



¶ 3 The Illinois Labor Relations Board, State Panel, certified the American Federation of State, County, and Municipal Employees, Council 31, as the exclusive bargaining representative of a group of four attorneys employed by the Department of Central Management Services (CMS) and holding the title Public Administrator, Option 8L. Those attorneys are Courtney C. O'Connell, Steven Schweitzer, Jerome S. Cephas, and Rupal Mehta. The board concluded there was a question of fact as to whether a fifth attorney, Erin A. Davis, was a confidential employee, and hence the board remanded the case to the administrative law judge for a hearing on that question.

¶ 4 CMS appeals. As for Davis, CMS contends that because of the board's rationale in its decision, the scope of the administrative hearing on remand will be so narrowly restricted as to deny CMS a full and fair opportunity to prove its claim that Davis is a confidential employee. Nevertheless, until CMS avails itself of that opportunity (such as it may be), the doctrine of exhaustion of administrative remedies forbids us from adjudicating CMS's claim that Davis is a confidential employee.

¶ 5 As for the other four employees (O'Connell, Schweitzer, Cephas, and Mehta), CMS contends it presented sufficient evidence to merit a hearing on whether they were confidential employees or managerial employees. On the contrary, we find no clear error in the board's decision that a hearing is unnecessary, considering that CMS makes no coherent argument on how these four employees' job duties match up with the statutory characteristics of a confidential employee or managerial employee. Therefore, we affirm the board's decision.

¶ 6 I. BACKGROUND

¶ 7 A. Erin A. Davis

¶ 8 According to the position description for Davis's position of personnel counsel, she

has essentially five areas of responsibility. They are as follows, from the ones that take up the most of her time to those that take up the least.

¶ 9 First, whenever, pursuant to the Freedom of Information Act (FOIA) (5 ILCS 140/1 through 11.5 (West 2010)), a request for information is sent to any of the 44 agencies, boards, and commissions that Davis (and O'Connell) represents, she evaluates the request and advises its recipient which of the requested items of information must be provided. If the denial of a FOIA request is appealed, she gives advice regarding the appeal.

¶ 10 Second, Davis gives legal advice to client agencies on matters of personnel administration. She also reviews—and drafts—proposed legislation and administrative rules having to do with personnel administration.

¶ 11 Third, she provides advice and training to client agencies on the Fair Labor Standards Act of 1938 (29 U.S.C. §§ 201 through 219 (2006)). Also, whenever a complaint is made to the United States Department of Labor that a client agency has violated the act, she serves as a liaison between the agency and the department.

¶ 12 Fourth, Davis does legal research on issues of personnel administration, and she reviews existing or proposed administrative policies and procedures, to make sure they are in accord with state and federal law, duties which overlap with number two.

¶ 13 Fifth, to quote the position description, Davis "[p]erforms other duties as required and assigned which are reasonably within the scope of the duties enumerated above."

¶ 14 Evidently, one example of "other duties" "reasonably within the scope of" personnel administration is Davis's representation of CMS before the Illinois Civil Service Commission. The American Federation of State, County, and Municipal Employees has filed a complaint with the

commission, accusing CMS of using "personnel service contracts" in situations in which the Personnel Code (20 ILCS 415/1 through 25 (West 2010)) forbids them to be used.

¶ 15 Because of Davis's representation of CMS in the case before the commission, the board found, contrary to the ALJ's recommended decision, that there was a question of fact as to whether Davis was a confidential employee. The board agreed with the ALJ that Davis's other job duties raised no question as to whether she was a confidential employee, but the board decided it was possible she could be a confidential employee by reason of her representation of CMS before the commission. Therefore, the board remanded the case to the ALJ for a hearing on that issue. The hearing is still pending, as far as we know from the record.

¶ 16 B. Courtney C. O'Connell

¶ 17 Like Davis, Courtney C. O'Connell is a personnel counsel for CMS, and she gives legal advice on matters of personnel administration. But the duties on which O'Connell spends most of her time differ from Davis's duties. O'Connell's five duties are as follows (again from the most to the least time-consuming).

¶ 18 First, whenever a complaint is filed with the Illinois Department of Human Rights, the Human Rights Commission, or the United States Equal Employment Commission accusing a client agency of illegal discrimination, O'Connell represents the client agency in the administrative proceedings.

¶ 19 Second, if a client agency has a question about the Family and Medical Leave Act of 1993 (29 U.S. C. §§ 2601 through 2654 (2006)), O'Connell is the attorney to consult. The offer of proof that CMS filed with the board includes e-mails in which O'Connell advised an agency on whether a particular employee could be disciplined for calling in sick an excessive number of times

without providing a written doctor's excuse. O'Connell recommended: "Proceed with denial and discipline and let's see what he comes up with in response." ("Denial," in this context, apparently means denial of additional time off.) Also, O'Connell serves as a liaison between client agencies and the United States Department of Labor whenever any issues arise regarding the implementation of the Family and Medical Leave Act or the Fair Labor Standards Act (evidently, for purposes of the Fair Labor Standards Act, she doubles with Davis as a liaison).

¶ 20 Third, O'Connell gives guidance to client agencies whenever any legal questions arise regarding personnel administration, and she reviews and drafts proposed legislation and regulations regarding personnel functions.

¶ 21 Fourth, O'Connell performs legal research on issues related to personnel administration, and she evaluates existing and proposed administrative policies and procedures to ensure they are consistent with state and federal law.

¶ 22 Fifth, like Davis, O'Connell "[p]erforms other duties as required and assigned which are reasonably within the scope of the duties enumerated above." (All of the position descriptions have this catchall category.)

¶ 23 C. Steven Schweitzer

¶ 24 Steven Schweitzer's working title is benefits counsel. As his job title suggests, he does legal work in the field of benefits.

