

**STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
STATE PANEL**

State of Illinois, Department of	)	Consolidated Case Nos.
Central Management Services,	)	S-DE-14-005
	)	S-DE-14-008
Petitioner	)	S-DE-14-009
	)	S-DE-14-010
and	)	S-DE-14-017
	)	S-DE-14-021
American Federation of State, County	)	S-DE-14-026
and Municipal Employees, Council 31,	)	S-DE-14-028
	)	S-DE-14-030
Labor Organization-Objector	)	S-DE-14-031
	)	S-DE-14-032
and	)	S-DE-14-034
	)	S-DE-14-039
Glen Bell, Lisa Krebs, Carol Gibbs, David	)	S-DE-14-040
Johnson, and Maureen Haugh-Stover,	)	S-DE-14-041
	)	S-DE-14-042
Employee-Objectors	)	S-DE-14-043
	)	S-DE-14-044
	)	& S-DE-14-045

**DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD  
STATE PANEL**

The above-captioned cases, consolidated for purposes of determination by the Illinois Labor Relations Board, State Panel, all involve designations made by the Illinois Department of Central Management Services (CMS) on behalf of the Governor of the State of Illinois pursuant to Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012) (Act), a section recently added to the Act by Public Act 97-1172 (eff. April 5, 2013). Section 6.1 allows the Governor to designate certain State employment positions as excluded from the collective bargaining rights which might otherwise be available to State employees under Section 6 of the Act.

Section 6.1(a) sets out three categories of positions from which such designations may be made, defined in terms of their relation to collective bargaining. The Governor may designate 1) positions which were first certified to be in a bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008, 2) positions which were the subject of a petition for such certification pending on April 5, 2013 (the effective date of Public Act 97-1172), or 3) positions which have never been certified to have been in a collective bargaining unit and are not subject to pending petitions. Only 3,580 of such positions may be so designated by the Governor, and, of these, only 1,900 positions which have already been certified to be in a collective bargaining unit.

Section 6.1(b) further restricts the positions which might be designated to those fitting one or more of five categories defined on the basis of the positions' title, duties, or classification with respect to civil service or restrictions on political hiring. To be properly designated, the position must fit one or more of the following five categories:

- 1) it must authorize an employee in the position to act as a legislative liaison;
- 2) it must have a title of, or authorize a person who holds the position to exercise substantially similar duties as, a Senior Public Service Administrator, Public Information Officer, or Chief Information Officer, or an agency General Counsel, Chief of Staff, Executive Director, Deputy Director, Chief Fiscal Officer, or Human Resources Director;
- 3) it must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), see 20 ILCS 415/4 through 4d (2012);
- 4) it must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
- 5) it must authorize an employee in that position to have "significant and independent discretionary authority as an employee."

Section 6.1(c) defines the meaning of the term “significant and independent discretionary authority as an employee,” used in the fifth category, as meaning the employee is either

- 1) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
- 2) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. It also requires this Board to determine, in a manner consistent with due process, whether the designation comports with the requirements of Section 6.1, and to do so within 60 days.<sup>1</sup>

As noted, Public Act 97-1172 and Section 6.1 of the Illinois Public Labor Relations Act became effective on April 5, 2013. They allow the Governor 365 days to make such designations measured from that date. The Board promulgated emergency rules to effectuate Section 6.1, which became effective on April 22, 2013, 37 Ill. Reg. 5,901 (May 3, 2013), and promulgated permanent rules for the same purpose which became effective on August 23, 2013, 37 Ill. Reg. 14,070 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board’s Rules and Regulations, 80 Ill. Admin. Code Part 1300, and are available on the Board’s website.<sup>2</sup>

The 19 above-captioned cases arose out of 19 petitions filed by CMS on behalf of the Governor on August 8, 9 and 14, 2013. Collectively, they designate a total of 885 State positions

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<sup>1</sup> Public Act 98-100, which became effective July 19, 2013, added subsections (e) and (f) to Section 6.1 which shield certain specified positions from such Gubernatorial designations, but none of those positions are at issue in this case.

