sought therein were excluded from coverage under the exemption for statutory supervisors. At hearing, the parties stipulated that the lieutenants met the principal work requirement. The ALJ thereafter determined that they lacked the authority to perform any of the statutory indicia with the requisite independent judgment, concluding that the employees in the petitioned-for rank were public employees within the meaning of the Act. The Board upheld the ALJ's decision, finding no merit to the Employer's exceptions. In so doing, the Board noted as follows:

> an examination of the ALJ's decision plainly demonstrates that he not only dealt with the indicia specifically relied on by the Employer, but also reviewed, unasked, the evidence with regard to the transfer and promote indicia. See Employer's post-hearing brief at page 2—referred to as page 3

> in its exceptions. Moreover, the transcript and exhibits fully support the ALJ's statement of fact. There is no error in the ALJ's application of law to the facts; indeed, it is the Employer, at several points in its exceptions, that relied on non-precedential ALJ decisions in Metropolitan Alliance of Police, Chapter No. 94/Village of Plainfield, 22 PERI ¶71 (IL SRB-GC 2006), which it referred to as a decision of the Board, and Northeastern Illinois University, 13 PERI ¶2035 (IL SRB-GC 1997).

Contrary to the Board, in an unpublished, nonprecedential order, the Illinois Appellate Court found the petitioned-for employees statutory supervisors, relying on the decision in Village of Hazel Crest v. Illinois Labor Relations Board, 385 Ill. App. 3d 109, 895 N.E.2d 1082, 24 PERI ¶106 (1st Dist. 2008). Town of Cicero v. Illinois Labor Relations Board, Docket No. 1-08-3036, October 5, 2009. In so finding, the court concluded that exactly as in Hazel Crest, the ALJ made an "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." Compare Metropolitan Alliance of Police, Chapter No. 456/Village of Western Springs, 24 PERI ¶24 (IL LRB-SP 2008) (Case No. S-RC-06-081), aff'd by unpub. order, Village of Western Springs v. Illinois Labor Relations Board, Docket No. 1-08-1059, September 30, 2009 (wherein the court applies Hazel Crest, but upholds the Board's determinations in circumstances nearly identical to Town of Cicero).

In Homewood Professional Firefighters, Local 3656, International Association of Fire Fighters/Village of Homewood, 25 PERI ¶137 (IL LRB-SP 2009) (Case No. S-RC-08-067), the Village relied on the penultimate sentence in the second paragraph of Section 3(r) of the Act, which reads as follows: "[i]f there is no rank between that of chief and the highest company officer, the employer may designate a position on each shift as a Shift Commander, and the persons occupying those positions shall be supervisors", to argue that the petitioned-for lieutenants fall into this category, and therefore, must be excluded. The Union disagreed, arguing that the position of Deputy Chief, established in January 2008, by the Village fire chief, through a general order, constituted a rank between the chief and the highest company officer—the petitioned-for lieutenants. The Union, therefore, contended that the lieutenants are no longer excluded from the ambit of the Act. Accordingly, at issue was whether there existed an intervening rank between the lieutenants and the chief such that the lieutenants may be excluded from collective bargaining under Section 3(r) of the Act. Relying on the Board's decisions in Carpentersville and Countryside Fire Protection District, 10 PERI ¶2016 (IL SLRB 1994); Village of Alsip, 3 PERI ¶2051 (IL SLRB 1987), the ALJ determined that although the deputy

chief position was created by order of the chief rather than by ordinance, the Village's budget provided for the position, and the Employer's organization chart and the testimony at hearing proved that the deputy chief was higher in the chain of command than were the lieutenants. Thus, the ALJ concluded that the deputy chief position was established and recognized by the Employer. Disposing of the Employer's exceptions, the Board held that "in the absence of any indication that the legislature intended to circumscribe the term "rank" in Section 3(r) to appointments bestowed by police and fire commissions, the Board may not apply such a wooden standard, but rather, must examine the totality of circumstances to arrive at a reasoned result." The Board, agreeing with the ALJ, concluded that the record as a whole demonstrated that the position of deputy chief was an intervening rank.

