2018 IL App (1st) 171322-U

FIRST DIVISION
September 28, 2018

No. 1-17-1322

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).

METROPOLITAN ALLIANCE OF POLICE, CHAPTER 294,	)	
Petitioner,	)	Petition for Review of an Order of the Illinois Labor Relations Board
v.	)	
THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL and STATE OF ILLINOIS, THE DEPARTMENT OF CENTRAL MANAGEMENT SERVICES (DEPARTMENT OF CORRECTIONS),	)	No. S-UC-16-050
Respondents.	)	

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Mikva and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held*: The Illinois Labor Relations Board's determination that Investigators were confidential employees was not clearly erroneous.

¶ 2 On April 22, 2016, this matter was brought before the Illinois Labor Relations Board (Board) by a unit clarification petition filed by State of Illinois, Central Management Services (CMS), Illinois Department of Corrections (DOC or Employer). The unit clarification petition sought to exclude ISI-Is and ISI-IIs (Investigators) from the Metropolitan Alliance of Police

(MAP or Union) bargaining unit on the grounds that Investigators are confidential and managerial employees under the Illinois Public Labor Relations Act (Act) (5 ILCS 315/3(c) (2016)). After an evidentiary hearing, on January 25, 2017, the Administrative Law Judge (ALJ) found the Investigators were confidential employees within the meaning of section 3(c) of the Act and granted the Employer's petition. On April 11, 2017, the Board upheld the ALJ's findings regarding granting the unit clarification petition and finding the Investigators to be confidential employees under the Act given their access to confidential information. Additionally, the Board found the Investigators were confidential employees because of their role in discipline and grievances processes. On June 5, 2017, the Union filed a notice of appeal in this court arguing: (1) the unit clarification petition was not properly brought; (2) the Board's finding that the Investigators are confidential employees is clearly erroneous; and (3) the Board's finding that the Investigators' role in the grievance process confers confidential employee status is clearly erroneous. For the following reasons, we affirm the findings of the Board.

¶ 3 BACKGROUND

¶ 4 In September 2016, there was a hearing before an ALJ to determine whether Investigators were excluded from the union because they were confidential or managerial employees. The parties submitted testimony from multiple witnesses, as well as documentary evidence. The Employer called two witnesses, Mark Delia, the division chief of investigations and intelligence for the DOC and Edward Jackson, the chief of labor relations for the DOC. The Union called Investigators Marc Hodge and Jack Thomas, who testified about their experiences.

¶ 5 The organization structure of the DOC is as follows: the highest position in the DOC is the director, followed by an assistant director, then six division chiefs. Each division chief oversees one of the following divisions: investigations and intelligence, labor relations,

operations, patrol, and legal. Under the division chiefs are three deputy directors in the operations division, each of whom oversees the prisons in one region of Illinois: north, central, and south. Each prison is run by a warden and two assistant wardens. Under the wardens, the highest ranking security employees within a prison are the majors, also called shift commanders. The ranks below major are lieutenants, sergeants, and correctional officers, all of whom are uniformed security employees. All correctional employees ranked major and lower are members of bargaining units; those ranked above major are not.

¶ 6 Mark Delia testified that he has worked for the DOC for twenty-eight years, the last fifteen in the investigations and intelligence division. Delia is currently the chief of the investigations and intelligence division and he oversees an external investigations unit. This unit includes, in order of rank, two commanders; two deputy commanders; six district coordinators (for intelligence); and sixteen active Investigators. Prior to the Board's decision and order issued in this case, Investigators in the external investigations unit were members of the bargaining unit and represented by the Union.

¶ 7 The external investigations unit works out of DOC's central office and can work outside prison facilities and interview civilians. The internal investigations units, which work within specific facilities, cannot interview civilians. The purpose of the external investigations unit is to investigate any administrative or criminal actions, *e.g.*, staff assaults with injuries, suicides, unnatural deaths, staff-on-inmate sexual assaults, socialization, and allegations involving staff higher than major, against the state, state employees, inmates, or state property. Investigators also conduct investigations into matters raised in grievances filed by members of a bargaining unit. Cases involving rapes, murders, and illegal drugs brought into prison facilities are required by statute to be referred to the Illinois state police. The state police may decline to

investigate. If so, those cases are handled by the external investigations unit.