<sup>2</sup> <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>

for exclusion from collective bargaining rights. Each petition concerns employment positions at a particular State agency, and each designation is made pursuant to the second category set out by Section 6.1(b)(2). Even more specifically, each of the petitions at issue in this consolidated matter designate the employment positions at issue on the basis that they bear the title of a Senior Public Service Administrator or “SPSA.”

Pursuant to Section 1300.50(c) of the Board’s Rules, the Board served CMS’s petitions on each of the incumbents to those positions, and also on the American Federation of State, County and Municipal Employees, Council 31 (AFSCME), the representative of collective bargaining units containing some of those positions, and a petitioner seeking to represent other of those positions pursuant to Section 9. In each of these 19 cases, AFSCME filed objections pursuant to Board Rule 1300.60. In five of the cases, an individual employee also filed objections.<sup>3</sup>

Upon the filing of objections, each case was assigned to one of the Board’s administrative law judge (ALJ). Seven different ALJs considered one or more of the petitions and their related objections. In each case, the assigned ALJ found the objections failed to raise an issue of fact or law such as to require an evidentiary hearing, and in each case, the assigned ALJ ultimately concluded that the designations comported with the requirements of Section 6.1, and recommended that the positions at issue should be certified as excluded from Section 6 collective bargaining rights. No individual filed exceptions to the ALJs’ recommendations pursuant to Board Rule 1300.130, but AFSCME has filed an exception in every case. Because

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<sup>3</sup> Case Nos. S-DE-14-021 (Glen Bell at Dep’t of Revenue), S-DE-14-026 (Lisa Krebs at Dep’t of Corrections), S-DE-14-031 (Carol Gibbs at Ill. State Police), S-DE-14-032 (David Johnson at Dep’t of Healthcare and Family Services), and S-DE-14-042 (Maureen Haugh-Stover at Dep’t of Human Services)

the exceptions raise the same issues, we consolidated the cases for purposes of deliberation and decision.

As previously noted, each of the petitions designated employees pursuant to Section 6.1(b)(2) of the Act, in that they were classified as SPSAs. In relevant part, Section 6.1 provides:

- (a) .... [T]he Governor is authorized to designate up to 3,580 State employment positions collectively within State agencies directly responsible to the Governor, and, upon designation, those positions and employees in those positions, if any, are hereby excluded from the self-organization and collective bargaining provisions of Section 6 of this Act...
- (b) In order to properly designate a State employment position under this Section, the Governor shall provide in writing to the Board: the job title and job duties of the employment position; the name of the State employee currently in the employment position, if any; the name of the State agency employing the public employee; and the category under which the position qualifies for designation under this Section.

To qualify for designation under this Section, the employment position must meet one or more of the following requirements:

\* \* \*

- (2) **it must have a title of**, or authorize a person who holds that position to exercise substantially similar duties as a[ ] ... **Senior Public Service Administrator** ...[.]

5 ILCS 315/6.1(b) (2012) (emphasis added).

In not a single case does AFSCME challenge the factual finding that the position at issue does, indeed, have the title of an SPSA. AFSCME instead objects that the designation process failed to provide it with due process of law as required in the final sentence of Section 6.1(b): “Within 60 days after the Governor makes a designation under this Section, the Board shall determine, in a manner that is consistent with the requirements of due process, whether the designation comports with the requirements of this Section.” Its due process challenge focuses

on the limited time the Board allowed it to file objections,<sup>4</sup> combined with lack of discovery procedures at the objection stage, and multiplied by the sheer number of petitions filed by CMS in a very short period of time. It claims a right to discovery and to present evidence at a hearing that the legislation, facially or as applied, violates due process and equal protection. AFSCME also claims a violation of the equal protection clause in that the positions are arbitrarily designated, and it claims the legislation violates separation of powers in that it improperly delegates a legislative function to the Governor.

AFSCME takes issue with the statements of several ALJs that the only relevant inquiry is whether the positions have been classified as SPSA positions, and that it was not relevant whether the classifications as SPSAs had been properly made. It also claims the ALJs erred when finding irrelevant CMS's failure to properly state whether or not a position was subject to a pending representation petition. In several cases it complains that CMS had previously agreed to include the positions in bargaining units, or conceded that, for example, they were not managerial positions. And it complains that the Board is being arbitrary in attempting to meet its statutory 60-day timeline when it is not complying with its statutory timeline to make decisions in representation cases under Section 9(a-5).