In Palatine Fire Fighters, International Association of Fire Fighters, Local 4588/Village of Palatine, 25 PERI ¶114 (IL LRB-SP 2009) (Case No. S-UC-08-007), the Employer opposed the inclusion of the four firefighters in the rank of Captain, arguing that the disputed positions were excluded pursuant to the second paragraph of Section 3(r), which provides in pertinent part as follows:

> Further, in new fire fighter units, employees shall consist of fire fighters of the rank of company officer and below. If a company officer otherwise qualifies as a supervisor under the preceding paragraph, however, he or she shall not be included in the fire fighter unit. If there is no rank between that of chief and the highest company officer, the employer may designate a position on each shift as a Shift Commander, and the persons occupying those positions shall be supervisors. All other ranks above that of company officer shall be supervisors [Emphasis added.].

Specifically, the Employer argued that the four captains held a rank above the company officers, the lieutenants, and therefore, must be excluded from collective bargaining under the exclusion for statutory supervisors. The ALJ agreed and excluded them from collective bargaining, reasoning that of the two ranks, the firefighters in the rank of Lieutenant functioned as company officer far more often, nearly all of their time on duty, than did the firefighters in the rank of Captain. The Board disagreed, finding instead that the resolution of the issue turned on the captains' function in the workplace. Noting that the parties stipulated that the captains spend approximately half of their on-duty work time functioning as company officers, while the lieutenants spend nearly all of their time on duty so engaged, the Board concluded that if only one rank may be labeled "company officer", the ALJ's choice of Lieutenant was sound. Citing the language of Section 3(r), however, the Board found that company officers of more than one rank was clearly contemplated: "If there is no rank between that of chief and the highest company officer, the employer may designate a position on each shift as a Shift Commander, and

the persons occupying those positions shall be supervisors." The Board concluded since the petitioned-for captains spend approximately half of their on-duty work time functioning as company officers, no differently than the lieutenants, that they were "company officers" for purposes of the Act. However, the Board observed that the outcome would likely be different if the company officer function consumed only a minute portion of the captains' workday.

In American Federation of State, County and Municipal Employees, Council 31/State of Illinois, Department of Central Management Services, 25 PERI ¶140 (IL LRB-SP 2009) (Case No. S-RC-08-044), the Board upheld the ALJ's determination that the Employer failed to provide any specific examples of oral reprimands that later led to more severe disciplinary action. In its exceptions, the Employer argued that various suspensions and letters of reprimand were based on earlier oral reprimands issued by the petitioned-for employees, as the oral reprimands occurred earlier in time. Citing to Village of Bolingbrook, 19 PERI ¶125 (IL LRB-SP 2003), the Board found the argument conclusory, and instead, explained that the Employer needed to prove that it relied on oral reprimands as a foundation for more severe discipline, rather than what the Employer demonstrated, that if an employee accumulated an unspecified number of oral reprimands for repeated misconduct, it was a signal to the Employer's upper level management to take action. Citing Illinois Fraternal Order of Police Labor Council/Village of Hinsdale, 22 PERI ¶176 (IL LRB-SP 2006), the Board concluded that the record failed to indicate that the petitioned-for employees had the discretion or judgment to decide whether to issue such reprimands, nor was there evidence that such verbal warnings or reprimands serve as the underpinnings for future disciplinary action.

In American Federation of State, County and Municipal Employees, Council 31/State of Illinois, Department of Central Management Services, 25 PERI ¶68 (IL LRB-SP 2009) (Case No. S-RC-07-174), 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), 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 (2nd 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. Compare Village of Hazel Crest v. Illinois Labor Relations Board, 385 Ill. App. 3d 109, 895 N.E.2d 1082, 24 PERI ¶106 (1st Dist. 2008). See also, Metropolitan Alliance of Police, Chapter No. 456/Village of Western Springs, 24 PERI ¶24 (IL LRB-SP 2008) (Case No. S-RC-06-081), aff'd by unpub. order, Village of Western Springs v. Illinois Labor Relations Board, Docket No. 1-08-1059, September 30, 2009.

