

No. 1-16-0835

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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AMERICAN FEDERATION OF STATE, )  
COUNTY and MUNICIPAL EMPLOYEES, ) Petition for Review of Decision and Order  
COUNCIL 31, ) of the Illinois Labor Relations Board,  
) Local Panel  
)  
Petitioner, )  
)  
v. ) No. L-RC-15-008  
)  
ILLINOIS LABOR RELATIONS BOARD, )  
LOCAL PANEL AND CITY OF CHICAGO, )  
DEPARTMENT OF BUILDINGS, )  
)  
Respondents. )

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JUSTICE SIMON delivered the judgment of the court.  
Justices Harris and Mikva concurred in the judgment.

**ORDER**

¶ 1 *Held:* The Illinois Labor Relations Board did not clearly err when it determined that a city employee was a supervisor and, therefore, could be excluded from a collective bargaining unit.

¶ 2 The American Federation of State, County and Municipal Employees filed a petition with the Illinois Labor Relations Board seeking to include an employee in a collective bargaining unit.

After a hearing, the administrative law judge agreed with the union and issued a recommended

order that the employee be included in the bargaining unit. The ILRB, however, rejected the administrative law judge's recommendation and dismissed the representation petition. The ILRB concluded that the individual was a "supervisor" under the Illinois Labor Relations Act so as to not be entitled to collectively bargain. AFSCME filed a petition for direct review, and we confirm the ILRB's decision.

¶ 3

### BACKGROUND

¶ 4 Basil Rhymes is the Assistant Chief Engineer of Sewers in the City of Chicago's Department of Buildings. The American Federation of State, County and Municipal Employees (AFSCME) filed a petition with the Illinois Labor Relations Board (ILRB) seeking to add Rhymes into a bargaining unit. The City of Chicago objected on the basis that Rhymes is a supervisor and, therefore, not entitled to union membership under Illinois law. An administrative law judge sided with AFSCME and issued a recommended decision and order that Rhymes be included in the bargaining unit. The ILRB, however, weighed the evidence, rejected the ALJ's recommendation, and found that Rhymes is a supervisor. AFSCME filed a petition for direct review.

¶ 5 As the Assistant Chief Engineer of Sewers, Rhymes oversees two civil engineers, one engineering technician, and five administrative staff members. Those eight employees all report to Rhymes. The group works in the easy permit subsection of the sewer permit section. Their aim is to quickly issue sewer permits to contractors when the work complies with the requirements of the Chicago Municipal Code. Rhymes reports to Asif Rahman, Deputy Building Commissioner, and three levels up from Rahman is Felicia Davis, Commissioner of the Department of Buildings.

¶ 6 At the administrative hearing, the City called Rahman and the Assistant Commissioner of

the Department of Buildings, Scott Loeff, to testify. Rahman testified that the process in Rhyme's subsection of the Department is that contractors file applications and drawings seeking a permit. The two civil engineers review the applications and drawings to determine whether the project complies with the Municipal Code. If the civil engineers cannot resolve a question, they bring it to Rhymes who would then make the ultimate decision on whether to issue the permit. Rhymes reviews the civil engineers' work to ensure they are enforcing the Municipal Code with consistency and to prevent mistakes.

¶ 7 Rhymes assigns work to his subordinates. He is responsible for approving or rejecting his staff's requests for vacation time. The assessment of whether to grant a vacation request involves consideration of the collective bargaining agreement, Department rules, and making sure the subsection is not short-staffed by multiple people taking vacation at the same time. The record did not show that Rhymes had ever refused an employee's request for time off.

¶ 8 Rhymes also completes performance evaluation forms for his staff and has input on whether they should receive merit increases. When an employee is eligible for a merit increase, the Department sends a letter to Rhymes seeking feedback about the employee's performance and attendance. A rating from Rhymes that is below 70 means that the employee will not receive a merit increase. He also provides substantive written comments about employee performance and submits the evaluation to the Commissioner. Loeff testified that the Commissioner relies heavily on Rhymes' recommendation and evaluation when making the ultimate decision about whether a pay raise is in order. However, of the nine merit recommendations made by Rhymes that are in the record, only seven were granted by his superiors.

