IN THE SUPREME COURT OF FLORIDA

State ex rel. LAWTON CHILES,
as Governor of Florida,
ROBERT A. BUTTERWORTH, Attorney
General, and MELANIE ANN HINES,
Statewide Prosecutor,

Petitioners,

v. Case No. 81,835

FLORIDA PUBLIC EMPLOYEES
RELATIONS COMMISSION and
STATE EMPLOYEES ATTORNEY
GUILD (FPD, NUHHCE/AFSCME)
(hereafter SEAG),

Respondents.
_____/

PETITIONERS' REPLY TO RESPONSES OF PERC AND SEAG

This Court has jurisdiction to enter "all writs" necessary to the complete exercise of its juridiction, pursuant to Article V, section 3(b)(7) of the Florida Constitution. Whether by writ of prohibition or by writ of some other title, this Court may prevent encroachment by any entity, including an administrative agency, into a matter which is vested, by Constitutional mandate, in this Court's exclusive jurisdiction.

The union states, "[b]ecause this Court retains, at all times, the final say, no encroachment upon its authority can occur." SEAG Response, p. 21. This statement demonstrates a fundamental misapprehension of the law.

Respondents refuse to acknowledge that Article V, section 15 of the Florida Constitution vests the exclusive authority to

regulate the practice of law with this Court. Thus, under our constitution, this Court has the only say in matters relating to the practice of law and the vitality of the attorney-client relationship -- not merely the "final" say.

Neither the Legislature through statute, nor PERC by rule, has the authority or jurisdiction to affect the exclusivity of this Court's jurisdiction over members of the Bar, regardless of where and for whom the attorney works. While the Legislature can, by statute, expressly waive rights held by public employer-clients, the Legislature has not done so with respect to bargaining by state-employed attorneys. Further, PERC is without authority to encroach, by rule, on this Court's exclusive jurisdiction to regulate the practice of law by injecting itself into the attorney-client relationship of the State of Florida and its attorneys.

Courts in other jurisdictions have been faced with balancing the unique responsibilities of attorneys with collective bargaining. As a direct consequence of attorneys' duties under applicable Codes of Professional Responsibility, attorneys have been denied collective bargaining status or classified as "managerial" or "confidential" employees. Where collective bargaining by attorneys has been permitted, the enforcement mechanisms available to attorneys have been severely limited.

Respondents assert a right to have a union negotiate standards and conditions for the practice of law by government attorneys which conflict with this Court's Rules Regulating the

Florida Bar. Further, Respondents assert that an outside Commission, whose members need not be members of the Bar, has jurisdiction to compel negotiations between the State, as client, and its attorneys, over "at-will" employment and other matters regulated by this Court through the Rules Regulating The Florida Bar. See e.g. Section 447.205, Florida Statutes. Indeed, the union even suggests that contracts containing obligations which conflict with the Rules Regulating The Florida Bar can be entered through collective bargaining and the State would be obligated to seek changes to the Rules Regulating The Florida Bar from this Court, pursuant to the procedures in Section 447.309(3), Florida Statutes. SEAG Response, pp. 20-21.

The unprecedented erosion of government lawyers' ethical responsibilities sought by Respondents is contrary to the professional standards enunciated by this Court for all lawyers in the Rules Regulating the Florida Bar.

Petitioners will address each of the issues raised by Respondents in more detail below.

I. THIS COURT HAS JURISDICTION TO ENTER ANY APPROPRIATE WRIT NECESSARY TO THE COMPLETE EXERCISE OF ITS JURISDICTION.

The unionization of government attorneys poses a significant and direct encroachment upon this Court's exclusive jurisdiction over members of the Bar. Unionization would fundamentally alter the attorney-client relationship of the State to its attorneys by thrusting the Public Employees Relations Commission and a union between them. And yet, Respondents assert that this Court lacks a procedural mechanism permitting it to assert its exclusive jurisdiction. This view is without merit. The "all writs" authority of this Court provides the mechanisms necessary to protect this Court's jurisdiction over the regulation of the practice of law.

SEAG opposes this Court's invocation of its "all writs" power. However, Petitioners rely on all of Article V, section 3(b)(7), in filing their petition. The "all writs" provision grants this Court full authority to protect its jurisdiction by the issuance of appropriate writs in addition to writs of prohibition.[1]

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[1] On page four of the petition filed in this Court (Section III. Nature of Relief Sought), petitioners stated in pertinent part:

> The relief sought is entry of an order prohibiting PERC from proceeding further with certification of a bargaining unit for state employed attorneys under section 447.307, Fla.Stat.

The order sought may be analogous to a writ of prohibition but that does not make it such. The order or writ sought is simply one that protects this Court's exclusive jurisdiction.

Moreover, this Court's "all writs" authority is not confined to issuing writs only to inferior courts. In *Florida Senate v. Graham*, 412 So.2d 360 (Fla. 1982), this Court, upon petition of the State Senate, found it appropriate to issue such a writ to the Governor (although issuance of the writ was withheld) in order to protect its jurisdiction to review a legislative plan of reapportionment. In reaching this conclusion, this Court relied on its earlier decision in *Couse v. Canal Authority*, 209 So.2d 865 (Fla. 1968), where this Court made it clear that its "all writs" jurisdiction extends to cases within the ultimate, as distinguished from the already acquired, jurisdiction of the Court. *See generally* Mann, *The Scope of the All Writs Power*, 10 Fla.Stat.L.Rev. 197 (1982). Similarly, under its "all writs" authority, this Court, in *Petit v. Adams*, 211 So.2d 565 (Fla. 1968), directed the Dade County Canvassing Board not to erase election results.

There is, therefore, no question that this Court has the same authority to issue an appropriate writ to PERC, a quasi-judicial administrative agency, as it does a lower court. It is particularly appropriate that such a writ be issued here for the reason that this Court has original and exclusive jurisdiction under article V, section 15, Florida Constitution, to regulate the practice of law and to discipline lawyers. That jurisdiction is shared neither with PERC nor with lower courts.

The thrust of respondents' jurisdictional argument, plainly stated, is that by virtue of the right of public employees to

collectively bargain, PERC shares this Court's authority to regulate or discipline lawyers insofar as matters affecting practice or discipline may inhere in or may be sought to be included in collective bargaining agreements. Further, respondents contend, PERC's decisions are subject to this Court's review. Hence, they conclude this Court can supervise PERC's attempts to regulate or discipline attorneys.

The first proposition is wrong. This Court's jurisdiction is not shared by PERC. Thus, only this Court can determine if attorneys can collectively bargain and, if bargaining is permitted, only this Court can define and establish the scope of bargainable issues and the enforcement remedies available to attorneys in adversarial proceedings against their clients.

The second proposition is highly problematic and simply begs the jurisdictional question. There is no right of appeal to this Court from PERC and no certain avenue through the district court of appeal. More importantly, this Court does not have appellate jurisdiction, but rather exclusive jurisdiction in this case.

Because this Court's authority is exclusive, it should issue an appropriate writ to PERC directing it to proceed no further with the petition submitted by SEAG.

II. PERC DESIGNATED A BARGAINING UNIT OF SELECTED EXEMPT SERVICE ATTORNEYS IN THE ABSENCE OF STATUTORY AUTHORITY

Chapter 447 does not specifically include attorneys within the meaning of "public employees" and the Legislature has not designated the Governor as the employer of Selected Exempt Service lawyers. Further, PERC is without statutory authority to designate a unit of lawyers in the absence of express legislative intent to create such a unit.

The union argues that prohibition is inappropriate because, PERC has already determined, by rule, that attorneys employed by the State as a class were public employees entitled to collective bargaining. While it may be so that PERC made this determination through initiation of an administrative rule, PERC was without any statutory authority to make this designation. More importantly, the Legislature has rejected recent attempts to specifically include lawyers under Section 447.203, Florida Statutes.

In 1985, the Florida Legislature enacted Chapter 85-219, Laws of Florida, which exempted certain professionals employed by the State, including physicians and lawyers, from the provisions of the Career Service System. During the same session, the Legislature amended Chapter 110, Florida Statutes, and created the "Selected Professional Service" (hereafter SPS). Physicians and attorneys were among the professionals included in the SPS. Chapter 85-318, Part VI, Laws of Florida.

The legislative purpose of the formation of a Selected Professional Service was:

> to create a system of personnel management which ensures to the state the delivery of high quality performance in select exempt classifications by facilitating the state's ability to attract and retain qualified personnel in those positions, while also providing sufficient management flexibility to ensure that the work force is responsive to agency need. . . .

Chapter 85-318, Part VI, Laws of Florida.

Salary increases for Selected Professional Service employees were based on performance. Chapter 85-318, Part VI, Laws of Florida, p. 1932. According to this statute, employees in the SPS:

> shall serve at the pleasure of the agency head, and shall be subject to suspension, dismissal, reduction in pay, demotion, transfer, or other personnel action at the discretion of the agency head. Such personnel actions are exempt from the provisions of Chapter 120.

Chapter 85-318, Part VI, Laws of Florida, p. 1932 (emphasis added).

In Section 12 of Chapter 85-318, Laws of Florida, the Legislature amended the definition of "public employer" contained in Section 447.203(2), Florida Statutes, to designate the Governor as the public employer of SPS employees "with respect to all public employees determined by the commission as properly belonging to a statewide bargaining unit." However, Chapter 85-318 was silent as to whether the Legislature intended SPS attorneys to bargain collectively.