In Illinois Council of Police/Village of Broadview, 25 PERI ¶63 (IL LRB-SP 2009) (Case No. S-RC-06-177), rather than providing specific examples of the disputed sergeants' alleged supervisory authority, the Employer relied primarily on generalized testimony from its chief to establish their job functions. Citing its decision in Metropolitan Alliance of Police/Northern Illinois University, 17 PERI ¶2005 (IL LRB-SP 2000), 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 Illinois State Employees Association, Laborers International Union, Local 2002 & Service Employees International Union, Local 73/American Federation of State, County and Municipal Employees, Council 31/State of Illinois, Department of Central Management Services, 25 PERI ¶116 (IL LRB-SP 2009) (Case Nos. S-RC-08-152 and S-RC-09-002), the Employer's exceptions to the ALJ's supervisory findings focused on the discretion the petitioned-

for employees used in their various oversight functions—for example, the Employer argued as follows:

> [the petitioned-for] employees use discretion in training their staff (by individualizing their instruction to the perceived need of the educator) and monitoring and reviewing their staff's performance and work product (by combining the set standards of the facility to the unique circumstances of the subordinates' actual performance of duties, and making an individualized determination as to its sufficiency).

The Board, assuming the Employer's contention in this regard was true, found it irrelevant to the question of whether the petitioned-for employees' possessed significant discretionary authority to affect their subordinates' terms and conditions of employment.

III. Employer unfair labor practices

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

In American Federation of State, County and Municipal Employees, Council 31/Champaign-Urbana Public Health District, 24 PERI ¶122 (IL LRB-SP 2008) (Case No. S-CA-04-092), in the course of litigation challenging a Board's certification, Respondent filed a motion to compel the Board to file a complete record, including the following:

> the dues deduction authorization cards and other evidence of majority support are by statute intended to be the equivalent of a "vote," and in the labor arena, the "voting" papers for union representation are always accessible to employer to review for validity and legality….Likewise, employers are always entitled to know which employees are eligible to vote….This same information exists in this case but is being kept from disclosure without any apparent basis.

Charging Party filed the charge, contending that Respondent's motion violated Section 10(a) (1) of the Act. The ALJ determined that Respondent, by seeking to learn through its motion, the identities of its employees who signed cards supporting Charging Party's majority interest petition, violated Section 10(a) (1) of the Act. Using the three part test set out in Wright Electric, Inc., 327 NLRB 1194, 163 LRRM 1077 (1999), enf'd, 200 F.3d 1162, 163 LRRM 2353 (8th Cir. 2000); and GUESS?, Inc., 339 NLRB 432, 172 LRRM 1361 (2003); the Board upheld the outcome determined by the ALJ, emphasizing that even if Respondent's motion met the first two parts of the test, that is, that it was relevant and lacked an illegal objective, it nonetheless violated Section 10(a) (1) of the Act, as the employees' confidentiality interests under Section 6 of the Act far outweighed the District's need for the information.

The Board upheld the ALJ's determination in American Federation of State, County and Municipal Employees, Council 31/State of Illinois, Department of Central Management Services, 25 PERI ¶12 (IL LRB-SP 2009) (Case No. S-CA-06-250), that Respondent violated

Section 10(a) (1) of the Act when it prohibited its non-uniformed employees from wearing union-related pins, including pins with the message "No Scabs", at Sheridan correctional facility during the period of time the certain private-sector employees employed there were on strike, noting that "substantial evidence of special circumstances, such as interference with production or safety, is required before an employer may prohibit the wearing of union insignia, and the burden of establishing those circumstances rests on the employer."

In McDaniel/Morris/County of Cook/Sheriff of Cook County, 25 PERI ¶74 (IL LRB-LP 2009) (Case Nos. L-CA-08-048 and L-CA-08-049), the Board found that Respondent clearly understood that at least one of the reasons Charging Parties refused to transport an arrestee with methicillin-resistant *Staphylococcus aureus* (MRSA), an antibiotic-resistant bacteria, was their concern about the safety of engaging in such conduct. Accordingly, the Board found Charging Parties engaged in protected concerted activity, Respondent knew of that activity, and that Respondent took adverse action against them as a result of their involvement in that activity. The Board concluded that since Charging Parties were suspended for engaging in such activity, their suspensions violate Section 10(a) (1) of the Act.