¶ 25 According to the position description of a benefits counsel, Schweitzer spends 20% of his time interpreting statutes, regulations, and case law relating to benefits and another 20% of his time "[r]eview[ing] and research[ing] legislation, resolutions, rules and regulations to evaluate their impact upon existing, projected and proposed programs within area of assignment." (The

position description does not specify what kind of "programs.")

¶ 26 The rest of Schweitzer's time is parceled out in 10% and 5% shares: advising the manager of Bureau of Benefits "in matters related to existing[,] projected and proposed programs within area of assignment" (again that inscrutably vague phrase); reviewing policies and procedures for compliance with law; drafting proposed bills and regulations; writing correspondence, memoranda, and reports; serving as a liaison between state agencies and the United States Department of Labor for purposes of the Family and Medical Leave Act (like O'Connell); and conducting sexual-harassment investigations.

¶ 27 D. Jerome S. Cephias

¶ 28 Jerome S. Cephias's job title is assistant procurement counsel, and under the general direction of the senior procurement counsel, he does legal work related to the procurement activities of CMS and other state agencies, boards, and commission—"at all stages of the procurement process," the position description says. For example, he gives legal advice to CMS and other agencies "regarding the content and procedures for the bid and proposal solicitation processes." If someone protests a bid, he investigates the protest and advises the senior procurement counsel and the state procurement officer on how the protest should be resolved. The record includes two letters in which Cephias responds to protests.

¶ 29 E. Rupal Mehta

¶ 30 Rupal Mehta is a facilities support counsel, and her job, according to the position description, is to "[p]rovide technical advice and legal policy determinations to [CMS] and other agencies, boards and commissions \*\*\* as related to Property and Facilities Management." She reviews, prepares, and revises lease documents and other legal documents relating to property. She

also assists the facilities management counsel and the deputy general counsel in drafting legislation, rules, and executive and administrative orders and notices relevant to the management of property and facilities.

¶ 31

## II. ANALYSIS

¶ 32

### A. Administrative Remedies Not Yet Exhausted as to the Claim That Davis Is a Confidential Employee

¶ 33

Although the board adopted the ALJ's recommendation as to Courtney O'Connell, Steven Schweitzer, Jerome Cephas, and Rupal Mehta and ordered the executive director to certify the inclusion of their positions in the bargaining unit, the board declined to follow the ALJ's recommendation to include Erin Davis's position in the bargaining unit as well. Instead, the board remanded the case to the ALJ for a hearing on whether Davis was a confidential employee. Accordingly, the certification of representative expressly excludes Davis's position from the bargaining unit, stating that the position is still "in dispute."

¶ 34

Even though the certification of representative excludes Davis, CMS wishes us to review the board's rationale for excluding her. While agreeing (obviously) with the board's decision to exclude Davis, CMS is dissatisfied with the board's reason for doing so. The board held that Davis could be a confidential employee only because of her representation of CMS in the administrative case pending before the Illinois Civil Service Commission, not because of any other powers or responsibilities of her position. So, CMS anticipates that the hearing before the ALJ will be confined to the question of whether Davis is a confidential employee solely by reason of her representation of CMS before the commission. Confining the scope of the hearing in that manner, CMS argues, effectively will deny CMS a full hearing on its claim that Davis is a confidential employee. Consequently, despite the exclusion of Davis from the bargaining unit, CMS makes an

argument regarding Davis in its brief—an argument that touches on other aspects of her job, not merely her representation of CMS in the case pending before the commission.

¶ 35 The board and the union contend, however, that we lack subject-matter jurisdiction to consider CMS's argument regarding Davis because we have only the subject-matter jurisdiction that section 9(i) (5 ILCS 315/9(i) (West 2010)) confers and a remand order is not one of the orders that section 9(i) defines as a reviewable final order. Section 9(i), according to the board, "authorizes administrative review of the \*\*\* certification of representative, issued on August 13, 2010," but it does not authorize a review of the "remand order," issued on August 9, 2010, because unlike the certification of representative, the "remand order" is not an order that section 9(i) designates as "final."

¶ 36 It is true that, having remanded the case to the ALJ, the board has not yet made a final decision regarding Davis. Because the ordered hearing and further administrative decision on Davis are still pending (as far as we can tell from the record), we conclude that CMS has not yet exhausted its administrative remedies with respect to its claim that Davis is a confidential employee. Until CMS does so, we are forbidden to interfere. See *Castenada v. Illinois Human Rights Comm'n*, 132 Ill. 2d 304, 308 (1989).

¶ 37 Generally, a party may not seek judicial review of an administrative action unless the party has exhausted all available administrative remedies. *Castenada*, 132 Ill. 2d at 308. We say "generally" because there are exceptions. The supreme court has recognized six exceptions:

"An aggrieved party may seek judicial review of an administrative decision without complying with the exhaustion of remedies doctrine where a statute, ordinance or rule is attacked as unconstitutional on

its face [citations], where multiple administrative remedies exist and at least one is exhausted [citations], where the agency cannot provide an adequate remedy or where it is patently futile to seek relief before the agency [citations], where no issues of fact are presented or agency expertise is not involved [citations], where irreparable harm will result from further pursuit of administrative remedies [citations], or where the agency's jurisdiction is attacked because it is not authorized by statute [citation]." *Id.* at 308-09.

None of those exceptions applies to CMS's claim that Davis is a confidential employee. The claim presents an issue of fact, which the board is especially qualified to resolve, considering it has a lot of experience in deciding who is a confidential employee. And even though CMS objects to the narrow scope of the board's remand, it will not be "patently futile" to seek relief before the board: the board might ultimately find that Davis is a confidential employee. Indeed, one of the purposes of the requirement of exhausting administrative remedies is to allow the aggrieved party an opportunity to "ultimately succeed before the agency, making judicial review unnecessary." *Id.* at 208.

