

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

|                                      |   |                      |
|--------------------------------------|---|----------------------|
| State of Illinois, Department of     | ) |                      |
| Central Management Services          | ) |                      |
| (Department of Commerce &            | ) |                      |
| Economic Opportunity),               | ) |                      |
|                                      | ) |                      |
| Petitioner                           | ) |                      |
|                                      | ) | Case No. S-DE-14-053 |
| and                                  | ) |                      |
|                                      | ) |                      |
| American Federation of State, County | ) |                      |
| and Municipal Employees, Council 31, | ) |                      |
|                                      | ) |                      |
| Labor Organization-Objector          | ) |                      |

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

On September 17, 2013, Administrative Law Judge (ALJ) Anna Hamburg-Gal issued a Recommended Decision and Order (RDO) finding that designations made on behalf of the Governor by the Illinois Department of Central Management Services (CMS) pursuant to Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012) (Act), were properly made. CMS's petition designated five attorney positions at the Illinois Department of Commerce and Economic Opportunity pursuant to Section 6.1(b)(5). No individual employees filed objections pursuant to Section 1300.60 of the Rules and Regulations of the Illinois Labor Relations Board promulgated to implement Section 6.1, 80 Ill. Admin. Code Part 1300, but the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) did, and upon the ALJ's issuance of her RDO, AFSCME also filed exceptions pursuant to Section 1300.130 of the Board's Rules. Although the ALJ ruled in its favor, CMS, too, filed exceptions. After reviewing these exceptions and the record, we accept the ALJ's recommendation for the reasons which follow.

Section 6.1 was recently added to the Illinois Public Labor Relations Act by Public Act 97-1172 (eff. April 5, 2013), legislation which, in several ways, was intended to diminish the number of State employees with access to collective bargaining rights. 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) limits him to 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, 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 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 political hiring restrictions 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>

#### **The ALJ’s recommendation**

The ALJ recommends that this Board find the designations do, in fact, comport with the requirements of Section 6.1. She noted that the checkbox for supervisory status was unchecked on all but one of the position statements (CMS-104 forms) that accompanied the petition for designations, and from that surmised that the CMS intended to demonstrate that the positions met the managerial component of Section 6.1(b) as described in Section 6.1(c)(i) rather than the supervisory component described in Section 6.1(c)(ii). Section 6.1(c)(i) incorporates 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.

“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.”

In evaluating that standard, the ALJ found it appropriate to apply Illinois case law pertaining to the pre-existing exclusion from collective bargaining for managerial employees set out in Section 3(j) of the Act. She rejected AFSCME’s contention that she should instead look to precedent established under the National Labor Relations Act (NLRA), noting that the legislature had made specific reference to NLRA precedent in the supervisory component of Section 6.1(b) set out in Section 6.1(c)(ii), but made no similar reference in the managerial component set out in Section 6.1(c)(i). Noting the presumption of appropriateness set out in Section 6.1(d), the ALJ found that the objecting party, AFSCME, bore the burden of establishing that the designation was inappropriate. Based on the presumption of appropriateness of the designations, the CMS-104 forms that provided evidence in support of the designations, and the absence of any evidence submitted by AFSCME to the contrary, the ALJ concluded that each of the positions at issue was properly designated under Section 6.1(b) and (c)(i).

### **CMS’s exceptions**

Although the ALJ ruled in its favor, CMS filed exceptions, claiming she misapplied the law. We ultimately disagree with that contention, but CMS’s argument raises a very important point we wish to address and, to the extent necessary, clarify the ALJ’s application of the law. The managerial component of new Section 6.1(c)(i) is not equivalent to the pre-existing definition of a managerial employee in Section 3(j). Both by slightly modifying the traditional

two-part test for managerial status and more significantly by adding with the word “or” a second, alternative test, it sweeps much broader. Compare Section 6.1(c)(i):

a person has significant and independent discretionary authority as an employee if he or she (i) is 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[.]

with pre-amendment Section 3(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 management policies and practices[.]

or, for that matter, with the language added to Section 3(j) by an amendment added by Public Act 97-1172 that is prospectively applicable to constitutional officers other than the Governor:

With respect only to State employees in positions under the jurisdiction of the Attorney General, Secretary of State, Comptroller, or Treasurer ... “managerial employee” means an individual who is engaged in executive and management functions or who is charged with the effectuation of management policies and practices or who represents management interests by taking or recommending discretionary actions that effectively control or implement policy. Nothing in this definition prohibits an individual from also meeting the definition of “supervisor” under subsection (r) of this Section.