¶ 8 Cases handled by the external investigations unit can arise from a variety of sources, including prison facilities, the office of the executive inspector general, the state police, or local state's attorneys. Delia does not have the ability to decline a case if it is properly assigned to the external investigations unit. Delia does not have the ability to efficiently assign specific types of investigations to specific Investigators due to the number of employees available.

¶ 9 Once an Investigator has been assigned to a case, he conducts the investigation independently, with minimal oversight, relying on his training and experience. Investigators do not need approval from Delia or anyone else to expand an investigation to cover high-ranking administrators, including the director of the DOC or the chief of labor relations. Rather, Investigators have the authority to investigate any employee, regardless of rank or bargaining unit status, and every employee of the DOC, regardless of rank, is required to cooperate with an investigation. Delia and the other supervisors do not give direction to an Investigator on how to conduct an investigation unless an Investigator asks for assistance.

¶ 10 Delia does not put any limitations on what material an Investigator can review if it is determined to be relevant to the case. To obtain materials from inside the DOC, an Investigator sends a request through a deputy commander to Delia; such requests are always approved without limitations. An Investigator directly receives all responsive materials requested from within the DOC. Investigators can obtain materials from outside the control of DOC through a subpoena, including telephone records, text messages, emails, and bank records. If an Investigator needs to obtain materials through a subpoena, he prepares the subpoena and submits it to Delia for signature. Delia signs all of the subpoenas submitted by the Investigators without changing the scope of the subpoena; he does not review the case file to determine if a subpoena

is appropriate.

¶ 11 An employee responding to an Investigator's request has no option to limit what materials to produce. Investigators may obtain and review the emails of any employee, including those holding union leadership positions. When an Investigator requests an employee's emails, they get every email generated during a specified time period and review every email to determine if it is relevant to their case. There is no way for specific types of emails, such as those related to labor issues, to be excluded from a response to an Investigator's request for emails.

¶ 12 A case is not reassigned to a different Investigator regardless of the number of other employees or what rank of employee are added to the investigation. If an Investigator learns of information that indicates other employees should be included in an investigation, no one else will be aware of this unless the Investigator includes the information in his report. This gives the Investigators the ability to exclude individuals from investigations if they so choose. Investigators also have the discretion to administratively close a case early in the investigation if it appears to have no substance, and Delia will approve the closing without independent investigation.

¶ 13 At the end of every investigation, the Investigator drafts a report summarizing the evidence and determines whether a charge is substantiated or unsubstantiated. These reports are sent to the deputy commanders for review to ensure they are complete but the deputy commanders do not conduct any independent investigation to determine if they agree with the conclusion of the Investigator. Delia performs the final review of a report to ensure that it is complete. If a charge is substantiated, the report is sent to the warden to impose discipline. Wardens have no discretion as to whether to accept a substantiated finding. They are required to report to Delia what discipline they imposed within 30 days.

¶ 14 Delia and the other supervisors put deadlines on investigations, but otherwise Investigators are given no limits on what direction to take an investigation, what questions to ask of witnesses, what materials to gather, or what conclusions to reach. A supervisor may call an Investigator with a question about a case, but does not call about every case. Investigators can access any employee records without supervisory approval and without Delia's approval.

¶ 15 Delia acknowledged that he was not aware of an instance in which the Employer's confidential negotiating positions, collective bargaining proposals, or other labor relations information had been disclosed to an investigator. However, Delia admitted that he does not personally go through the emails that are provided as a result of an investigator's request.

¶ 16 Ed Jackson is the chief of DOC's labor relations division and has worked in labor relations for ten years with DOC and ten years with the department of natural resources. Chief Jackson and his staff handle matters related to collective bargaining, contract administration, employee grievances, and discipline. He communicates with the director, the chiefs, the deputy directors, the wardens and CMS regarding confidential labor relations matters. These communications are mostly conducted by email.

¶ 17 In performing its duties, the labor relations office interacts with staff at every level, from the director to correctional officers and other staff. In the last six months, Chief Jackson has communicated with every warden regarding labor relations, unless there was a "brand-new warden" just appointed. He probably communicates weekly with the other chiefs on labor relations matters. The labor relations office interacts with the director on a weekly basis, answering questions regarding the interaction between his policy initiatives and requirements under collective bargaining and the related contracts. The labor relations office interacts with CMS on a daily basis regarding employee grievances and arbitrations as well as labor contract

negotiations.

