

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

State of Illinois, Department of	)	
Central Management Services	)	
(various agencies),	)	
	)	
Petitioner	)	
	)	
and	)	Case No. S-DE-14-092
	)	
American Federation of State, County	)	
and Municipal Employees, Council 31,	)	
	)	
Labor Organization-Objector	)	

Consolidated With

State of Illinois, Department of	)	
Central Management Services	)	
(Pollution Control Board),	)	
	)	
Petitioner	)	
	)	
and	)	Case No. S-DE-14-093
	)	
American Federation of State, County	)	
and Municipal Employees, Council 31,	)	
	)	
Labor Organization-Objector	)	

Consolidated With

In re Designation Made Pursuant to	)	
Section 6.1 of the Illinois Public Labor	)	
Relations Act: State of Illinois,	)	Case No. S-DE-14-094
Department of Central Management	)	
Services (Pollution Control Board),	)	
	)	
Petitioner	)	

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

Section 6.1 of the Illinois Public Labor Relations Act authorizes the Governor to designate for exclusion from self-organization and collective bargaining up to 3,580 State employment positions “within State agencies directly responsible to the Governor.” 5 ILCS 315/6.1(a) (2012). These three consolidated cases present the issue whether that authority extends to positions within the Illinois Pollution Control Board (PCB), and one of these cases presents the same question with respect to a position at the Human Rights Commission (HRC). This Board has previously found that the Governor’s authority did not extend to positions within the PCB or two other agencies, the Illinois Commerce Commission and the Illinois Workers’ Compensation Commission, State of Ill., Dep’t of Cent. Mgmt. Servs. and Am. Fed’n of State, Cnty. & Mun. Employees, Council 31, Case Nos. S-DE-14-047, S-DE-14-083 & S-DE-14-086, 30 PERI ¶83 (IL LRB-SP Oct. 15, 2013); however, that decision was made without the benefit of an oral hearing on the issue of legislative intent. There was such a hearing here, and consequently we revisit the issue.

Based on our review of the entire consolidated record in these cases, including the transcript of the hearing and exhibits admitted at hearing, as well as on consideration of the arguments raised by the parties in their respective exceptions, we find that the Governor had authority to designate positions at the PCB and at the HRC, and that the designations made in each of these cases comported with the requirements of Section 6.1 of the Act. Consequently, we reverse those portions of the Administrative Law Judge’s Recommended Decisions and Orders that dismiss the designation of PCB positions in Case Nos. S-DE-14-092, S-DE-14-093 and S-DE-14-094. We affirm the remainder of her recommended decision in Case No. S-DE-14-092, and we direct the Executive Director to make the appropriate certifications consistent with this opinion. Our reasons for doing so follow.

## **I. Procedural background**

On October 28, 2013, Administrative Law Judge (ALJ) Michelle Owen issued a Recommended Decision and Order (RDO) in Consolidated Case Nos. S-DE-14-092 and S-DE-14-093, finding that some 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, but also finding that the Governor lacked authority to designate positions at the PCB because that agency was not directly responsible to the Governor. In Case No. S-DE-14-092 CMS designated nine positions at eight agencies with the title of Private Secretary I, two of which are at the PCB (one filled and one vacant), and one of which is at the HRC. Case No. S-DE-14-093 involved three more Private Secretary I positions, all at the PCB, two of which are vacant. Also on October 28, 2013, ALJ Owen issued an RDO in Case No. S-DE-14-094. In that case, she again found that the Governor lacked authority to designate positions at the PCB. The petition in that case sought to designate two Private Secretary II positions at the PCB, both of which are vacant.

The American Federation of State, County and Municipal Employees, Council 31, (AFSCME) filed objections in Case Nos. S-DE-14-092 and S-DE-14-093, pursuant to Section 1300.60 of the rules promulgated by the Board to implement Section 6.1, 80 Ill. Admin. Code §1300.60. No party filed objections in Case No. S-DE-14-094, but we nevertheless assigned the matter to ALJ Owen after recognizing it presented the same issue with respect to the PCB as in the other cases. The ALJ held a consolidated hearing concerning the extent of the statutory authority of the Governor in the first two cases, at which two CMS officials and one AFSCME official testified. She incorporated the evidence and testimony submitted in those cases in the record for Case No. S-DE-14-094.

Pursuant to Section 1300.130 of the Board's rules, 80 Ill. Admin. Code §1300.130, AFSCME filed exceptions to those portions of the ALJ's RDO in S-DE-14-092 that finds most of the Governor's designations to have been proper. Conversely, CMS filed exceptions to the portion of the RDO in consolidated cases S-DE-14-092 and S-DE-14-093 that found the Governor lacked authority to designate positions at the PCB, and it filed similar exceptions in S-DE-14-094.

## **II. CMS's exceptions**

CMS filed exceptions to the ALJ's decision and made several arguments to support its position that the Governor's authority to designate State positions under Section 6.1 extends to positions at the PCB.

For the reasons articulated below, we agree.

Illinois courts have long held that "[w]here a statute is capable of more than one reasonable interpretation, the statute will be deemed ambiguous." General Motors Corp. v. State of Ill. Motor Vehicle Review Bd., 224 Ill. 2d 1, 13 (2007). Such is the case before the Board.

The dissent in Case Nos. S-DE-14-047, S-DE-14-083 & S-DE-14-086, interpreted the statute to clearly and unambiguously allow the Governor to designate positions at the PCB. When considering the statute as a whole, the phrase "State agencies directly responsible to the Governor" in Section 6.1 must include the PCB and the other agencies specifically listed in the Section 3(q-5) in order to avoid rendering portions of the statute meaningless. This rationale was fully explained in the dissent in Case Nos. S-DE-14-047, S-DE-14-083 & S-DE-14-086.

Simultaneously, the majority of the Board in Consolidated Case Nos. S-DE-14-047, S-DE-14-083 & S-DE-14-086 found that the phrase "State agencies directly responsible to the Governor," as it is used in Section 6.1(a) is clear, and unambiguously limits the Governor's

ability to designate positions only at agencies that are covered by the Executive Reorganization Implementation Act (ERIA).

