2018 IL App (1st) 173061-U
Order filed: September 14, 2018

FIRST DISTRICT
Fifth Division

No. 1-17-3061

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN FEDERATION OF STATE, COUNTY, and MUNICIPAL EMPLOYEES, COUNCIL 31,	)	Petition for Review of a Decision and Order of the Illinois Labor Relations Board, Local Panel
Petitioner,	)	
v.	)	No. L-UC-16-009
ILLINOIS LABOR RELATIONS BOARD, LOCAL PANEL, and THE CITY OF CHICAGO,	)	
Respondents.	)	

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirmed the Illinois Labor Relation Board's decision that five employees within the Bureau of Economic Development of the City of Chicago are managerial employees who are not eligible to be added to an existing collective bargaining unit for City employees. We reversed and remanded to the Illinois Labor Relations Board for a new determination as to the remaining employee, finding that the Illinois Labor Relations Board had relied on erroneous factual findings when rendering its decision as to him.

¶ 2 Petitioner, the American Federation of State, County, and Municipal Employees, Council 31 (AFSCME), a national public services employee union, appeals from the decision of respondent, the Illinois Labor Relations Board, Local Panel (ILRB), finding certain employees within the Bureau of Economic Development (Bureau) of the City of Chicago (City), are managerial employees and thus are not eligible to be added to AFSCME's existing collective bargaining unit for City employees. We affirm in part and reverse and remand in part.[1]

¶ 3 I. Relevant Law

¶ 4 The Illinois Public Relations Act (Act) "grant[s] public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection." 5 ILCS 315/2 (West 2016). However, managerial employees are excluded from the definition of "public employee" and therefore cannot engage in collective bargaining. See 5 ILCS 315/3(n) (West 2016). The Act 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 2016).

¶ 5 As our supreme court has explained, "[t]he [managerial] exclusion is intended to maintain the distinction between management and labor and to provide the employer with undivided loyalty from its representatives in management." *Chief Judge of the Sixteenth Judicial*

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

Circuit v. Illinois State Labor Relations Board, 178 Ill. 2d 333, 339, (1997). "[M]anagerial status is not limited to those at the very highest level of the governmental entity." (Internal quotation marks omitted.) *Office of the Cook County State's Attorney v. Illinois Local Labor Relations Board*, 166 Ill. 2d 296, 301 (1995). Employees have managerial status where their functions sufficiently align them with management such that the employees are not required to divide their loyalty to the administration with their loyalty to an exclusive collective-bargaining representative. *American Federation of State, County and Municipal Employees, Council 31 v. State Department of Central Management Services (Illinois Commerce Commission)*, 2018 IL App (1st) 140656, ¶ 11.

¶ 6 II. The Unit Clarification Petition

¶ 7 In February 2016, AFSCME filed a unit clarification petition with the ILRB (case number L-RC-15-015), seeking to add all underwriting financial planning analyst (FPA) positions to an existing collective bargaining unit of City employees. In response, the City argued for the exclusion of the Bureau FPA positions held by Terrence Johnson, Tom Kurlan, Gloria Peralta, Ryan Slattery, and Nora Curry from the bargaining unit because they were managerial employees under the Act and thus were ineligible for inclusion. A hearing was held on the unit clarification petition. Through a procedural error by the ILRB, the Administrative Law Judge (ALJ) was unable to issue a recommended decision and order.

¶ 8 The case was reassigned to a different ALJ (case number L-UC-16-009). In lieu of holding a second hearing, the ALJ ordered that case number L-UC-16-009 would be resolved based on the record in case number L-RC-15-015.

¶ 9 III. The Hearing

¶ 10 Evidence at the hearing, including the testimony of Aarti Kotak, the Bureau's managing deputy commissioner, and Chip Hastings and Mark Sagun, assistant commissioners, established the following facts.

¶ 11 The City's Human Resources Department created a written description for the FPA classification, which stated that a FPA, "[u]nder directions, performs financial planning and economic analysis for commercial, industrial, and residential private development projects that require the use of public funds, and performs related duties as required." The job description outlines a FPA's essential duties as "[performing] financial analysis of proposed development projects by reviewing applications and evaluating the financial feasibility of projects *** and the economic benefits to the public sector;" making recommendations as to whether the City should participate in development projects in order to stimulate investment in designated areas; and negotiating redevelopment agreements.