In Metropolitan Alliance of Police/Village of McCook, 25 PERI ¶75 (IL LRB-SP 2009) (Case No. S-CA-06-097), Charging Party argued that Respondent violated Section 10(a) (1) of the Act in that it reduced the pay given to patrol officers and sergeants for making court appearances, in retaliation for the representation petition Charging Party filed on their behalf. Respondent, on the other hand, contended that well before Charging Party filed the representation petition, it was engaged in reducing police department overtime expenses, and that the complained-of action was not prompted by the Union's presence. The Board noted that the motive requirement in cases such as this is satisfied simply by showing that the employer's actions were prompted by the employee's protected activity; once such a showing is made, it is immaterial that the employer may have subjectively believed that the employee's activity was not protected or that its actions were within the confines of the law. Thus, the Board further noted, the general rule that follows therefrom is that an employer should continue to grant or withhold benefits as it would if a union were not in the picture, and if its action in granting or withholding benefits is prompted by the presence of a union, it violates the law, citing NLRB v. Otis Hospital, 545 F.2d 252 (1st Cir. 1976). Accordingly, in order to prevail, the Board observed that Charging Party had to prove by a preponderance of the evidence that the sergeants and patrol officers engaged in protected activity, that Respondent knew of that activity, and that Respondent took adverse action against them as a result of their involvement in that activity. The Board found that Respondent admitted most of the elements of Charging Party's case, in that

Respondent acknowledged that during all times relevant, the sergeants and patrol officers were engaged in protected activity, it knew of that activity, and it took adverse action against them in that it reduced the pay given them for making court appearances. The only question left, the Board determined, was whether Respondent reduced their court appearance pay, in whole or in part, due to their decision to organize. The Board found that the evidence failed to indicate that Respondent took the complained-of action in retaliation for the filing of the representation petition, and noted that other than timing, Charging Party proffered no evidence in support of its contention that Respondent reduced the sergeants and patrol officers' court appearance pay, in whole or in part, due to their decision to organize. The Board further noted that it has repeatedly held that timing alone, without supporting proof to suggest that a respondent acted with unlawful motivation, was insufficient to establish a violation of the Act. Upholding the ALJ's dismissal, the Board concluded that Charging Party was unable to establish a causal link between the complained-of action and the decision to organize. See also, Urszula T. Panikowski/PACE Northwest Division, 25 PERI ¶188 (IL LRB-SP 2009) (Case No. S-CA-05-217) (wherein the Board noted that to prove a violation of Section 10(a) (1), Charging Party was not required to demonstrate that the complained-of action was motivated, in whole or in part, by union animus).

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), relying 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 [NLRB v. Weingarten, Inc., 420 U.S. 251 (1975)] 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 of their interviews prior thereto. In the case of the first employee, the Board noted he had several days notice of the investigatory interview, and upon learning what the interview was about, after it began, he and his union representative were allowed to privately confer whenever they asked, and in fact, they conferred frequently. The Board observed that eventually, the employee, aided by his representative, satisfactorily answered all of Respondent's questions, and he 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. As to the second employee, the Board found she 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. Similar to the first employee, however, the Board noted the second employee did not know the subject of the interview until she surmised what it was about from Respondent's questioning. Nonetheless, the Board found that not long after beginning the interview of the second employee, without a request from her, Respondent asked whether she wanted union representation. When she replied in the affirmative, the Board noted that Respondent obtained a Union designated representative to assist her. The Board found that neither the employee, nor the representative made a request to confer at any time during the investigatory interview, but the Board noted, it was not Respondent's responsibility to offer that option, a request was necessary, 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 concluded that the employee admitted no wrongdoing during the interview, but Respondent nonetheless suspended her at the conclusion thereof. Accordingly, the Board determined that unlike the first employee's situation, because Respondent neglected to cure its failure to provide the second employee information as to the subject matter of the interview prior thereto, it violated her rights under Weingarten, as the representative had no opportunity to give the aid and protection intended therein. The Board explained that the failure to provide information as to the subject matter of the investigatory interview constituted an unfair labor practice, but the union's contention that Respondent violated the Act by failing to provide the second employee with a knowledgeable representative was completely without merit, noting that it is the union's responsibility, not Respondent's, to provide experienced, knowledgeable union representatives. The appropriate remedy, the Board determined, 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. Regarding Weingarten, see also, Policemen's Benevolent Labor Committee/City of Ottawa, 25 PERI ¶43 (IL LRB-SP 2009) (Case Nos. S-CA-04-193 and S-CA-04-233).

