2018 IL App (1st) 180096-U
Order filed: September 28, 2018

FIRST DISTRICT
Fifth Division

No. 1-18-0096

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN FEDERATION OF STATE, COUNTY, and MUNICIPAL EMPLOYEES, COUNCIL 31,

Petitioner,

v.

ILLINOIS LABOR RELATIONS BOARD, STATE PANEL, and THE CITY OF ROLLING MEADOWS,

Respondents.

Petition for Review of a Decision and Order of the Illinois Labor Relations Board, State Panel

No. S-UC-16-029

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the decision of the Illinois Labor Relations Board that three employees of the City of Rolling Meadows are "confidential employees" and are, therefore, not eligible to be added to an existing collective bargaining unit for employees of the City of Rolling Meadows.

¶ 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, State Panel (Board), finding that three employees of respondent, The City of Rolling Meadows (City), are "confidential employees"

and, thus, are not eligible to be added to AFSCME's existing collective bargaining unit for City employees. For the following reasons, we affirm.[1]

¶ 3 I. BACKGROUND

¶ 4 In December 2015, AFSCME filed a unit clarification petition with the Board (case number S-UC-16-029), pursuant to the Illinois Public Labor Relations Act (Act) (5 ILCS 315/1 *et seq*. (West 2016)), seeking to add 12 positions to an existing collective bargaining unit of City employees previously certified in case number L-RC-16-030. In response, the City argued for the exclusion of all 12 positions from the bargaining unit because they were all confidential employees, managerial employees, and/or supervisors under the Act and were, therefore, ineligible for inclusion. AFSCME and the City subsequently reached an agreement with respect to 9 of the 12 positions, agreeing to include 4 and exclude 5 positions from the bargaining unit. The parties, thus, agreed to proceed to an administrative hearing on the unit clarification petition solely with respect to the remaining three positions: (1) Logistics Coordinator, a position held by Lisa Norton; (2) Secretary to the Chief of Police, a position held by Linda Schendel; and (3) Executive Secretary/Administrative Support Coordinator, a position held by JoAnn Fitch.

¶ 5 At the May 2016 hearing, the Board's administrative law judge (ALJ) was presented with the testimony of the three individuals holding the positions at issue, as well as testimony from: (1) the City Manager, Barry Krumstok; (2) the Fire Chief, Scott Franzgrote; (3) the Chief of Police, John Nowacki; and (4) the Director of Public Works, Fred Vogt, Jr. The parties also introduced a number of stipulations and exhibits into evidence, including organizational charts and position descriptions. Following the hearing, the parties filed posthearing briefs.

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[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.

¶ 6 In a recommended decision and order entered on May 22, 2016, the ALJ concluded that each of the three positions at issue were confidential employees under the Act and, therefore, the ALJ recommended that each of the three positions be excluded from the bargaining unit. AFSCME, thereafter, filed written exceptions to the ALJ's recommended decision and order, and the City filed a written response.

¶ 7 On December 13, 2017, the Board issued a written decision and order in which it rejected AFSCME's exceptions and adopted the ALJ's recommended decision and order. AFSCME, thereafter, filed a timely petition for direct appellate review of the Board's decision.

¶ 8 II. ANALYSIS

¶ 9 On appeal, AFSCME challenges the Board's classification of the three positions as "confidential employees," and the resulting exclusion of those positions from the bargaining unit.

¶ 10 Judicial review of the Board's decision 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). 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).

¶ 11 The applicable standard of review with respect to the Board'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 reviewed *de novo*. *Id*. at 205.

¶ 12 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.

¶ 13 Here, the parties agree that the Board decided a mixed question of fact and law when it determined, on the facts of this case, that the three positions at issue met the definition of a confidential employee. Thus, we review the Board's decision under the clearly erroneous standard. *Id.*

¶ 14 "The Act's purpose in excluding 'confidential employees' from any bargaining unit is 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." *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board,* 2014 IL App (1st) 132455, ¶ 32. To be considered "confidential" under the Act, the employee's position must qualify under either (1) the "labor-nexus" test; or (2) the "authorized access" test. *Support Council of District 39 v. Illinois Education Labor Relations Board*, 366 Ill. App. 3d 830, 837 (2006). The two tests are taken from the definition of a confidential employee contained in section 3(c) of the Act, which provides:

> " 'Confidential employee' means 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 2016).

¶ 15 Thus, the party seeking to classify an employee as confidential under the labor-nexus test must: (1) identify a person who formulates, determines, and effectuates labor relations policies; and (2) show that the employee subject to the classification assists that person in a confidential capacity in the regular course of his or her duties. See, *e.g.*, *Niles Township High School District 219, Cook County v. Illinois Education Labor Relations Board*, 387 Ill. App. 3d 58, 71 (2008) (finding that, since the petitioner conceded that two individuals formulated, determined and effectuated labor relations policy, the only remaining question under the labor-nexus test was whether the contested employees assisted those two individuals in a confidential capacity in the regular course of their duties).

