

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

State of Illinois, Department of)	
Central Management Services,)	
)	
Petitioner)	
)	
and)	Case No. S-DE-14-111
)	
American Federation of State, County)	
and Municipal Employees, Council 31,)	
)	
Labor Organization-Objector)	

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

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012), allows the Governor to designate certain employment positions with the State of Illinois as excluded from the collective bargaining rights which might otherwise be available to State employees under Section 6 of the Act. This case involves such a designation made by the Illinois Department of Central Management Services (CMS) on behalf of the Governor of the State of Illinois.

On November 4, 2013, Administrative Law Judge (ALJ) Elaine Tarver issued a Recommended Decision and Order (RDO) in Case No. S-DE-14-111, finding that a set of such designations made by CMS pursuant to Section 6.1, was properly made. CMS's petition designated seven positions at the Illinois Department of Public Health, all holding the job classification of Senior Public Service Administrator (SPSA), but all designated solely pursuant to Section 6.1(b)(5) of the Act, not Section 6.1(b)(2).¹

¹ In relevant part, Section 6.1(b) provides:

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

* * *

The American Federation of State, County and Municipal Employees, Council 31, filed objections to CMS's designations pursuant to Section 1300.60 of the rules promulgated by the Board to effectuate Section 6.1 of the Act, 80 Ill. Admin. Code Part 1300, and after the ALJ rejected these objections, AFSCME filed timely exceptions pursuant to Section 1300.130 of the Board's rules. After reviewing the exceptions, the RDO, and the underlying record, we reject the exceptions and adopt the RDO for the reasons contained in that document and the reasons we previously articulated in our decision in State of Illinois, Department of Central Management Services and American Federation of State, County and Municipal Employees, Council 31, Case Nos. 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.). We direct the Executive Director to issue a certification consistent with our findings.

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

(2) it must have a title of ... Senior Public Service Administrator[.]

* * *

(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 phrase used in Section 6.1(b)(5):

For the purposes of this Section, 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 or (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

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

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois, on November 19, 2013;
written decision issued at Springfield, Illinois, November 27, 2013.

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**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.¹

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

¹ 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. 14,070 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On October 3, 2013, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designation petition pursuant to Section 6.1 of the Act and Section 1300.50 of the Board's Rules. CMS' petition designates the exclusion of the following seven Senior Public Service Administrators in the Department of Central Management Services based on Section 6.1(b)(5) of the Act:

**Senior Public Service Administrator, Option 8H
Employed at Department of Public Health**

<u>Position Number</u>	<u>Working Title</u>	<u>Incumbent</u>
40070-20-53-040-00-01	Division Chief	Vacant
40070-20-53-050-00-01	Section Chief	Joseph Mitchell
40070-20-53-100-00-11	Section Chief Regional	Clayton Simonson
40070-20-53-200-00-21	Supervisor	Vacant
40070-20-53-400-00-41	Section Chief Regional	Mary Lynne Williams
40070-20-53-500-00-51	Supervisor	Vacant
40070-20-53-700-00-71	Section Chief	Joseph O'Connor

In support of its petition, CMS submitted job descriptions (CMS-104s) for the positions and a summary spreadsheet. The spreadsheet identifies, position numbers, titles, name of the incumbents, bargaining unit, certification's date and case number, statutory category of designation and a list of job duties that support the presumptions that the positions are supervisory or managerial. The positions were certified into the RC-63 bargaining unit pursuant to the actions of the Board in Case. No. S-RC-09-036 on February 3, 2011.

Based on my review of the designations, the documents submitted as part of the designations, the objections, and the documents and arguments submitted in support of those objections, here are my findings:

I. OBJECTIONS

On October 18, 2013, AFSCME filed objections to the designations pursuant to Section 1300.60(a)(3) of the Board's Rules, objecting to only the four currently filled positions being designated.

AFSCME argues that Section 6.1 of the Act is unconstitutional, as applied and on its face, under the Illinois Constitution and the Constitution of the United States of America because it deprives AFSCME of its due process, deprives employees of their freedom of association with a union and speech, and violates the separation of powers and equal protection clauses as well as the prohibition against impairment of contracts.

AFSCME also states that CMS fails to meet the criteria of either 6.1(b)(2) or (5) because the positions designated are not properly classified as SPSA position and they are professional positions that do not hold significant and independent discretionary authority as required in Section 6(c) of the Act. AFSCME further maintains that there is no rational basis for treating these positions differently than the many other positions holding the same or similar duties. Lastly, AFSCME argues that failing to hold a hearing in this matter is a denial of due process.

II. DISCUSSION AND ANALYSIS

A. Procedural Objections

The Board has held that it is beyond its capacity to rule on the constitutional allegations made by AFSCME. Specifically, it is beyond the Board's purview to rule whether the Illinois Public Labor Relations Act, as amended, violated provisions of the United States and Illinois constitutions. The Board noted that administrative agencies have no authority to declare statutes unconstitutional or even to question their validity and in doing so, their actions are null and void and cannot be upheld. State of Illinois, Department of Central Management Services, Case No. S-DE-14-005 (IL LRB-SP Oct. 7, 2013) (citing Goodman v. Ward, 241 Ill. 2d. 398, 411 (2011)). As such, I will not address the constitutional objections in this decision.