Because these two interpretations expose the ambiguity of the language, the Board should consider extrinsic aids to construction, including “the purpose behind the law and the evils sought to be remedied, as well as the consequences that would result from construing the law one way or the other,” County of Du Page v. Ill. Labor Relations Bd., 231 Ill. 2d 593, 604-06 (2008) (internal citations omitted), in order to “ascertain and effectuate the legislature’s intent.” People v. Garcia, 241 Ill. 2d 416, 421 (2011). The Illinois Supreme Court has held that in attempting to effectuate the legislature’s intent, other tools of interpretation may be considered even where the statute contains plain language if “when read in the context of the statute as a whole or [in the context] of the ... other real-world (as opposed to law-world or word-world) activity that the statute is regulating, points to an unreasonable result.” People v. Hanna, 207 Ill. 2d 486, 498, (2003) (internal citations omitted).

In this case, for the first time,<sup>1</sup> the Board had before it an extensive record that included testimony and evidence regarding the efforts that led to the passage of the so-called “Management Bill,” legislation which resulted in multiple and significant amendments to the Act, including the addition of Sections 3(q-5) and 6.1. The ALJ received testimony from three witnesses: Stephanie Barton, Robb Craddock, and Michael Newman. During the time that various legislative bills were being drafted, bills which eventually led to House Floor Amendment 2 to Senate Bill 1556 and ultimately became Public Act 97-1172, Stephanie Barton was Deputy General Counsel at CMS and Robb Craddock was Deputy Director of CMS’s

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<sup>1</sup>In Case Nos. S-DE-14-047, S-DE-14-083 & S-DE-14-086, the ALJ did not hold a hearing. Accordingly, the Board did not have an evidentiary record beyond the parties’ briefs and attached exhibits to consider.

Bureau of Labor Relations. Michael Newman is and was Associate Director for AFSCME Council 31. The parties also presented more than 20 exhibits that were included into the record.

Barton testified regarding the efforts to amend the Act and the purpose of the amendments. Barton stated that the Quinn administration was very concerned with the rising number of representation petitions and union organizing at the highest levels of State government, including in the State's boards and commissions. She was requested to begin drafting legislation that would amend the Act to address this concern.

Both Barton and Craddock testified at the hearing held before the ALJ that they were involved in drafting this legislation. In fact, Barton testified that she initiated a change to proposed Section 3(q-5) which added the PCB and other agencies to the definition of "State agency." She had been shown a draft bill which provided the following as the definition:

"State agency" means an agency directly responsible to the Governor, as defined in Section 3.1 of the Executive Reorganization Implementation Act.

Aware that Section 3.1 of the Executive Reorganization Act excluded the PCB and other agencies from its definition of "agency directly responsible to the Governor,"<sup>2</sup> Barton suggested the following language be added:

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<sup>2</sup> Section 3.1 of the provides:

"Agency directly responsible to the Governor" or "agency" means any office, officer, division, or part thereof, and any other office, nonelective officer, department, division, bureau, board, or commission in the executive branch of State government, except that it does not apply to any agency whose primary function is service to the General Assembly or the Judicial Branch of State government, or to any agency administered by the Attorney General, Secretary of State, State Comptroller or State Treasurer. In addition the term does not apply to the following agencies created by law with the primary responsibility of exercising regulatory or adjudicatory functions independently of the Governor:

- (1) the State Board of Elections;
- (2) the State Board of Education;
- (3) the Illinois Commerce Commission;
- (4) the Illinois Workers' Compensation Commission;

and the Illinois Commerce Commission, the Illinois Workers' Compensation Commission, the Civil Service Commission, the Pollution Control Board, the Illinois Racing Board, and the Department of State Police Merit Board.

Along with the suggested edit, Barton submitted to the legislature a rationale for the proposed change. First, she noted that “the high percentage of unionization is still prevalent” in the added boards and commissions (including the PCB) and that CMS Labor Relations “has historically represented” them before the Board. Barton further indicated that the change to the definition of “State agency” was needed “in order to ensure the high level positions in these agencies are subject to the jurisdiction of the amendments to the Act to ensure top level personnel are not covered by a collective bargaining agreement.”

Ultimately, the legislators responsible for final drafting of the bill adopted Barton’s suggestion, and the language was passed by the General Assembly and appears in Public Act 97-1172. Thus, the term “State agency” as defined in the Illinois Public Labor Relations Act includes the PCB.

Barton testified that by changing the definition of “State agency,” the legislation would make the PCB and other listed agencies subject to the amendments being made to the Act, amendments which include the addition of Section 6.1. Barton also testified she was certain from her conversations with the bill’s primary sponsor, Representative Barbara Flynn Currie, that this was also her opinion. Craddock testified that he worked with the legislative staff members, as well as the legislative leaders in both the Senate and the House, on the language of

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- (5) the Civil Service Commission;
  - (6) the Fair Employment Practices Commission;
  - (7) the Pollution Control Board;
  - (8) the Department of State Police Merit Board;
  - (9) the Illinois Racing Board;
  - (10) the Illinois Power Agency.

15 ILCS 15/3.1 (2012).

the legislation. Craddock testified that it was “absolutely” the administration’s intent for the Governor to have the ability to designate positions at the PCB. In fact, there is no evidence suggesting that anyone involved in negotiating, drafting, or reviewing the legislation held the view that the PCB or other entities listed in Section 3(q-5) were shielded from Section 6.1.

It should also be noted, the Associate Director of AFSCME Council 31, Michael Newman, testified at the hearing and did not deny that this was also his understanding.<sup>3</sup> He confirmed that notices issued by AFSCME advised employees, including those at the PCB, that the proposed legislation would put their collective bargaining rights at risk.

As the Labor Board, we would be remiss to ignore the long-standing bargaining relationship between various labor organizations and CMS, negotiating and administering collective bargaining agreements on behalf of various state agencies, boards and commissions, including the PCB and the other boards and commission itemized in Section 3(q-5). Robb Craddock testified to this, and the parties stipulated to CMS’s representation of the PCB in various proceedings before this Board. It defies logic to think that, with this long-standing bargaining relationship, the legislature would have intended to shield the PCB from the corrective effect of Section 6.1 designations. Indeed, Barton noticed the potential flaw in the draft legislation, and took steps to ensure that the Governor’s authority would continue to extend to the full range of positions over which the Governor exercised labor relations and collective bargaining authority. This included having the boards and commissions listed in Section 3(q-5) subject to Section 6.1.

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<sup>3</sup> The fact that representatives from both AFSCME and CMS had the same interpretation of the law during the time the language was being drafted and passed, an interpretation that differs significantly from the Board majority in Case Nos. S-DE-14-047, S-DE-14-083 & S-DE-14-086, underscores the ambiguity that exists in the law.