To the extent portions of the ALJ’s RDO may suggest that one can look directly to precedent established under Section 3(j) without considering differences in the wording between that section and Section 6.1(c)(i), we clarify that this is not the case. For a Section 6.1(b)(5) designation, one must look first to the language of Section 6.1(b)(5) as explained in Section 6.1(c), and consider case precedent only to the extent that precedent explains the meaning of terms commonly used in both. An excellent example lies in the commonly used phrase “executive and management functions,” which case law has long explained refers to matters which “specifically relate to running a department and include such activities as formulating

department policy, preparing the budget, and assuring efficient and effective operations of the department.” Vill. of Elk Grove Vill. v. Ill. State Labor Relations Bd., 245 Ill. App. 3d 109, 121-22 (1st Dist. 1993). The legislature was no doubt aware of this judicial explanation of the phrase as used in the context of Section 3(j) when it determined to use the very same phrase in Section 6.1(c)(i). It therefore can be thought to have incorporated that understanding in the new legislation. City of Bloomington v. Ill. Labor Relations Bd., 373 Ill. App. 3d 599, 608 (4th Dist. 2007) (“When statutes are enacted after judicial opinions are published, it is presumed that the legislature acted with knowledge of the prevailing case law.”). Conversely, where language in Section 6.1(c)(i) deviates from that in Section 3(j), one can assume some change was intended. Id. at 607. The absence of the word “predominantly” from Section 6.1(c)(i), though used in Section 3(j), is a clear example.

Such careful attention to the language used causes us to reject CMS’s argument that the managerial component of Section 6.1(b) and (c)(i) includes three independent alternative tests. That accurately describes the recent amendment made to Section 3(j) applicable only prospectively for constitutional officers other than the Governor, but not Gubernatorial designations under Section 6.1(b) and (c)(i). We agree with the ALJ’s interpretation of Section 6.1(b) and (c)(i) and her application of relevant judicial precedent to the facts of this case.

#### **AFSCME’s exceptions**

As it had in its objections rejected by the ALJ, AFSCME argues that in interpreting Section 6.1(c)(i) the Board should look to precedent established under the NLRA rather than precedent established by State courts under the Illinois Public Labor Relations Act. We agree with the ALJ that doing so would be inconsistent with the fact that the legislature made specific reference to precedent under the NLRA in formulating the supervisory component of Section

6.1(c)(ii), but made no similar reference in the managerial component set out in section 6.1(c)(i). To the extent precedent is relevant to interpretation of Section 6.1(c)(i), we look first to precedent established by Illinois courts, this Board, and where relevant the Illinois Educational Labor Relations Board, then to federal precedent interpreting similarly worded provisions of the NLRA.

We note that one of the arguments AFSCME presents based on its proposed application of NLRA precedent is that CMS should bear the burden to prove that the designation it makes meets the statutory standard, and that presentation of a position description, without more, is insufficient to meet that burden. This is directly contrary to Section 6.1(d), which creates a presumption that the designation is appropriate. We agree with the ALJ that submission of position descriptions that are consistent with the designation made, combined with the presumption of appropriateness, and in the absence of any contrary evidence from objectors like AFSCME that might demonstrate that the designation is inappropriate, leads to the conclusion that the designation comports with the requirements of Section 6.1.

AFSCME also wishes to rely on the distinction drawn by the National Labor Relations Board between managerial status and professional status such as that held by the attorneys whose positions are at issue here. However, Illinois precedent under the Section 3(j) definition of a managerial employee shows that the terms are not mutually exclusive, see, e.g., Dep't of Cent. Mgmt. Servs./Ill. Pollution Control Bd., 2013 IL App (4th) 110877, and there certainly is no exception for professional employees in the language of Section 3(c)(i). Where a position meets one of the two alternative tests set out in Section 3(c)(i), it may appropriately be designated by the Governor for exclusion from collective bargaining rights regardless of whether it is also a

professional position and even if it fails to meet the definition of a managerial employee in Section 3(j).