In 1986, Chapter 86-149, Laws of Florida, was enacted, amending Chapter 110, Florida Statutes, again. Under the amended statute, the Selected Professional Service was abolished and the Selected Exempt Service created. Selected Exempt Service (hereafter SES) was comprised of professionals, including physicians and attorneys, and other employees not previously included in SPS. The SES constitutes a new class of "at-will" employees, different in composition from its predecessor SPS.

Significantly, the Legislature did not amend Section 447.203(2), Florida Statutes, when the SES was created. Thus, the statutes do not expressly designate the Governor as the public employer of SES employees. Neither do the statutes indicate an intent to include attorneys within the definition of "public employees" under 447.203, Florida Statutes.

Although it is arguable that Chapter 85-318, Laws of Florida, indicated some legislative contemplation of collective bargaining by some members of the Selected Professional Service, this same intent has not been demonstrated with respect to Selected Exempt Service employees. Furthermore, collective bargaining of wages, hours and "at-will" employment under Chapter 447, Florida Statutes, is inconsistent with the express legislative purpose of Section 110.601, Florida Statutes (1991).

Despite the failure of the Legislature to designate the Governor as the public employer of SES employees or to include attorneys in the definition of public employees, in November 1987, the Public Employees Relations Commission amended its rule

(38D-17.023, FAC) to establish statewide bargaining units of State Selected Exempt Service physicians and attorneys. That rule, 38D-17.023(2), FAC, makes no provision for a collective bargaining unit of SES employees who are neither physicians nor attorneys, and specifically excludes "all managerial and confidential employees".[2]

However, PERC issued this rule on the erroneous premise that "the Legislature has deemed the Governor to be the public employer of the State's attorneys for purposes of collective bargaining." PERC Response, p. 5. In fact, during the 1993 regular session, bills were introduced to designate the Governor as the public employer of state employed attorneys in Section 447.203(2), Florida Statutes.[3] However, the Legislature did not adopt these proposed amendments.

The SEAG representation-certification petition was approved by PERC as an appropriate bargaining unit under this PERC rule. This is the first attempt to unionize attorneys who represent the

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[2] Rule 38D-17.023(2)(b), FAC, reads as follows:

> (b) ATTORNEYS:
> Unit 2: All positions which require as a prerequisite membership in The Florida Bar except for any attorney who serves as a hearing officer pursuant to s. 120.65 or for hearings conducted pursuant to s. 120.57(1)(a).

[3] CS/HB 1523 died in the Committee on Appropriations on April 4, 1993 and CS/SB 2150 died in the Committee on Rules and Calendar on April 4, 1993.

State of Florida since PERC issued 38D-17.023(2), FAC. SEAG's proposed unit includes:

> (Professional Employees) All regular, full-time attorneys licensed to practice law in Florida who are employed in attorney positions by the State of Florida.[4]

However, this rule was issued in reliance upon an erroneous interpretation of legislative intent by PERC and, thus, PERC's issuance of a notice of sufficiency to SEAG was inappropriate.

The union asserts that the Legislature has preserved collective bargaining rights for state-employed attorneys and has either waived or consented to any conflicts with or alterations of the traditional attorney-client relationship, by failing to specifically exempt attorneys from the definition of "public employee" in Section 447.203(3), Florida Statutes (1991).

However, the waiver of a client privilege must be express and unequivocal.[5] In fact, the Legislature's characterization of attorneys as "at-will" employees directly contradict any claim of "waiver" by the State of its rights as a client under the Rules Regulating The Florida Bar. More importantly, the State retains all of its rights under these Rules. Accordingly, this Court must act to preserve its exclusive jurisdiction over the practice of law.

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[4] The union's unit definition is more expansive than the PERC rule and arguably includes judicial branch law clerks.

[5] Rule 4-1.7(b)(ii) only permits an attorney to pursue an interest adverse to a client where the client agrees after consultation. Rules Regulating The Florida Bar.

III. CONSIDERATION OF ETHICAL ISSUES BY OTHER STATES HAS LED TO PROHIBITIONS OF OR LIMITATIONS ON ATTORNEYS' COLLECTIVE BARGAINING RIGHTS

The union notes that "substantial doubt" is cast on the Petition, because of the absence of discussion of cases from other jurisdictions illustrating that bargaining is inherently destructive of the attorney client relationship and the ability of government attorneys to comply with their ethical obligations. See e.g. SEAG Response, p. 18.

The petition to certify a statewide unit of government lawyers is the first of its kind in Florida. This case involves questions of constitutional interpretation of the laws and Constitution of Florida which are unique to our State. However, in recent years, other states have been forced to consider the ethical issues presented by the unionization of government lawyers. These decisions offer guidance on resolution of many of the issues presented by the petition at bar. Specifically, these decisions illustrate the significant ethical problems presented by attorney unions. While these cases approach resolution of these inherent conflicts with attorneys' professional obligations differently, these decisions may assist this Court.

Illinois

In Illinois, recent cases have addressed the issue of government attorneys' participation in a collective bargaining unit. In each case the Illinois courts have found that attorneys were excluded from such bargaining units. These decisions have

as their basis the "unique attributes" of the attorney-client relationship.

In *Salaried Employees of North America (SENA) v. Illinois Local Labor Relations Board*, 560 N.E.2d 926 (Ill.App. 1 Dist. 1990), *cert. denied*, 567 N.E.2d 328 (1991), the appellate court affirmed a decision of the Labor Relations Board holding that attorneys within the City of Chicago's Department of Law are "managerial employees" excluded from collective bargaining under the Illinois Public Labor Relations Act.[6]

The Labor Relations Board's decision was based upon the recognition that:

> . . . [T]he relationship between the Law Department's attorneys and the City brings the attorneys within the statutory exclusion for "managerial employees". The necessity that the attorneys give complete confidentiality, fidelity and loyalty to the City while conducting its legal affairs inevitably aligns them with the City for all practical purposes. Like the court in *Herbster*, we cannot separate the attorneys' roles as employees from their roles as the City's trusted and confidential agents in a wide variety of important and sensitive activities.

Salaried Employees of North America (SENA) v. City of Chicago, Department of Law, Memorandum Opinion and Direction of Election, pp. 28-29. [Attached as Appendix I].

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[6] Although the definitions of managerial and confidential employees in Illinois differ from those in Florida, the reasoning related to attorneys' duties and responsibilities to clients apply with equal force here.

In affirming the determination that all attorneys within the Department of Law were excluded from collective bargaining, the appellate court applied the reasoning enunciated in *NLRB v. Yeshiva University*, 444 U.S. 672, 682, 100 S.Ct. 856, 862, 63 L.Ed.2d 115, 125 (1980). The *SENA* court reiterated that the managerial exclusion is not limited to "very high positions."

> Instead, . . . the key inquiry is whether the duties and responsibilities of the employees in question are such that the employees should not be placed in a position requiring them to divide their loyalty between the employer and the collective bargaining unit. . .
>
> According to the Supreme Court [in *Yeshiva*], the goal in applying the managerial exclusion is to ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between the employer and the union. Where the professional interests of the employee cannot be separated from those of the employer, the employees can be properly considered as "managerial employees". . .

Salaried Employees of North America (SENA) v. Illinois Local Labor Relations Board, 560 N.E.2d at 932.

Likewise, in *Chief Judge v. AFSCME, Council 31*, 593 N.E.2d 922 (Ill.App. 1 Dist. 1992), an Illinois appellate court held that attorneys who worked as guardians ad litem in the county Public Guardian's office were excluded from collective bargaining. In the *Chief Judge* case, the Illinois State Labor Relations Board certified AFSCME, Local 31, as the collective bargaining agent of a bargaining unit of employees from the Office of the Cook County Public Guardian.

The Board attempted to distinguish the earlier holding in *Salaried Employees of North America (SENA) v. Illinois Local Labor Relations Board, supra*, by claiming that attorneys in the Guardian Ad Litem office were not employed by their "client" (as in the *SENA* case), rather their clients were the "individual wards of the court whose interests the Public Guardian's Office has been designated to protect." Under the Board's theory, the attorneys had a fiduciary duty to the wards and it is primarily on their behalf that these attorneys exercise discretionary judgment in their capacity as attorneys. *Chief Judge v. AFSCME, Council 31*, 593 N.E.2d at 927.

The court rejected this reasoning, noting that the attorneys were carrying out the fiduciary duty owed by the Public Guardian to the wards and that the attorneys exercise large amounts of discretionary authority that effectively controls or implements the Public Guardian's fiduciary duty to his wards. *Chief Judge v. AFSCME, Council 31*, 593 N.E.2d at 928. The appellate court concluded that, indeed, all of the attorneys in the Public Guardian's Office were excluded from the bargaining unit, based on the unique attributes of their responsibilities as attorneys. Accordingly, all of the attorneys in the Guaridan Ad Litem office were classified by the appellate court as "managerial".[7]

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[7] This holding is particularly significant to the consideration of inclusion of attorneys for the Florida Department of Health and Rehabilitative Services in the proposed unit at bar. Like the attorneys in the *Chief Judge* case, many of these Florida attorneys exercise a great deal of discretionary authority that effectively controls and implements the fiduciary duty owed by

While the Illinois Courts have approached resolution of the ethical issues involved with attorney bargaining through reference to labor law, they conclude that attorneys may not bargain because of the unique nature of the attorney client relationship and attorneys' duty of loyalty to their clients under the applicable Code of Professional Responsibility. For this reason, these cases are particularly relevant to the issue at bar.