The purpose behind the law and the situation sought to be remedied leads us to find that the logical interpretation of the language of Section 6.1 – the interpretation that most fully effectuates the legislature’s intent - authorizes the Governor to designate position at the PCB and other agencies listed in Section 3(q-5). “Where statutory language yields two constructions, one of which makes the enactment absurd and illogical while the other renders it reasonable, the construction which leads to an absurd result must be avoided.” White v. Dep’t of Employment Sec., 264 Ill. App. 3d 851, 855 (1st Dist. 1994) (citing Mulligan v. Joliet Regional Port Dist., 123 Ill. 2d 303, 312-13 (1988)).

For these reasons and those articulated in the dissent in State of Ill., Dep’t of Cent. Mgmt. Servs. and Am. Fed’n of State, Cnty. & Mun. Employees, Council 31, Case Nos. S-DE-14-047, S-DE-14-083 & S-DE-14-086, 30 PERI ¶83 (IL LRB-SP Oct. 15, 2013), we find the Governor had authority to designate positions at the PCB for exclusion from collective bargaining pursuant to Section 6.1 of the Act.

### **III. AFSCME’s exceptions**

AFSCME prevailed in S-DE-14-093 (though not for all the reasons it proposed), and took no part in S-DE-14-094. Its exceptions could have practical effect only with respect to Case Nos. S-DE-14-092 and S-DE-14-093. We have addressed most of its arguments generally attacking Section 6.1 and our rules implementing that section in our decision issued in State of Ill., Dep’t of Cent. Mgmt. Servs. and Am. Fed’n of State, Cnty. & Mun. Employees, Council 31, Case No. S-DE-14-005 etc., 30 PERI ¶80 (IL LRB-SP Oct. 7, 2013), appeal pending, No. 1-13-3454 (Ill. App. Ct., 1st Dist.). With respect to these generalized arguments, we incorporate that prior decision as well as the rationale articulated by the ALJ in her RDO.

AFSCME raises one exception unique to this case, which we also reject for the following reasons. This argument concerns a single Private Secretary I position at the Human Rights Commission (HRC) which was designated in Case No. S-DE-14-092. AFSCME argues that the HRC is in the same posture as the PCB, and therefore the ALJ should have found (as she had for the positions at the PCB) that the Governor lacked authority to designate any position at the HRC. More specifically, it refers to Section 3.1 of the Executive Reorganization Implementation Act (ERIA) which provides:

“Agency directly responsible to the Governor” or “agency” means any office, officer, division, or part thereof, and any other office, nonelective officer, department, division, bureau, board, or commission in the executive branch of State government, except that it does not apply to any agency whose primary function is service to the General Assembly or the Judicial Branch of State government, or to any agency administered by the Attorney General, Secretary of State, State Comptroller or State Treasurer. In addition the term does not apply to the following agencies created by law with the primary responsibility of exercising regulatory or adjudicatory functions independently of the Governor:

- (1) the State Board of Elections;
- (2) the State Board of Education;
- (3) the Illinois Commerce Commission;
- (4) the Illinois Workers’ Compensation Commission;
- (5) the Civil Service Commission;
- (6) the Fair Employment Practices Commission;**
- (7) the Pollution Control Board;
- (8) the Department of State Police Merit Board;
- (9) the Illinois Racing Board;
- (10) the Illinois Power Agency.

15 LCS 15/3.1 (2012) (emphasis added).

AFSCME argues that, because a predecessor to the HRC, the Fair Employment Practices Commission (FEPC), is defined in ERIA as an agency that is not directly responsible to the

Governor, the ALJ should have found that the HRC is not an agency directly responsible to the Governor. The ALJ used a literal approach, finding that because the HRC was not listed as one of the 10 agencies excluded from the definition of “agencies directly responsible to the Governor” in ERIA, it was also not excluded from those “agencies directly responsible to the Governor” within the meaning of Section 6.1(a).

In its exceptions, AFSCME focuses on the HRC’s functions. It states ERIA lists agencies which exercise regulatory or adjudicatory functions independent of the Governor, and that the HRC performs the functions of the former FEPC. It states that the HRC “is an independent commission which has final adjudication responsibility for complaints regarding violation[s] of the Human Rights Act” and that “[t]he [S]tate[,] including executive departments[, is] subject to the jurisdiction of the Human Rights Commission.”

There are three problems with AFSCME’s position. First, we can find no basis to exclude the HRC from the definition of State agency in Section 3(q-5).

Second, the HRC is not the equivalent of the FEPC. The Human Rights Act covers more than discriminatory employment practices; it covers discrimination in real estate, financial credit, public accommodations, and education. As the ALJ notes, it consolidated a “patchwork of antidiscrimination law.” Blount v. Stroud, 232 Ill. 2d 302 (2009). Furthermore, the Human Rights Act created two agencies: the Human Rights Department with enforcement duties, and the Human Rights Commission with adjudicatory responsibilities, and transferred the duties of several agencies to those two bodies.<sup>4</sup>

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<sup>4</sup> The Human Rights Act’s agency transfer provisions demonstrates there is no linear descent from the former FEPC to the HRC:

(A) Personnel.

Finally, we note that the legislature has on other occasions changed the list of agencies set out in Section 3.1 of ERIA when it sought to add an existing agency, created a new agency, or renamed an agency as AFSCME (wrongly) implies was the case here. When the legislature changed the name of the Industrial Commission to the Workers Compensation Commission, it amended the list to reflect that change, Public Act 93-721 (eff. Jan. 1, 2005); it added the Illinois Racing Board to the list in 2009, Public Act 96-796 (eff. Oct. 29, 2009); and when it created the Illinois Power Agency, it added it to the list as well. Public Act 97-618 (eff. Oct. 26, 2011). ERIA became effective on September 22, 1979, Public Act 81-984, and the Human Rights Act nine months later on July 1, 1980, Public Act 81-1216, yet the legislature never added the

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(1) All personnel previously assigned to the Fair Employment Practices Commission, Department of Equal Employment Opportunity, and Human Relations Commission shall be transferred, in accordance with this Act to the Department or Commission.

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(B) Documents; Property. All books, records, papers, documents, and property in the possession of the Fair Employment Practices Commission, Department of Equal Employment Opportunity, and Human Relations Commission shall be transferred, in accordance with this Act to the Department or Commission.