AFSCME has also filed exceptions claiming that our procedures set out in Part 1300 of our Rules and Regulations fail to provide it with due process and that Public Act 97-1172 and Section 6.1 is in other ways unconstitutional. We rejected these same arguments in our decision in State of Illinois, Department of Central Management Services, Cons. Case Nos. S-DE-14-005 etc. (IL LRB-SP Oct. 7, 2013), and do not deviate from our position there.

#### **AFSCME's standing**

There is a more fundamental flaw to AFSCME's exceptions in that AFSCME lacked standing to present them. No collective bargaining unit represented by AFSCME contains the positions at issue, nor has AFSCME filed a petition to represent these positions. In addition, AFSCME has not asserted any manner in which a collective bargaining unit it does represent, or seeks to represent, would be harmed by the designation of these particular positions pursuant to Section 6.1 of the Act.

Our rules allow objections to Section 6.1 designation petitions to be filed by incumbent employees or "the collective bargaining representative." 80 Ill. Admin. Code §1300.60(a)(3). AFSCME is neither. Our rules allow "parties" to file exceptions, 80 Ill. Admin. Code §1300.130, but AFSCME is not properly classified as a party. For this additional reason, we reject AFSCME's exceptions. McHenry County Landfill, Inc. v. Ill. Env'tl. Protection Agency, 154 Ill. App. 3d 89, 95 (2d Dist. 1987) (Pollution Control Board had no authority to permit objectors to become parties before it).

**Conclusion**

For these reasons, those set out in the ALJ's RDO, and those we have previously expressed in State of Illinois, Department of Central Management Services, Cons. Case Nos. S-DE-14-005 etc. (IL LRB-SP Oct. 7, 2013), we reject the exceptions, accept the ALJ's recommendation and find that the designation of the positions at issue comports with the requirements of Section 6.1. Consistent with that action, we direct the Executive Director to certify that the positions designated are excluded from collective bargaining rights under Section 6 of the Act.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

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

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

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

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

/s/ Albert Washington  
Albert Washington, Member

Decision made at the State Panel's public meeting in Springfield, Illinois, on October 8, 2013; written decision issued at Springfield, Illinois, October 21, 2013.

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

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|--|---|----------------------|
| State of Illinois, Department of Central | ) |                      |
| Management Services, (Department of      | ) |                      |
| Commerce and Economic Opportunity),      | ) |                      |
|  | ) |                      |
| Petitioner,                              | ) |                      |
|  | ) |                      |
| and                                      | ) | Case No. S-DE-14-053 |
|  | ) |                      |
| American Federation of State, County     | ) |                      |
| and Municipal Employees, Council 31,     | ) |                      |
|  | ) |                      |
| Labor Organization-Objector              | ) |                      |

**ADMINISTRATIVE LAW JUDGE'S  
RECOMMENDED DECISION AND ORDER**

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) *added by* Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. There are three broad categories of positions which may be so designated: 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. Only 3,580 of such positions may be so designated by the Governor, and, of those, only 1,900 positions which have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, the position must fit one 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 as an agency General

Counsel, Chief of Staff, Executive Director, Deputy Director, Chief Fiscal Officer, or Human Resources Director; or

- 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” by which the Act means the employee is either
  - (i) 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
  - (ii) 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 the Illinois Labor Relations 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, and allow the Governor 365 days from that date to make such designations. The Board promulgated emergency rules to effectuate Section 6.1, which became effective on April 22, 2013, 37 Ill. Reg. 5901 (May 3, 2013), and the Board promulgated rules

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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.

for the same purpose effective on August 23, 2013, 37 Ill. Reg. 14,070 (Sept. 6, 2013) (collectively referred to as the Board's rules). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On August 20, 2013, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designation pursuant to Section 6.1 of the Act and Section 1300.50 of the Board's Rules. On September 9, 2013, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules. Based on my review of the designations, the documents submitted as part of the designation, the objections, and the documents and arguments submitted in support of those objections, I find that the designation was properly submitted, that it is consistent with the requirements of Section 6.1 of the Act, and that the objections fail to raise an issue of law or fact that might overcome the presumption that the designation is proper. Consequently, I recommend that the Executive Director certify the designation of the positions at issue in this matter as set out below and, to the extent necessary, amend any applicable certifications of exclusive representatives to eliminate any existing inclusion of these positions within any collective bargaining unit.