As a preliminary matter we note that it is beyond our capacity to rule that the Illinois Public Labor Relations Act, as amended by Public Act 97-1172, either on its face or as applied violates provisions of the United States and Illinois constitutions. Goodman v. Ward, 241 Ill. 2d 398, 411 (2011) ("Administrative agencies ... have no authority to declare statutes unconstitutional or even to question their validity. [citations omitted] When they do so, their

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<sup>4</sup> Board Rule 1300.60 allows 10 days to file objections, but by order of the Board's General Counsel, the period was extended in about half of these cases: Case Nos. S-DE-14-005 (13 days), S-DE-14-008 (15 days), S-DE-14-009 (13 days), S-DE-14-010 (13 days), S-DE-14-017 (13 days), S-DE-14-021 (13 days), S-DE-14-026 (14 days), S-DE-14-029 (14 days), and S-DE-14-034 (13 days).

actions are a nullity and cannot be upheld.”). We understand AFSCME’s perceived need to present these arguments to us, see Arvia v. Madigan, 209 Ill. 2d 520, 531 (2004) (“We caution litigants, however, that it remains advisable to raise all defenses before the administrative tribunal—even those outside of the agency’s authority to decide—or risk waiver on review.”), but an actual ruling on the constitutionality of Public Act 97-1172 is beyond our authority.

We reject AFSCME’s contention that where, as here, an administrative agency is called to determine a single, simple factual issue such as whether an employment position has a particular title, and that factual issue is not even disputed, the agency must nevertheless conduct a hearing allowing a party to attempt to evidence that the legislation as whole is unconstitutional as applied. The two cases cited by AFSCME for this proposition, Arvia v. Madigan, 209 Ill. 2d 520 (2004), and Gruwell v. Ill. Dep’t of Financial and Professional Regulations, 406 Ill. App. 3d 283, 296-98 (4th Dist. 2010), explain why courts are less likely to find that a party has waived a facial constitutional challenge by failing to raise it before a administrative agency as they are for an as applied challenge, but neither case holds that an agency is required to hold a hearing fully exploring the potential for such a challenge where it has no reason to hold a hearing on the statutory issue at hand.

That we cannot rule on whether the legislation is constitutional does not mean we are unconcerned with due process. In the regulations we promulgated in Part 1300 we made considerable effort to meet both the statutory directive to complete our review within 60 days, and to do so in a manner consistent with due process. To that end, we have insured that the individual employees as well as their representative and potential representative receive notice soon after designation petitions are filed, usually without hours, and have provided for redundant notice by means of posting at the worksite. Board Regulation 1300.60. We have provided them

an opportunity to file objections, and where they raise issues of fact or law that might overcome the statutory presumption of appropriateness, an opportunity for a hearing. *Id.* We require a written recommended decision by an administrative law judge in each case in which objections have been filed, *id.*, and have allowed an opportunity to appeal those recommendations for consideration of the full Board by means of filing exceptions, Board Rule 1300.130. We have also doubled the frequency of our scheduled public meetings in order to provide adequate review of any exceptions in advance of the 60-day deadline.<sup>5</sup> Finally, as evident by this document, we are issuing written final agency decisions which may be judicially reviewed pursuant to the Administrative Review Law. We also note that in many of the cases presently before us, the General Counsel has granted AFSCME's requests for extensions of time within which to file objections to the extent he felt it would not jeopardize our ability to meet and deliberate concerning each case in advance of the statutory deadline. We have made every effort to provide procedures adequate for the issues involved.

