

**STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD**

In the Matter of:)	
)	
McHenry County College,)	
)	
Petitioner,)	
)	
and)	Case No. 2005-UC-0013-C
)	
McHenry County College)	
Staff Council, Local 1642, IFT/AFT,)	
)	
Respondent.)	

OPINION AND ORDER

On May 5, 2005, McHenry County College (College) filed its unit clarification petition with the Illinois Educational Labor Relations Board (IELRB or Board). The petition sought unit clarification for the position of Administrative Assistant for Learning and Student Support Services (Administrative Assistant/LSSS), arguing that the Administrative Assistant/LSSS position be excluded from the bargaining unit as a “confidential employee” pursuant to Section 115 ILCS 5/2(n) of the Illinois Educational Labor Relations Act (Act). On August 25, 2005, the Executive Director dismissed the College’s petition, determining that the College’s Petition for Unit Clarification was untimely.

The College filed timely exceptions to the Executive Director’s Recommended Decision and Order and a brief in support of its exceptions. The McHenry County College Staff Council, Local 1642, IFT/AFT (Council) filed a timely brief in response to the College’s exceptions.

For the reasons discussed below, we affirm the Executive Director’s Recommended Decision and Order dismissing the College’s petition as untimely.

I.

The following facts are based on the College’s factual allegations and exhibits submitted to the Executive Director.

Due to a reconfiguration in the College’s leadership, Dr. James Gray (Gray), Vice-President/LSSS, began performing tasks related to labor relations and collective bargaining negotiations. Gray was a key member in the College’s bargaining team with the Faculty Association in negotiations that occurred from February 17, 2004 through September 15, 2004. Gray is directly involved in ongoing

contract interpretation and maintenance activities. Since at least September 2003, Debra Gallo (Gallo) provided administrative support to Gray as the Administrative Assistant/LSSS.

In March 2004, the College alleged Gallo began performing duties it deemed confidential under the Act. 115 ILCS 5/2(n). Gray sporadically asked Gallo to support him on collective bargaining related tasks, and Gallo's role in assisting Gray increased over time. By September 2004, Gallo regularly was involved in supporting Gray's labor relations activities with access to information regarding collective bargaining negotiations and strategies, contract interpretation and maintenance.

Between December 2004 and March 2005, the College engaged in discussions with the Council to remove the Administrative Assistant/LSSS position from the bargaining unit. On May 5, 2005, six weeks after negotiations between the College and the Council failed, the College filed its Petition for Unit Clarification.

II.

The Board has determined that a petition for unit clarification must be filed within a "reasonable period of time after the unit began to include allegedly statutorily excluded employees." Niles Township High School Dist. No. 219, 20 PERI 152, Case No. 2003-UC-0007-C (IELRB Opinion and Order, Jun. 16, 2005). The relevant portion of the Act states that confidential duties must be performed in the regular course of the employee's duties. 115 ILCS 5/2(n)(ii). The requirement that confidential duties be performed "regularly" does not refer to the absolute amount of time devoted to confidential duties. Community Consol. School Dist. No. 59, 2 PERI 1088, Case No. 85-UC-0009-C (IELRB Opinion and Order, Jun. 24, 1986). An employee will meet the statutory requirement when the employee spends only a small amount of time performing those duties or performs such duties only on a sporadic basis. Board of Educ. of Plainfield Community Consol. School Dist., No. 202 v. IELRB, 143 Ill.App.3d 898, 911, 493 N.E.2d 1130 (4th Dist. 1986).

The College filed an exception, arguing that the Niles standard should not be applied in cases where the delay in filing a petition for unit clarification is due to the parties' attempt to bargain over the unit clarification. The College argues that the Niles standard discourages negotiated resolution of unit clarification issues because the time the parties spend bargaining over unit clarification does not stop the running of the limitations period. See Beach Park Community Consol. School Dist. #3, 10 PERI 1089,

Case No. 94-UC-0008-C (IELRB Opinion and Order, May 23, 1994). The College attempts to draw a distinction between the case at issue and Beach Park by stating that Beach Park involved newly created positions whereas this case involves statutorily excluded positions. However, this is a distinction without a difference.