The following five positions within the Department of Commerce and Economic Opportunity are at issue in this designation:

|                       |                     |          |
|-----------------------|---------------------|----------|
| 37015-42-00-040-21-02 | Samantha Hufnagel   | Attorney |
| 37015-42-00-040-31-01 | Rachel Powell       | Attorney |
| 37015-42-00-040-31-03 | Addrena Kim         | Attorney |
| 37015-42-00-040-60-01 | Matthew Stonecipher | Attorney |
| 37015-42-00-040-60-02 | Vacant              | Attorney |

CMS's petition indicates the positions at issue qualify for designation under Section 6.1(b)(5) of the Act.<sup>2</sup> AFSCME objects to designation of all positions on the grounds set forth below.

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<sup>2</sup> CMS filed position descriptions (CMS-104s) for the positions in support of its assertion. These positions are not subject to a pending petition and are not currently represented by AFSCME.

## **I. AFSCME's Objections**

First, AFSCME argues that it was not afforded due process because CMS gave AFSCME no notice as to the basis for the exclusion. In support, AFSCME notes that CMS submitted no information indentifying the basis for the exclusion, submitted no evidence in support of its petition, and merely stated generally that the positions qualify for designation under Section 6.1(b)(5). Nevertheless, AFSCME observes that most of the designated positions have no subordinates and that there is no indication from the position descriptions that they perform any indicia of supervisory authority. AFSCME concludes, on that basis, that CMS designated these employees based on their presumptive managerial authority under Section 6.1(b)(5)(i) but argues against both grounds for exclusion.

AFSCME also asserts that the Board should apply an analytical framework to these designation petitions which conforms to case law from the National Labor Relations Board and places the burden of proving the exclusion on the party who asserts it.<sup>3</sup> As such, AFSCME argues that CMS has the burden to prove that the designation is proper and that the Board should construe the Act's exclusions narrowly in assessing CMS's evidence.

Finally, AFSCME asserts that the designated positions are professional rather than managerial. In support, AFSCME states that the work of the designated positions requires the exercise of technical expertise and not managerial discretion because one of the position descriptions states that the position prepares legal summaries and legal interpretations. AFSCME does not reference any other portion of any other position description in support of its arguments.

## **II. Position Descriptions**

### **a. 37015-42-00-040-21-02 - Samantha Hufnagel**

This position works under the administrative direction of the Springfield legal counsel and functions as a legal advisor to the Director and the operational divisions of the Department. In relevant part, the position provides legal opinions, interprets the Workforce Investment Act (WIA), and "advises the General Counsel on WIA developments and recommended resolutions."

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<sup>3</sup> The National Labor Relations Act does not include a managerial exclusion, but the NLRB and the Federal Courts have created one. NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974).

Further, the position recommends procedural processes, compliance with federal rules and regulations and legal interpretations for administering, monitoring and complying with 29 CFR Part 37, Implementation of Non-Discrimination Policies and Procedures for the Workforce Investment Act. In addition, the position acts as hearing officer and departmental representative in administrative hearings and appeals brought pursuant to the Illinois Administrative Procedure Act, departmental rules, or federal regulations. In that capacity, it conducts all legal research for cases and prepares determinations and legal decisions at the Agency level. Next, it serves as the Agency's representing attorney in lawsuits, discrimination charges, and civil service hearings. Finally, it drafts and negotiates terms and conditions of loan agreements and supporting documentation, modifications, settlement agreements, and demand and referral letters.

This position has one subordinate and is labeled a supervisor on the position description. However, the position description does not detail the position's supervisory responsibilities "in a detailed duty statement with a time percentage allotted" as the position description itself requires.

b. 37015-42-00-040-31-01 - Rachel Powell

This position works under the administrative direction of the Chicago Senior Public Service Administrator (SPSA) legal counsel and functions as a legal advisor to the Director and the operational divisions of the Department. In relevant part, the position drafts and interprets administrative rules and communicates with state legislative staff concerning the interpretation and implementation of legislation and administrative processes. Finally, the position represents the Department in bankruptcy matters.