¶ 9 Rahman testified that Rhymes spends about 25% of his time in meetings with consultants and with people that are seeking permits, 50% reviewing subordinates' work and answering their

questions, and 25% assigning work, evaluating subordinates, and approving requests for time off.

¶ 10 The ALJ heard this evidence, reviewed the record, and concluded that Rhymes was not a supervisor under the Illinois Public Labor Relations Act (5 ILCS 315/1 *et seq.* (West 2012)). The ALJ found that Rhymes' principal work was substantially different from that of his subordinates. The ALJ found that Rhymes did not have supervisory direction resulting from his authority to review his subordinates' work because it comes primarily from his greater experience and technical expertise. Thus, the ALJ concluded, Rhymes does not possess authority to direct his subordinates' with independent judgment in the review of their work. The ALJ found that Rhymes did engage in supervisory direction when he assigns work, approves time off, and evaluates his subordinates' performance. Those facets of his work, the ALJ found, require that Rhymes exercise independent judgment.

¶ 11 The ALJ found that Rhymes does not spend a preponderance of his time engaged in supervisory actions. He found that Rhymes only spends about 25% of his time acting in a supervisory capacity, not more than half. The ALJ also found that Rhymes' most important job functions are reviewing his subordinates' work and meeting with contractors and consultants which he found to not be supervisory functions. Based on those findings, the ALJ concluded that Rhymes was not a supervisor under the Act and recommended that the ILRB grant AFSCME's representation petition. Both parties filed exceptions to the ALJ's recommended order and the matter proceeded before the ILRB.

¶ 12 The ILRB agreed with a number of the ALJ's findings, but disagreed with others and with his ultimate determination that Rhymes is not a supervisor within that term's meaning in the Act. The Board agreed that Rhymes acts as a supervisor when he assigns work, approves time off, and completes performance reviews. The ILRB, however, unlike the ALJ, found that Rhymes' review

of his subordinates work and answering their questions requires the exercise of supervisory authority. The ILRB also found that Rhymes spends a preponderance of his time on supervisory activity and that the primary aim of his position was to manage his subordinates and their work. Ultimately, the ILRB concluded that Rhymes is a supervisor under the Act. The ILRB dismissed AFSCME's representation petition, and AFSCME appeals the ILRB's decision.

¶ 13

#### ANALYSIS

¶ 14 When an administrative agency's decision involves a pure question of law, we review it *de novo*. *Skokie Firefighters Union, Local 3033 v. Illinois Labor Relations Bd., State Panel*, 2016 IL App (1st) 152478, ¶ 11. When reviewing purely factual findings, the agency's findings and conclusions are deemed to be *prima facie* true and correct and, thus, are reviewed under a manifest weight of the evidence standard. *Id.*; 735 ILCS 5/3-110 (West 2012). When an agency's decision presents a mixed question of law and fact, it will be overturned on appeal only if it is clearly erroneous. *Village of North Riverside v. Boron*, 2016 IL App (1st) 152687, ¶ 14. Here, the ILRB made factual findings that we review under the manifest weight of the evidence standard, but the main issue is whether the ILRB properly concluded that Rhymes is a supervisor which we will only overturn if that conclusion is clearly erroneous.

¶ 15 Under the Illinois Public Labor Relations Act (5 ILCS 315/1 *et seq.* (West 2012)), supervisors are not public employees who have been granted the right to unionize. *City of Freeport v. Illinois State Labor Relations Board*, 135 Ill. 2d 499, 505 (1990); 5 ILCS 315/3(n) (West 2012). A "supervisor" is:

"An employee whose principal work is substantially different from that of his or her subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or

discipline employees, to adjust their grievances, or to effectively recommend any of those actions, if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment. Except with respect to police employment, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising that authority, State supervisors notwithstanding. \*\*\*" 5 ILCS 315/3(r) (West 2012).