¶ 16 The assistance must be "in a confidential capacity," and the confidential capacity must relate specifically to "labor relations." 5 ILCS 315/3(c) (West 2016); *Health & Hospital Systems of County of Cook v. Illinois Labor Relations Board*, 2015 IL App (1st) 150794, ¶ 59. Labor relations does not include hiring, performance or promotion or " 'mere access to personnel or statistical information,' " even if that information is confidential. *Id.* (quoting *Board of Education of Community Consolidated High School District No. 230, Cook County v. Illinois Education Labor Relations Board*, 165 Ill. App. 3d 41, 62-63 (1987)). Rather, the assistance must provide the employee with advance information about collective bargaining positions or strategies. *Id.*

¶ 17 Under the authorized access test, an employee is a "confidential employee" if, "in the regular course of his or her duties, [he or she] has access to information relating to the effectuation or review of the employer's collective bargaining policies." 5 ILCS 315/3(c) (West 2016); *American Federation*, 2014 IL App (1st) 132455, ¶ 34. The access must be authorized; and the information must relate specifically to collective bargaining between labor and management. *Id*. Examples of such information include the employer's bargaining strategy and actual collective bargaining proposals. *Health & Hospital Systems*, 2015 IL App (1st) 150794, ¶ 67. The access must also be in the regular course of the employee's duties. *Id*.

¶ 18 There is also a third, non-statutory test; the "reasonable expectations" test. *Id*. ¶ 56. This test asks whether there is a reasonable expectation that the employees at issue would perform confidential duties in a future collective bargaining process. *Id.*; *Chief Judge of Circuit Court of Cook County v. American Federation of State, County & Municipal Employees, Council 31*, 153 Ill. 2d 508, 528 (1992) ("[t]he reasonable expectation test should only be applied where the responsibilities may be reasonably expected but have not yet been assumed").

¶ 19 As the employer, the City bears the burden of proving that the three positions at issue here merit classification as confidential employees. *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 the collective-bargaining rights that are otherwise given to all public employees. *American Federation*, 2014 IL App (1st) 132455, ¶ 31. However, should an employee meet the requirements of *any one* of the above three tests, the employee is deemed to be confidential. *Chief Judge*, 153 Ill. 2d at 523.

¶ 20 First, we address the AFSCME's challenge to the Board's decision that Logistics Coordinator Lisa Norton and Secretary to the Chief of Police Linda Schendel were confidential employees. The Board determined that Ms. Norton and Ms. Schendel satisfied both the labor-nexus and authorized access tests. However, because an employee need meet the requirements of only one of the relevant tests to be deemed a confidential employee (*id.*), and because we reject AFSCME's argument with respect to the labor-nexus test, we need only consider that test on appeal.

¶ 21 Ms. Norton and Ms. Schendel directly worked for—respectively, Fire Chief, Scott Franzgrote, and Chief of Police, John Nowacki—two City employees that AFSCME conceded below work to formulate, determine, and effectuate labor relations policies. AFSCME does not raise any argument with respect to this issue on appeal. Thus, it is undisputed that the first element of the labor-nexus test was satisfied with respect to Ms. Norton and Ms. Schendel.

¶ 22 Moreover, on appeal AFSCME raises no *direct* challenge to the Board's conclusion that the ALJ correctly determined that Ms. Norton assists the City's Fire Chief and Ms. Schendel assists the City's Chief of Police in a confidential capacity specifically related to labor relations in the regular course of their duties, because: (1) "[Ms.] Norton in the regular course of her duties, had the opportunity to view the City's bargaining proposals and assisted the Fire Chief in developing his strategy for objecting to [an] organization campaign involving the Battalion Chiefs when they discussed whether Battalion Chiefs were supervisors;" and (2) Ms. Schendel "photocopies the Police Chief's bargaining proposals for presentation to unions in bargaining sessions, files the Police Chief's notes from bargaining meetings, files the Chief's disciplinary decision before the discipline is issued, and performs these tasks as part of her regularly performed duties." As such, any such challenge to the Board's conclusion that the second

element of the labor-nexus test was satisfied with respect to Ms. Norton and Ms. Schendel has been forfeited. *American Federation*, 2014 IL App (1st) 132455, ¶ 36; Ill. S. Ct. R. 341(h)(7) (eff. May 28, 2018) ("Points not argued [in the opening brief] are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 23 What AFSCME does argue on appeal is that the labor-nexus test was not satisfied and Ms. Norton and Ms. Schendel were not properly classified as confidential employees, because "[n]one of the information to which Norton or Schendel has *authorized* access provides advance notice about collective bargaining positions or strategies." (Emphasis in original.) However, as the Board recognized when AFSCME raised this same argument below, "AFSCME appears to read an authorized access requirement into the labor nexus test and conflates the two tests without citing any authority in support of its contention." We come to the same conclusion here, where the same argument is raised again without citation to any legal support. Clearly, the two statutorily-based labor-nexus and authorized access tests discussed above are separate and distinct, and an employee need meet the requirements of only *one* of the two statutorily-based tests to be deemed a confidential employee. *Chief Judge*, 153 Ill. 2d at 523.