¶ 38 In order to give CMS a chance to succeed before the board on its claim that Davis is a confidential employee, we refrain from addressing CMS's arguments regarding Davis. CMS must exhaust its administrative remedies.

¶ 39 B. The Board's Request That We Deem CMS's Arguments To Be Forfeited Because of Noncompliance With Illinois Supreme Court Rule 341(h)(7)

¶ 40 Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) says that the argument section of the appellant's brief "shall contain the contentions of the appellant and the reasons

therefor, with citation of the authorities and the pages of the record relied on." CMS does not cite "the pages of the record relied on" in the argument section of its brief, and consequently the board requests that we deem CMS's arguments to be forfeited.

¶ 41 When making a factual representation in the argument section of a brief, it is unwise to omit the page of the record where that fact may be found, because without a citation to the record, the reviewing court could choose to regard the corresponding point of the argument as forfeited. See *In re Marriage of Tutor*, 2011 IL App (2d) 100187, ¶ 31. We will not do so in this case, given that (1) the facts on which CMS relies are merely those alleged in its offer of proof to the board and (2) the offer of proof is small enough that any relevant matters therein can be readily located. Nevertheless, we will disregard any factual representation that appears to lack support in the evidence. If we overlook any evidence in the record, that is the risk CMS takes by not complying with Rule 341(h)(7).

¶ 42 C. The Claim That Courtney O'Connell Is a Confidential Employee

¶ 43 1. *The Labor-Nexus Test*

¶ 44 CMS contends that, in its offer of proof to the board, it presented sufficient facts to raise a question of whether Courtney O'Connell was a confidential employee. According to CMS, this question deserves to be resolved in a hearing, with the examination and cross-examination of witnesses, rather than on the written submissions. See 80 Ill. Adm. Code § 1210.100(b)(7)(C) (2012); *Department of Central Management Services/Illinois Commerce Comm'n v. Labor Relations Board, State Panel*, 406 Ill. App. 3d 766, 773 (2010) (hereinafter *CMS/ICC*).

¶ 45 The question of whether O'Connell is a confidential employee is, of course, a pivotal question because if she is a confidential employee, she should not be a member of the bargaining

unit. The reason is that, under section 6(a) of the Illinois Public Labor Relations Act (5 ILCS 315/6(a) (West 2010)), only "employees" have the right to collectively bargain and section 3(n) (5 ILCS 315/3(n) (West 2010)) defines the term "employee" as excluding "confidential employees."

¶ 46 A "confidential employee" is "an employee who, in the regular course of his or her duties, assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations or who, in the regular course of his or her duties, has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies." 5 ILCS 315/3(c) (West 2010). From this statutory definition, the board has derived two alternative tests for determining whether a person is a confidential employee: (1) the labor-nexus test and (2) the authorized-access test. *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, 523 (1992) (citing decisions by the board).

¶ 47 The labor-nexus test deems a person to be a confidential employee if, in the regular course of his or her duties, the person assists, in a confidential capacity, someone who formulates, determines, and effectuates management policies regarding labor relations. *Chief Judge*, 153 Ill. 2d at 523. The person who is assisted must do all three things: formulate, determine, and effectuate management policies regarding labor relations. *Id.*

¶ 48 CMS maintains that O'Connell is a confidential employee under the labor-nexus test, but CMS does not cite any evidence that O'Connell assists a person who formulates, determines, and effectuates management policies regarding labor relations. Thus, we find no clear error in the board's conclusion that CMS failed to raise a question of fact as to whether O'Connell was a confidential employee according to the labor-nexus test. See *CMS/ICC*, 406 Ill. App. 3d at 769.

¶ 49

## 2. *The Authorized-Access Test*

¶ 50

### a. Job Duties That Are Not Tied to Any Legal Analysis

¶ 51

The authorized-access test deems a person to be a confidential employee "if he or she 'ha[s] authorized access to information concerning matters specifically related to the collective-bargaining process between labor and management.' " *American Federation of State, County & Municipal Employees, Council 31*, 28 Pub. Employee Rep. (Ill.) par. 50, at 178 (quoting *Chief Judge*, 153 Ill. 2d at 523) (hereinafter 28 Pub. Employee Rep. (Ill.) par. 50). The board has explained: "Such information includes the employer's strategy for dealing with an organizational campaign, actual collective bargaining proposals, and matters relating to contract administration." *Id.* Mere access to confidential information does not make a person a confidential employee; the confidential information must be "related to collective bargaining or contract administration." *Id.*

¶ 52

After describing the unauthorized-access test in its argument, CMS catalogues the duties of O'Connell's position. Then CMS fails to draw an explicit connection between most of these duties and the labor-nexus test or the authorized-access test. We are presented with one list after another of job duties without any accompanying explanation of how these duties make O'Connell a confidential employee.

¶ 53

For example, CMS says in its argument:

"Ms. O'Connell provides legal representation for discrimination complaints made against CMS. Further, she serves as initial legal services contact for client agencies for questions of interpretation or implementation of the FMLA; serves as a liaison with the U.S. Department of Labor for client agencies regarding issues or

complaints related to FMLA and the FLSA; and develops informational materials and conducts training on FMLA for client agencies."

But instead of explaining how doing each of those things—being a liaison, for example, to the Department of Labor—makes O'Connell a confidential employee under either the labor-nexus test or the authorized-access test or both, CMS begins another paragraph, which lists other things that O'Connell does in her job: she performs legal research; writes opinions, memoranda, pleadings, agreements, and other legal documents; analyzes proposed or existing legislation; and represents CMS and client agencies in front of various administrative bodies. But, again, CMS does not explain what those job duties have to do with the labor-nexus test or the authorized-access test. After going through these lists of job duties, the reader is left wondering, So what? No explicit connection is drawn from these job duties to the elements of the labor-nexus test or authorized-access test, which CMS discussed earlier in its argument. Basically, CMS describes the labor-nexus test and the unauthorized-access test, recites all of O'Connell's job duties, and then hopes for the best.