(C) Service of Documents; Response to Subpoenas. Any report, notice, paper, document or response to a subpoena which previously had to be made, given, furnished or served to or upon the Fair Employment Practices Commission, Department of Equal Employment Opportunity and Human Relations Commission shall be made, given, furnished or served, in accordance with this Act to the Department.

(D) Rules and Regulations. No rule or regulation promulgated by the Fair Employment Practices Commission, Department of Equal Employment Opportunity, or Human Relations Commission, including those now in effect and those filed pursuant to the Illinois Administrative Procedure Act, shall be abrogated by this Act. In accordance with this Act they shall be deemed rules and regulations of the Department or the Commission.

(E) Completed Acts. This Act shall not affect any act completed, ratified or confirmed or any action taken in a judicial proceeding by or any right accrued or established under the authority of the Fair Employment Practices Commission, Department of Equal Employment Opportunity, Human Relations Commission. Such actions shall be continued, in accordance with this Act, by the Department or Commission.

(F) Appropriations. Appropriations made to or for the use of the Fair Employment Practices Commission, Department of Equal Employment Opportunity, and Human Relations Commission shall be transferred, in accordance with Section 9b of the State Finance Act, to the Department or Commission.

Human Rights Commission to the ERIA Section 3.1 list or substituted it for the FEPC. The fact that the legislature took no action to add the HRC to the list when it had added other agencies suggests that it did not intend to exclude the HRC from those agencies it considered directly responsible to the Governor.

**Conclusion**

We reverse the ALJ's finding in Case Nos. S-DE-14-092, S-DE-14-093 and S-DE-14-094 that the Governor lacked authority to designate pursuant to Section 6.1 of the Act positions at the Illinois Pollution Control Board but affirm the remaining portions of her Recommended Decision and Order in Case No. S-DE-14-092. We find the Governor's designations made in all three cases comport with the requirements of Section 6.1 of the Act and for that reason direct the Executive Director to designate that the positions at issue are excluded from 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/ Michael G. Coli  
Michael G. Coli, Member

/s/ Albert Washington  
Albert Washington, Member

**Members Besson and Brennwald, dissenting:**

For the reasons expressed in the Board's majority opinion in State of Ill., Dep't of Cent. Mgmt. Servs. and Am. Fed'n of State, Cnty. & Mun. Employees, Council 31, Case Nos. S-DE-14-047, S-DE-14-083 and S-DE-14-086, 30 PERI ¶83 (IL LRB-SP Oct. 15, 2013), we respectfully dissent from the majority's holding with regard to the positions at the Pollution

Control Board. We would accept the ALJ's recommended decision in its entirety, including her recommendation to dismiss the petitions in Case Nos. S-DE-14-093 and S-DE-14-094, and her recommendation to dismiss that portion of the petition in Case No. S-DE-14-092 that seeks to designate a position at the Pollution Control Board. Simply put, and for whatever reason it may have had, our State legislature clearly and unambiguously expressed its intent that the gubernatorial designation process provided in Section 6.1 of the Act be limited to State agencies "directly responsible to the Governor." Because the Pollution Control Board is not an agency "directly responsible to the Governor" within the meaning of the Act, we believe this Board is duty-bound to apply the plain language of the statute and dismiss the petition with respect to the positions within the Pollution Control Board, for the same reasons this Board dismissed the petitions in Case Nos. S-DE-14-047, S-DE-14-083 and S-DE-14-086. There is no basis for reaching a different result in this case. We are not at liberty to ignore the clear and unambiguous limiting phrase "directly responsible to the Governor," nor are we free to deem that language ambiguous, and rely on extrinsic evidence as to the intent of a party affected by language chosen by the legislature. Kaider v. Hamos, 2012 IL App (1st) 111109; Town of City of Bloomington v. Bloomington Twp., 233 Ill. App. 3d 724 (4th Dist. 1992); People v. Burdunice, 211 Ill. 2d 264 (2004); Morel v. Coronet Ins. Co., 117 Ill. 2d 18 (1987). We would also accept the ALJ's recommendation to find that all other portions of the designations made in Case No. S-DE-14-092 comport with the requirements of Section 6.1 of the Act, including the designation of the position at the Human Rights Commission.

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

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

Decision made at the State Panel's public meeting in Chicago, Illinois, on November 5, 2013;  
written decision issued at Springfield, Illinois, November 15, 2013.

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

State of Illinois, Department of Central Management Services,	)	
	)	
	)	
Petitioner	)	
	)	
and	)	Case Nos. S-DE-14-092
	)	S-DE-14-093
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;

- 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 rules to effectuate Section 6.1, which became effective on

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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.

August 23, 2013, 37 Ill. Reg. 14070 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board’s Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On September 16, 2013, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designations pursuant to Section 6.1 of the Act and Section 1300.50 of the Board’s Rules.

The petitions designate the following twelve Private Secretary I positions at various agencies, set out below, for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act:

34201-11-01-000-00-01	Agriculture	Kerry Lofton	Private Secretary I
34201-44-00-000-00-01	Employment Security	Lisbeth Leanos	Private Secretary
34201-48-50-000-00-01	Historic Preservation Agency	Katrina Weinert	Private Secretary
34201-50-01-000-00-01	Human Rights Commission	Lanade Bridges	
34201-50-95-000-00-01	Investment	Polly Smith	Private Secretary I
34201-45-00-000-01-01	Lottery	Beverly Womack	Private Secretary
34201-50-80-000-00-04	Pollution Control Board	Vacant established	Confidential Secretary
34201-50-80-000-00-03	Pollution Control Board	Sarah Shannon	Confidential Secretary
34201-50-80-000-01-01	Pollution Control Board	Vacant established	Confidential Secretary
34201-50-80-000-01-03	Pollution Control Board	Vacant established	Confidential Secretary
34201-25-71-000-01-01	Revenue	Nicole Dituri	Liquor Control Commission Secretary

CMS’ petitions indicate that the positions at issue qualify for designation under Section 6.1(b)(3) of the Act by asserting that all the positions are completely exempt from jurisdiction B of the Personnel Code and all are Rutan-exempt. In support of its contentions, CMS filed position descriptions (CMS-104s) for each position and a spreadsheet in support of its petitions which confirm its assertion. All of the positions at issue have been certified in the bargaining

unit known as RC-62, which is represented by the American Federation of State, County and Municipal Employees, Council 31 (AFSCME).