¶ 18 The communications with wardens, deputy directors, chiefs, the director, and CMS include confidential labor matters and are conducted mostly by email. The email communications include labor contract negotiation strategy and may occur while negotiations are taking place. Information related to negotiation strategy is not often shared with the opposing side. Negotiations take place over time, and information requested through email may not be used for weeks.

¶ 19 The labor relations office reviews all discipline greater than five-day suspensions and makes recommendations to the director as to whether to approve the level of discipline. Ninety-nine percent of cases where discipline is approved lead to employee grievances challenging the discipline. Investigators who conducted investigations that led to discipline are often consulted by the labor relations office and used as witnesses in later hearings.

¶ 20 Jackson testified that he was not aware of an instance where an investigator possessed emails regarding labor relations.

¶ 21 An investigative report from a January 2016 charge that a chief had misused state wi-fi services was made part of the record. Delia testified that during that investigation, the Investigator was required to view the chief's emails for the prior six months. That time period included the expiration of the parties' contract through the Union's demands for arbitration. Other investigative reports that were made part of the record demonstrated that Investigators obtain emails from and investigate high-level employees.

¶ 22 Investigator Hodge stated that he is president of the Union and an investigator (ISI-II) with the southern district DOC investigations unit. He stated that he had never received an email in the course of an investigation that contained any confidential or collective bargaining

information. He was not aware of anyone else who had come across such information. He had never received any confidential information that would have helped him in his position as president of the Union.

¶ 23 As an investigator, Hodge was not involved in the preparation of the budget, nor was he involved in discussions regarding policy decisions or rules and regulations of the department. He did not have the ability to evaluate or manage his peers. He was not in any way involved in management meetings on wages, discipline or procedure and was not involved in formulating the administrative directives of the department. The chief had never discussed confidential labor information with the Investigators.

¶ 24 In two years of investigating about 60 cases, Hodge requested about 6 subpoenas, which were for phone records. He had never investigated a grievance involving a labor contract. He was aware of an instance where an investigation regarding conduct was substantiated but discipline was not imposed.

¶ 25 Investigator Jack Thomas testified that he has been an investigator (ISI II) for 13 years. He was in the room listening to all the questions posed to Investigator Hodge and his answers would be similar and did not disagree with anything Investigator Hodge stated regarding the conduct of investigations and the consultations with supervisors during the course of an investigation.

¶ 26 Investigator Thomas has conducted 1,000 investigations over the last 13 years, and has requested e-mails as part of those investigations infrequently. When he received those e-mails, he did not read all the e-mails. Rather, he went directly to the date he was looking for. The most number of emails he received was over 100.

¶ 27 On January 25, 2017, the ALJ issued her recommended decision and order, finding that

the unit clarification petition was timely filed. The ALJ also found that the Investigators are confidential employees under the authorized access test because, in the regular course of their duties, they have authorized access to emails that contain the Employer's collective bargaining strategies and information concerning contract administration. The ALJ rejected the Employer's additional argument that the Investigators were also confidential because they investigate alleged misconduct by union members. Since the ALJ found the Investigators were confidential employees, she did not address their managerial status.

¶ 28 Timely exceptions were filed by both the Union and Employer regarding the ALJ's recommended decision and order. On April 11, 2017, the Board issued its decision, accepting the ALJ's recommended decision and order granting the unit clarification petition. However, the Board modified the order based on the Employer's exceptions and found that the Investigators were also confidential because of their role in investigating misconduct that lead to grievances. On May 17, 2017, the Board revoked the Union's certification. This timely appeal followed.

¶ 29 ANALYSIS

¶ 30 The Union first argues that the Board erred when it found the Employer's unit clarification petition was properly brought. The Union argues that it was error for the Board to entertain the petition where the Employer waited eight years to file the unit clarification petition.

¶ 31 A bargaining-unit-clarification petition is a procedure created by the Board's regulations and case law to provide an official determination of a bargaining unit's composition. *American Federation of State, County & Municipal Employees v. Illinois State Labor Relations Board*, 333 Ill. App.3d 177, 181 (2002); *Sedol Teachers Union v. Illinois Educational Labor Relations Board*, 276 Ill. App. 3d 872, 878 (1995). The filing of a unit-clarification petition is appropriate under limited circumstances. *American Federation of State, County & Municipal Employees*, 333

Ill. App. 3d at 181-82. Sections 1210.170(a)(1), (a)(2), and (a)(3) of the Illinois Administrative Code (Code) provide as follows:

> "(a) An exclusive representative or an employer may file a unit [-]clarification petition to clarify or amend an existing bargaining unit when:
>
> (1) substantial changes occur in the duties and functions of an existing title, raising an issue as to the title's unit placement;
>
> (2) an existing job title that is logically encompassed within the existing unit was inadvertently excluded by the parties at the time the unit was established; and
>
> (3) a significant change takes place in statutory or case law that affects the bargaining rights of employees." 80 Ill. Adm.Code §§ 1210.170(a)(1), (a)(2), (a)(3), as amended by 27 Ill. Reg. 7393 (amended May 1, 2003).