¶ 12 The FPAs at issue are employed by the Bureau which is part of the City's Department of Planning and Development (Department). The Department has the responsibility of promoting the comprehensive growth and well-being of the City and its neighborhoods. The Bureau manages City-owned property, assists in the development of work forces and businesses within the City, and administers the Tax Increment Financing (TIF) Program. The Bureau is composed of four divisions, which include the TIF administration division (TIF division), and the business development division.

¶ 13 The TIF division implements the tax increment financing program, under which the City

freezes the equalized assessed tax value of a blighted area and, for 23 years, reinvests the property tax increments that are generated above that base in local redevelopment projects. Deputy commissioner Jim Horan oversees the TIF division, which includes the TIF underwriting section, the district performance monitoring and reporting section (district performance section), and the RDA monitoring and compliance section (compliance section).

¶ 14 Mr. Johnson, Mr. Kurlan, and Ms. Peralta are FPAs in the TIF underwriting section. Mr. Slattery is the sole FPA assigned to the district performance section. Ms. Curry is the FPA assigned to the business development division.

¶ 15 A. The TIF Underwriting Section

¶ 16 The TIF underwriting section is managed by Mr. Hastings. The section is composed of five employees, including the FPAs. Upon receiving a TIF application, Mr. Hastings assigns a FPA in the TIF underwriting section (Mr. Johnson, Mr. Kurlan, or Ms. Peralta) to conduct the initial review of the application, and to determine if the proposal is viable and the financing request is appropriate. After examining the application, the FPA creates a preliminary project review which contains a recommendation as to whether to grant or deny the application. The FPA discusses the recommendation with Mr. Hastings and Mr. Horan and gains their input. The FPA presents the preliminary project review at a TIF intake meeting with Ms. Kotak, Mr. Hastings, the other TIF underwriting FPAs, and others. A decision is then made to either deny the application or continue the process. The recommendation of the FPA is usually accepted at this stage.

¶ 17 If an application moves forward from the intake meeting, the FPA requests any necessary

additional information from the developer. As a next step, the FPA makes a presentation on the project at an internal roundtable meeting, which is attended by Ms. Kotak, Mr. Hastings, and others. The FPA makes a recommendation as to whether the application should be accepted or denied, and the attendees "provide feedback." After this meeting, Ms. Kotak presents the FPA's recommendation to the Planning Department commissioner, who then presents it to the Mayor. If the Mayor approves the TIF project, the "legislative steps" begin with the FPA presenting the preliminary project review to the Chicago Community Development Commission (Commission). The Commission recommends whether the project moves forward.

¶ 18 If the application is approved at this stage to move forward, the FPA then "finalize[s] a draft term sheet," which contains the business terms for the potential agreement. The FPA, Ms. Kotak, Mr. Hastings, and Mr. Horan negotiate with the developer. During that process, the FPA requests further information from the developer and "[tries] to structure a deal that works, a dollar amount that works, the parameters, the timing of the assistance, *** trying to come up with a deal that works for the developer and for the City." The final terms are memorialized in a redevelopment agreement which must be approved by the City Council in the form of an ordinance. The redevelopment agreement "comes from *** the term sheet that the [FPA] assembles."

¶ 19 B. The District Performance Section

¶ 20 Mr. Sagan manages the district performance and the compliance sections. Mr. Slattery, the FPA assigned to the district performance section, performs "mixed work." He assists with the designation, expansion, and extension of TIF districts and helps with various required reports.

Mr. Slattery also spends some of his time working as a TIF underwriting FPA.

¶ 21 C. The Business Development Division

¶ 22 Ms. Curry, the FPA in the business development division, "leads" the Local Industrial Retention Initiative program (LIRI). This program strives to maintain and encourage manufacturing and industrial jobs in the City. John Malloy supervises her work on LIRI. Ms. Curry has the responsibility of maintaining the City's relationships with the 11 organizations which form LIRI and "leads" a current strategic review. Ms. Curry ensures that LIRI organizations meet their reporting obligations and that the reports are accurate. She and Mr. Malloy analyze the reports and prioritize the reported issues. They will resolve some of the problems or, if beyond the scope of their authority, refer them to deputy commissioner Mary Bonome or Ms. Kotak with recommendations. The issues "run the gamut," from requests for driveway permits to notices of relocation from the City and problems with workforce retention or recruitment. Ms. Curry, Mr. Malloy, Ms. Bonome, and Ms. Kotak meet monthly to discuss the reported LIRI issues and to strategize about moving LIRI forward. At the time of the hearing, Ms. Curry held a leadership role in drafting LIRI policies and determining the implementation of those policies.