B. Section 10(a) (2) discrimination

In International Association of Fire Fighters, Local 2392/Village of Villa Park, 25 PERI ¶185 (IL LRB-SP 2009) (Case No. S-CA-07-231), the Board upheld the ALJ's dismissal of a complaint wherein he concluded that Charging Party proved the employee engaged in union activity, that the circumstances were such that it could be inferred that the chief had knowledge of that activity or support, and that Respondent's termination of the employee's employment

constituted an adverse employment action against him, but found the 10(a) (2) claim failed because there was no evidence of a causal connection between the employee's union activity and the adverse employment action he suffered.

In Michael McLaughlin/Lincolnshire-Riverwoods Fire Protection District, 25 PERI ¶138 (IL LRB-SP 2009) (Case No. S-CA-04-047), Charging Party alleged that Respondent violated Section 10(a) (2) and (1) of the Act in that it terminated his probationary employment in retaliation for his union activity. To prevail, Charging Party had to show that Respondent discharged him as a result of his union activity, however, the Board found, to the extent the record contained evidence on this point, it demonstrated that Respondent terminated his probationary employment without regard thereto. The Board noted that during Charging Party's probationary employment, Respondent employed another probationary employee. In contrast to Charging Party, the second probationer successfully completed his probationary employment. Moreover, the Board pointed out that the second probationer was openly pro-union, wearing shirts in the firehouse that referenced the union he had been represented by when he worked in other departments, wearing union decals on his hardhat, and sporting union decals on his automobile. The Board further noted that the record indicated that Respondent's fire chief was aware of the second probationer's support, as he stated to another firefighter, the local union president, words to the effect that everyone knew the second probationer came from a fire department with a strong union. Nonetheless, the Board noted that the second probationer received higher performance ratings than did Charging Party and successfully passed probation. Finding the two employees similarly situated insofar as both were probationary District employees at approximately the same time, the Board concluded that if Charging Party's theory of the case was correct, that Respondent terminated his probationary employment in retaliation for his union activity, then clearly, the second probationer should likewise have been discharged. As he did not suffer a fate similar to Charging Party's, the Board found it very unlikely that the complained-of discharge stemmed from Charging Party's union activity, and upheld the dismissal of the complaint.

In Metropolitan Alliance of Police, Chapter 126/County of DuPage/Sheriff of DuPage County, 25 PERI ¶61 (IL LRB-SP 2009) (Case No. S-CA-06-225), Charging Party argued Respondent involuntarily transferred employee Connell from law enforcement activities in Respondent's patrol division, to a position in the County jail's corrections bureau, stripped him of the right to wear a sheriff's office uniform, and stripped him of the right to carry a firearm, in retaliation for his years of support for Charging Party, in several organizing campaigns among Sheriff's deputies. Respondent denied that Connell suffered any adverse consequences as a

result of its actions, that he was placed in a position in the jail's corrections bureau because that was where the need for employees was the greatest, that he was stripped of the right to wear a sheriff's office uniform because of a "supervisory inquiry" into various actions by Connell, and that he was stripped of the right to carry a firearm because he no longer qualified to do so under Illinois law. To establish a *prima facie* violation of Section 10(a) (2), the ALJ noted, and the Board agreed, that Charging Party had to show that Connell engaged in union activity, that Respondent knew of that activity, and that Respondent took adverse action against him as a result of his involvement in that activity in order to encourage or discourage union membership or support. The ALJ concluded that Charging Party proved each of these elements, thereby establishing a *prima facie* violation of Section 10(a) (2), and further, found that Respondent failed to rebut Charging Party's case. The ALJ determined that Respondent violated the Act as alleged, and the Board upheld his decision.

C. Section 10(a) (3) discrimination

In Service Employees International Union, Local 73/Sarah D. Culbertson Memorial Hospital, 25 PERI 11 (IL LRB-SP 2009) (Case No. S-CA-06-128), the Board noted that to establish a violation of Section 10(a) (3) of the Act, Charging Party had to prove, by a preponderance of the evidence, that Respondent took adverse action against employee Valentine because of her involvement in proceedings before the Board. Upon a review of the record, the Board agreed with the ALJ's determination that Charging Party proved each of these elements, thereby establishing a *prima facie* violation of Section 10(a) (3), and that Respondent failed to rebut Charging Party's case. Finding Respondent violated the Act as alleged, the Board upheld the ALJ's decision.