On September 27, 2013, AFSCME filed objections to the designations pursuant to Section 1300.60(a)(3) of the Board's Rules. AFSCME objects to the designations generally, as well as specifically to the positions at the Pollution Control Board (PCB) and the Illinois Human Rights Commission (IHRC).

Generally, AFSCME argues that the designations violate due process and are arbitrary and capricious because all of the positions have previously been certified into a bargaining unit by the Board, the positions' job duties and functions have not changed since their certification, the positions' job duties and functions are similar to those of other titles represented in various bargaining units, and the positions are covered by a collective bargaining agreement which CMS entered into subsequent to the enactment of Section 6.1. AFSCME also argues that the designation of the positions would impair the contractual rights of the employees as beneficiaries of the collective bargaining agreement in violation of Section 16 of Article I of the Illinois Constitution and the United States Constitution. Ill. Const. art. I, § 16; U.S. Const. art. I, § 10. In addition, AFSCME argues that there is no rational basis for treating the positions at issue here differently than the many other positions which hold similar titles and perform similar duties. Lastly, AFSCME asserts that due process requires that the Board hold a hearing to determine whether there is a legal basis for the exclusion of the positions and the effect of such exclusion.

Specifically, AFSCME asserts that Section 6.1 of the Act limits gubernatorial designations to state agencies that are "directly responsible to the Governor." AFSCME argues that pursuant to Section 3.1 of the Executive Reorganization Implementation Act, 15 ILCS 15 (2012) (ERIA), the PCB and the Fair Employment Practices Commission, now known as the IHRC, which AFSCME claims has the same authority pursuant to 775 ILCS 5/9-101, are not state agencies "directly responsible to the Governor," and thus the Governor does not have the authority to designate positions within those agencies. AFSCME contends that Section 3(q-5) of the Act, which provides a definition of state agency, specifically acknowledges that the PCB is not a state agency "directly responsible to the Governor." AFSCME notes that Section 3(q-5) does not include the IHRC. Nonetheless, AFSCME asserts that since Section 6.1 limits

designations only to state agencies “directly responsible to the Governor,” the Governor does not have the authority to designate positions at IHRC.

On October 2, 2013, I informed the parties that there were issues of law or fact for hearing regarding whether the positions within the PCB and the IHRC are properly designable due to the language in Section 6.1(a) of the Act, which states in relevant part, “the 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.” I informed the parties that this was the sole issue for hearing in both cases. As such, on October 9, 2013, I consolidated Case Nos. S-DE-14-092 and S-DE-14-093 for hearing to determine whether the positions within the PCB and the IHRC are properly designable based on the language in Section 6.1(a) of the Act.

A hearing was held on October 16, 2013, by the undersigned, at which time all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally and to file written briefs.<sup>2</sup> Based on my review of the designations, the documents submitted as part of the designations, the objections, the documents and arguments submitted in support of those objections, evidence presented at hearing, arguments and briefs, and upon the entire record of the case, I make two recommendations. First, I recommend that the Board find that the designation of the five positions within the PCB is not consistent with the requirements of Section 6.1 of the Act, and consequently I recommend that the petition be partially dismissed with respect to those positions.

Second, I recommend that the Board find that the designation of the following remaining seven positions comports with the requirements of Section 6.1 of the Act: 34201-11-01-000-00-01, Agriculture (Kerry Lofton); 34201-44-00-000-00-01, Employment Security (Lisbeth Leanos); 34201-48-50-000-00-01, Historic Preservation Agency (Katrina Weinert); 34201-50-01-000-00-01, Illinois Human Rights Commission (Lanade Bridges); 34201-50-95-000-00-01,

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<sup>2</sup> At the hearing, Robb Craddock, the Deputy Director of Labor Relations for CMS, and Stephanie Barton (Shallenberger), the Deputy General Counsel of CMS Labor Relations from November 2009 through June 2012, testified on behalf of CMS. Michael Newman, the Associate Director of AFSCME, testified on behalf of AFSCME.

Investment (Polly Smith); 34201-45-00-000-01-01, Lottery (Beverly Womack); and 34201-25-71-000-01-01, Revenue (Nicole Dituri).

## **I. ISSUES AND CONTENTIONS FOR HEARING**

AFSCME argues that the issue regarding the Governor’s authority to designate positions at the PCB and the IHRC is a purely legal issue to be determined based on the accepted principles of statutory construction, and thus it was unnecessary to hold a hearing. AFSCME notes that the day before the hearing, the Board issued a decision, which found that the PCB and certain other agencies were not state agencies “directly responsible to the Governor” as required by Section 6.1, and therefore the Governor did not have the authority to designate positions for exclusion at those agencies. AFSCME contends that the Board found that the language of Section 6.1 was unambiguous and therefore resort to extrinsic evidence was unnecessary and contrary to the principles of statutory construction. In the alternative, AFSCME contends that it is rational to contend that the Governor should not have the authority to designate positions within the PCB and IHRC given that these agencies are “independent agencies” as defined in the ERIA, and instead the legislature should have the ability to legislate that these independent agencies be subject to the other amendments of the Act.

CMS argues that the Governor properly designated the positions at the PCB and the IHRC because (1) the express language of the amendments to the Act and principles of statutory construction make clear that these agencies are “State agencies directly responsible to the Governor,” (2) the designations are presumed to be valid and AFSCME failed to present clear and convincing evidence at the hearing as required to rebut this presumption of validity, (3) the evidence presented at hearing “undisputedly” established that the PCB and IHRC are state agencies directly responsible to the Governor for purposes of the Act, and (4) the amendments to the Act were intended to bring the PCB and the IHRC under the jurisdiction of the Governor for purposes of making designations of positions as exempt from collective bargaining.

## **II. DISCUSSION AND ANALYSIS**

### **A. Hearing requirement**

Initially, AFSCME argues that it was unnecessary to hold a hearing to determine the Governor’s authority to designate positions at the PCB and the IHRC because this is a purely legal issue. The Board has found however that “while issues of law do not need factual

development and therefore do not logically call for an evidentiary hearing [citation omitted], Board Rule 1300.60(d)(2)(B) provides that where an ALJ finds that objections raise an ‘issue of law or fact that might overcome the presumption that the designation is proper under Section 6.1 of the Act, the Administrative Law Judge will order a hearing to be held to determine whether the designation is proper.’ State of Ill., Dep’t of Cent. Mgmt. Servs., \_ PERI \_ Cons. Case Nos. S-DE-14-047, S-DE-14-083, S-DE-14-086 (IL LRB-SP Oct. 15, 2013). Thus, it was necessary to hold a hearing in this case because AFSCME’s objections raised an issue of law or fact that might overcome the presumption that the designation was proper.