¶ 54

#### b. Leaves and Discipline

¶ 55 We infer that CMS means to draw a connection between "contract administration" and the legal advice that O'Connell gives to CMS and its client agencies regarding leaves and discipline. The board has held that, for purposes of the authorized-access test, "confidential information" includes "matters relating to contract administration." 28 Pub. Employee Rep. (Ill.) par. 50, at 178. The collective-bargaining agreement probably covers leaves and disciplines, or so one would expect. Therefore, it could be argued, ensuring that leaves and discipline are handled in

accordance with the collective-bargaining agreement and all the laws implied therein (see *Finch v. Illinois Community College Board*, 315 Ill. App. 3d 831, 836 (2000)) is an "administration" of the contract. See Merriam-Webster's Collegiate Dictionary 15 (10th ed. 2000) (defining "administer" as "to manage or supervise the execution, use, or conduct of").

¶ 56 One of the cases that CMS cites, *American Federation of State, County & Municipal Employees, Council 31*, 26 Pub. Employee Rep. (Ill.) par. 114, Nos. L-UC-09-008, L-RC-09-018, at 469 (Illinois Labor Board, Local Panel, October 12, 2010) (hereinafter 26 Pub. Employee Rep. (Ill.) par. 114), associates discipline with "contract administration." (Another case that CMS cites, *Northeastern Illinois University*, 13 Pub. Employee Rep. (Ill.) par. 2035, No. S-RC-97-75 (Illinois State Labor Relations Board General Counsel, July 10, 1997), must be disregarded because it is "non-precedential," as the decision itself says (*id.* at 190). See 80 Ill. Adm. Code § 1200.135(b)(5), as amended at 27 Ill. Reg. 7365, 7388 (eff. May 1, 2003).) In 26 Pub. Employee Rep. (Ill.) par. 114, at 467, 469, the board concluded (contrary to an ALJ's recommendation) that two staff assistants, Wendy Donaldson and Tyra Carroll, were confidential employees under the authorized-access test because they had "access to matters involving contract administration." Donaldson had knowledge of decisions to lay off or discipline employees before the notifications were sent out to the employees. *Id.* at 473, 480-81. Carroll likewise was privy to impending layoffs and discipline before the employees were notified. *Id.* at 469, 483. Evidently, in the board's view, layoffs and discipline were "matters relating to contract administration." *Id.* at 469. The employer no doubt wanted to keep these matters confidential until the employer was ready to disclose them to the employees. Hence, Donaldson and Carroll had "authorized access to [confidential] information concerning matters specifically related to the collective-bargaining process," *i.e.*, "matters relating

to contract administration," making them confidential employees under the authorized-access test. (Internal quotation marks omitted.) *Id.*

¶ 57 Similarly, it might be argued, when a client agency inquires of O'Connell whether the Family and Medical Leave Act permits the agency to discipline an employee for calling in sick too many times, O'Connell, in the regular course of her duties, receives information relating to contract administration, *i.e.*, the contemplated discipline of an employee. O'Connell will learn of this contemplated discipline before the employee learns of it—and before the agency wants the employee to learn of it. Arguably, then, this advance knowledge of confidential matters relating to contract administration makes O'Connell a confidential employee under the authorized-access test. See 26 Pub. Employee Rep. (Ill.) par. 114, at 469.

¶ 58 On the other hand, the union cites *Metropolitan Alliance of Police, Chapter No. 294*, 24 Pub. Employee Rep. (Ill.) par. 33, No. S-RC-05-090 (Illinois Labor Relations Board, State Panel, March 14, 2008) (hereinafter, 24 Pub. Employee Rep. (Ill.) par. 33), in which some of the petitioned-for employees, like O'Connell, recommended discipline or no discipline on the basis of their application of law to the facts and the board held that this activity did not make them confidential employees. (The board also cited this case in its decision.) The Department of Children and Family Services (DCFS) employed investigators, who investigated "alleged misconduct on the part of department employees." 24 Pub. Employee Rep. (Ill.) par. 33, at 146. After amassing all the pertinent evidence, the investigator wrote a draft report of his or her findings, specifying the regulations that (in the investigator's opinion) the person had violated. *Id.* The ALJ said: "The investigator also makes recommendations, which can include taking disciplinary action against an individual to suggested reforms. When the investigator makes a recommendation to take

disciplinary action, he recommends either discharge or instead merely 'discipline' without specifying a level of discipline." *Id.* After the investigator's supervisor approved the draft report, it went to the Inspector General, and if the Inspector General approved the draft report and the recommendation therein, the draft report became the inspector general's report, whereupon the report then went to the director of DCFS and to the Governor's office. *Id.* at 146-47. "Responsibility for action thus rest[ed] with other officials," although the office of the inspector general monitored what ultimately occurred. *Id.* at 147.

¶ 59           The ALJ reasoned as follows:

"True, by nature of their work, [the investigators] often have access to particular individuals' personnel files, disciplinary files, files regarding an ongoing investigations [*sic*] of such individuals, information regarding possible but not yet imposed discipline, and, as well, on occasion their medical and mental records. However, such access to such a limited range of materials is not authorized access to strategies or proposals unknown in advance to unions serving or seeking to serve as bargaining representatives. [Citation.] Hence, the Investigators fail to meet the 'authorized access' test." 24 Pub. Employee Rep. (Ill.) par. 33, at 147.