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

(1) Subjects of bargaining

In Downers Grove Professional Firefighters Association, Local 3234, International Association of Fire Fighters/Village of Downers Grove, 24 PERI 114 (IL LRB-SP 2008) (Case No. S-CA-05-085), the Board determined that Respondent violated Section 10(a) (4) and (1) of the Act in that it refused to bargain with regard to the criteria for promotion to the rank of Battalion Chief, which is outside the bargaining unit, but pursuant to the Fire Department Promotion Act (FDPA), 50 ILCS 742 (2009), certain promotions to non-bargaining unit positions are now mandatory subjects of bargaining. In an unpublished, nonprecedential decision, the court reversed the Board's decision, Village of Downers Grove v. Ill. Labor Relations Bd., Docket No. 4-08-0837, 25 PERI ¶104 (4th Dist. June 24, 2009), finding the rank of

Battalion Chief was exempted from the definition of "promotion" by the Village, a home rule municipality, prior to January 1, 2002.

(2) Transfer of unit work

In Southern Illinois Laborers' District Council/Union County State's Attorney, 25 PERI ¶1 (IL LRB-SP 2009) (Case Nos. S-CA-07-154, S-CA-07-204, and S-UC-08-002), the Board upheld the ALJ's finding of a violation where Respondent unilaterally began dealing with two employees as if they were no longer within the Union's certified bargaining unit, or viewed another way, when it attempted to transfer the work of the bargaining unit. The Board approved the ALJ's make-whole remedy and award of sanctions.

IV. Union unfair labor practices

Section 10(b) (4) refusal to bargain

The Board upheld the ALJ's determination in Village of Bellwood/American Federation of State, County and Municipal Employees, Council 31, 25 PERI ¶95 (IL LRB-SP 2009) (Case Nos. S-CB-06-039 and S-CA-06-211), that the Village proved Respondent violated the duty to bargain in good faith, Section 10(b) (4) of the Act, in that it engaged in delaying tactics and conditioned bargaining over a mandatory subject of bargaining, namely, the impact or effects of the decision to subcontract, by demanding that the Village respond to its requests for information with regard to a non-mandatory subject of bargaining, namely, the decision to subcontract, which had already been resolved in the parties' collective bargaining agreement and about which the Village had no obligation to bargain.

V. Procedural issues

A. Evidence

In Janette Watkins/Amalgamated Transit Union, Local 241, 25 PERI ¶72 (IL LRB-SP 2009) (Case Nos. S-CB-06-045 and S-CA-06-227), the Board found no error in the ALJ's refusal to admit the transcript and decision in connection with Charging Party's unemployment compensation hearing. In support of its position, Charging Party cited to two sections of the Unemployment Insurance Act, 820 ILCS 405 (2009), contending that they provide for the admission by the ALJ of that transcript and decision. However, the Board noted that a closer examination of the cited provisions revealed that they pertained to admission of such documents in administrative and judicial proceedings arising out of the Unemployment Insurance Act. Moreover, agreeing with Respondent, the Board found Section 1900 of that Act seemed to mandate precisely the opposite of Charging Party's position, reading in pertinent part as follows: "[n]o finding, determination, decision, ruling or order (including any finding of fact, statement or conclusion made therein) issued pursuant to [the Unemployment Insurance Act] shall be

admissible or used in evidence in any action other than one arising out of this Act." The Board determined that the proffered transcript and decision was irrelevant to the instant matter, as in an unemployment compensation hearing, the standards of proof, the issues being litigated, and the litigation standards themselves are quite different from those at this agency, and undoubtedly have an effect on the result. Moreover, the Board questioned the weight to accord such offerings, using the example of credibility determinations. The Board concluded that the transcript and decision from that earlier hearing was incapable of proving a matter in controversy before this agency, citing Bullard v. Barnes, 102 Ill. 2d 506, 468 N.E.2d 1228 (1984) (wherein the court noted that evidence is relevant only if it tends to prove a matter in controversy).

B. Substitution of administrative law judges

Substitution of ALJs is irrelevant where the decision turns on a failure of proof rather than credibility. 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). See also, North Shore Sanitary District v. Illinois State Labor Relations Board, 262 Ill. App. 3d 279, 634 N.E.2d 1243, 10 PERI ¶ 4005 (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), 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.