A party may also file a unit-clarification petition when a newly created job classification has job functions similar to functions already covered in the bargaining unit. *American Federation of State, County & Municipal Employees*, 333 Ill. App. 3d at 18.

¶ 32 In *Department of Central Management Services v. Illinois Labor Relations Board*, 364 Ill. App. 3d 1028 (2006) (*CMS*), this court addressed the issue of when a unit clarification petition, seeking to exclude confidential employees, may be filed. In *CMS*, in two separate cases the Board dismissed stipulated unit clarification petitions which sought to exclude four employees from their bargaining units. The Board determined that, in both cases, the unit clarification petitions did not fall under any of four exceptions in section 1210.170 (80 Ill. Adm.Code §§ 1210.170(a)(1), (a)(2), (a)(3), as amended by 27 Ill. Reg. 7393 (amended May 1, 2003)) permitting the filing of the petitions.

¶ 33 On appeal, we similarly found that the unit clarification petition did not fall within the

limited circumstances under which a party may file such a petition, but we concluded that "under the unique circumstances that exist in these cases-that is, where allegedly confidential employees were improperly included in a bargaining unit-the filing of a unit-clarification petition is appropriate." *CMS*, 364 Ill. App. 3d at 1033. We reasoned that under section 3(n) of Act (5 ILCS 315/3(n) (West 2004)), confidential employees are excluded from the definition of employees to which the Public Labor Relations Act applies. The reason for this exclusion " 'is to keep employees from "having their loyalties divided" between their employer and the bargaining unit which represents them. The employer expects confidentiality in labor[-]relations matters but the union may seek access to the confidential materials to gain a bargaining advantage.' " *CMS*, 364 Ill.App.3d at 1033-34 (quoting *Chief Judge of the Circuit Court of Cook County v. American Federation of State, County & Municipal Employees, Council 31*, 153 Ill. 2d 508, 523 (1992) (*Chief Judge II*). "Given the importance of confidentiality in labor-relations matters, to protect both the employers and the confidential employees (who could find themselves torn between loyalty to their employer and their bargaining unit), we hold that a unit-clarification petition may appropriately be used to sever confidential employees from a bargaining unit." *CMS*, 364 Ill. App. 3d at 1034,

¶ 34 With respect to the Board's argument that one of the petitions was untimely filed, we held:

> "As our supreme court recognized in *Chief Judge of the Circuit Court of Cook County*, [citation], the State has an interest in keeping confidential employees out of bargaining units. If, at any point, the State determines that a confidential employee is a member of a bargaining unit, the State must be allowed to file a unit-clarification petition to remove that confidential employee. The fact that a confidential employee was improperly placed

> in a bargaining unit and the issue of his placement was not raised for several years should not dictate that he forever be allowed to stay in the bargaining unit. We thus conclude that the State can file a unit-clarification petition to remove a confidential employee from a bargaining unit *at any time*." (Emphasis added.) *CMS*, 364 Ill. App. 3d at 1035-36.

¶ 35 The law on this issue is clear. In accordance with *Chief Judge II*, 153 Ill. 2d at 523, and *CMS*, 364 Ill. App. 3d at 1035-36, we hold that the State's clarification petition to remove confidential employees from a bargaining unit could be brought at any time, even eight years later.

¶ 36 The Union next argues that the Board's finding that the Investigators are confidential employees is clearly erroneous. We disagree.

¶ 37 The Administrative Review Law (735 ILCS 5/3-101 to 3-113 (West 2014)) governs the judicial review of a decision by the Board to dismiss a certification petition. 5 ILCS 315/9(i) (West 2014). This court reviews the final decision of the Board, not the ALJ's recommendation. *Wilson v. Department of Professional Regulation*, 317 Ill. App. 3d 57, 64-65 (2000).