**B. The Governor’s authority to designate positions at the PCB and the IHRC**

The Governor’s authority to designate positions under Section 6.1 does not extend to positions within the PCB, and therefore those positions are not properly designable.<sup>3</sup> However, ASFCME has failed to show that Section 6.1 limits the Governor’s authority to designate positions at the IHRC.

**1. PCB**

CMS argues that the express language of the amendments to the Act and principles of statutory construction “make clear” that the PCB is a “State agency directly responsible to the Governor.” However, this argument was rejected by the Board in State of Illinois, Department of Central Management Services, \_ PERI \_ Cons. Case Nos. S-DE-14-047, 083, 086 (IL LRB-SP Oct. 15, 2013). In that case, the Board specifically examined whether Section 6.1 of the Act authorizes the Governor to designate positions within the PCB. The Board stated: “the Governor’s authority to designate positions under Section 6.1 is limited to ‘State agencies directly responsible to the Governor,’ and finding that language to be unambiguous, we conclude that the attempt to designate positions within the Illinois Commerce Commission, the Illinois Workers’ Compensation Commission, and the Illinois Pollution Control Board, which under ERIA are not ‘directly responsible to the Governor,’ is contrary to the intent of the legislature, as expressed in the clear and unambiguous language of Section 6.1(a) of the Act.” Id. Thus, the Governor’s authority to designate positions within the PCB does not extend to the five positions within the PCB designated in this case.

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<sup>3</sup> For this reason, I will not address AFSCME’s alternative objections with regard to the positions within the PCB.

CMS also argues that the designations made by the Governor for positions within the PCB is presumed to be valid, and AFSCME has failed to present clear and convincing evidence as required to rebut this presumption. As noted above, Section 6.1(d) does provide a presumption that any designation is presumed to have been properly made. However, in this case, the presumption of appropriateness is rebutted by the clear statutory language expressing the limits on the Governor's authority to designate positions at the PCB. Id. ("CMS's position suggests that the presumption of appropriateness cannot be rebutted, even by clear statutory language expressing limits on the Governor's authority. CMS's position with respect to the presumption is extreme, cannot be reflective of legislative intent, and is rejected.")

In addition, CMS argues that the amendments to the Act intended to bring the PCB under the jurisdiction of the Governor for purposes of making designations of positions as exempt from collective bargaining. This argument was rejected by the Board: "the attempt to designate positions within . . . the Illinois Pollution Control Board, which under ERIA [is] not 'directly responsible to the Governor,' is contrary to the intent of the legislature, as expressed in the clear and unambiguous language of Section 6.1(a) of the Act." Id.

## 2. IHRC

Where an enactment is clear and unambiguous, the Board is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations, or conditions that the legislature did not express. Id., citing Kraft, Inc. v. Edgar, 138 Ill. 2d 178, 189 (1990). The Board has found that the language within Section 6.1(a) is "not at all ambiguous." State of Ill., Dep't of Cent. Mgmt. Servs., \_ PERI \_ Cons. Case Nos. S-DE-14-047 etc.

Section 6.1(a) of the Act authorizes the Governor to "designate . . . positions collectively within State agencies directly responsible to the Governor[.]"

Section 3.1 of the ERIA indicates that certain agencies are *not* State agencies "directly responsible to the Governor," and then sets forth a list of those ten agencies.<sup>4</sup> 15 ILCS 15/3.1

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<sup>4</sup> Section 3.1 of ERIA states:

"Agency directly responsible to the Governor" or "agency" means any office, officer, division, or part thereof, and any other office, nonelective officer, department, division, bureau, board, or commission in the executive branch of State government, except that it does not apply to any agency whose primary function is service to the General Assembly or the Judicial Branch of State government, or to any agency administered by the Attorney General, Secretary of State, State Comptroller or State Treasurer. In addition the

(2012). The IHRC is not one of the ten listed agencies. Nonetheless, AFSCME argues that the IHRC should be read to be included in the list of agencies not directly responsible to the Governor because the IHRC was formerly known as the Fair Employment Practices Commission. It is true that the Fair Employment Practices Commission is included in the list of ten agencies that are “not directly responsible to the Governor.” However, as CMS points out, the IHRC is not the Fair Employment Practices Commission.<sup>5</sup> Under the clear language of the ERIA, the term “agency directly responsible to the Governor” applies to the IHRC because the agency is not included in the list of agencies to which the definition does *not* apply. Thus, the Governor’s authority to designate positions extends to positions at the IHRC.

### **C. Designability**

The Governor’s designation of the positions at the IHRC, Agriculture, Employment Security, Historic Preservation Agency, Investment, Lottery, and Revenue were properly made.

As stated previously, a position is properly designable if: (1) it was first certified to be in a bargaining unit by the Board on or after December 2, 2008; and (2) it is both a Rutan-exempt position, as designated by the employer, and completely exempt from Jurisdiction B of the Personnel Code. 5 ILCS 315/6.1 (2012). The Act presumes that any designation made by the Governor under Section 6.1 is properly made. 5 ILCS 315/6.1(d) (2012). Rule 1300.60(d)(2)(A) of the Board’s Rules permits an administrative law judge to find that a designation is proper

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term does not apply to the following agencies created by law with the primary responsibility of exercising regulatory or adjudicatory functions independently of the Governor:

- (1) the State Board of Elections;
- (2) the State Board of Education;
- (3) the Illinois Commerce Commission;
- (4) the Illinois Workers' Compensation Commission;
- (5) the Civil Service Commission;
- (6) the Fair Employment Practices Commission;
- (7) the Pollution Control Board;
- (8) the Department of State Police Merit Board;
- (9) the Illinois Racing Board;
- (10) the Illinois Power Agency.

<sup>5</sup> The Illinois Human Rights Act, adopted in 1979, consolidated a “patchwork of antidiscrimination law” in Illinois by repealing various acts but incorporating their “principal design, purpose or intent.” Blount v. Stroud, 232 Ill. 2d 302 (2009). The Fair Employment Practices Act, which created the Fair Employment Practices Commission, was among the acts repealed. Micro Switch, Inc. v. Human Rights Com’n of the State of Ill., 164 Ill. App. 3d 582 (1st Dist. 1987). The Illinois Human Rights Act created the Department of Human Rights and the Human Rights Commission. 775 ILCS 5 (2012),

based solely on the information submitted to the Board in cases in which no objections sufficient to overcome this presumption are filed. 80 Ill. Admin. Code 1300.60(d)(2)(A).