¶ 60           The board held: "[T]he ALJ properly applied the law to the facts in the record and determined that none of the disputed employees [(the investigators)] are confidential within the meaning of the Act." 24 Pub. Employee Rep. (Ill.) par. 33, at 138. The board did not mention "contract administration," but one of the cases that the board cited did so (*id.* (citing *Board of*

*Education of Community Consolidated High School District No. 230 v. Illinois Educational Labor Relations Board*, 165 Ill. App. 41, 63 (1987)), and the board long had held that "confidential information," for purposes of the authorized-access test, included "information relating to matters dealing with contract administration" (*City of Burbank*, 1 Pub. Employee Rep. (Ill.) par. 2008, No. S-RC-45, at 44 (Illinois State Labor Relations Board, June 6, 1985)).

¶ 61 Consequently, it appears that, in the board's interpretation of section 3(c) (5 ILCS 315/3(c) (West 2010)) (the section defining a "confidential employee"), knowledge of possible but not yet imposed discipline is not knowledge of "matters relating to contract administration" (26 Pub. Employee Rep. (Ill.) par. 114, at 469) or, in other words, knowledge of "information relating to the effectuation \*\*\* of the employer's collective bargaining policies" (5 ILCS 315/3(c) (West 2010)). Although we are not bound by the board's interpretation of section 3(c), we should defer to the interpretation if it is reasonable (*City of Collinsville v. Illinois State Labor Relations Board*, 329 Ill. App. 3d 409, 416 (2002))—and this interpretation is reasonable. One could reasonably take the view that a mere recommendation to impose discipline or a mere proposal to do so is not a matter of contract administration because recommendations need not be followed, proposals can be abandoned, and the contract is not administered until the decision actually is made and the discipline is imposed.

¶ 62 Under this view, O'Connell is more analogous to the investigators in 24 Pub. Employee Rep. (Ill.) par. 33, who merely recommended discipline, than to the staff assistants in 26 Pub. Employee Rep. (Ill.) par. 114, who had access to the actual notices of discipline or layoffs before the notices were sent to employees. The record appears to contain no evidence that O'Connell had access to client agencies' final decisions on discipline before employees were notified of those

decisions. Instead, O'Connell gave the agencies advice on what decision to make, and then it was up to the agencies whether to follow the advice. Like the investigators whom the board found not to be confidential employees, O'Connell applies the law to the facts and makes a recommendation. O'Connell's advice is analogous to "raw materials," such as statistics and financial data, that go into making a decision. The raw materials are not the decision itself. See *Chief Judge of Circuit Court of Cook County v. American Federation of State, County, & Municipal Employees, Council 31, AFL-CIO*, 218 Ill. App. 3d 682, 699 (1991).

¶ 63

c. Grievances

¶ 64

One also might infer that CMS means to make a connection between "contract administration" and the advice O'Connell allegedly gives client agencies on grievances. The offer of proof states that O'Connell "provide[s] legal advice and coordinate[s] with CMS Labor Relations on \*\*\* pending grievances." Nevertheless, the official position description attached to the offer of proof says nothing about grievances. Nor did CMS present any documentary evidence that O'Connell ever gave legal advice regarding a grievance, although the ALJ had made it clear that she wanted evidence.

¶ 65

In her letter dated November 12, 2009, the ALJ warned the employer: "[T]he Employer must show cause \*\*\* why the petitioned-for unit should not be certified, using examples of \*\*\* confidential authority. This should include specific evidence, including all documentary evidence and affidavits, which support its position. Job descriptions alone are insufficient evidence." (Emphasis omitted.) Thus, a mere representation, in an offer of proof, that an employee had a certain job duty, such as advising the employer on grievances, was "insufficient evidence" to avoid certification. Specific evidence of this job duty was required, including examples of the

employee's performance of this job duty. See 80 Ill. Adm. Code § 1210.100(b)(6) (2012).

¶ 66 In this respect, an offer of proof in an administrative hearing before the board is different from an offer of proof in circuit court. In circuit court, a statement by counsel may suffice. *Slezak v. Girzadas*, 167 Ill. App. 3d 1045, 1056 (1988). In a hearing before the board, by contrast, a statement by counsel—for example, an offer of proof signed by counsel—will not suffice because the rule requires "sufficient evidence" (80 Ill. Adm. Code § 1210.100(b)(6) (2012)) and representations by counsel are not evidence (*Simmons v. Garces*, 319 Ill. App. 3d 308, 321 (2001)); *Goldberg v. Schroeder*, 10 Ill. App. 2d 186, 194 (1956)). CMS filed with the board an offer of proof signed by its counsel, but to the extent that the representations therein were unsubstantiated by any accompanying documentary evidence, they were ineffectual. Thus, we find no clear error in the board's conclusion that CMS failed to carry its burden with respect to O'Connell's alleged participation in the grievance process.

¶ 67 d. Advance Knowledge of the Employer's Posture in Labor Negotiations

¶ 68 CMS seems to argue that O'Connell is a confidential employee under the authorized-access test because she allegedly has advance knowledge of "the employer's collective bargaining policies." 5 ILCS 315/3(c) (West 2010). The offer of proof says: "Another vital role performed by Assistant Personnel Counsel is assisting and coordinating the interpretation and implementation of personnel issues with activities and developments in CMS Labor Relations. This requires knowledge of unannounced priorities, plans, goals, and strategies, both with respect to personnel and labor relations." Because of its vagueness, this quoted text is not very enlightening, but perhaps the "announced priorities, plans, goals, and strategies \*\*\* with respect to \*\*\* labor relations" could be interpreted to include strategies and positions in the negotiation of collective-bargaining agreements.