¶ 38 "The applicable standard of review depends upon whether the question presented is one of fact, one of law, or a mixed question of fact and law." *American Federation of State, County and Municipal Employees, Council 31 v. Illinois State Labor Relations Board, State Panel*, 216 Ill. 2d 569, 577 (2005). The Board's findings of fact are "held to be prima facie true and correct" (735 ILCS 5/3-110 (West 2014)) and will be disturbed on review only if they are against the manifest weight of the evidence. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998). The Board's findings of fact are against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008). The Board's conclusions of law

are reviewed *de novo*. *Cinkus*, 228 Ill. 2d at 210-11. The Board's decision on a question of law is not binding on the reviewing court and, thus, this court's review is independent and not deferential. *Id*. at 210. Cases that involve mixed questions of law and fact are subject to a clearly erroneous standard of review. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 392 (2001). A mixed question of law and fact typically arises when "the historical facts are not in dispute and the issue is whether the established facts satisfy the statutory standard." *Village of Hazel Crest v. Illinois Labor Relations Board*, 385 Ill. App. 3d 109, 113 (2008). An agency's decision is clearly erroneous "only where the reviewing court, on the entire record, is 'left with the definite and firm conviction that a mistake has been committed.' " *AFM Messenger Service*, 198 Ill. 2d at 395 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

¶ 39 In this case, this court is asked to review the Board's finding that the Investigators were confidential employees, which requires an application of the undisputed facts to section 3(c) of the Act, defining the term "confidential employee," and is a mixed question of law and fact. *Village of Hazel Crest*, 385 Ill. App. 3d at 113. Therefore, we will reverse the Board's decision only if this court is left with the definite and firm conviction that a mistake has been made. *AFM Messenger Service*, 198 Ill. 2d at 395.

¶ 40 Section 3(c) of the Act defines a "confidential employee" as follows:

> "[A]n 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 2014).

¶ 41 The Employer bears the burden of proving that the Investigator position merits classification as a "confidential employee" position. *County of Cook (Provident Hospital) v. Illinois Labor Relations Board*, 369 Ill. App. 3d 112, 123 (2006). We construe the "confidential employee" exclusion "narrowly" because such employees are precluded from exercising collective-bargaining rights that are given to all public employees. *Niles Township High School District 219 v. Illinois Educational Labor Relations Board*, 387 Ill.App.3d 58, 69-70 (2008) (quoting *Board of Education of Glenview Community Consolidated School District No. 34 v. Illinois Educational Labor Relations Board*, 374 Ill.App.3d 892, 898-99 (2007), and applying analogous provision in Illinois Educational Labor Relations Act)). "Confidential employees" are excluded from bargaining units to prevent employees from having their loyalties divided between their employer, who expects confidentiality in labor relations matters, and the union, which may seek disclosure of management's labor relations material to gain an advantage in the bargaining process. *Chief Judge II*, 153 Ill. 2d at 523.

¶ 42 There are two tests specifically designated in the statutory definition to determine whether a position is, in fact, a "confidential employee" position: the "labor-nexus" test and the "authorized access" test. *Id*. at 523–24. The parties agree that the "authorized access" test applies in this case.

¶ 43 According to the "authorized access" test, an employee is "confidential" if he or she has "authorized access to information concerning matters specifically related to the collective-bargaining process between labor and management." *Chief Judge II*, 153 Ill. 2d at 523. "Labor relations encompasses ongoing or future collective-bargaining negotiations and strategy, not general, though undoubtedly otherwise confidential department administration matters." *Chief Judge of the Circuit Court v. American Federation of State, County, & Municipal Employees*,

Council 31, 218 Ill. App. 3d 682, 699 (1991) (*Chief Judge I*), *aff'd, Chief Judge II*, 153 Ill.2d 508. So, "[m]ere access to 'confidential' information concerning the general workings of the department or to personnel or statistical information upon which an employer's labor relations policy is based is insufficient to confer confidential status." *Id*. at 699; see also *Board of Education of Community Consolidated School District No. 230 v. Illinois Educational Labor Relations Board*, 165 Ill.App.3d 41, 60 (1987) ("[A]ccess to information concerning general confidential district business matters is irrelevant. * * * [I]nquiry is limited to whether the employee in question has unfettered access ahead of time to information pertinent to the review or effectuation of pending collective-bargaining policies."). Therefore, if, as part of a position's regular duties, an employee has access to information that, if divulged to the employee's respective bargaining unit, would give the Union unfair, advance notice of the employer's private information regarding labor relations' activity, the employee should be classified as a confidential. *Chief Judge I*, 218 Ill. App. 3d at 699. Infrequent access to such information is adequate if that access is "part of [the employee's] normal duties." *Niles*, 387 Ill. App. 3d at 70-71 (citing *Board of Education of Plainfield Community Consolidated School District No. 202 v. Illinois Educational Labor Relations Board*, 143 Ill. App. 3d 898, 911 (1986), and applying analogous provision in Illinois Educational Labor Relations Act).