California

In California, the courts have resolved the ethical conflicts inherent in the adversarial arena of attorneys collective bargaining through other means. In *Santa Clara County Counsel Attorneys Association v. Woodside,* 15 Cal.Rptr.2d 898 (Cal. App. 6 Dist. 1993), a California appellate court recently determined that, although government attorneys are authorized to form a union, bargaining unit attorneys may not sue their clients to enforce terms of a collective bargaining agreement.

The *Santa Clara* court held that:

> . . . where courts have unanimously held that an attorney's professional obligations must take precedence over personal interests, we can only conclude the MMBA does not authorize [attorneys in an association] to bring suit against [their client-employer].

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the Department of Health and Rehabilitative Services to dependent children in this State.

Santa Clara County Counsel Attorneys Association v. Woodside, 15 Cal.Rptr.2d at 904.[8/9]

Although, unlike Florida, the right to collectively bargain is not fundamental under California law, *Santa Clara County Counsel Attorneys Association v. Woodside,* 15 Cal.Rptr.2d at 905, the *Santa Clara* court holding was premised on the conclusion that government attorneys' duty to their client outweighed even their fundamental First Amendment right to petition government. Thus, the infringement of fundamental rights was not considered dispositive of the outcome in *Santa Clara* and should not alter the applicability of this decision in Florida.

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[8] Like Florida, California's constituion vests its Supreme Court with exclusive jurisdiction over the regulation of the practice of law. Accordingly, the California Supreme Court granted a petition for review of the *Santa Clara* case on May 13, 1993.

[9] In California, the Meyers-Milias-Brown Act (hereafter MMBA) governs the collective bargaining rights of all public employees. (California Gov.Code, § 3500, et seq.) Under the MMBA public employees are guaranteed "the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (§ 3502). Section 3517 of the MMBA imposes an obligation on public employers to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations. . . "

The MMBA contemplates the formation of employee organizations by "professional employees", which are defined as employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including but not limited to attorneys . . ." (§ 3507.3). However, the California Court of Appeal for the Sixth District has held that, "it does not follow that because the MMBA allows government attorneys to organize, they also have a statutory right to sue their client." *Santa Clara County Counsel Attorneys Association v. Woodside,* 15 Cal.Rptr.2d at 904.

Other States

In its response, the union listed six additional states having government attorneys in collective bargaining unit: Connecticut, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin. Although some public employed attorneys within these states bargain collectively, typically at the local or county level, there is not a single state in this country which has a statewide bargaining unit of attorneys like that sought by Respondents.

The absence of a single example of statewide bargaining by state-employed counsel and the substantial limitations imposed by courts in other states on lawyers seeking to unionize are indicative of the radical nature of the intrusion into the attorney-client relationship sought by Respondents here. This Court should exercise its exclusive jurisdiction under Article V, section 15, Fla.Const., to prevent the significant encroachment upon its jurisdiction over members of the Florida Bar.

IV. RESOLUTION OF THE STATUS OF ASSISTANT ATTORNEYS GENERAL AND ASSISTANT STATEWIDE PROSECUTORS IS IN THE PUBLIC INTEREST AND IN THE INTEREST OF JUDICIAL ECONOMY

Petitioners concur that resolution of the question of the status of assistant attorneys general and assistant statewide prosecutors as "officers" rather than employees is not an issue which directly implicates this Court's jurisdiction under Article V, section 15. However, this is an alternative issue which demands immediate resolution.

Respondents argue that the issue of the status of these attorneys should be handled through PERC and the district court of appeal, as occurred in *Murphy v. Mack*, 358 So.2d 822 (Fla. 1978). Petitioners submit, however, that the history of that case demonstrates the reason for immediate resolution of this matter.

In *Murphy v. Mack*, a union attempted to organize deputy sheriffs. The Sheriff challenged the unit asserting that deputies were not "public employees" within the meaning of Section 447.203(3), Florida Statutes, but rather were officers clothed with the same powers as the constitutional officer who appoints them. PERC and the First District Court of Appeal rejected this argument and held that deputies were public employees. On appeal, this Court reversed holding that deputy sheriffs are not public employees because they hold office by appointment and are vested with the same sovereign powers as sheriffs.

Although ultimately this Court corrected PERC's error, correction came only after the expenditure of substantial judicial energies and public resources. It is not in the best interest of the people of this State, nor in the best interest of judicial economy, to delay resolution of this question. This is a question of great public importance. Delay serves no purpose but to increase the taxpayer-borne costs of this proceeding. Accordingly, in the event this Court determines that any collective bargaining is permitted by attorneys, the status as officers of assistant attorneys general and assistant statewide prosecutors should be resolved.

CONCLUSION

The State as client cannot be compelled to bargain collectively with its attorneys, pursuant to Chapter 447, Florida Statutes, because the inherently adversarial nature of bargaining is in conflict with the Rules Regulating the Florida Bar. SEAG has virtually acknowledged that collective bargaining is an adversarial process, but argues that it is inherent in the employment relationship. SEAG Response, p. 22. Whatever its source, attorneys are prohibited from pursuit of their own self-interest to their clients' detriment. The union also acknowledges that a modification of the collective bargaining rules "might" be required, but that this Court's Article V, section 15 jurisdiction is "elastic" and would permit an accommodation of some form of collective bargaining. SEAG Response, p. 29. Whether there is such elasticity, and its degree, of course, is the whole point of this petition.

The Legislature has not expressly waived its rights under the Rules, including the right to discharge its attorneys "at will." Pursuant to Article V, section 15, this Court has exclusive jurisdiction to rule on the propriety of collective bargaining by members of The Florida Bar.

The issues in this case are legal, rather than factual. However, if this Court believes that further factual evidence is needed to resolve the issues in this cause, this Court should appoint a special master to conduct appropriate hearings. PERC is not an appropriate fact-finder to gather evidence relative to

the exercise of this court's jurisdiction over the practice of law and discipline of members of the Florida Bar.[10]

Further, if this Court determines that any collective bargaining is permitted under the Rules, only this Court has the authority and jurisdiction to define and establish the scope of bargainable issues and the limits of enforcement mechanisms available to attorneys against their clients. These limitations should be established and made known to attorneys employed by the State before a vote is held on unionization. Such notice is necessary so that attorneys may make informed choices on whether to give up their individual rights as professionals in favor of a collective scheme of legal practice, under standards negotiated by non-lawyer union representatives.

Accordingly, this Court should issue all writs necessary to the complete exercise of its jurisdiction over the practice of law by attorneys who represent the State of Florida, as client, through full-time employment.

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[10] See *City of Hollywood v. Perc*, 476 So.2d 1340, 1342 (Fla. 1st DCA 1985), where the district court admonished PERC, noting that "PERC has acted in the area of regulating attorney-client relations, a subject not within its particular province."

Respectfully submitted,

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See Notice of Substitution

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing was provided via hand delivery to Stephen A. Meck, General Counsel, Public Employees Relations Commission, and Thomas W. Brooks, MEYER AND BROOKS, P.A., Attorneys for Petitioner, 2544 Blairstone Pines Drive, Post Office Box 1547, Tallahassee, Florida 32302, this 26th day of July, 1993.

Kimberly J. Tucker

NO. 88-2764

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO, Petitioner, -vs- ILLINOIS LOCAL LABOR RELATIONS BOARD; CITY OF CHICAGO, DEPARTMENT OF LAW; and SALARIED EMPLOYEES OF NORTH AMERICA (SENA), DIVISION OF UNITED STEELWORKERS OF AMERICA, AFL-CIO, Respondents.	)	Appeal From The Illinois Local Labor Relations Board. NOS. L-RC-87-04 L-UC-87-06 L-UC-87-07 L-UC-87-08

FILED
'88 SEP 23 P5:0

NOTICE OF FILING

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PLEASE TAKE NOTICE that on the 23rd day of September, 1988, we caused to be filed with the Clerk of the Appellate Court of Illinois, First District, PETITION FOR

ADMINISTRATIVE REVIEW, a copy of which is attached hereto and herewith served upon you.

CORNFIELD AND FELDMAN

BY: _____
JACOB POMERANZ
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NO.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO, Petitioner, -vs- ILLINOIS LOCAL LABOR RELATIONS BOARD; CITY OF CHICAGO, DEPARTMENT OF LAW; and SALARIED EMPLOYEES OF NORTH AMERICA (SENA), DIVISION OF UNITED STEELWORKERS OF AMERICA, AFL-CIO, Respondents.	)	Appeal From The Illinois Local Labor Relations Board. NOS. L-RC-87-04 L-UC-87-06 L-UC-87-07 L-UC-87-08

PETITION FOR ADMINISTRATIVE REVIEW

Now comes American Federation of State, County and Municipal Employees, Council 31, AFL-CIO ("AFSCME"), Petitioner, and hereby petitions the Court for review of the decision of the Illinois State Labor Relations Board in the matter of Salaried Employees of North America (SENA), Division of United Steelworkers of America, AFL-CIO, Petitioner, and City of Chicago, Department of Law, Employer, and American Federation of State, County and Municipal Employees, Council 31, AFL-CIO, Intervenor, and American Federation of State, County and Municipal Employees, Council 31, AFL-CIO, Intervenor, and City of Chicago, Department of

Law, Employer, entered on the 25th day of August, 1988, specifically those portions of said decision (1) holding that all attorneys in the Department of Law, City of Chicago, were "managerial" as defined in Section 3(j) of the Illinois Public Labor Relations Act (Ch. 48 ¶1603(j), Ill.Rev.Stat.); and (2) holding that Senior Attorneys/Supervisors were supervisors under the Act (Ch. 48, ¶1603(r), Ill.Rev.Stat.).