This position has no subordinates and is not labeled a supervisor on the position description.

c. 37015-42-00-040-31-03 - Addrena Kim

This position works under the direction of the Chicago Deputy General Counsel. In relevant part, the position provides legal interpretation and counsel to the Deputy Directors, their staff, and senior level management of the Agency on legal issues and policies and procedures pertaining to federal and state legislation and regulations. Further the position advises the General Counsel on related legal developments and recommended resolutions. In addition, it recommends procedural processes for compliance with federal and state legislation. Next, it

formulates procedures, conducts and reviews legal research on federal and state laws, and drafts and prepares memoranda and opinions on issues affecting state- and federally-funded programs administered by the Agency. Finally, it reviews proposed legislation and assists in drafting and reviewing administrative rules.

This position has no subordinates and is not labeled a supervisor on the position description.

d. 37015-42-00-040-60-01 - Matthew Stonecipher

This position works under the administrative approval of the Chicago Deputy General Counsel to track and manage all litigation matters for the Agency. In relevant part, the position provides legal interpretations and counsels the Deputy Directors and senior level management of the Agency on legal issues, policies, and procedures pertaining to federal legislation and grants as they relate to business development for various Agency programs. Finally, the position reviews proposed legislation and assists in drafting and/or approving administrative rules for codification into Illinois statutes.

This position has no subordinates and is not labeled a supervisor on the position description.

e. 37015-42-00-040-60-02 - Vacant

This position works under the administrative direction of the Chicago Deputy General Counsel to prepare legal summarizations and legal interpretations in regulatory and law interpretations of Homeland Security market developments. The position revises, amends, and reviews complex federal legislation for Homeland Security. Further, it formulates procedures, directs and reviews legal research on federal laws, and prepares legal memoranda and opinions on issues affecting state- and federally-funded programs administered by the Agency for Homeland Security marketplace development. In addition, it reviews proposed legislation and assists in drafting and/or approving administrative rules for codification into Illinois statutes. Next, it tracks all federal grant and appropriation opportunities and proposed appropriations which are currently available. Finally, it develops and prepares information including legal interpretations for use by Illinois companies assessing opportunities to develop new business ventures in the marketplace of Homeland Security.

This position has no subordinates and is not labeled a supervisor on the position description.

### **III. Discussion and Analysis**

#### **a. Procedural Issues**

The character of CMS's submissions to the Board did not deprive AFSCME of due process because those submissions adequately placed AFSCME on notice as to the basis of the designation.

Here, CMS's petition placed AFSCME on notice as to the basis of the petition because CMS indicated that it sought exclusion under Section 6.1(b)(5) of the Act and submitted position descriptions for the positions in question to support its designation. As such, CMS clearly sought exclusion based on the assertion that the positions authorize the holders with "significant and independent discretionary authority." Accordingly, AFSCME had notice as to grounds for the petition.

Notably, AFSCME received proper notice, even though CMS did not specify whether the nature of that authority was supervisory or managerial, because the CMS-104s describe the positions and express, with a checkbox, whether the positions in question are deemed supervisory or not. Accordingly, AFSCME had ample information from which to ascertain the basis for the proposed exclusion and properly proceeded to argue against both of them.

Thus, the character of CMS's submissions to the Board did not deprive AFSCME of due process.

#### **b. Substantive Issues**

##### **i. Analytical framework**

AFSCME has the burden to demonstrate that the designation is improperly made and the Board must follow Illinois case law with respect to the managerial exclusion.

First, the Act states that the objector (here, AFSCME) bears the burden of proving that the designation is not proper because the Act provides that "any designation made by the Governor...shall be presumed to have been properly made." 5 ILCS 315/6.1 (2012). In this case, CMS designated this position under Section 6.1(b)(5) which provides that the position must "authorize an employee in that position to have significant and independent discretionary

authority as an employee.” 5 ILCS 315/6.1(b)(5) (2012). Under Section 6.1(c), a position authorizes its holder with the requisite authority if the position is supervisory, within the meaning of the National Labor Relations Act and the National Labor Relations Board’s case law, or managerial, within the meaning of the Illinois Public Labor Relations Act (discussed below). Accordingly, the burden is on the objector to demonstrate that the designation is not proper and that the employer has not conferred significant discretionary authority upon that position.