Accordingly, our Supreme Court has explained that in order to be excluded from a bargaining unit on the basis of being a "supervisor," an employee must meet four criteria. *Chief Judge of Circuit Court of Cook Cty. v. American Federation of State, County & Municipal Employees, Council 31, AFL-CIO*, 153 Ill. 2d 508, 515 (1992).

"The test requires that (1) the supervisory employee must perform principal work substantially different from that of her subordinates; (2) the supervisory employee must have authority to perform some or all of the 11 functions enumerated in section 3(r); (3) the supervisory employee must consistently use independent judgment in the performance of these 11 enumerated functions; and (4) generally, the supervisory employee must devote a preponderance of her time to exercising the authority to handle these 11 functions." *Id.*

The burden is on the employer seeking to exclude an employee from a bargaining group to present sufficient evidence to support the exclusion. *Service Employees International Union, Local 73 v. Illinois Labor Relations Board*, 2013 IL App (1st) 120279, ¶ 48; 80 Ill. Adm. Code 1210.107(a) (effective May 1, 2003).

¶ 16 The ALJ found and the ILRB accepted that the first prong of the supervisory test had

been met. AFSCME does not contest that finding here. AFSCME does, however, challenge the Board's findings and conclusions on the other prongs, principally focusing on whether Rhymes uses independent judgment when carrying out his duties.

¶ 17 Even one of the statutory indications of supervisory authority accompanied by independent judgment is sufficient to support a finding of supervisory status. *Department of Central Management Services v. Illinois State Labor Relations Board*, 278 Ill. App. 3d 79, 83 (1996). An employee exercises “independent judgment” when he makes a choice between two or more significant courses of action without substantial review by superiors. *Metropolitan Alliance of Police v. Illinois Labor Relations Board*, 362 Ill. App. 3d 469, 477-78 (2005).

¶ 18 To start, Rhymes is the Assistant Chief Engineer of Sewers. He has a staff of eight subordinate employees that report to him made up of two civil engineers, one engineering technician, and five administrative staff members. His status as the head of a unit and as the manager of eight subordinates is an indication that he may not be just a general public employee.

¶ 19 Rhymes' eight subordinates are members of AFSCME bargaining units. His position gives him the authority and discretion to affect his staff members' employment in important ways, including in areas covered by their union membership. For example, the collective bargaining agreement covering his subordinates comes into play when Rhymes decides if his subordinates should be granted vacation time and when he recommends performance-based merit increases. "The authority to deny leave, issue written reprimands, and conduct performance evaluations indicates an authority to influence the terms and conditions of employment, as well as the use of independent judgment in determining when and how to exercise these functions." *Village of Maryville v. Illinois Labor Relations Board*, 402 Ill. App. 3d 369, 376 (2010).

Rhymes' membership in the collective bargaining unit would conflict with the performance of his

job duties and his exercise of independent judgment to not be influenced by his own union membership when making these types of decisions. See *id.* at 376; *Village of Hazel Crest v. Illinois Labor Relations Board*, 385 Ill. App. 3d 109, 114 (2008).

¶ 20 The permitting process that Rhymes oversees begins when a contractor comes in with a permit application. From the very beginning, Rhymes exercises judgment without oversight and decides which engineer should be assigned to do the work by considering, among other things, the engineer's workload. Rhymes has to balance the Department's goal of quickly issuing the permit with considerations about his employees' working conditions.