Here, CMS' petitions indicate, and AFSCME does not contest, that the seven positions were certified into a bargaining unit by the Board on or after December 2, 2008. Further, CMS' petitions indicate, and AFSCME does not contest, that each position is both Rutan-exempt, as designated by CMS, and completely exempt from Jurisdiction B of the Personnel Code. Since the evidence submitted indicates that the seven designated positions meet the requirements of Section 6.1(b)(3) and no objections sufficient to overcome the presumption have been raised, I find that the designation of these positions is proper.

AFSCME argues that the exclusion of the seven positions based solely on their designation by the Governor would be arbitrary. In support of its contention, AFSCME states that each position has previously been certified into a bargaining unit by the Board, the positions' job duties and functions have not changed since their certification, the positions' job duties and functions are similar to those of other titles represented in various bargaining units, and the positions are covered by a collective bargaining agreement which CMS entered into subsequent to the enactment of Section 6.1.

An agency's action is arbitrary and capricious if the agency contravenes the legislature's intent, fails to consider a crucial aspect of the problem, or offers an explanation which is so implausible that it runs contrary to agency expertise. Deen v. Lustig, 337 Ill. App. 3d 294, 302 (4th Dist. 2003). In addition, an agency must follow its own rules. Dep't of Cent. Mgmt. Servs./Ill. Commerce Comm'n v. Ill. Labor Relations Bd., 406 Ill. App. 3d 766, 771 (4th Dist. 2010). Here, the plain language of the statute permits the designation of a position based solely on its Rutan-exempt and Jurisdiction B-exempt status. In addition, AFSCME does not contend that the Board has failed to follow its own Rules regarding the designation of the seven positions. Therefore, it is not arbitrary for the Board to permit designation of the seven positions because in doing so the Board is adhering to its own rules and the plain language of the statute. In sum, AFSCME's argument fails in light of the Act's clear language, which, in this case, permits designation of the seven positions based solely on Rutan-exempt and Jurisdiction B-exempt status.

Next, AFSCME argues that it is not rational to treat the seven positions at issue here differently than similar non-designated positions. AFSCME also argues that Public Act 97-1172 violates the impairment of contract prohibitions of the Illinois and United States Constitutions. Both of these arguments speak to the constitutionality of Public Act 97-1172, and it is beyond the Board's capacity to "rule that the Illinois Public Labor Relations Act, as amended by Public Act 97-1172, either on its face or as applied violated provisions of the United States and Illinois constitutions." State of Ill., Dep't of Cent. Mgmt. Servs., \_ PERI \_ Cons. Case Nos. S-DE-14-005 etc. (IL LRB-SP Oct. 7, 2013), citing 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 actions are a nullity and cannot be upheld.")

Finally, AFSCME asserts that it is necessary to have a hearing in order to determine whether there is a legal basis for the exclusion of the seven positions and the effect of such exclusion. However, as stated previously, Section 1300.60(d)(2)(A) of the Board's Rules permits an administrative law judge to find that a designation is proper based solely on the information submitted to the Board where no objections sufficient to overcome this presumption are filed. As discussed, AFSCME's objections regarding the designation of these positions are not sufficient to overcome the presumption, and therefore a hearing into their designability is unnecessary. CMS provided documentation indicating that the positions meet the requirements for designability under Section 6.1(b)(3), and AFSCME was given an opportunity to raise its objections to the designation. Thus, AFSCME has been provided with adequate notice and a meaningful opportunity to be heard as required by due process. See Peacock v. Bd. of Trs. of the Police Pension Fund, 395 Ill. App. 3d 644, 54 (1st Dist. 2009), citing Goldberg v. Kelly, 397 U.S. 254, 67-68 (1970).

### **III. CONCLUSIONS OF LAW**

The Governor's designation of the five positions within the Pollution Control Board is not consistent with the requirements of Section 6.1 of the Act. The Governor's designation of the remaining seven positions was properly made.

#### IV. RECOMMENDED ORDER

Unless this Recommended Decision and Order is rejected or modified by the Board, I recommend the following:

The petition is partially dismissed with respect to the five positions within the Pollution Control Board: 34201-50-80-000-00-01, Nancy Miller; 34201-50-80-000-00-04, Vacant established; 34201-50-80-000-00-03, Sarah Shannon; 34201-50-80-000-01-01, Vacant established; and 34201-50-80-000-01-03, Vacant established.

The designation of the following positions was proper and the positions are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

34201-11-01-000-00-01	Agriculture	Kerry Lofton	Private Secretary I
34201-44-00-000-00-01	Employment Security	Lisbeth Leanos	Private Secretary
34201-48-50-000-00-01	Historic Preservation Agency	Katrina Weinert	Private Secretary
34201-50-01-000-00-01	Human Rights Commission	Lanade Bridges	
34201-50-95-000-00-01	Investment	Polly Smith	Private Secretary I
34201-45-00-000-01-01	Lottery	Beverly Womack	Private Secretary
34201-25-71-000-01-01	Revenue	Nicole Dituri	Liquor Control Commission Secretary

#### V. EXCEPTIONS

Pursuant to Section 1300.90 and Section 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300,<sup>6</sup> parties may file exceptions to the Administration Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than three 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 sent to [ILRB.Filing@Illinois.gov](mailto:ILRB.Filing@Illinois.gov). Each party shall serve its exception on the other parties. If the original exceptions are withdrawn, then all subsequent exceptions are moot.

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<sup>6</sup> Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>

A party not filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

**Issued at Chicago, Illinois, this 28th day of October, 2013**

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

*/s/ Michelle Owen*

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**Michelle Owen  
Administrative Law Judge**

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

State of Illinois, Department of Central Management Services,	)	
	)	
	)	
Petitioner	)	
	)	
and	)	Case No. S-DE-14-094
	)	
American Federation of State, County and Municipal Employees, Council 31,	)	
	)	
	)	
Labor Organization	)	

**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;

- 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 rules to effectuate Section 6.1, which became effective on

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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.

August 23, 2013, 37 Ill. Reg. 14070 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On September 16, 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. No objections have been filed to this designation.