Before addressing AFSCME's arguments, we clarify the exact nature of the designations at issue in these particular cases. Section 6.1(b)(2) of the Act indicates that it is proper to designate a position if that position either "ha[s] the title of, *or* authorize[s] a person who has that position to exercise substantially similar duties as a[ ] ... Senior Public Service Administrator." 5 ILCS 315/6.1(b)(2) (2012) (emphasis supplied). In each of the cases presently before the Board, CMS asserted the designation pursuant to Section 6.1(b)(2) and submitted CMS-104 forms (job descriptions) evidencing that the positions sought to be designated had the *title* of an SPSA. If true, that is sufficient basis to find the designation proper under a literal wording of the Act (and since we assume the Act is constitutional, under the United States and Illinois

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<sup>5</sup> See <http://www.state.il.us/ilrb/subsections/meetings/index.asp> (visited Sept. 29, 2013).

constitutions). Whether the position duties as described on the CMS-104s or the duties actually performed by incumbents showed they were *authorized* to perform substantially the same duties as an SPSA is entirely unnecessary where they have the actual title. Section 6.1 says nothing about whether the title has to have been properly designated.

As noted, AFSCME does not claim any of these positions lack the title of an SPSA. Rather, it argues that, because the Act requires the Governor to provide both the job title and the job duties,<sup>6</sup> the legislature must have intended to have the Board ensure the two matched. That is quite a logical jump, and would require this Board to review matters never before a part of its set of duties and in duplication or substitution of pre-existing procedures for reviewing job classification appropriateness by the Civil Service Commission. See 80 Ill. Admin. Code §§ 320.90 & 320.100. In any event, AFSCME's position is negated by the language in Section 6.1(b)(2) which establishes qualification based on the position "hav[ing] a title of, *or* authoriz[ing] a person who holds the position to exercise substantially similar duties..." Where the Governor has complied with the procedural steps of supplying the title and duties, and also demonstrates meeting the substantive requirement of the position having one of the titles listed, the designation is proper and the Board's task is complete. The ALJs properly found that the issue of whether the titles were properly designated is irrelevant to the statutory task at hand. Concurrently, the impression AFSCME tries to create of a need for access to a broader range of information than simple job title is unwarranted.

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<sup>6</sup> Section 6.1(b) begins:

In order to properly designate a State employment position under this Section, the Governor shall provide in writing to the Board: the job title and job duties of the employment position; the name of the State employee currently in the employment position, if any; the name of the State agency employing the public employee; and the category under which the position qualifies for designation under this Section.

Because the issue in these cases is so succinct, AFSCME's complaint that it had insufficient time and tools to perform discovery prior to filing objections is particularly inapt. The only information that might need to be discovered is whether these positions have the title of an SPSA, and the Board's regulations require the petitioner, CMS, to supply information in support of the designation along with its petition. Furthermore, citizens are presumed to know the law, and Public Act 97-1172 had been the law of the land for over four months before CMS filed its first designation petition. We also note that AFSCME is not an average citizen: it is highly sophisticated and keenly aware of legislative developments; indeed, in the statement he issued in conjunction with his withdrawal of a motion to reconsider the legislation, Senator Harmon indicated he had been involved in extensive negotiations between the Governor's office and unions representing affected employees, unions which undoubtedly included AFSCME. Consequently, it is safe to assume AFSCME knew of the proposed legislative language providing for designations based merely on the SPSA title soon after the Second House Floor Amendment was filed for Senate Bill 1556. That took place on May 31, 2011, over *two years* before CMS filed the first petition at issue in this case. As the exclusive representative of numerous employees with the SPSA title, as the exclusive representative of bargaining units containing vacant positions with the SPSA title, and as a petitioner seeking to represent still more SPSA titles, AFSCME either knew who held these titles (by asking the very people it represents or by visiting online databases such as the State of Illinois Transparency and Accountability Portal or by means of requests made under the Freedom of Information Act) or it would have failed its responsibilities as a representative. Again, we note that AFSCME does not challenge whether these positions hold the title of an SPSA, but confines its arguments merely to issues

remote from that key issue. We find AFSCME has failed to demonstrate any need for additional discovery tools or time in order to object to the designations.

AFSCME has raised several arguments outside the concept of due process. For example, in some of its petitions, CMS has failed to correctly identify that a particular position is included in a collective bargaining unit or is the subject to a pending petition. Our forms require this information, though neither the statute nor our rules do. AFSCME raised this issue with the ALJs, but none found it relevant to determining whether the designation comported with the requirements of Section 6.1 of the Act, our precise obligation under Section 6.1(b). AFSCME points out that the Act limits the number of positions that are already in bargaining units that the Governor can designate to 1900, and that correct identification in the designations is relevant to ensuring he does not go over this limit. It is true that proper identification would help to ensure accuracy in this regard, but it is not essential. Failure to be accurate on this point does not mean the designation does not comport with the requirements of Section 6.1.