Respectfully submitted,

CORNFIELD AND FELDMAN

BY: Jacob Pomeranz
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STATE OF ILLINOIS
LOCAL LABOR RELATIONS BOARD

In the Matter of:	
SALARIED EMPLOYEES OF NORTH AMERICA (SENA), DIVISION OF UNITED STEELWORKERS OF AMERICA, AFL-CIO,	
Petitioner,	
and	
CITY OF CHICAGO, DEPARTMENT OF LAW,	
Employer,	
and	Case Nos. L-RC-87-04
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO,	
Intervenor,	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO,	Case Nos. L-UC-87-06 L-UC-87-07 L-UC-87-08
Petitioner,	
and	
CITY OF CHICAGO, DEPARTMENT OF LAW,	
Employer.	

MEMORANDUM OPINION AND
DIRECTION OF ELECTION

This matter is before the Local Labor Relations Board ("the Board") for review of the Supplemental Decision and Recommended Order of Hearing Officer Michele B. Levine, issued April 7, 1988, involving Phase II of these proceedings. Written exceptions to the hearing officer's decision have been duly filed[1/], and the Board heard oral arguments by the parties on June 15, 1988.

This case arises from petitions filed by two labor organizations which seek to represent several previously-unrepresented employees of the Law Department (also known as the Office of the Corporation Counsel) of the City of Chicago ("the City"). The first petition (L-RC-87-04) was filed by the Salaried Employees of North America ("SENA"), a division of the United Steelworkers of America, AFL-CIO, and subsequent petitions were filed by the American Federation of State, County and Municipal Employees, Council 31, AFL-CIO ("AFSCME"). All were consolidated. In Phase I of these proceedings, the Board in July 1987 determined the bargaining units in which those employees might appropriately be represented. See, 3 PERI

1/ Pursuant to 80 Ill. Adm. Code 1200.110, the Board granted leave to the Illinois Public Employers' Labor Relations Association to file an amicus brief in support of certain exceptions of the City of Chicago.

¶3026.[2/] Phase II addresses which of the petitioned-for employees, if any, are excluded from bargaining under the Public Labor Relations Act ("the Act"), and must therefore be excluded from the potential bargaining units so defined.

In the supplemental decision now before the Board, the hearing officer has determined that none of the employees in the City's Law Department, except the relative few which the parties have agreed to exclude, is statutorily precluded from bargaining under the Act. The City has filed lengthy exceptions, arguing that all of the Law Department employees must be excluded on one or more grounds. AFSCME has filed limited exceptions. The Board has carefully considered the record, the hearing officer's decision, the parties' and the amicus' written submissions to the Board, and the arguments made orally to the Board.

With only one exception addressed hereinafter, the parties do not take issue with the hearing officer's findings of fact. The Board accordingly adopts those findings, subject

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[2/] The Board held that the clerical, administrative, investigative, library and paralegal employees of the Law Department appropriately can be represented only in the existing City-wide bargaining units comprising similar employees in other City departments. Those units are all represented by AFSCME. Thus, the Board determined that the eligible employees in each of those groups should vote on two choices: representation by AFSCME in the existing corresponding unit or no representation. As to the attorneys, in the Law Department, the Board determined that they might be represented in a separate unit or in the existing City-wide unit of professional employees which is also represented by AFSCME.

to the one reservation mentioned. However, the Board disagrees with the hearing officer's conclusions of law and, for the reasons which follow, holds that all the attorneys and a few other Law Department employees must be excluded from bargaining under the Act.

I. BACKGROUND

The pertinent facts of this matter are set forth in detail in the hearing officer's Phase II findings and the earlier Phase I decisions. We will only summarize the facts here, to give context to our conclusions.

The City's Law Department is headed by the City's Corporation Counsel and employs a total of approximately 335 persons. Of them, some 190 are attorneys and some 145 are administrative or support personnel.

The Law Department is subdivided into 16 functional divisions, including an administration division and an investigations division. Each of the remaining divisions is primarily responsible for particular aspects of the City's legal business. However, the record reflects that the divisional boundaries are not rigid. Rather, the Corporation Counsel maintains and regularly exercises the flexibility to reassign personnel between divisions, and to assign employees tasks normally associated with other divisions, when circumstances warrant such adjustments.

Each division within the Law Department is headed by a Deputy Corporation Counsel, with some Deputies being responsible for more than one division. Every division has a Chief, holding the title of First Assistant Corporation Counsel, who reports to the appropriate Deputy. Most of the Department's clerical and support personnel are assigned to particular divisions, but they may be utilized to support other divisions when the workload requires.

The record reflects that the Corporation Counsel, with the aid of his several deputies and assistants, serves as attorney for the City. In that capacity, which is dictated by statute and City ordinance, all the attorneys in the Law Department advise and represent the Mayor, the City Council, and the heads of the City's various operating departments.

Of the 190 attorneys in the Law Department, the parties have agreed to exclude from bargaining the Corporation Counsel himself, all seven Deputy Corporation Counsels, and the sixteen First Assistant Corporation Counsels. Among the administrative and support personnel, the parties have agreed to exclude the Office Administrator, the Director of Legal Investigations who oversees some 20 investigators, the Law Librarian, all law clerks, and the Administrative Assistants to the Corporation Counsel and Deputy Corporation Counsel(s).

II. EXCEPTIONS OF THE PARTIES

One of AFSCME's exceptions to the hearing officer's decision concerns the Law Department positions which the parties have agreed to exclude from bargaining. AFSCME objects to the hearing officer's statement that the parties have stipulated to exclude the Assistant Director of Legal Investigations. AFSCME's objection appears to be well-taken. The record properly reflects that AFSCME did not agree to the exclusion of that title from bargaining.[3/] Consequently, the Assistant Director of Legal Investigations should be included among the employees who may vote on inclusion in the unit of investigative personnel, unless the position is subject to exclusion on any of the grounds set forth in the Act.

The other exceptions asserted by AFSCME deal with issues raised in the City's exceptions, and thus may be considered in the context of the City's exceptions.

The City's exceptions first argue that the entire Law Department operates as a law firm representing the City's management, and therefore all of its personnel must be precluded from bargaining collectively with the City. According to the City, well established public policy considerations which surround the attorney-client relationship require this

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3/ Only AFSCME and the City continue to have interests in the position of Assistant Director of Legal Investigations since, in Phase I, the Board held that the Law Department's investigative personnel appropriately can be represented only in an existing AFSCME unit of City investigators.

result. In addition to those policy considerations, the City argues that the Law Department's role as law firm for the City brings the Department's employees within the Act's definitions of exempted "confidential" and "managerial" employees. Alternatively, the City argues that at least certain sub-groups of the Law Department employees qualify as excluded supervisors or managers or confidential employees under the Act.

Petitioners reject the City's arguments and urge that the Board adopt the hearing officer's conclusions and exclude from bargaining none of the petitioned-for employees other than those whom all the parties have stipulated to exclude.

III. DISCUSSION

A. Public Policy Considerations

The City observes that the Illinois Code of Professional Responsibility, Ill. Rev. Stat. ch. 110A, foll. par. 771, to which all Illinois attorneys must adhere, requires the Law Department attorneys to remain completely loyal to their "client", the City, and to avoid any conflicts of interest with it. In this connection, the City notes the hearing officer's observation that, if they form a bargaining unit, the attorneys will have to "walk a fine line" with respect to their ethical obligations to management. The City further argues that attorneys are ethically obliged not merely to avoid their own conflicts with their client, but also to assure that their

clerical and support personnel likewise do not use their positions to disserve the client's interests. Accordingly, the City argues that all the employees of the Law Department must be barred from bargaining collectively against the City in order to give effect to the fundamental public policy attending the attorney-client relationship.

However, nothing in the Act expressly authorizes the Board to deny bargaining rights to any category of public employees based exclusively on public policy considerations which are not articulated in the Act itself. The Board has previously noted that the Act manifests a conscientious attempt to delineate the classes of employees which are excluded from bargaining, and thereby appears to deny the Board the discretion to disqualify employees who are not within the statutory exclusions. AFSCME and County of Cook, Chief Judge of the Circuit Court of Cook County, 3 PERI 3001 (LLRB) 1986. This logic is reinforced by the Supreme Court's observation, in City of Decatur v. AFSCME Local 268, 122 Ill.2d 353, 522 N.E.2d 1219 (1988), that the Act was intended to extend bargaining rights broadly and its exemptions should be narrowly construed. Accord, Plainfield School District No. 202 v. Illinois Educational Labor Relations Board 143 Ill. App.3d 898, ___, 493 N.E.2d 1130, 1136 (1986). See, also, County of Kane v. Carlson, 116 Ill.2d 186 ___, 507 N.E.2d 482, 488 (1987), holding that judicial branch employees may not be deemed outside the Act in the absence of an explicit exclusion for them.