¶ 21 As the permitting process goes forward, Rhymes is responsible for answering his subordinates' questions and reviewing their work. To effectuate the Department's goal, Rhymes must concern himself with issuing permits quickly and accurately. Because the work is not an exact science, "gray areas" come up where Rhymes has to make the final call and take command. The Department needs his loyalty to the stated goals, not to his subordinates or any collective employee interest. The decisions require independent judgment. Reviewing subordinates' work constitutes supervisory authority when the reviewing employee has to make decisions in his employer's interest or in consideration of macro-level criteria like policy implications as opposed to using only technical or tactical expertise. *Department of Central Management Services v. Illinois Labor Relations Board*, 2012 IL App (4th) 110013, ¶¶ 66-69. The board did not err when it concluded that Rhymes engages in supervisory direction with independent judgment when he reviews his subordinates work, takes control, and weighs myriad considerations to make final decisions to advance his employer's interest.

¶ 22 AFSCME argues that the ILRB erred in determining that Rhymes directs his subordinates with independent judgment when he approves or denies their requests for time off. In support of



this argument, AFSCME maintains that it is not Rhymes' independent judgment that controls these decisions, but rather, the collective bargaining agreement covering his subordinates.

AFSCME points us to multiple cases in which the ILRB has determined that an employee does not act with independent judgment when he grants leave requests based on criteria over which he has no control.

¶ 23 Here though, the collective bargaining agreement is a guide, it does not compel most leave-request decisions. And Rhymes has the authority to make the decisions without consulting or obtaining approval from a supervisor—he has final authority over the matter. *Village of Maryville*, 402 Ill. App. 3d at 375-76. Even AFSCME concedes that although the default process is first-come, first-served or is controlled by seniority, Rhymes has to decide if granting a request would leave him short-staffed. The ultimate goal of his position and his department is to issue permits correctly and quickly and Rhymes has to balance that goal with his subordinates' desire to take vacation. He has to use independent judgment (uncontrolled by the collective bargaining agreement) to determine if his subordinates' vacation leave would adversely affect his department's aims. Moreover, were Rhymes to be a member of the collective bargaining unit, there is the risk that his exercise of discretion in making leave-request decisions would be slanted to favor his fellow union members. See *id.* at 376. The employer has a legitimate interest in ensuring that Rhymes directs his subordinates with an eye toward the interests of the Department, not fellow union members.

¶ 24 AFSCME argues that Rhymes' completion of performance evaluations for his subordinates does not demonstrate supervisory authority. To the contrary, however, the circumstances surrounding Rhymes' completion of performance evaluations indicates that it is an archetypal supervisory function. He uses independent judgment in evaluating his subordinates.

AFSCME does not really quarrel with the fact that Rhymes exercises discretion and independent judgment when he evaluates subordinates, but instead maintains that Rhymes' evaluations do not impact the terms and conditions of his subordinates' employment.

¶ 25 Whenever one of Rhymes' subordinates is eligible for a merit-based pay raise, Rhymes is tasked with evaluating that employee's performance. Rhymes is to consider various subjective factors and apply his own judgment to assess whether or not to recommend that the employee deserves a raise. If Rhymes rates a subordinate less than 70, no pay raise is given. He has full control over merit-based pay raises in that regard. Rhymes also gives written comments and suggests ways for employees to improve. He considers improvement from past review periods. His evaluations are, therefore, a means by which to direct his employees and to address how their performance is helping or hindering carrying out the Department's goals.

¶ 26 AFSCME points out that the Commissioner does not always agree with Rhymes' recommendation. The record showed that there were times when Rhymes would give a subordinate a score of 70 or greater, but that employee did not receive a raise. Also, the record did not contain any evidence that Rhymes had ever rated a subordinate less than 70. AFSCME posits that this evidence is sufficient to show that Rhymes' recommendations do not have any real impact on whether merit-based raises are granted.