¶ 44 The Union argues that the Board's finding that ISI-I and ISI-IIs are confidential employees is clearly erroneous because the Employer failed to present any real evidence that the Investigators had access to emails with confidential information regarding labor relations. Further, the Union maintains that the Board's finding that the Investigators' role in the grievance process confers confidential employee status is clearly erroneous.

¶ 45 There was sufficient evidence presented at the hearing to support the Board's

determination that the Investigators are confidential employees. Clearly, under the "authorized access" test, the Investigators had "authorized access to information concerning matters specifically related to the collective-bargaining process between labor and management." *Chief Judge II*, 153 Ill. 2d at 52. The evidence showed that the Investigators are charged with investigating any employee, regardless of rank. In the course of those investigations, the Investigators have unfettered access to whatever information they deem necessary to complete their investigation, including employee email correspondence. Delia testified that in subpoenaing email correspondence, an Investigator would have to sift through all of the emails received in response to a subpoena to determine what information contained in those emails was relevant to the investigation. It was common for the Investigators to obtain and review all emails for a specific time period involved. Delia testified that there was no way to exclude emails that contained labor relations or collective bargaining information from an Investigator's subpoena.

¶ 46 The evidence also demonstrated that the emails that would be accessible to the Investigators specifically included confidential labor relations information. Chief Jackson testified that he regularly communicated by email with the director, deputy directors, chiefs and wardens regarding labor relations, including matters involving contract negotiations, contract administration and labor policy. Jackson testified that these email communications were frequent-daily and weekly. Furthermore, the investigative reports that were submitted at the hearing highlighted an instance where an investigation of a chief produced emails for a six month time period that was simultaneous to ongoing union contract negotiations.

¶ 47 Although Investigator Thomas testified that he did not come across a confidential email in the course of his investigations, he acknowledged that he has requested emails and that his requests have never been denied. His testimony regarding the lack of contact with confidential

email does nothing to negate the fact that Thomas had unfettered access to any email generated during a period that he deemed necessary to any investigation, even those containing confidential collective bargaining information. This is testimony that supports the Board's finding that the Investigators were confidential employees and we cannot say that this finding was clearly erroneous.

¶ 48 Although not necessary based on discussion above, we address the Union's contention that the Board erred in finding that Investigators were confidential employees based on the significant role their work product played in the disciplinary and grievance process, which exposed Investigators to advance knowledge of the Employer's likely cause of action because the Investigators do not recommend disciplinary action. The Board found that the primary purpose of the investigations conducted by the Investigators was "to provide the foundation for discipline and discharge should the investigation substantiate the allegations." Conversely, an Investigator who "did not substantiate allegations of misconduct would in effect have knowledge that discipline or discharge would not be imposed because there would be no just cause." Furthermore, if an employee challenged the disciplinary action by way of a grievance, the Investigator's report would guide management's response because the report would contain the circumstances found to substantiate the charge and justify discipline.

¶ 49 We find that the Board's decision was not clearly erroneous in this regard. The reports prepared by the Investigators included findings of misconduct for any employee level in the DOC. Those findings formed the basis of potential disciplinary action. The evidence established that, almost always, employees would be disciplined based on an investigative report that substantiated allegations of misconduct. Moreover, "99 percent of the time" employees who were disciplined after a substantiated investigative report filed grievances challenging that

discipline. The investigative report then would guide the Employer's response to that grievance. The Investigators were directly involved in the disciplinary and grievance process by way of their reports. The record contains sufficient testimony to support the Board's finding. Based on this record, we cannot conclude that it was clearly erroneous for the Board to find that the Investigators were confidential employees under the Act.

¶ 50 CONCLUSION

¶ 51 For the foregoing reasons, we affirm the final decision of the Board finding the Investigators to be confidential employees.

¶ 52 Affirmed.