¶ 23 IV. The ALJ And ILRB Determinations

¶ 24 In her recommended decision and order, the ALJ determined that the FPAs in the TIF underwriting section—Mr. Johnson, Mr. Kurlan, and Ms. Peralta—did not "predominantly engage in executive management functions." Instead, the FPAs, when reviewing TIF applications and negotiating redevelopment agreements, primarily requested information from

the developers under close supervision of their superiors. The ALJ also found that it was not established that a FPA's recommendation to deny an application was a significant consideration in its ultimate denial.

¶ 25 The ALJ also found that Mr. Slattery divided his time between the TIF underwriting and the RDA monitoring and compliance sections. Although the ALJ had determined that RDA monitoring and compliance FPAs were managers, she concluded that Mr. Slattery's position was not managerial because TIF underwriting FPAs were not managers and there was no evidence about how much time Mr. Slattery spent in each role, or their relative importance.

¶ 26 The ALJ decided that Ms. Curry was not a manager because her role was limited to performing an intake function, and the evidence did not demonstrate her level of involvement in drafting LIRI policies.

¶ 27 The City, in its exceptions to the ALJ's recommended decision, argued that the TIF underwriting FPAs engage in executive and management functions when making recommendations about TIF applications, negotiating redevelopment agreements, and modifying division policies. The City also asserted that the FPAs exercise discretion when, after in-depth analysis, they make recommendations, and that those recommendations are usually followed. Contrary to the ALJ's finding that the FPAs have a limited role in negotiating redevelopment agreements, the City maintained that the evidence demonstrated that the FPAs have authority to directly negotiate all aspects of an agreement. The City also maintained that it presented examples of instances where TIF underwriting FPAs have modified division policies. As to Mr. Slattery, the City argued that his position is managerial regardless of how he divides his time

between the TIF underwriting and compliance sections, because the FPAs in both units are managers. Finally, the City argued that Ms. Curry is also a manager because she is responsible for the day-to-day operations of the LIRI program.

¶ 28 The ILRB issued a final decision and order excluding the disputed positions from the bargaining unit as managerial under section 3(j) of the Act. The ILRB concluded that the TIF underwriting FPAs engage in executive and management functions when they make recommendations about TIF financing applications (which are usually accepted), negotiate redevelopment agreements, and modify division policies and procedures. The ILRB determined that Mr. Slattery is also a manager because he divides his time between the TIF underwriting and compliance sections and the FPAs in both sections are managerial. As to Ms. Curry, the ILRB agreed with the City that her responsibility to oversee the day-to-day operations of the LIRI program is a managerial function.

¶ 29 V. AFSCME's Appeal

¶ 30 AFSCME has filed a timely petition for review of the decision of the ILRB under section 11(e) of the Act (5 ILCS 315/11(e) (West 2016)), challenging the classification of the FPAs as "managerial employees," which excludes them from the bargaining unit.

¶ 31 The City, as the party seeking to exclude the employees from the bargaining unit, carried the burden of proving the employees' managerial status by a preponderance of the evidence. See *Secretary of State v. Illinois Labor Relations Board, State Panel*, 2012 IL App (4th) 111075, ¶55.[2] The question presented by AFSCME in this appeal is whether the ILRB erred in finding

[2] AFSCME questions whether the preponderance of the evidence standard applies,

that the City had met its burden.

¶ 32 Judicial review of the decision of the ILRB is governed by the Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2012)). *County of Cook v. Illinois Labor Relations Board, Local Panel*, 347 Ill. App. 3d 538, 546 (2004). The applicable standard of review of the ILRB's final administrative decision depends upon whether the question presented is a question of fact, a question of law, or a mixed question of fact and law. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998). Rulings on questions of fact will be reversed only if they are against the manifest weight of the evidence, while questions of law are review*ed de novo. Id*. at 205.

¶ 33 Mixed questions of fact and law "are 'questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.' " *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board*, 216 Ill. 2d 569, 577 (2005) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19 (1982)). Mixed questions of fact and law are subject to reversal only when they are clearly erroneous. *Id*. An administrative decision is clearly erroneous only when the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Id*. at 577-78.