The board has explained: "The statutory purpose in excluding 'confidential employees' from bargaining is to guard against the situation where employees in a bargaining unit may, in the normal performance of their duties, have advance knowledge of the employer's posture on labor negotiation and related labor relations matters, because that could jeopardize the employer's bargaining strategy and upset the balance of negotiations." *Salaried Employees of North America (SENA), Division of United Steelworkers of America, AFL-CIO*, 4 Pub. Employee Rep. (Ill.) par 3028, No. L-RC-87-04, at 160 (Illinois Local Labor Relations Board, August 25, 1988). The position description, however, says nothing about collective-bargaining negotiations, and CMS has provided no evidence of a specific instance in which O'Connell received advance knowledge of "the employer's posture on labor negotiation." See 80 Ill. Adm. Code § 1210.100(b)(6) (2012). Absent such evidence, the denial of a hearing was not clear error.

¶ 69 D. The Claim That Steven Schweitzer Is a Confidential Employee

¶ 70 1. *The Labor-Nexus Test*

¶ 71 After asserting that Schweitzer is a confidential employee under the labor-nexus test, CMS offers no explanation of how the elements of that test are satisfied. As we have explained (and as CMS itself explains in its brief), a person is a confidential employee if, in the regular course of his or her duties and in a confidential capacity, that person assists someone who formulates, determines, and effectuates labor-relations policies. *Chief Judge*, 153 Ill. 2d at 523. Schweitzer allegedly reports to Assistant General Counsel Joseph Rose, and he gives legal advice to the Bureau of Benefits. How does Rose formulate, determine, and effectuate labor-relations policies? How do the assisted persons in the bureau do so? The offer of proof gives no clue.

¶ 72 2. *The Authorized-Access Test*

¶ 73 a. More Lists of Duties Without any Reasoned Connection  
to the Elements of the Authorized-Access Test

¶ 74 We have observed that, in its argument that O'Connell is a confidential employee, CMS lists a multitude of job duties without explaining how each of those duties ties into the authorized-access test. We make the same observation about CMS's argument that Schweitzer is a confidential employee. For example, in the argument section of its brief, CMS tells us that Schweitzer "provides legal counsel regarding health insurance policies and personnel benefits to the Bureau of Benefits" and that he "conduct[s] sexual harassment investigations," but CMS does not explain how those job duties relate to the elements of the authorized access test (or the labor-nexus test).

¶ 75 b. Leadership Meetings

¶ 76 Although, for the most part, CMS appears to assume that the connection between Schweitzer's various job duties and the authorized-access test is self-evident and need not be established by a reasoned argument, CMS does a somewhat better job of spelling out the connection when discussing Schweitzer's alleged attendance of "leadership meetings." CMS says in its brief:

"[A]s part of his Benefits Counsel position, Mr. Schweitzer attended and contributed his opinion and expertise during bi-monthly leadership meetings, wherein labor related issues were discussed. Union representatives and members were not present in these meetings. \*\*\* During the July meeting, the leadership group discussed *strategy* related to changing retiree dental premiums that eventually resulted in the cessation of premium dissemination. Importantly, AFSCME, the affected union, was not aware of these

discussions until the ultimate cessation of the premium, which resulted in a grievance being filed by AFSCME and advanced to arbitration. Accordingly, through his regular course of duties, Mr. Schweitzer is involved in undisclosed strategy relating to pending collective bargaining and labor relations matters through his involvement during these leadership meetings." (Emphasis in original.)

This paragraph, however, is merely a verbatim repetition of a paragraph in the offer of proof signed by CMS's attorney and submitted to the ALJ. The record appears to contain no evidence to substantiate counsel's representations in this paragraph. Mere representations by a party's attorney, lacking evidentiary support, do not establish the necessity of an oral hearing. See 80 Ill. Adm. Code § 1210.100(b)(6) (2012).

¶ 77 c. Applying the Family and Medical Leave Act to the Collective-Bargaining Agreement

¶ 78 CMS says in its argument:

"Mr. Schweitzer also provides legal interpretation and advice with respect to the [Family and Medical Leave Act] and related collective bargaining agreement provisions. As recent as September 2009, Mr. Schweitzer provided legal analysis and recommendations to Assistant General Counsel Joseph Rose related to administration of a collective bargaining agreement's family leave provisions in light of amendments to the FMLA."

Does one become a confidential employee by interpreting publicly accessible documents such as the

Family and Medical Leave Act and collective-bargaining agreements? Apart from that problem, the quoted paragraph lacks a citation to any evidence in the record. It repeats verbatim a paragraph in the offer of proof, but, again, the offer of proof, signed by the employer's attorney, is not evidence. See 80 Ill. Adm. Code § 1210.100(b)(6) (2012).

¶ 79 In summary, we find no clear error on the board's part inasmuch as the board found it unnecessary to hold an oral hearing on CMS's claim that Schweitzer is a confidential employee.

¶ 80 E. The Claim That Jerome Cephas Is a Managerial Employee

¶ 81 1. *Researching and Applying the Law to Questions of Procurement*

¶ 82 CMS says that as the assistant procurement counsel, Jerome Cephas "provides legal counsel and legal policy determinations in matters related to the procurement and contracting process, including the statutory authority of CMS and other state agencies, boards and commissions." In order to provide this legal counsel, Cephas does legal research. He does what lawyers commonly do: he informs clients what the law requires in a given factual situation.

¶ 83 CMS says:

"In doing so [(in providing legal counsel and making legal policy determinations)], Mr. Cephas conducts research relating to procurement and contracting process, including the statutory authority of CMS and other state agencies, boards and commissions. Mr. Cephas also performs specialized legal work involving various types of procurement-related documents and associated justifications, negotiates

with vendors, and assists procurement professional [sic] in the resolution of contract disputes. Furthermore, Mr. Cephas conduct research for the purpose of analyzing the relationship between the Procurement Code, State Finance Act, Joint Purchasing Act and other relevant statutes to assist in the formation of policy and to resolve procurement-related disputes. Mr. Cephas also drafts legislation, regulations and executive and administrative orders related to procurement. *Accordingly*, Mr. Cephas is a managerial employee as defined by the Act." (Emphasis added.)