¶ 27 However, the testimony at the administrative hearing was that the Commissioner of the Department makes the final decision, but "rel[ies] very heavily" on Rhymes' recommendations. AFSCME presented no evidence to the contrary. While AFSCME quarrels with the ILRB's factual finding on this question, it has failed to explain how it was against the manifest weight of the evidence. *Skokie Firefighters Union, Local 3033*, 2016 IL App (1st) 152478, ¶ 11. The fact that Rhymes has not rated a subordinate lower than 70 does not change the outcome. Rhymes has

the authority to preclude a subordinate from getting a pay raise based on his subjective judgment which can significantly affect a subordinate's employment. The performance evaluations Rhymes conducts are fully consistent with supervisory status and the ILRB did not err by finding this factor to favor a finding that Rhymes is a supervisor.

¶ 28 AFSCME argues that the ILRB erred when it found that Rhymes effectively recommends the reward of his subordinates. Similar to the argument above, AFSCME maintains that the City did not demonstrate that Rhymes' recommendations are effective. However, the evidence was clear that Rhymes can, and does, impact the rewards given to his subordinates. He could rate a subordinate lower than a 70, and preclude that person from a merit-pay increase. Or he could rate that person much higher, which the Commissioner would rely upon very heavily. The reviews in the record show that Rhymes did not simply rate the employees the same, but undertook an individualized analysis and gave a range of scores. It is clear that they are only recommendations and not final decisions, but the submission of those recommendations and the fact that there is evidence they are heavily relied upon supports a finding that completing the evaluations is an exercise of supervisory authority.

¶ 29 AFSCME's final argument is that the ILRB erred when it found that Rhymes spends a preponderance of his time engaged in supervisory functions. Generally, in order to be a supervisor under the Illinois Labor Relations Act, the employee must devote a preponderance of his time to exercising the authority to handle supervisory functions. *Chief Judge of Circuit Court of Cook Cty.*, 153 Ill. 2d at 515. We have said that "preponderance" in this context can mean superiority in numbers or superiority in importance. *Department of Central Management Services*, 278 Ill. App. 3d at 86. Under either the qualitative or quantitative approach, the ILRB's conclusion in this case holds.

¶ 30 The ILRB made the factual finding that Rhymes spent 50% of his time reviewing his subordinates' work, 25% of his time in meetings with contractors and consultants, and 25% of his time assigning work, evaluating subordinates, and approving requests for time off. AFSCME contends, "none of those tasks are supervisory in this case." The ILRB found, and as we have confirmed above, Rhymes' review of subordinates work and his time assigning work, evaluating subordinates, and approving requests for time off are supervisory under the Act, so more than 50% of his time is spent exercising supervisory authority. The ILRB also made the factual finding that reviewing subordinates' work and resolving permit ambiguities were among his most important job duties and require the exercise of supervisory authority. AFSCME provides no persuasive reason for us to reject those findings or the ultimate conclusion that Rhymes devotes the preponderance of his time to exercising supervisory authority.

¶ 31 Although AFSCME goes through the individual considerations as we have above, our task on review is to determine whether the ILRB's ultimate decision that Rhymes is a supervisor was clearly erroneous. *Illinois Deparment of Central Management Services (State Police) v. Illinois Labor Relations Board, State Panel*, 382 Ill. App. 3d 208, 220-22 (2008). Even if there could be two reasonable but opposing views of whether the facts satisfy the statutory standard (and there is not even that here), the Board cannot have committed clear error by choosing between those views. *Department of Central Management Services v. Illinois Labor Relations Board, State Panel*, 2011 IL App (4th) 090966, ¶ 129. Based on the documentary evidence, the testimony adduced at the administrative hearing, and the undisputed facts, the ILRB did not clearly err when it concluded that Rhymes is a supervisor under section 3(r) of the Illinois Public Labor Relations Act and qualifies for exclusion from the collective bargaining unit under the test explained in the Illinois Supreme Court's decision in *Chief Judge of Circuit Court of Cook*

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*County*, 153 Ill. 2d at 515.

¶ 32

CONCLUSION

¶ 33 Accordingly, we confirm the decision of the Illinois Labor Relations Board.