The Board has also expressed its concern with AFSCME's due process arguments but maintained that it has taken necessary measures to prevent a violation of such. Therefore, consistent with the Fourth District, the Board held that it "insured that the individual employees as well as their representative and potential representative receive notice soon after designation petitions are filed, usually without hours, and have provided for redundant notice by means of posting at the worksite....we provided them an opportunity to file objections, and where they raise issues of fact or law that might overcome the statutory presumption of appropriateness, an opportunity for a hearing, [and]...require a written recommended decision by an administrative law judge in each case in which objections have been filed. State of Illinois, Department of

Central Management Services, Case No. S-DE-14-005 (IL LRB-SP Oct. 7, 2013) (citing Arvia v. Madigan, 209 Ill. 2d 520 (2004), and Gruwell v. Ill. Dep't of Financial and Professional Regulations, 406 Ill. App. 3d 283, 296-98 (4th Dist. 2010)). Additionally, the Board found that it has “allowed an opportunity to appeal those recommendations for consideration of the full Board by means of filing exceptions,...doubled the frequency of our scheduled public meetings in order to provide adequate review of any exceptions in advance of the 60-day deadline and... issu[e] written final agency decisions which may be judicially reviewed pursuant to the Administrative Review Law”, in an effort to adhere to due process. State of Illinois, Department of Central Management Services, Case No. S-DE-14-005 (IL LRB-SP Oct. 7, 2013).

Moreover, in administrative hearings, failing to go to an oral hearing is not necessarily the denial of a hearing where submission of written documents could suffice as a hearing. Department of Central Management Services (Illinois Commerce Commission) v. Illinois Labor Relations Board, State Panel, 406 Ill. App. 3d 766, 769-70 (4th Dist. 2010). Therefore, AFSCME’s due process rights have not been violated by the Board following the policies and procedures mandated by the legislature and I find there is no issue of law or fact warranting a hearing.

B. Substantive Objections

As stated above, a position is properly designated if, amongst other reasons, it was first certified to the bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008; and it authorizes an employee in the position to have “significant and independent discretionary authority as an employee” as defined by Section 6(c) of the Act. Moreover, designations made by the Governor are presumed proper under Section 6.1 of the Act.

It is undisputed that the positions at issue were certified into bargaining unit RC-63 in Case No. S-RC-09-036 on February 3, 2011. The issue is whether the positions authorize the employees to have significant and independent discretionary authority as described in Section 6.1(c).

CMS’s designation of the positions at issue is proper. Section 6.1(c) explains that a position authorizes its holder with the requisite authority, when the position is a “supervisor” within the meaning of the National Labor Relations Act, or is a “manager” within the meaning of the Illinois Public Labor Relations Act. CMS provided job descriptions and listed the specified job duties as evidence of supervisory authority of the positions at issue. Because the positions

are properly designated as supervisory, I will not address whether the positions at issue are also managerial.

The NLRA defines a supervisor as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, responsibility to direct them, to adjust their grievances, or effectively to recommend such actions, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C.A. § 152 (11). Employees are supervisors if they (1) hold the authority to engage in any of the above listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer. NLRB v. Kentucky River Comm. Care, Inc., 532 U.S. 706, 713 (2001); see also Oakwood Healthcare Inc., 348 NLRB 686, 687 (2006). Independent judgment is a key issue in determining whether an employee is a supervisory under the NLRA. See Id. at 689. Unlike the definition of a supervisor within the meaning of Section 3(r) of the Illinois Labor Relations Act, Section 6.1(c)(i) does not have a preponderance of time component.

Here, CMS noted that the positions at issue all have the authority to supervise subordinate staff through direction by assigning and reviewing work. Whether the employees actually exercise the authority granted within the position descriptions does not determine whether the position is properly designated under Section 6.1(b)(5) of the Act. Therefore, AFSCME’s contention that CMS has not provided evidence of actual authority does not refute the evidence submitted by CMS. Moreover, AFSCME provides no evidence that the positions do not exercise their authority with the requisite independent judgment. Therefore, its argument does not raise an issue that might overcome the presumption that the designation is proper.

III. CONCLUSIONS OF LAW

The designations in this case are properly made.

IV. RECOMMENDED ORDER

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

**Senior Public Service Administrator, Option 8H
Employed at Department of Public Health**

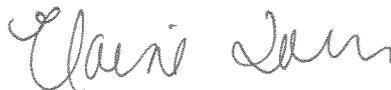
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40070-20-53-400-00-41	Section Chief	Mary Lynne Williams
	Regional	
40070-20-53-500-00-51	Supervisor	Vacant
40070-20-53-700-00-71	Section Chief	Joseph O'Connor

V. EXCEPTIONS

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300, parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, no 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 and Regulations. Exceptions must be filed by electronic mail sent to 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 filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

Issued at Chicago, Illinois this 4 day of November, 2013

**STATE OF ILLINOIS
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Elaine L. Tarver, Administrative Law Judge