¶ 84 This is not an argument, and the adverb "accordingly" does not substitute for an argument. CMS does not explain how these activities that Cephas performs in his job—basically, researching the laws relevant to procurements and applying these laws to given factual situations—make him a "managerial employee" as defined in section 3(j) of the Act (5 ILCS 315/3(j) (West 2010)). If Cephas were a managerial employee by virtue of researching and applying the law, almost all publicly employed attorneys would be managerial employees simply because they are attorneys; researching and applying the law are what attorneys do. We have held, however, that just because attorneys "us[e] their professional discretion and skills of legal analyses" and thereby "perform[ ] duties essential to the employer's ability to accomplish its mission," it does not follow that they are managerial employees. *Department of Central Management Services/Department of*

*Healthcare & Family Services v. Illinois Labor Relations Board, State Panel*, 388 Ill. App. 3d 319, 332 (2009) (quoting State of Illinois, Department of Central Management Services, 21 Pub. Employee Rep. (Ill.) par. 205, No. 5-UC-05-006, 748, 753). See also *American Federation of State, County & Municipal Employees, Council 31*, 26 Pub. Employee Rep. (Ill.) par. 132, No. S-RC-09-144, at 596 (Illinois Labor Board, State Panel, December 1, 2010). To be a managerial employee, a professional employee, such as an attorney, has to do more than exercise professional discretion and judgment (*Chief Judge of the Circuit Court of Cook County v. American Federation of State, County & Municipal Employees, Council 31*, 229 Ill. App. 3d 180, 186 (1992)); otherwise, there would be no distinction between professional employees (5 ILCS 315/3(m) (West 2010)) and managerial employees (5 ILCS 315/3(j) (West 2010)), because all professional employees, by definition, exercise professional discretion and judgment (5 ILCS 315/3(m) (West 2010)). To be a managerial employee, a professional employee must "actually formulate[] and effectuate[] management policies by expressing and making operative [the] decisions of the Employer." (Internal quotation marks omitted.) *Chief Judge*, 229 Ill. App. 3d at 186.

¶ 85 Section 3(j) defines a "managerial employee" as "an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices." 5 ILCS 315/3(j) (West 2010). Given that "executive and management functions" are activities by which someone runs an agency or department—for example, formulating policies and procedures, preparing the budget, and making sure the agency or department operates effectively and efficiently (*City of Evanston v. Illinois State Labor Relations Board*, 227 Ill. App. 3d 955, 974-75 (1992))—how do the functions of researching and applying the law qualify as "executive and management functions"? CMS offers no



¶ 88 CMS observes that under section 1.2025(d)(3) of title 44 of the Illinois Administrative Code (44 Ill. Adm. Code § 1.2025(d)(3) (2012), "CMS must approve all sole-source procurements proposed by an agency." A "sole-source procurement" is a "procurement from a sole economically feasible source" unless the purchase is a "small purchase" or an "emergency procurement." 44 Ill. Adm. Code § 1.2025(a) (2012). Before any contract with a sole source becomes effective, CMS must review and approve the contract. CMS says in the argument of its brief: "In this approval process, Mr. Cephas determines, without further approval, whether the sole-source procurement meets legal requirements and adheres to accepted economic practices. During 2009, Mr. Cephas evaluated, and approved or denied, 532 sole-source procurement requests."

¶ 89 It is unclear how, in CMS's view, this activity of evaluating sole-source procurements makes Cephas a "managerial employee" within the meaning of section 3(j) (5 ILCS 315/3(j) (West 2010)) and the decisions interpreting that statute. In one section of its argument, CMS discusses this statute and the interpreting case law, and in another section of its argument, CMS describes Cephas's job duties, and for the most part, CMS seems to regard the connection between these two sections of its argument to be self-evident—but it is not. How, for example, is reviewing sole-source procurements an "executive or management function"? 5 ILCS 315/3(j) (West 2010). And is it not true that in approving or denying sole-source procurements, Cephas's discretion is, as the board found, "significantly circumscribed by predetermined requirements and procedures," *i.e.*, statutes and administrative regulations? See *Circuit Clerk of Champaign County*, 17 Pub. Employee Rep. (Ill.) par. 2032, No. S-UC-00-038, at 208 (Illinois Labor Board, State Panel, May 4, 2001) ("An employee's exercise of discretion does not make him 'managerial' if the discretion must conform to the employer's established policies.").

¶ 90

### 3. *Protests*

¶ 91 A procurement decision can be protested. "An actual or prospective bidder, offeror, or vendor that may be aggrieved in connection with a procurement action may file a protest provided the aggrieved party has evidence of a violation of the Illinois Procurement Code or other law, associated rules, or the solicitation itself, including evaluation or award." 44 Ill. Adm. Code § 1.5550(a) (2012). CMS says in its argument: "It is Mr. Cephas's responsibility to manage this protest process from receipt to resolution with little, if any, input from his supervisor. For examples of the correspondence created by Mr. Cephas during this process in response to a vendor's protest, which detail his legal conclusions and award determinations, *see* Exhibits 18 and 19, all of which go beyond simply following established rules and policies." (Emphasis in original.)

¶ 92 Exhibit Nos. 18 and 19 of CMS's offer of proof are two letters in which Cephas responds to protests. In exhibit No. 18, Cephas tells a protester's attorney that the protest has "presented no violation of the Illinois Procurement Code and Rules," and in exhibit No. 19, Cephas tells a protester: "Since the submission of your protest, the Criminal Justice Information Authority has decided to cancel the award and to rebid the procurement. You may access the solicitation when it comes available on the Illinois Procurement Bulletin."