---

pointing out that a recent ILRB decision stated that an employer is required to prove "by clear and specific evidence that the employee falls within the delineated excluded categories set out within the Act." See *American Federation of State, County, and Municipal Employees, Council 31*, 26 PERI ¶ 149 (ILRB-SP 2011). Whether the employer's burden of proof was by a preponderance of the evidence, or by clear and specific evidence, the result here would be the

¶ 34 Here, the ILRB decided a mixed question of fact and law when it determined, on the facts of this case, that the FPAs met the statutory definition of a managerial employee; thus, we review the decision of the ILRB under the clearly erroneous standard. *Id*.

¶ 35 First, we address the decision of the ILRB that the FPAs in the TIF underwriting section, Mr. Johnson, Mr. Kurlan, and Ms. Peralta, are managerial employees.

¶ 36 A two-part test is applied to determine whether an employee holds a managerial position. *American Federation of State, County, and Municipal Employees, Council 31*, 2018 IL App (1st) 140656, ¶ 17. The employee must "be both (1) 'engaged predominantly in executive and management functions' and (2) 'charged with the responsibility of directing the effectuation of management policies and practices.' " *Id*. (quoting 5 ILCS 315/3(j) (West 2010)). Although the Act does not define "executive and management functions," this court has generally interpreted the language to mean duties related to the running of a department, for example, by formulating policies and procedures. *Id*. at ¶ 18. "The employee must possess and exercise authority and discretion which broadly affects a department's goals and means of achieving its goals. If the employee's role is advisory and subordinate, the employee is not a managerial employee because it is the final responsibility and independent authority to establish and effectuate policy that determines management status." *Department of Central Management Services v. Illinois State Labor Relations Board*, 278 Ill. App. 3d 79, 87 (1996). The second part of the test relates to who is responsible for the running of the department; that is, to be managerial, an employee must not merely have the authority to make policy but he must also make that policy happen. *Id*. at ¶ 18.

---

same.

"However, managerial status can also include those who make 'effective recommendations'—that is, those employees who make recommendations that are almost always implemented." *Department of Central Management Services v. Illinois Labor Relations Board, State Panel*, 2011 IL App (4th) 090966, ¶ 135.

¶ 37 In the present case, there was evidence at the hearing that Mr. Johnson, Mr. Kurlan, and Ms. Peralta satisfy the first part of the test in that they are involved in formulating and modifying Department policies. Specifically, Mr. Hastings was asked at the hearing whether FPAs in the TIF underwriting section (*i.e.*, Mr. Johnson, Mr. Kurlan and Ms. Peralta) have the ability to make or change Department policies regarding TIFs, and Mr. Hastings responded affirmatively, testifying that the FPAs were engaged at the time of the hearing in policy-making by rewriting the TIF application and drafting guidelines for a profit-sharing requirement for the redevelopment agreements. Mr. Hastings also specifically testified that Mr. Johnson had engaged in policy-making by creating a TIF underwriting template that improved the quality and efficiency of the review process.

¶ 38 Mr. Hastings and Ms. Kotak also testified that Mr. Johnson, Mr. Kurlan, and Ms. Peralta satisfy the second part of the test because, as FPAs in the TIF underwriting section, they not only craft Department policies regarding the TIF application and review process, but they also implement those policies by actively engaging in the process whereby decisions are made on TIF applications. Specifically, the duties of a FPA in the TIF underwriting section include being assigned to and reviewing a TIF application, and making recommendations at the TIF intake meetings and at the project roundtables regarding whether the TIF application should move

forward, which recommendations are almost always accepted; without the FPA's positive recommendations, the TIF application would never move past the TIF intake or roundtable stages and the TIF financing would never be implemented. Also, after a TIF application moves past the intake and roundtable stages, the FPA's recommendation is presented to the Planning Department Commissioner, the Mayor, and the Commission. If the Commission recommends that the project continue moving forward, the FPA negotiates a redevelopment agreement with the developer; the redevelopment agreement is a "binding legal document" that is presented to the City Council, which approves the redevelopment agreement as an ordinance. Thus, the FPAs in the TIF underwriting section are involved throughout the TIF application process and it is their recommendations and negotiated agreements with the developers that effectively determine whether the TIF application ultimately gains approval. As the FPAs in the TIF underwriting section do not merely recommend policies or give advice that someone higher up is equally apt to take or leave, but, rather, they direct the governmental enterprise in a hands-on way, they satisfy the second part of the test and are considered managerial employees. See *Department of Central Management Services/Illinois Commerce Comm'n v. Illinois Labor Relations Board, State Panel*, 406 Ill. App. 3d 766, 775 (2010).