AFSCME points out that in some instances, CMS had earlier agreed to the inclusion of some of these positions within bargaining units, or admitted, for example, that a position was not a managerial position such as to warrant its exclusion in the context of a representation petition filed under Section 9. The argument fails to recognize that Section 6.1 is new creation. It does not modify pre-existing means of determining collective bargaining units, but is a self-contained and entirely new means of decreasing the number of State employees in collective bargaining units. Admitting that an employee does not meet the definition of a managerial employee under Section 3(j) has no direct bearing on whether the employee's position is properly designated for exclusion under Section 6.1 as an SPSA. Even agreeing to include the employee in a bargaining unit under the pre-amendment provisions of Illinois Public Labor

Relations Act does not mean that the legislature cannot subsequently amend the Act and provide for the removal of that employee's position. We agree with the ALJs that this argument has no bearing on our task.

Finally, AFSCME states it is arbitrary for this Board to attempt to meet the 60-day statutory time frame for making decisions under Section 6.1 when it does not comply with the 120-day statutory time limit for making representation determinations under Section 9(a-5). It suggests that the 60-day time limitation is directory, but not mandatory. We acknowledge that the considerable efforts we expended in attempting to meet the 120-day time limit added to Section 9(a-5) by Public Act 96-813 (even when the concurrently adopted staffing minimums were never funded)<sup>7</sup> have often failed, frequently in the form of a court-ordered remand. We also note that in several representation cases still pending before us, the parties, including AFSCME, have asked for an abeyance. In any event, we fail to see how that, or whether the 60-day time limit is labeled mandatory or directory, would allow us to forego any attempt to meet the time limit the General Assembly has most recently placed upon us. Our attempt to obey the legislature in this respect is not arbitrary.<sup>8</sup>

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<sup>7</sup> Public Act 96-813 requires the Board to employ 16 attorneys and six investigators. It presently has 19 staff members in total, ten of whom possess law licenses and another three of whom are investigators.

<sup>8</sup> We address one more issue. In several of its exceptions, AFSCME states: "The presumption that exists in support of the Governor's designation and the fact that the Board's members serve at the Governor's discretion, creates an inference that an 'extrajudicial' source of influence exists precluding AFSCME's due process right to a 'fair and impartial hearing before a fair and *impartial tribunal*.' Smith v. Dep't of Registration & Educ., 412 Ill. 332, 351 (1952)." (emphasis in original). We note AFSCME raises this allegation of bias before this Board has reviewed a single one of the petitions for designation under Section 6.1. We further note that AFSCME has its facts wrong. The Members of this Board have never served at the Governor's discretion. From the inception of the Act, they have been appointed to four-year terms. 5 ILCS 315/5 (2012). Furthermore, the potential for holding Members beyond the expiration of their terms was eliminated by legislative fiat several years ago. Public Act 97-582 (eff. Aug. 26, 2011). We expect of those who appear before us a higher degree of professionalism and accuracy than that displayed in this portion of the exceptions.

For the reasons set forth above and for those expressed in the recommended decisions and orders issued in these cases, we find that the designations comport with the requirements of Section 6.1 of the Illinois Public Labor Relations Act. Consistent with that finding, we direct the Executive Director to certify that the positions designated be certified as excluded from the collective bargaining rights under Section 6.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ John J. Hartnett  
John J. Hartnett, Chairman

/s/ James Q. Brennwald  
James Q. Brennwald, Member

/s/ Michael G. Coli  
Michael G. Coli, Member

/s/ Albert Washington  
Albert Washington, Member

**Member Besson, concurring in part and dissenting in part:**

I join in all portions of the opinion of the majority with the exception of the last sentence of footnote 8.

/s/ Paul S. Besson  
Paul S. Besson, Member

Decision made at the State Panel's public meeting in Chicago, Illinois, on September 24, 2013; written decision issued at Springfield, Illinois, October 7, 2013.