¶ 93 So, in one of these letters (exhibit No. 18), Cephas communicates his conclusion that the protest has identified no violation of law in the procurement in question, and in the other letter (exhibit No. 19), he simply communicates the decision of a different agency, the Illinois Criminal Justice Information Authority (see 20 ILCS 3930/4 (West 2010)). It is unclear how these letters "go beyond simply following established rules and policies," as CMS asserts.

¶ 94 It also is unclear how, in reviewing protests, Cephas meets the description of a

managerial employee, *i.e.*, someone who (1) engages predominantly in executive and management functions and (2) is charged with the responsibility of directing the effectuation of management policies and practices. See 5 ILCS 315/3(j) (West 2010). Instead of making the connection explicit in its argument, CMS expects us to somehow make a connection between Cephas's job function of evaluating protests and CMS's explication, in a previous section of its argument, of what a managerial employee is.

¶ 95 *4. The American Recovery and Reinvestment Act*

¶ 96 According to CMS, the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5, 123 Stat. 115 (2009)) has required the modification of CMS's procurement procedures. CMS says: "To meet this requirement, Mr. Cephas was assigned the task of managing these activities for CMS's legal counsel and he worked with the Governor's legal staff to effectuate the new federal policy on the State level. Consequently, Mr. Cephas was responsible for managing time and personnel resources in order to accomplish these additional tasks."

¶ 97 Although CMS uses words from the statutory definition of a "managerial employee" (5 ILCS 315/3(j) (West 2010)), *i.e.*, "managing," "effectuate," and "responsible," CMS does not explain, in a systemic way, how Cephas conforms to the statutory definition of a managerial employee by assisting with the modification of CMS's procurement procedures. Specifically, how is this task an "executive or management function"? 5 ILCS 315/3(j) (West 2010). Does one "establish policies and procedures" by following federal policy? See *City of Evanston*, 227 Ill. App. 3d at 974-75. If the objective was to comply with a new federal statute, did Cephas have independent discretion, or was it more a matter of mechanically altering CMS's procedures so as to do what the federal statute said to do? See *CMS/ILRB*, 278 Ill. App. 3d at 87 ("Managerial

employees must exercise discretion within, or even independently of, established employer policy \*\*\*." (Internal quotation marks omitted.)); *City of Delavan*, 22 Pub. Employee Rep. (Ill.) par. 41, No. S-RC-05-196, at 150 (Illinois Labor Board, State Panel, March 31, 2006) ("[I]f an individual's discretion is significantly circumscribed by predetermined requirements and procedures, the authority is not managerial authority within the meaning of the Act."). And was it Cephas who finally determined what the modifications of procurement policy would be (in obedience to federal law), or did he, together with others, merely propose modifications, which persons higher up in the chain of command might accept, modify, or reject? See *City of Evanston*, 227 Ill. App. 3d at 975 ("[W]here an employee's role in establishing policy is merely advisory and subordinate, the employee is not a managerial employee, as it is the final responsibility and independent authority to establish and effectuate policy that determines managerial status under the Act."). According to the position description of an assistant procurement counsel and according to a performance evaluation of Cephas, he "[d]rafts legislation, regulations, executive and administrative orders, and policies relating to the state Procurement function *for final review and approval by the Deputy General Counsel–Procurement*." (Emphasis added.) CMS asserts that Cephas is a managerial employee as a matter of law, but how can he be regarded as a surrogate of the deputy general counsel if the deputy general counsel reviews, and approves or disapproves, his recommendations? See *Cook County State's Attorney v. Illinois Local Labor Relations Board*, 166 Ill. 2d 296, 303 (1995); *Chief Judge of the Sixteenth Judicial Circuit v. Illinois State Labor Relations Board*, 178 Ill. 2d 333, 344 (1997).

¶ 98 We might add that CMS likewise left these questions unanswered in the written argument it filed with the board in the administrative proceeding ("Brief in Support of Respondent's

Exceptions to the Administrative Law Judge's Recommended Decision and Order"). In fact, the argument that CMS makes in its brief in this court appears to be a verbatim repetition of the argument it made in its brief to the board. Consequently, CMS's argument to the board suffered from the same problem that we have repeatedly pointed out here: a failure to connect the particular job duties of the employee in question to a preceding abstract discussion of what a confidential employee is or what a managerial employee is. In short, in the administrative proceeding—as here—CMS did not make much of an argument. We cannot reasonably fault an administrative agency for being unconvinced by an undeveloped argument. *Cf. Philpott v. Board of Trustees of City of Charleston Firefighters' Pension Fund*, 397 Ill. App. 3d 369, 371 (2010) ("[P]articular arguments that were not presented to the administrative board are forfeited and should not be considered on appeal."). We agree with the board that it "was not obligated to develop legal arguments that connect \*\*\* identified job responsibilities with the elements of the authorized access test"—any more than we are so obligated.

¶ 99 F. The Claim That Rupal Mehta Is a Managerial Employee

¶ 100 CMS describes what Mehta does in her position of facilities support counsel for the Bureau of Property Management and Claims: she reviews leases; she gives legal advice to agencies, boards, and commissions regarding property management matters; she responds to requests under the Freedom of Information Act; and so forth. Then, at the conclusion of this recitation of Mehta's job duties, CMS says: "*Accordingly*, contrary to ALJ Strizak's RDO [(recommended decision and order)], Ms. Mehta is a managerial employee as defined by the Act, and at a minimum, the State has set forth sufficient issues of law or fact to warrant an oral hearing." (Emphasis added.)

¶ 101 Again, this is not an argument, and the "accordingly" is unearned. Instead of an

argument, this is yet another list of job duties suspended in space, so to speak, without any reasoned, explicit connection to an earlier discussion of what a managerial employee is.

¶ 102

### III. CONCLUSION

¶ 103

For the foregoing reasons, we affirm the board's decision.

¶ 104

Affirmed.