Second, the Board must apply Illinois case law pertaining to the managerial exclusion because it is applicable both substantively and under the plain language of the Act. Substantively, Illinois precedent is applicable because the definition of managerial employee in designation cases is similar to that used in traditional representation cases. While there are differences between the two definitions (“traditional definition” versus “designation definition”), they do not alter this conclusion. First, although the traditional definition contains a predominance element while the designation definition does not, this difference does not hamper the application of existing managerial case law to designation petitions because the court’s qualitative assessment of a position’s duties remains the same. Second, although the designation definition includes reference to effective recommendations, omitted in the traditional definition, Illinois precedent remains applicable despite this difference because the designation definition merely codifies existing case law pertaining to the traditional definition. See, Dep’t of Cent. Mgmt. Serv./Ill. Commerce Com’n, 406 Ill. App. 3d 766, 775 (4th Dist. 2010) (an advisory employee who makes effective recommendations can be managerial within the meaning of the Act).

Further, the plain language of the Act suggests that the Board should apply Illinois precedent to the managerial exclusion in designation cases because the legislature did not direct the Board to look to different case law. Here, the legislature does not specify that the Board should assess the managerial exclusion in light of NLRB case law. However, it did include such a directive with respect to the supervisory exclusion in designation petitions. If the legislature had intended the Board to consider NLRB case law to assess the managerial exclusion, it could have done so, as it did with respect to the supervisory exclusion. The fact that it did not, strongly suggests that the legislature intended the Board to follow Illinois case law in assessing the managerial exclusion in designation cases.

Thus, AFSCME has the burden to prove the designation is improperly made and the Board must consider Illinois case law with respect to the managerial exclusion to make its determination.

ii. Relevant Case Law

All but one of the positions in question have no subordinates. Further, because of my findings that the designations are proper by virtue of the positions' managerial authority, it is unnecessary to address the supervisory status of the single position that is marked as a supervisor. Accordingly, the relevant case law in this case addresses the managerial exclusion.

Under Illinois case law, "management functions" include such activities that relate to running a department, formulating policy, preparing the budget, and assuring effective and efficient operation of the department. Dep't of Cent. Mgmt. Serv. (Dep't of Healthcare and Family Serv.) v. Ill. Labor Rel. Bd. (State Panel), 388 Ill. App. 3d 319, 330 (4th Dist. 2009) (citing Vill. of Elk Grove Vill. v. Ill. State Labor Rel. Bd., 245 Ill. App. 3d 109, 121-22 (2nd Dist. 1993)). Other managerial duties include using discretion to make policy decisions rather than simply following established policy, changing the focus of an organization, responsibility for day-to-day operations, negotiating with employees or the public on behalf of the employer, or pledging the employer's credit. Id., at 330-331, citing Dep't of Cent. Mgmt. Serv., 21 PERI ¶ 205 (2005). Central to the determination of whether an employee is a managerial employee is the employee's ability to broadly affect the department's goals and means of achieving those goals. Dep't of Cent. Mgmt. Serv., 278 Ill. App. 3d at 87.

An employee need not necessarily formulate policy to be considered a managerial employee; rather, directing effectuation of policy is the hallmark of an employee engaged in running a department. Dep't of Cent. Mgmt. Serv. (Illinois Commerce Commission), 406 Ill. App. 3d at 780. The Fourth District has also noted that directing a division of a department "in a hands-on way" is evidence of managerial activity. Dep't of Cent. Mgmt. Serv., 2011 IL App (4th) 090966. The court further noted that "exclusivity in the implementation of management policy is not a requirement" of the Act, and that an employee may be deemed managerial if he makes effective recommendations on policy actions. Dep't of Cent. Mgmt. Serv., 406 Ill. App. 3d at 777 (effective recommendations are those that are accepted almost all the time.)

Each position is discussed in turn below in light of these precedents.

iii. Managerial status of the positions

1. 37015-42-00-040-21-02 - Samantha Hufnagel

CMS's designation of this position is proper because the designation is presumed to be properly made, the position description supports that conclusion, and AFSCME has introduced no evidence to suggest that CMS has not authorized this position to exercise managerial discretion.