¶ 39 In conclusion, the testimony of Mr. Hastings and Ms. Kotak supported the decision of the ILRB that Mr. Johnson, Mr. Kurlan, and Ms. Peralta satisfy the two-part test for managerial employees and, thus, they are not eligible under the Act to be added to AFSCME's existing collective bargaining unit for City employees. Accordingly, the decision of the ILRB was not clearly erroneous.

¶ 40 Next, we address the decision of the ILRB that the FPA in the business development division, Ms. Curry, is a managerial employee. There was evidence at the hearing that Ms. Curry satisfies both parts of the managerial test in that she is involved in formulating and implementing Department policy relating to the LIRI initiative. Specifically, Ms. Kotak testified:

> "Q. Does the Department have policies that relate to the LIRI initiative?
>
> A. We are drafting them as we currently speak. *** We are in the middle of drafting them and [Ms. Curry] has a leadership role in that process.
>
> Q. She is undertaking the lead to draft those policies?
>
> A. She is undertaking the lead to both collaborate in terms of the drafting of them and also figure out the equally important piece of implementation, so that what we put on paper actually is live, and she has a leadership role in both.
>
> Q. Does she have any role in effectuating Department policy with respect to your LIRI partners?
>
> A. She does. The policy is only as good as the implementation, and so the work that she does with the LIRIs, the relationship she has to make sure that what they are submitting is reflective of what we want them to do, that the information is correct.
>
> And then the follow-up is critical, because otherwise those are just papers that are sitting on a shelf. And so the identification of issues on which the City needs to get engaged, the identification of how we can help the analysis of what to do next and who should do that, those are things, again, that she leads and often is the person implementing."

¶ 41 Ms. Kotak's testimony established that Ms. Curry holds a leadership role in drafting LIRI policies and determining the implementation of those policies and, thus, Ms. Kotak's testimony supported the decision of the ILRB that Ms. Curry is a managerial employee who is not eligible under the Act to be added to AFSCME's existing collective bargaining unit for City employees. Accordingly, the decision of the ILRB was not clearly erroneous.

¶ 42 Finally, we address the decision of the ILRB that Mr. Slattery is a managerial employee. The ILRB adopted the ALJ's factual finding that Mr. Slattery divides his work between the TIF underwriting section and the compliance section, and the ILRB found that his combined managerial functions in both capacities was sufficient to make him a managerial employee under the Act. However, the ALJ's factual finding adopted by the ILRB was erroneous, as Mr. Slattery does not work in the compliance section but instead only works in the district performance section and in the TIF underwriting section. Given its erroneous factual finding, the ILRB never made a determination whether Mr. Slattery acts in a managerial or non-managerial capacity while working in the district performance section, nor did it determine how Mr. Slattery divides his work between the district performance section and the TIF underwriting section.

¶ 43 Both parties agree that because the ILRB relied on erroneous factual findings when analyzing Mr. Slattery's managerial status, the appropriate remedy is to reverse and remand to the ILRB for an analysis of Mr. Slattery's managerial status based on the facts actually presented at the hearing. On remand, the ILRB should decide (under the two-part test discussed earlier) whether Mr. Slattery acts in a managerial capacity in the district performance section as well as in the TIF underwriting section. If the ILRB determines that Mr. Slattery works in a managerial

capacity only in one section and not the other, it must then determine how he divides his work between the sections, how much of his overall work is spent as a manager, and whether such work is sufficient to make him a managerial employee.

¶ 44 For all the foregoing reasons, we affirm the decision of the ILRB that Mr. Johnson, Mr. Kurlan, Ms. Peralta, and Ms. Curry are managerial employees under the Act who are ineligible to be added to the existing collective bargaining unit for City employees; we reverse and remand to the ILRB for a new determination as to whether Mr. Slattery is a managerial employee under the Act.

¶ 45 Affirmed in part and reversed and remanded in part.