Petitioners and the hearing officer refer us to Lumbermen's Mutual Casualty Co. of Chicago, 75 NLRB 1132, 21 LRRM 1107 (1948). In that case the National Labor Relations Board held that the eleven-member in-house legal staff representing an insurance company was eligible to organize and bargain collectively with the company, even though the employees were "officers of the court and fiduciaries" and were "subject to various rules of conduct prescribed by the courts." 75 NLRB, at 1135-37. The NLRB observed that attorneys are professional employees, and that professional employees were specifically covered by the National Labor Relations Act, 29 U.S.C. §151 et seq. Id, at 1137-8.[4/] The NLRB concluded that the special relationship between an attorney and client was not enough to remove attorneys from the coverage of the NLRA:

> [T]he statutory objectives [of the NLRA], including the right to collective bargaining, may be achieved despite any limitations imposed on the attorneys by virtue of their status as officers of the court. The Employer....asserts that the relationships of client-attorney existing between it and these employees precludes the existence of an employer-employee status. We do not agree. The entire association between the Employer and its attorneys is pervaded by an employer-employee relationship. The attorneys are hired, discharged and promoted in the same manner as the other employees of the Employer. They have the same working conditions as other employees. Furthermore, in the performance of their duties as attorneys, they are directed and controlled by the Employer....[W]e are of the opinion that although a client-attorney relationship is coexistent with that of an employer-employee in this case, the client-attorney relationship does not preclude these

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4/ Professional employees are similarly covered in our Act. See, Ill. Rev. Stat. ch. 48, pars. 1603(m) and 1609(b).

> employees from exercising their statutory right to bargain collectively with respect to conditions of employment.

Id, at 1137.

The City argues that in State of Illinois (Educational Labor Relations Board), 2 PERI ¶2020 (SLRB 1986), it was recognized that extrinsic policy considerations may warrant precluding employees from bargaining under the Act even when the employees are not within an explicit statutory exclusion. However, that decision split the members of the State Labor Relations Board and probably is distinguishable. In it, the State Board excluded from bargaining the investigators and hearing officers of the Illinois Educational Labor Relations Board. The State Board's majority reasoned that those employees are required to impartially investigate and adjudicate labor relations controversies, and that the public's confidence in their ability to do so without bias would be compromised if the employees were themselves unionists. In addition, the majority found evidence that the General Assembly had intended to specifically exclude the employees from bargaining under the Act, but inadvertently failed to do so owing to the complicated manner in which the Educational Labor Relations Act and the Public Labor Relations Act eventually became law.

In our judgment, the public policy considerations asserted by the City in this case are very important, but are better evaluated in conjunction with the specific exclusions of

"confidential" and "managerial" employees which the Act contains. We therefore turn at this point to a consideration of those exclusions.

B. Managerial and/or Confidential Employees

The City argues, supported by IPELRA, that if the special relationship between the Law Department and the City's administration does not independently warrant excluding the Law Department from bargaining, it certainly brings all the attorneys, and perhaps others, within the statutory exclusions for managerial and confidential employees. Section 3(n) of the Act, Ill. Rev. Stat. ch. 48, par. 1603(n), excludes managerial and confidential employees from the universe of "public employees" covered by the Act. In turn, the terms "confidential employee" and "managerial employee" are defined in Sections 3(c) and 3(j) of the Act, respectively:

> (c) "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.
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> (j) "Managerial employee" means an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of such management policies and practices.

Ill. Rev. Stat. ch. 48, pars. 1603(c) and 1603(j).

The Board has recognized that the statutory definition of "confidential employee" sets up two alternative tests whereby an employee may achieve confidential status: the "labor nexus" test and the "access" test. AFSCME, Council 31 and City of Chicago (Office of Professional Standards), 2 PERI 3017, at p. IX-72 (LLRB 1986). Under the "labor nexus" test, outlined in the first portion of Section 3(c) , "the regular course of the employee's duties [must] involve confidential assistance to a person who develops and effectuates management's labor relations policies." Id. Alternatively, under the "access" test outlined in the latter portion of the definition, the regular course of the employee's duties must include

> authorized access to information concerning matters arising from the collective bargaining process, such as information concerning the employer's strategy in dealing with an organizational campaign, actual collective bargaining proposals and information relating to matters dealing with contract administration.

City of Burbank, 1 PERI ¶2008, at p.VIII-44 (SLRB 1985).

To meet the statutory definition of a "managerial employee," we have said that an individual

> must engage both in executive and management functions and in the effectuation of management policies, and those activities must form the predominant aspect of his work. The management functions and policies for which the employee is responsible must be of the sort that are involved in operating and directing the organization or a major unit of it, marked by a level of authority and independent judgment sufficient to affect broadly the organization's mission or its methods of accomplishing its mission. In essence, the employee's functions must effectively make him part of the employer's management team.

General Service Employees Union, Local 73 and County of Cook, Cermak Health Services, 2 PERI 3020, at p.IX-100 (LLRB 1986). The requisite managerial functions may include establishment of management policies and procedures, preparation of the budget, and assuring that the governmental agency or department operates effectively and efficiently. State of Illinois (Department of Central Management Services), 1 PERI ¶2014 (SLRB 1985). A professional employee is a managerial employee when he or she exercises something more than mere professional discretion and judgment and if he or she actually formulates management policies by expressing and making operative decisions of the employer. Id. However, a purely advisory role does not give rise to managerial status. State of Illinois (Department of Public Aid), 2 PERI ¶2019 (SLRB 1986).

In this case there is no dispute among the parties that all the employees in the Labor Relations Division of the Law Department should be excluded from bargaining under the Act. The Labor Relations Division is responsible for conducting negotiations on behalf of the City with the unions representing City employees, for representing the City in arbitration proceedings under its bargaining agreements, and for representing the City in proceedings before this Board. The employees in that Division accordingly satisfy the statutory definition of

"confidential employees".[5/] The attorneys in the Division also qualify as "managerial employees" due to their involvement in the determination and effectuation of labor relations policy for the City, or at least major units of it.

However, the City argues that this involvement of some Law Department employees in the making and effectuation of the City's confidential labor relations policies necessarily renders all of the employees of the Department excludable as statutory "confidential employees." In part the City relies on the hearing officer's finding that "[a]ll employees in the Law Department have authorized access to all files and records maintained in the office." (Supplemental Decision and Recommended Order, Finding No. 4). According to the City, that access necessarily extends to labor-related matters including the files handled by the Labor Relations Division. Therefore, the City argues all Law Department employees must be excluded under the "access" test of the statutory definition of "confidential employee."

One of AFSCME's exceptions is to the hearing officer's finding that all employees have authorized access to such materials. AFSCME contends that the testimony merely reflects

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5/ The clerical and support personnel in the Labor Relations Division are excluded because of their relationships with the Division's attorneys and their access to confidential labor relations materials. See, Foley, Hoag & Eliot, 229 NLRB 456, at 457-8 (note 12).

that attorneys are not forbidden or prevented from inspecting files maintained anywhere in the Law Department (except for personnel files pertaining to Law Department employees), and that clerical and support personnel have access to whatever files are handled by the attorneys for whom they work. This characterization of the evidence is more accurate.

The testimony indicates that the reason no restrictions have been placed on the access which Law Department attorneys have to Law Department files is that the attorneys are governed by their professional responsibility to maintain the confidentiality of Department records. (Tr. 2059-61). The testimony further indicates that the Department's non-attorneys can see whatever files are handled by the attorneys with whom they are assigned to work. (Tr. 2102, 2105, 2174, 2352). However, the Law Department's offices are physically divided between several floors in three different buildings, and few of the employees regularly visit the offices where they do not work. There is no evidence that the attorneys or the non-attorneys regularly examine files other than the ones that pertain to matters on which they are engaged. (See, Tr. 2218).

Consequently, the circumstance that no Law Department employee is prevented from inspecting files relating to confidential labor matters cannot make them all "confidential employees" under the Act. The regular course of every Law Department employee's duties does not bring him or her into authorized exposure to confidential labor relations information,

as is required under the "access" test for confidential status. Moreover, it is clear that not every Law Department employee regularly acts as a confidential assistant to persons who formulate and effectuate management's labor relations policies, as is required under the "labor nexus" test.[6/]

The statutory purpose in excluding "confidential employees" from bargaining is to guard against the situation where employees in a bargaining unit may, in the normal performance of their duties, have advance knowledge of the employer's posture on labor negotiations and related labor relations matters, because that could jeopardize the employer's bargaining strategy and upset the balance of negotiations. Board of Education of Community Consolidated School District No. 230 v. Illinois Educational Labor Relations Board, 165 Ill. App.3d 41, ___, 518 N.E.2d 713, 724-25 (1987). See, also Pennsylvania Labor Relations Board v. Altoona Area School District, 389 A.2d 553, ___, 99 LRRM 2308, 2309-10 (Pa. S.Ct. 1978) (the exclusion of confidential employees "balance[s] the right of employees to be represented with the right of the employer to formulate its labor policy with the assistance of

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6/ Rendering confidential assistance and advice to officials who are involved in sensitive matters of the employer outside the realm of labor relations does not make one a confidential employee under the "labor nexus" test. Board of Education of Plainfield Community Consolidated School District v. State Labor Relations Board, 165 Ill. App.3d 640, 521 N.E.2d 102 (1988). See, B.F. Goodrich Co., 115 NLRB 722, 724, 37 LRRM 1383, 1384 (1956).

employees not represented by the union with which it deals.") If merely leaving confidential labor relations files in accessible areas where any employee can inspect them were sufficient to render all employees "confidential" and thus excluded from bargaining, the statutory objective of narrowly confining the exclusions would be too readily frustrated.