As a preliminary matter, the designation is presumed to be properly made. Moreover, the position description supports CMS's assertion that the position is managerial because the position drafts and negotiates terms and conditions of loan agreements and settlement agreements on behalf of the employer. See Dep't of Cent. Mgmt. Serv. (Dep't of Healthcare and Family Serv.), 388 Ill. App. 3d at 330-331, citing Dep't of Cent. Mgmt. Serv., 21 PERI ¶ 205 (2005) (managerial functions include negotiating with employees or the public on behalf of the employer and pledging the employer's credit). Further this position acts as hearing officer and departmental representative to prepare determinations and legal decisions at the Agency level. Dep't of Cent. Mgmt. Serv./Ill. Commerce Com'n, 406 Ill. App. 3d at 776 (advisory employees such as administrative law judges who make legal decisions or recommendations at the agency level are managerial if their recommendations are effective and if they broadly affect the agency's mission). Finally, AFSCME has introduced no evidence to show that CMS has not authorized this position to exercise managerial discretion. Consequently, in light of these assigned duties, the statutory presumption, and the absence of evidence to the contrary, the Board must conclude that the character of the position holder's authority satisfies the managerial exclusion and that the position is properly designated.

Contrary to AFSCME's assertion, there is no indication from the position description that the position requires the exercise of technical and professional expertise to the exclusion of managerial discretion. Indeed, courts have held that managerial discretion and the use of technical or professional expertise are not mutually exclusive because an employee's exercise of "professional expertise is indispensable to the formulation and implementation of [the employer's] policy." State of Ill., Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n), 29 PERI ¶ 76 (IL LRB-SP 2012) (citing, N.L.R.B. v. Yeshiva Univ., 444 U.S. 672, 689-690 (1980) ("The

Board nevertheless insists that these decisions are not managerial because they require the exercise of independent professional judgment. We are not persuaded by this argument.”)) Thus, AFSCME’s argument does not undermine the presumption that the designation is proper because a position may both authorize an individual to act with managerial discretion and require the position holder to apply his professional expertise.

Thus, this position is properly designated as managerial. Accordingly, it is unnecessary to determine whether this position is also supervisory.

## 2. 37015-42-00-040-31-01 – Rachel Powell

CMS’s designation of this position is proper because the designation is presumed to be properly made, the position description supports that conclusion, and AFSCME has introduced no evidence to suggest that CMS has not authorized this position to exercise managerial discretion.

As a preliminary matter, the designation is presumed to be properly made. Moreover, the position description supports CMS’s assertion that the position is managerial because the position drafts and interprets administrative rules and communicates with state legislative staff concerning the interpretation and implementation of legislation and administrative processes. See Dep’t of Cent. Mgmt. Serv. (Dep’t of Healthcare and Family Serv.), 388 Ill. App. 3d at 332 (drafting rules and policies is an executive and management function which may satisfy the managerial exclusion); Dep’t of Cent. Mgmt. Serv. (Ill. Commerce Comm’n), 29 PERI ¶ 129 (IL LRB-SP 2013) (drafting proposed rules and amendments to legislation renders employee managerial). Finally, AFSCME has introduced no evidence and has presented no argument<sup>4</sup> to show that CMS has not authorized this position to exercise managerial discretion.

Consequently, in light of these assigned duties, the statutory presumption, and the absence of evidence to the contrary, the Board must conclude that the character of the position holder’s authority satisfies the managerial exclusion and that the position is properly designated.

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<sup>4</sup> See discussion on page ten addressing the relationship between managerial discretion and professional expertise.

3. 37015-42-00-040-31-03 - Addrena Kim

CMS's designation of this position is proper because the designation is presumed to be properly made, the position description supports that conclusion, and AFSCME has introduced no evidence to suggest that CMS has not authorized this position to exercise managerial discretion.

As a preliminary matter, the designation is presumed to be properly made. Moreover, the position description supports CMS's assertion that the position is managerial because the position reviews proposed legislation and assists in drafting and reviewing administrative rules. See Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., 2011 IL App (4th) 090966 ¶ 186 (exclusivity in the implementation of management policy is not a requirement under that Act; employees who developed and revised agency policies were managerial); Dep't of Cent. Mgmt. Serv. (Dep't of Healthcare and Family Serv.), 388 Ill. App. 3d at 332 (drafting rules and policies is an executive and management function which may satisfy the managerial exclusion); Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n), 29 PERI ¶ 129 (IL LRB-SP 2013) (drafting proposed rules and amendments to legislation affecting the department renders employee managerial). Finally, AFSCME has introduced no evidence and has presented no argument<sup>5</sup> to show that CMS has not authorized this position to exercise managerial discretion.