The petition designates the following two Private Secretary II positions within the Pollution Control Board for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act:

34202-50-80-000-00-01	Pollution Control Board	Vacant established	Private Secretary II
34202-50-80-000-00-02	Pollution Control Board	Vacant established	Private Secretary II

The petition indicates that both positions qualify for designation under Section 6.1(b)(3) of the Act by asserting that the positions are completely exempt from jurisdiction B of the Personnel Code and all are Rutan-exempt. In support of its contentions, CMS filed position descriptions (CMS-104s) for each position and a spreadsheet in support of its petition which confirm its assertion. Both positions are subject to the pending petition for certification, filed by American Federation of State, County and Municipal Employees, Council 31 (AFSCME), in Case No. S-RC-11-110.

On September 16, 2013, CMS filed a similar designation in Case No. S-DE-14-092 (CMS and AFSCME), which sought to exclude two private secretary positions, among others, within the Pollution Control Board. That same day, CMS also filed a designation in Case No. S-DE-14-093 (CMS and AFSCME), which sought to exclude three private secretary positions within the Pollution Control Board. On October 9, 2013, I consolidated Case Nos. S-DE-14-092 and S-DE-14-093 for hearing to determine whether the positions were properly designatable based on the language in Section 6.1(a) of the Act. A hearing was held on October 16, 2013, by the undersigned, at which time all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally and to file written briefs.<sup>2</sup>

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<sup>2</sup> At the hearing, Robb Craddock, the Deputy Director of Labor Relations for CMS, and Stephanie Barton (Shallenberger), the Deputy General Counsel of CMS Labor Relations from November 2009 through June 2012, testified on behalf of CMS. Michael Newman, the Associate Director of AFSCME, testified on behalf of AFSCME.

On October 23, 2013, I issued an Order to Show Cause, if there be any, why a separate hearing was needed in this case. I informed CMS that since, the designation at issue here, Case No. S-DE-14-093, also involves private secretary positions within the Pollution Control Board, I planned to take administrative notice of the hearing in Case Nos. S-DE-14-092 and S-DE-14-093 for purposes of the proceeding in this case.<sup>3</sup> I informed CMS that its response to the Order to Show Cause was due by electronic email by 10:00am on Monday, October 28, 2013. CMS has not filed a response to the Order to Show Cause. Accordingly, I take administrative notice of the hearing in Case Nos. S-DE-14-092 and S-DE-14-093 for purposes of this proceeding.

Based on my review of the designations, the documents submitted as part of the designations, evidence presented at hearing, arguments and briefs, and upon the entire record of the case, I recommend that the Board find that the designation is not consistent with the requirements of Section 6.1 of the Act.

## **I. DISCUSSION AND ANALYSIS**

The Governor's authority to designate positions under Section 6.1 does not extend to positions within the Pollution Control Board, and therefore the positions are not properly designable.

Section 6.1(a) of the Act authorizes the Governor to "designate . . . positions collectively within State agencies directly responsible to the Governor[.]" Section 3.1 of the Executive Reorganization Implementation Act (ERIA) indicates that certain agencies are *not* State agencies "directly responsible to the Governor," and then sets forth a list of those ten agencies.<sup>4</sup> 15 ILCS 15/3.1 (2012).

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<sup>3</sup> On October 28, 2013, I issued a Recommended Decision and Order in Case Nos. S-DE-14-092 and S-DE-14-093.

<sup>4</sup> Section 3.1 of ERIA states:

"Agency directly responsible to the Governor" or "agency" means any office, officer, division, or part thereof, and any other office, nonelective officer, department, division, bureau, board, or commission in the executive branch of State government, except that it does not apply to any agency whose primary function is service to the General Assembly or the Judicial Branch of State government, or to any agency administered by the Attorney General, Secretary of State, State Comptroller or State Treasurer. In addition the term does not apply to the following agencies created by law with the primary responsibility of exercising regulatory or adjudicatory functions independently of the Governor:

- (1) the State Board of Elections;
- (2) the State Board of Education;
- (3) the Illinois Commerce Commission;

In State of Illinois, Department of Central Management Services. \_ PERI \_ Cons. Case Nos. S-DE-14-047, 083, 086 (IL LRB-SP Oct. 15, 2013), the Board specifically examined whether Section 6.1 of the Act authorizes the Governor to designate positions within the Pollution Control Board. The Board stated: “the Governor’s authority to designate positions under Section 6.1 is limited to ‘State agencies directly responsible to the Governor,’ and finding that language to be unambiguous, we conclude that the attempt to designate positions within the Illinois Commerce Commission, the Illinois Workers’ Compensation Commission, and the Illinois Pollution Control Board, which under ERIA are not ‘directly responsible to the Governor,’ is contrary to the intent of the legislature, as expressed in the clear and unambiguous language of Section 6.1(a) of the Act.” Id. Thus, the Governor’s authority to designate positions does not extend to the two positions within the Pollution Control Board designated in this case.

As noted above, Section 6.1(d) does provide a presumption that any designation is presumed to have been properly made. However, in this case, the presumption of appropriateness is rebutted by the clear statutory language expressing the limits on the Governor’s authority to designate positions at the Pollution Control Board. Id. (“CMS’s position suggests that the presumption of appropriateness cannot be rebutted, even by clear statutory language expressing limits on the Governor’s authority. CMS’s position with respect to the presumption is extreme, cannot be reflective of legislative intent, and is rejected.”)

## **II. CONCLUSIONS OF LAW**

The Governor’s designation is not consistent with the requirements of Section 6.1 of the Act.

## **III. RECOMMENDED ORDER**

It is hereby recommended that the petition be dismissed.

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- (4) the Illinois Workers' Compensation Commission;
  - (5) the Civil Service Commission;
  - (6) the Fair Employment Practices Commission;
  - (7) the Pollution Control Board;
  - (8) the Department of State Police Merit Board;
  - (9) the Illinois Racing Board;
  - (10) the Illinois Power Agency.

#### **IV. EXCEPTIONS**

Pursuant to Section 1300.90 and Section 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300,<sup>5</sup> parties may file exceptions to the Administration Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than three 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 sent to [ILRB.Filing@Illinois.gov](mailto:ILRB.Filing@Illinois.gov). Each party shall serve its exception on the other parties. If the original exceptions are withdrawn, then all subsequent exceptions are moot. A party not filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

**Issued at Chicago, Illinois, this 28th day of October, 2013**

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

*/s/ Michelle Owen*

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**Michelle Owen  
Administrative Law Judge**

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<sup>5</sup> Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>