But the City relies on other circumstances, besides the access that all Law Department employees have to the files of the Department's Labor Relations Division, for its contention that more than just the Labor Relations Division employees should be deemed excluded "confidentials". For example, the City points to the hearing officer's findings that attorneys in the Law Department's Affirmative Litigation Division have sued current or former City employees over matters such as pensions and the misappropriation of City property; that attorneys in the General Litigation Division have suggested language changes for certain of the City's collective bargaining agreements based on their experience in defending police misconduct lawsuits; that attorneys in the Finance and Economic Development Division have been involved in discussions concerning the fiscal impact of prevailing wage agreements; that attorneys in the Appeals Division have devoted considerable time to appeals in labor-related cases; and that attorneys in the Legal Counselling Division convert bargaining agreements into ordinances for approval by the City Council and render legal

opinions upon such matters as Freedom of Information requests by unions and City employees.

These findings also are insufficient to make the attorneys in those divisions "confidential employees" for purposes of the Act. The activities at issue are not shown to have involved the attorneys in the formulation of sensitive labor management policy, or to have given them premature access to proposed bargaining strategy, in such a way as might compromise the City's conduct of its labor relations if the attorneys were themselves members of a bargaining unit. See, Pennsylvania Public Utility Commission, 9 PPER ¶9270 (Pa. Lab. Rel. Bd. 1978) (attorneys for state agency are not confidential employees merely because they render legal advice on and occasionally defend employment rights claims). Simply representing the City in litigation brought by or against City employees, or rendering legal advice on matters affecting employee rights, does not necessarily immerse the attorneys in subject matter satisfying the "labor nexus" test. Likewise, simply converting labor contracts into ordinance form or suggesting contract changes affecting the City's obligations to defend its employees does not entail advance access to the confidential labor relations strategy of the City.

However, the City also relies on the fact that the volume of its labor relations matters exceeds the capacity of the Law Department's Labor Relations Division, so that attorneys from

at least four other divisions have been assigned to represent the City in grievance arbitrations.[7] The City further points to the hearing officer's finding that there is significant overlap between the activities of the Labor Relations Division and the Labor and Personnel Division.

The Labor and Personnel Division is not responsible for traditional collective bargaining matters, but prosecutes employee disciplinary and discharge cases before the Police and Personnel Boards, and represents the City and its officials against employment discrimination and wage/hour claims and other employment-related claims. The hearing officer found that matters handled by the Labor and Personnel Division frequently parallel or overlap matters that are contemporaneously being handled by the Labor Relations Division.

There is authority for the view that public employees who only occasionally handle grievances on behalf of their employers are not thereby "confidential" employees who must be denied collective bargaining rights. See, e.g., Board of Education of Plainfield Community Consolidated School District v. Illinois Educational Labor Relations Board, 143 Ill. App.3d 898, ___, 493 N.E.2d 1130, 1138 (1986); Pennsylvania Public Utility Commission, 9 PPER ¶9270, at p.483. (Pa. Lab. Rel. Bd.

7/ The hearing officer found that attorneys in the Affirmative Litigation, General Litigation, Revenue, and Torts divisions have been assigned arbitrations.

1978). However, logic dictates that the frequency and level at which such matters are handled are all important. An employee who regularly represents his employer in high-level grievance proceedings likely will be involved in or privy to significant labor policy formulation. The grievance process is an extension of the collective bargaining process. See, Ill. Rev. Stat. ch. 48, par. 1610(a)(4); Richardson and City of Chicago Department of Police, 3 PERI ¶3020 (LLRB 1987); Illinois Nurses Association and County of Cook, 3 PERI ¶3013 (LLRB 1987). Extensive involvement in that process should be presumed to render the employer's advocate a "confidential employee."

At least one tribunal has held that a municipal attorney who represents his employer in personnel board actions and in proceedings (including arbitrations) arising from employee residency requirements is a "confidential employee" who should be excluded from collective bargaining. Madison City Attorneys Association and City of Madison, Decision No. 23183 (Wisc. Employ't Rel. Com. 1986). In the same case, the Wisconsin commission by a split vote determined that another municipal attorney, who defended the municipality against employment discrimination claims, was not an excludable confidential employee. The Wisconsin commission's distinction between the two attorneys apparently rested less on the types of cases they handled than on the extent to which their respective duties drew them into involvement with the city's contract negotiation and administration strategies.

In the present case, the evidence is insufficient for the Board to conclude that all Law Department attorneys who have been or may be assigned to handle a grievance arbitration must be deemed "confidential" and excluded from bargaining on that basis. To so hold would allow the confidential exclusion to sweep more broadly than the Act intends. However, the Board concludes that the functions regularly performed by the employees in the Law Department's Labor and Personnel Division involve them sufficiently closely with the City's development and implementation of labor policy that they should be excluded as confidentials. The Labor and Personnel Division employees deal almost exclusively with personnel matters, including matters which frequently touch on or overlap the formulation and administration of the City's labor relations. In addition, excluding them will provide the Law Department with an expanded pool of employees to which to assign sensitive grievance arbitrations when such cases overwhelm the resources of the Labor Relations Division.

MANAGERIAL — As mentioned the City also argues that all the Law Department's attorneys are "managerial employees" for purposes of the Act. While the Board has held that a "managerial employee" must engage predominantly in functions involving the direction of the governmental enterprise or a major unit of it, with authority to affect broadly its mission or fundamental methods, General Service Employees Union, Local 73 and County of Cook, Cermak Health Services, 2 PERI ¶3020 (1986), the

employee need not participate actively in the formulation or effectuation of management's labor relations policies in order to be deemed "managerial." Board of Regents of Regency Universities System v. Illinois Educational Labor Relations Board, 166 Ill. App. 3d 730, ___, 520 N.E.2d 1150, 1156-57 (1988). In addition, "managerial" status is not limited to personnel at the very highest administrative level of the governmental entity. Board of Regents, supra, 520 N.E.2d at 1157-58. It is enough if the functions performed by managerial employees sufficiently align them with management "that they should not be in a position requiring them to divide their loyalty to the administration...with their loyalty to an exclusive collective-bargaining representative." Id, at 1158.

Reported cases deciding whether in-house attorneys are too closely aligned with their employers to be permitted to form bargaining units are few in number. In City of Milwaukee v. Wisconsin Employment Relations Commission, 71 Wis.2d 309, 239 N.W.2d 63, 91 LRRM 3019 (1976), the Wisconsin Supreme Court affirmed a ruling by the Wisconsin Employment Relations Commission to the effect that assistant city attorneys in Milwaukee should not be deemed managerial employees excluded from collective bargaining under the Wisconsin Municipal Employment Relations Act. The Wisconsin Commission had refused to exclude the attorneys because it found that they did not substantially engage in both the formulation and implementation

of the municipality's management policies. The court agreed, stating:

> [T]he ability of a certain category of employees to effectuate and implement management policy does not necessarily indicate that they should be precluded from protection by the statute.

91 LRRM, at 3022. See, also, Wisconsin Council of County and Municipal Employees and Grant County, Dec. No. 21063 (Wis. Empl. Rel. Com. 1983) (assistant district attorneys not excluded as managerial employees).

In Pennsylvania Public Utility Commission, 9 PPER ¶9270 (Pa. Lab. Rel. Bd. 1978), discussed previously, the Pennsylvania board similarly determined that assistant counsels for a governmental commission were not management employees because they were insufficiently involved in the formulation or effectuation of management policies. Management policies, it was held, were formulated by the members of the commission with assistance from the chief counsel, while the chief counsel's subordinates merely played an advisory role. The assistant counsels represented the commission in litigation and drafted and enforced regulations, but were closely supervised. Their authority to settle cases was circumscribed by superiors, and the regulations they prepared were reviewed and approved by others before becoming effective.

Likewise, in Pennsylvania Human Relations Commission, 12 PPER ¶12196 (Pa. Lab. Rel. Bd. 1981), the Pennsylvania board ruled that staff attorneys for another Pennsylvania commission

were not management employees. Those attorneys attended policy meetings and hearings, rendered legal opinions, and drafted decisions for issuance by the commissioners, but again received close supervision and were under standing instructions not to render legal interpretations on "novel" questions without prior approval from the General Counsel. 12 PPER, at pp.304-05.