Consequently, in light of these assigned duties, the statutory presumption, and the absence of evidence to the contrary, the Board must conclude that the character of the position holder's authority satisfies the managerial exclusion and that the position is properly designated.

4. 37015-42-00-040-60-01 - Matthew Stonecipher

CMS's designation of this position is proper because the designation is presumed to be properly made, the position description supports that conclusion, and AFSCME has introduced no evidence to suggest that CMS has not authorized this position to exercise managerial discretion.

As a preliminary matter, the designation is presumed to be properly made. Moreover, the position description supports CMS's assertion that the position is managerial because the position reviews proposed legislation and assists in drafting and/or approving administrative

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<sup>5</sup> See discussion on page ten addressing the relationship between managerial discretion and professional expertise.

rules for codification into Illinois statutes. See Dep't of Cent. Mgmt. Serv. (Dep't of Healthcare and Family Serv.), 388 Ill. App. 3d at 332 (drafting rules and policies is an executive and management function which may satisfy the managerial exclusion); Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n), 29 PERI ¶ 129 (IL LRB-SP 2013) (drafting proposed rules and amendments to legislation affecting the department renders employee managerial). Finally, AFSCME has introduced no evidence and has presented no argument<sup>6</sup> to show that CMS has not authorized this position to exercise managerial discretion.

Consequently, in light of these assigned duties, the statutory presumption, and the absence of evidence to the contrary, the Board must conclude that the character of the position holder's authority satisfies the managerial exclusion and that the position is properly designated.

#### 5. 37015-42-00-040-60-02 - Vacant

CMS's designation of this position is proper because the designation is presumed to be properly made, the position description supports that conclusion, and AFSCME has introduced no evidence to suggest that CMS has not authorized this position to exercise managerial discretion.

As a preliminary matter, the designation is presumed to be properly made. Moreover, the position description supports CMS's assertion that the position is managerial because the position amends federal legislation for Homeland Security, formulates procedures concerning federally-funded programs administered by the Agency for Homeland Security marketplace development, and assists in drafting and/or approving administrative rules for codification into Illinois statutes. See, Secretary of State v. Ill. Labor Rel. Bd., State Panel, 2012 IL App (4th) 111075 ¶ 122 (establishing procedures for an agency constitutes a management function); Dep't of Cent. Mgmt. Serv. (Dep't of Healthcare and Family Serv.) v. Ill. Labor Rel. Bd., 388 Ill. App. 3d at 332 (drafting rules and policies is an executive and management function which may satisfy the managerial exclusion); Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n), 29 PERI ¶ 129 (IL LRB-SP 2013) (drafting proposed rules and amendments to legislation affecting the department renders employee managerial). Finally, AFSCME has introduced no evidence

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<sup>6</sup> See discussion on page ten addressing the relationship between managerial discretion and professional expertise.

and has presented no argument<sup>7</sup> to show that CMS has not authorized this position to exercise managerial discretion.

Consequently, in light of these assigned duties, the statutory presumption, and the absence of evidence to the contrary, the Board must conclude that the character of the position holder's authority satisfies the managerial exclusion and that the position is properly designated.

**IV. Conclusions of Law**

The Governor's designation in this case is properly made.

**V. Recommended Order**

Unless this Recommended Decision and Order Directing Certification of the Designation is rejected or modified by the Board, the following positions in the Department of Commerce and Economic Opportunity are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

|                       |          |
|-----------------------|----------|
| 37015-42-00-040-21-02 | Attorney |
| 37015-42-00-040-31-01 | Attorney |
| 37015-42-00-040-31-03 | Attorney |
| 37015-42-00-040-60-01 | Attorney |
| 37015-42-00-040-60-02 | Attorney |

**VI. Exceptions**

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,<sup>8</sup> parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than 3 days after service of the recommended decision and order. All exceptions shall be filed and served in accordance with Section 1300.90 of the Board's Rules. Exceptions must be filed by electronic mail to [ILRB.Filing@illinois.gov](mailto:ILRB.Filing@illinois.gov). Each party shall serve its exceptions on the other parties. If the original exceptions are withdrawn, then all subsequent exceptions are moot. A party not

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<sup>7</sup> See discussion on page ten addressing the relationship between managerial discretion and professional expertise.

<sup>8</sup> Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>.

filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

**Issued at Chicago, Illinois this 17th day of September, 2013**

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

*/s/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**