In Water Pipe Extension v. ILLRB, the Court held that if a party were permitted to delay filing a unit clarification petition, while engaging in other efforts to resolve the unit placement of individuals through another method, the result would be parties pursuing a variety of methods, in succession, with impunity. 252 Ill.App.3d 932, 939, 625 N.E.2d 733 (1st Dist. 1993). The Court found this result to be inconsistent with the policy of encouraging *all matters* involving unit clarification to go before the Board because the Labor Board has particular expertise in determining the appropriate bargaining unit. Id. (emphasis added). Nothing prevents a party from seeking unit clarification through filing of a petition while simultaneously bargaining about the unit placement of the disputed position. The College's choice to bargain about the unit placement of the Administrative Assistant/LSSS position without filing a unit clarification petition was strategic and not required by law. Id. Since the parties did not reach an agreement on whether to exclude the disputed position (see Niles, fn.4), the Niles standard should stand for all of the reasons set forth therein.

The College's next exception is that the Executive Director's interpretation of the Act renders Section 2(n) unconstitutional.¹ Whether the College has due process rights protected by the Constitution is a matter beyond the purview of this Board. See General George S. Patton School Dist. 133, 10 PERI 1118, Case No. 94-CA-0050-C (IELRB Opinion and Order, Aug. 19, 1994). This Board must assume that the statute is constitutional because it does not possess the power, as courts do, to declare a statute unconstitutional. Chicago Teachers' Union, Local 1, 15 PERI 1036, Case No. 98-CA-0015-C (IELRB Opinion and Order, Apr. 23, 1999). An agency has principal responsibility for interpreting statutory provisions consistent with its own or a legislature's intent and objectives. Board of Educ. of Community

¹ The College additionally argues that the Executive Director's decision violated the terms of the Act. The College argues that the Executive Director held that the College must include a confidential employee in the bargaining unit, contrary to the express terms of the Act. However, the Executive Director made no such ruling. In fact, the Executive Director made no ruling whatsoever on the merits of the unit clarification question.

Consol. High School Dist. No. 230, Cook County v. IELRB, 165 Ill.App.3d 41, 60, 518 N.E.2d 713 (4th Dist. 1987).

Finally, the College filed exceptions related to the Executive Director's finding that the petition for unit clarification was untimely. According to the College, Gallo began performing purportedly confidential tasks in March 2004. In its exceptions, the College contended that March 2004 should not be the month upon which to start the running of a reasonable period of time to file its unit clarification petition. The College stated that the month to start the running of time should be September 2004, the month within which Gallo "regularly" engaged in confidential duties. However, we find that under these facts, Gallo met the statutory requirement when she began spending infrequent and sporadic amounts of time performing duties in a confidential capacity as defined by Section 2(n) of the Act.

According to the College, in March 2004, Gallo's position as a confidential employee began when she assisted Gray in preparing confidential memoranda regarding the formulation of College proposals prepared for and distributed to the College's bargaining team. The actual amount of time in March 2004 that Gallo spent performing confidential duties is inconsequential. If Gallo began performing duties of a confidential nature as defined by Section 2(n) of the Act in March 2004, then the "reasonable amount of time" limitation in which to file the unit clarification petition began running in March 2004. Under the facts provided by the College, beginning in March 2004, Gallo was provided access² to confidential information and assisted in a confidential capacity a person who formulated, determined, and effectuated management policies with regard to labor relations. Gallo's performance was not isolated to one incident in this regard. Rather, Gallo continued similar duties at an ever-increasing extent over time. Therefore, the Niles limitation period began running in March 2004.

In Beach Park, this Board held that 16 months between the creation of a position and the filing of a petition to exclude that position from the bargaining unit was unreasonable. In this case, the College waited 14 months before filing its petition for unit clarification. We find that 14 months also is unreasonable. Therefore, we affirm the Executive Director's dismissal of the unit clarification petition as untimely.

² The College argues that Spoon River controls the timeliness analysis. 18 PERI 1143, Case No. 2002-UC-0013-S (IELRB, Aug. 30, 2002). Spoon River was decided by the Executive Director and is not binding on the Board.

III. Right to Appeal

This is a final order of the IELRB. Aggrieved parties may seek judicial review of this Order in accordance with the provisions of the Administrative Review Law, except that, pursuant to 115 ILCS 5/16(a), such review must be taken directly to the appellate court of the judicial district in which the IELRB maintains an office (Chicago or Springfield). “Any direct appeal to the Appellate Court shall be filed within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision.” 115 ILCS 5/16(a).

Decided: April 11, 2006
Issued: April 12, 2006
Chicago, Illinois

/s/ Lynne O. Sered
Lynne O. Sered, Chairman

/s/ Ronald Ettinger
Ronald Ettinger, Member

/s/ Bridget L. Lamont
Bridget L. Lamont, Member

/s/ Michael H. Prueter
Michael H. Prueter, Member

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