However, in another case the Pennsylvania board ruled that attorneys serving as hearing examiners for the Commonwealth of Pennsylvania are excluded managerial employees. Commonwealth of Pennsylvania (Attorney Examiners I), 12 PPER ¶12131 (Pa. Lab. Rel. Bd. 1981). The board found that the attorney examiners were intimately involved in the formulation and effectuation of state policy, because they presided at hearings and issued recommended decisions in a variety of cases involving compliance with and the interpretation of constitutional provisions, statutes and regulations. They were required to exercise independent judgment to construe ambiguous or conflicting provisions and to decide novel cases. Their decisions, although mere recommendations to various state boards and commissions, were adopted from 65 to 90 percent of the time. 12 PPER, at p.204. The Pennsylvania board concluded that the employees were meaningfully involved in policy formulation and implementation because they "make recommendations that if adopted..., serve as a basis for the respective agency's future policy." 12 PPER, at p.205.

Thus it may appear, as the hearing officer concluded, that the prevailing caselaw weighs against a determination that all the attorneys in the City's Law Department are managerial employees. The caselaw is hardly overwhelming, however. All told, there is a paucity of authority on the question. Moreover, the hearing officer's findings in this case indicate that the Law Department's attorneys are not as closely supervised as, and have wider discretion to act on behalf of the City than, the attorneys who have been deemed nonmanagerial in the Wisconsin and Pennsylvania cases.

Moreover, there are compelling reasons why the Board in this case should conclude that the Law Department attorneys are in reality inseparable from the City's management. The reported decisions, we think, simply give too little effect to the demands of the attorney-client relationship, as that relationship is recognized in Illinois.

The attorney-client relationship is a fiduciary relationship as a matter of law. In re Crane, 96 Ill.2d 40, ___, 449 N.E.2d 94, 101-2 (1983); In re Marriage of Bennett, 131 Ill. App.3d 1050, ___, 476 N.E.2d 1297, 1302 (1985). See, also, In re Czachorski, 41 Ill.2d 549, 244 N.E.2d 164 (1969). The attorney is effectively the agent for his client. People v. Wilkerson, 123 Ill. App.3d 527, ___, 463 N.E.2d 139, 143-44 (1984). The relationship requires complete confidentiality, good faith and loyalty by the attorney toward the client he serves. In re Broverman, 40 Ill.2d 301, ___, 239

N.E.2d 816, 819 (1968); Clement v. Prestwich, 114 Ill. App.3d 479, ___, 448 N.E.2d 1039, 1041 (1983). The relationship is so highly personal between the parties that a claim for attorney malpractice cannot be assigned or conveyed by the client to another. Clement v. Preswich, supra, 448 N.E.2d, at 1041-42; Christison v. Jones, 83 Ill. App.3d 334, ___, 405 N.E.2d 8, 10-11 (1980).

Because of the special relationship between attorney and client, Illinois courts have consistently held that a client has the right to discharge his attorney at any time for any or no reason. Rhoads v. Norfolk & Western Ry. Co., 78 Ill.2d 217, 399 N.E.2d 969 (1979); Ellerby v. Spiezer, 138 Ill. App.3d 77, 485 N.E.2d 413 (1985).

> A client may discharge counsel at any time, with or without cause, unless there is an agreement to the contrary....This rule recognizes that the relationship between an attorney and client is based on trust and that the client must have confidence in his attorney in order to ensure that the relationship will function properly.

Tobias v. King, 84 Ill. App.3d 998, ___, 406 N.E.2d 101, 103 (1980) (citations omitted). A client is always entitled to an attorney in whose fidelity he has confidence. Savich v. Savich, 12 Ill.2d 454, ___, 147 N.E.2d 85, 87 (1958).

Thus, in Herbster v. North American Company for Life and Health Insurance, 150 Ill. App.3d 21, 501 N.E.2d 343 (1986), the court held that an attorney cannot be accorded all the rights against his client-employer as may be enjoyed by other employees. That case involved an attempt by the chief legal

officer of an insurance company to claim damages from his employer for the tort of retaliatory discharge. The court found that the circumstances of the case would have given rise to such a claim, had the plaintiff not been his employer's attorney. The court said:

> Plaintiff's relationship with the corporation was of a permanent nature unlike the usual attorney-client relationship. He looked to North American for his compensation, career development and job security. Like the president, vice-president, and directors, plaintiff was an employee of North American. However, we cannot separate plaintiff's role as an employee from his profession. Unlike the average employee, plaintiff was a registered attorney subject not only to North American's review but also, like other attorneys, subject to disciplinary review and the Code of Professional Responsibility....

501 N.E.2d, at 346. The court then reviewed the unique attributes of the attorney-client relationship which are embedded in the law:

> [T]he law places special obligations upon an attorney by virtue of [his] close relationship [with his client]. Those obligations are referred to generally as the fiduciary duty of the attorney. It permeates all phases of the relationship, including the contract for employment....[T]he general rule is that a client may terminate the relationship between himself and his attorney with or without cause. This right is implied in every contract of employment and is deemed necessary because of the deeply embedded concept of the confidential nature of the relationship between the attorney and the client and the evil that would obviously be engendered by any friction or distrust.

501 N.E.2d, at 347 (citations omitted). From these premises, the court concluded:

> The mutual trust, exchanges of confidence, reliance on judgment and personal nature of the attorney-client relationship demonstrate the unique position attorneys occupy in our society. Attorneys

> are governed by different rules and have different duties and responsibilities than the employees in recent retaliatory discharge cases. Most employees do not have the mutuality of choice that is inherent in the professional relationship which attorneys enjoy. The attributes of the relationship are so important that we cannot permit this expansion of the exception to the general rule which would have a serious impact on that relationship.

501 N.E.2d, at 348.

Herbster teaches that the public policy considerations which surround the attorney-client relationship, and on which the City has relied in this case, are firmly grounded in Illinois law. Herbster further stands for the proposition that those considerations limit the employment rights of attorneys unlike all other employees. While this case involves statutory bargaining rights which must be liberally construed, the question remains whether the attorneys here enjoy those rights. The holding in Herbster that a client/employer may dismiss his attorney/employee for refusing to commit serious attorney misconduct indicates that Illinois public policy affords client/employers greater latitude in dealing with their attorney/employees than would obtain in the typical collective bargaining relationship with its prohibitions against wrongful discharge and other unfair labor practices. In light of Herbster, we believe that the relationship between the Law Department's attorneys and the City brings the attorneys within the statutory exclusion for "managerial employees". The necessity that the attorneys give complete confidentiality, fidelity and loyalty to the City while conducting its legal affairs inevitably aligns them with the City for all practical

purposes. Like the court in Herbster, we cannot separate the attorneys' roles as employees from their roles as the City's trusted and confidential agents in a wide variety of important and sensitive activities.

We recognize that, in Lumbermen's Mutual Casualty Co., supra, the NLRB reached a conclusion apparently inconsistent with Herbster and with our determination here. But decisions under the National Labor Relations Act, while helpful and informative, are not binding upon us and need not be followed where circumstances warrant a different result. Laborers International Union of North America, Local 1280 v. State Labor Relations Board, 154 Ill. App.3d 1045, ___, 507 N.E.2d 1200, 1204 (1987). See, also, Board of Regents of Regency Universities System v. Illinois Educational Labor Relations Board, 166 Ill. App.3d 730, ___, 520 N.E.2d 1150, 1156 (1988).

For the foregoing reasons, the Board rejects the conclusions of the hearing officer insofar as we determine that all the attorneys in the City's Law Department are "managerial employees" excluded from bargaining under the Act. In so holding, the Board emphasizes the role of the City's Law Department as it is reflected in this record. The Law Department's attorneys represent the City's management and serve no other clients. This distinguishes them from many other attorneys for public agencies, such as public defenders, whose clients are private individuals and not their employers. It also distinguishes them from mere staff attorneys who advise

lower-echelon government agents but do not regularly represent management. In addition, the City's Corporation Counsel may be distinguished from the States Attorneys and the Attorney General in Illinois who are accountable to the electorate as well as to their "employers". The Corporation Counsel is not elected and has no constituency other than the City authorities whom he represents. The Corporation Counsel's loyalty, and therefore that of his assistants, is owed exclusively to those City authorities. In that sense, this is an even stronger case than Herbster, inasmuch as an attorney for an insurance carrier (as in that case) also owes a duty toward an insured just as if the insured had retained the attorney independently. Outboard Marine Corp. v. Liberty Mutual Inc. Co., 536 F.2d 730 (7th Cir. 1976).

C. Supervisors

The City also excepts from the hearing officer's conclusion that none of the Law Department attorneys outside of those whose exclusion has been stipulated by the parties constitutes a "supervisor" who is excluded from bargaining under the Act. While we have concluded that all the attorneys are excluded as "managerial employees", we will nonetheless address this contention as well.

The term "supervisor" is defined in Section 3(r) of the Act:

> "Supervisor is an employee whose principal work is substantially different from that of his 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 or to adjust their grievances, or to effectively recommend such action, if the exercise of such 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 such authority....

Ill. Rev. Stat. ch. 48, par. 1603(r).[8/] This definition establishes a four-pronged test for determining supervisory status, each prong of which must be satisfied for an employee to be deemed a statutory "supervisor". As stated in Village of Wheeling v. Illinois State Labor Relations Board, ___ Ill. App.3d___, 524 N.E.2d 958 (1988):

> The employee must: (1) perform principal work substantially different from that of his or her subordinate, (2) have authority in the interest of the employer to perform one or more of the eleven listed functions or to effectively recommend such action, (3) consistently use independent judgment in the performance of the listed functions, and (4) devote a preponderance of his or her employment time to exercising this authority. The employee must meet all four criteria.