¶ 24 Indeed, Illinois Supreme Court Rule 341(h)(7) (eff. May 28, 2018) requires a litigant to support the contentions in its brief with citation to relevant authority. This court is not a repository into which an appellant may force upon the burden of research and argument. *People v. Universal Public Transportation, Inc.*, 2012 IL App (1st) 073303-B, ¶ 50 (citing *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993)). In light of the fact that AFSCME's argument runs counter to the relevant authority cited above, and the fact that AFSCME fails to cite to any alternative authority, we must affirm the Board's decision that Logistics Coordinator, Lisa Norton, and Secretary to the Chief of Police, Linda Schendel, were confidential employees.

¶ 25 Finally, we address AFSCME's challenge to the Board's decision that Executive Secretary/Administrative Support Coordinator, JoAnn Fitch, was a confidential employee. The Board determined that Ms. Fitch satisfied the non-statutory "reasonable expectations" test.

¶ 26 As noted above, this test asks whether there is a reasonable expectation that the employee at issue would perform confidential duties in a future collective bargaining process. *Chief Judge*, 153 Ill. 2d at 528. As such, this test "is to be applied where no collective-bargaining unit was previously in place, but it is expected that the establishment of the unit will require that confidential responsibilities be assumed by the employee. 'The "reasonable expectation" test was designed to determine, in the absence of a collective bargaining relationship, whether the onset of collective bargaining would reasonably bring the individual confidential duties.' [Citation.]" *Id*. at 524.

¶ 27 Here, the undisputed evidence presented below established that in 2015, the International Union of Operating Engineers, Local 150 (Local 150), was certified as the bargaining representative for certain employees in the City's Public Works department. However, at the time of the administrative hearing in this matter, the City had not yet begun negotiations with respect to the City's Public Works department employees. Nevertheless, it was conceded below that there was a reasonable expectation that, as the City's Director of Public Works, Fred Vogt, Jr., will formulate, determine, and effectuate labor relations policies. It was also undisputed that, in her role as Executive Secretary/Administrative Support Coordinator, Ms. Fitch worked for and supported Mr. Vogt, Jr.

¶ 28 Thus, the only remaining question for the Board to answer was whether the evidence presented below established that there was a reasonable expectation that in her role supporting Mr. Vogt, Jr., Ms. Fitch would assume confidential responsibilities under either the labor-nexus

or authorized access tests. The Board determined that there was a reasonable expectation that Ms. Fitch would assume confidential responsibilities under both tests. Once again however, because an employee need meet the requirements of only one of the relevant tests to be deemed a confidential employee, and because we reject AFSCME's argument with respect to the labor-nexus test, we need only consider that test on appeal.

¶ 29 Again, it was conceded below that that there was a reasonable expectation that Mr. Vogt, Jr. will formulate, determine, and effectuate labor relations policies. Thus, it is undisputed that the first element of the labor-nexus test was satisfied with respect to Ms. Fitch. In addition, the evidence presented below established that Ms. Fitch typed all of Mr. Vogt, Jr.'s documents, performed all of Mr. Vogt, Jr.'s filing, and checked Mr. Vogt, Jr.'s emails when he was out of the office or on vacation. Mr. Vogt, Jr. specifically testified that he anticipated that future collective bargaining proposals would "go through Ms. Fitch for preparation," and Ms. Fitch specifically testified that she reads all the documents she files for Mr. Vogt, Jr. so that she knows "where to file them."

¶ 30 It was on the basis of this evidence that the Board concluded there was a reasonable expectation that Ms. Fitch would assist Mr. Vogt, Jr. in a confidential capacity regarding matters specifically related to labor relations and, thus, receive advance information about collective bargaining positions or strategies, such that Ms. Fitch should be classified as a confidential employee. In light of this evidence, we are not left with the definite and firm conviction that a mistake has been committed such that the Board's determination was clearly erroneous.

¶ 31

III. CONCLUSION

¶ 32 For the foregoing reasons, we affirm the decision of the Board.

¶ 33 Board decision affirmed.