524 N.E.2d, at 964.

8/ Under Section 3(s) of the Act, Ill. Rev. Stat. ch. 48, par. 1603(s), supervisors are precluded from forming or being included in bargaining units without the employer's agreement. The City in this case objects to the inclusion of statutory supervisors in any bargaining unit(s) found appropriate.

The City argues that the twelve Senior Attorney/Supervisors in its Law Department are "supervisors" within the meaning of the Act and should therefore have been excluded from bargaining by the hearing officer. The Senior Attorney/Supervisors are employed in eight of the divisions of the Law Department, and several testified.

The hearing officer found that, while the various Senior Attorney/Supervisors do not all function alike, certain duties are typical of the class. The hearing officer found that the Senior Attorney/Supervisors assist in interviewing applicants for attorney positions, train and evaluate their subordinates, assign cases among their subordinates and review their work products, mediate disputes among their subordinates, and have authority to discipline subordinates by giving them oral reprimands and least-favored assignments. The hearing officer also found that the Senior Attorney/Supervisors typically carry their own caseloads, but devote at least half their time to assisting and overseeing their subordinates.

Despite these findings, the Hearing Officer concluded that the Senior Attorney/Supervisors are not "supervisors" under the Act. With regard to the first prong of the supervisory test, the Hearing Officer determined that the Senior Attorney/Supervisors do not perform work substantially different from that of their subordinates, since most carry their own caseloads, and because all attorneys in the Law Department below the level of Chief Assistant provide legal advice and re-

presentation to the City. This latter characterization of the attorneys' work proves too much, however. Ultimately the principal work of the Corporation Counsel himself must be characterized as providing legal advice and representation to the City.

In Cook County Hospital Doctoral Staff and County of Cook, Cook County Hospital, 3 PERI ¶3033 (LLRB 1987), the Board concluded that physicians who headed various sections of the hospital's medical staff were supervisors even though most of them maintained their own patient loads and furnished medical care to patients the same as did their subordinates. In fact, the Board concluded that all of the hospital's attending physicians qualified as supervisors of the hospital's residents and interns (house officers), because the attending physicians were responsible for monitoring and overseeing the delivery of medical services by those personnel. The Board stated:

> The Board must recognize the special relationship between the physicians, on the one hand, and the house officers and other medical personnel, on the other. We must also recognize their individual and combined responsibilities to the patients, the institution and the requirements of their professions. These realities compel the conclusion that the physicians perform the essential function of supervising the others not only when they interact overtly to instruct, correct or reprimand them. They are also "supervising" when they are teaching or training these personnel as to whom they have oversight responsibility, and even when they are merely present and passively observing them.

Id., at p.IX-187.

The Senior Attorney/Supervisors in the instant case are similar to the section chiefs and attending physicians in Cook County Hospital, in that they have important oversight responsibility for subordinate attorneys. They direct and evaluate the subordinates' work and are empowered to administer discipline. This is the essence of their responsibilities.[9/] The Board therefore holds that the principal work of the Senior Attorney/Supervisors is different from the principal work of their subordinates, and satisfies the first test of the "supervisor" definition.

With regard to the second criterion for supervisory status -- the eleven supervisory functions -- the Hearing Officer equated the Senior Attorney/Supervisors' oversight and direction of their subordinates with the mere exercise of professional expertise, thus concluding that it did not represent a supervisory function. She further noted that the occasional reprimands given by Senior Attorney/Supervisors have not led to more serious discipline. She therefore concluded that the Senior Attorney/Supervisors do not actually perform or effectively recommend any of the eleven supervisory functions denominated in the Act.

9/ When the primary function of certain employees is to manage, oversee and assist subordinates, their "principal work" is different than the subordinates' even though they are also responsible for providing the same sort of services. State of Illinois (Department of Central Management Services), 4 PERI ¶2013, at p.X-66 (1988).

The Board has held that the performance of only one of the eleven supervisory functions listed in the statutory definition is sufficient if the other components of the definition are met. AFSCME, Council 31 and City of Chicago (Office of Professional Standards), 2 PERI ¶3017, at p.IX-74 (1986). We hold that the Senior Attorney/Supervisors effectively perform at least one of the eleven functions in this case. The hearing officer's determination that the Senior Attorney/Supervisors merely exercise professional expertise, rather than supervisory authority, in directing their subordinates is inconsistent with Cook County Hospital, supra. In that decision, section heads and attending physicians were held to be supervisors even though they exercised professional expertise in directing their subordinates. The exercise of professional expertise and supervisory authority are not mutually exclusive. When professionals supervise other professionals, they inevitably will use professional expertise in doing so.

In American Federation of State, County and Municipal Employees, AFL-CIO and County of Cook and Chief Judge, Circuit Court of Cook County, 3 PERI ¶3001, at p.IX-2 (1987), this Board held that certain employees "directed" their subordinates within the meaning of the supervisor definition by assigning cases and guiding and monitoring the subordinates in the handling of those cases. In the instant case, the Senior Attorney/Supervisors perform similar functions as regards their

subordinate attorneys. The Hearing Officer therefore erred in holding that the Senior Attorney/Supervisors perform no supervisory functions cognizable under the Act.

The Senior Attorney/Supervisors obviously exercise independent judgment, the third prong of the definition, in training, assisting and directing the subordinate attorneys. Directing and evaluating professional employees in the performance of their work and the handling of their caseloads necessarily requires the exercise of independent judgment. See, Cook County Hospital, supra, 3 PERI ¶3-32, at p.IX-236 (attending physicians' evaluations of work performed by house officers necessarily involve exercise of independent judgment).

Finally, it is plain that the Senior Attorney/Supervisors meet the fourth prong of the supervisory definition: the "preponderance of time" test. The Board has held that this test requires that the employee's time devoted to the statutorily-enumerated supervisory tasks must exceed his work time devoted to all other tasks. AFSCME Council 31 and County of Cook, Chief Judge of the Circuit Court of Cook County, 3 PERI ¶3001 (1986).[10/] The Senior Attorney/Supervisors who testified indicated that they devote at least half of their time, and in

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10/ But, see, Village of Wheeling v. Illinois State Labor Relations Board, supra (slip op., p.14), interpreting the preponderance test to mean that "an employee must spend more time exercising the named statutory functions than performing any other function."

some cases substantially more, to discharging their training and oversight responsibilities. Since we conclude that those responsibilities are "supervisory" within the meaning of the Act, the preponderance-of-time test is satisfied.

The Board accordingly rejects the hearing officer's conclusion ands holds that the Senior Attorney/Supervisors in the Law Department are not only "managerial employees" but are also excluded from collective bargaining under the Act because they are "supervisors."

IV. SUMMARY

In summary, the Board determines that the following employees in the Law Department of the City of Chicago must be excluded from the appropriate bargaining units previously identified in the Board's Phase I decision:

> The Corporation Counsel, all Deputy Corporation Counsels, all Chief or First Assistant Corporation Counsels, all Senior Attorney/Supervisors, all other attorneys, all other employees in the Labor Relations and Labor and Personnel Divisions, the Office Administrator, the Director of Legal Investigations, the Law Librarian, all law clerks, and the Administrative Assistants to the Corporation Counsel and the Deputy Corporation Counsel(s).

V. DIRECTION OF ELECTION

Secret ballot elections shall be conducted among the employee groups described below, in accordance with Notices of Election to be issued by the Executive Director. In accordance

with the Public Labor Relations Act and the Board's Rules and Regulations, eligible employees shall be given the opportunity to vote between the options listed:

> Group A - Employees in the following job titles in the City's Law Department shall vote between representation by the American Federation of State, County and Municipal Employees, Council 31, AFL-CIO in the existing "Unit I" (clerical and administrative employees) or no representation: Administrative Legal Clerk, Assistant Chief Legal Clerk, Chief Legal Clerk, Case Intake Clerk, Court File Clerk, Legal Clerk, Legal Systems Specialist I, Legal Systems Operator, Legal Secretary, Senior Legal Stenographer, Legal Typist, Legal Messenger, Message Center Operator, Paralegal.
>
> Group B - Employees in the following job titles in the City's Law Department shall vote between representation by the American Federation of State, County and Municipal Employees, Council 31, AFL-CIO in the existing unit of "OPS" investigative employees or no representation: Housing Court Investigator, Legal Investigator, Senior Legal Investigator, Assistant Director of Legal Investigations.
>
> Group C - Employees in the job title of Library Page in the City's Law Department shall vote between representation by the American Federation of State, County and Municipal Employees, Council 31, AFL-CIO in the existing "Unit V" (library employees) or no representation.

Pursuant to 80 Ill. Adm. Code. 1210.100(L), the Employer shall, within seven days of the date hereof, furnish the Board and AFSCME with a list of the full names, alphabetized by last name, and addresses of the employees eligible to vote in each Group listed above. The lists shall be provided by personal

delivery or certified mail and the Employer shall obtain receipts verifying delivery.

Entered this 25th day of August, 1988.

LOCAL LABOR RELATIONS BOARD*/

Walter H. Clark, Member

Raymond F. Simon, Member

*/ Chairman William M. Brogan concurs in part and dissents in part, in a separate opinion.