

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

State of Illinois, Department of)	
Central Management Services)	
(Department of Insurance),)	
)	
Petitioner)	
)	
and)	Case No. S-DE-14-138
)	
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 collective bargaining rights which might otherwise be available under Section 6 of the Act. This case involves such designations made on the Governor’s behalf by the Illinois Department of Central Management Services (CMS). On December 19, 2013, Administrative Law Judge (ALJ) Elaine L. Tarver issued a Recommended Decision and Order (RDO) in Case No. S-DE-14-138, finding the designations comport with the requirements of Section 6.1. We agree.

CMS’s petition designates for exclusion two positions at the Illinois Department of Insurance, both classified as Actuary III positions, both with the working title of Life Actuary, and both designated for exclusion pursuant to Section 6.1(b)(5) of the Act. Section 6.1(b)(5) allows designation of positions which “authorize an employee in that position to have significant

and independent discretionary authority as an employee.” Section 6.1(c) defines that phrase as follows:

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.

The American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed timely objections to the petition 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. Some were general in nature, but others were specific to these two positions. Relying on earlier Board decisions, the ALJ rejected the general objections, and relying on information supplied with the petition, rejected the specific objections and found both positions met the supervisory component of Section 6.1(b)(5) and 6.1(c)(ii) of the Act. She therefore concluded that their designation comported with the requirements of Section 6.1, and found she did not need to address whether the positions might also meet the managerial component of Sections 6.1(b)(5) and 6.1(c)(i).

AFSCME filed timely exceptions to the ALJ’s RDO pursuant to Section 1300.130 of the Board’s rules, 80 Ill. Admin. Code §1300.130, again raising its general objections but failing to provide any arguments tailored to the specific facts of these two positions. Based on our review of the exceptions, the record, and the RDO, we reject the exceptions and adopt the RDO. We find the designations comport with the requirements of Section 6.1, and direct the Executive Director to issue a certification consistent with our finding.

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 Chicago, Illinois, on January 16, 2014;
written decision issued at Springfield, Illinois, January 21, 2014.

**STATE OF ILLINOIS
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STATE PANEL**

State of Illinois, Department of Central Management Services,)	
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Petitioner)	
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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.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 November 21, 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 Actuary III positions in the Department of Insurance based on Section 6.1(b)(5) of the Act:

**Actuary III
Employed at Department of Insurance**

<u>Position Number</u>	<u>Working Title</u>	<u>Incumbent</u>
00203-14-11-100-00-01	Life Actuary	Bruce Sartain
00203-14100-200-00-01	Life Actuary	Judy Mottar

In support of its petition, CMS submitted job descriptions (CMS-104s) for the positions, affidavits 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 at issue were certified into the RC-63 bargaining unit pursuant to the actions of the Board in Case. No. S-RC-09-076 on January 6, 2009.

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 December 9, 2013, AFSCME filed objections to the petition pursuant to Section 1300.60(a)(3) of the Board's Rules.

AFSCME makes several objections arguing that Section 6.1 of the Act violates due process, the separation of powers doctrine in the Illinois Constitution, equal protection under Article I, Section 2 of the Illinois Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution, and impairs the contractual right of the employees prohibited by the impairment of contract clause in the Illinois Constitution.

AFSCME generally objects to the designation of the petitioned-for positions claiming that the position descriptions merely acknowledge the employee's potential responsibilities and CMS failed to provide specific evidence that the employees at issue have actual authority to perform the job duties listed. As such, AFSCME argues that the employees in the petitioned-for positions were never informed of their significant and independent discretionary authority to perform supervisory or managerial functions and CMS has not met its burden of proving the positions possess the necessary significant and independent discretionary authority. Moreover, AFSCME maintains that to the extent the affidavits state an employee at issue effectuates policies and the position description does not define a policy, there can be no showing that the employee is in fact managerial and the burden is on CMS to show why different duties should not apply to those holding the same title. Therefore, AFSCME maintains that the positions at issue are neither supervisory nor managerial in accordance with Section 6.1 of the Act.

II. DISCUSSION AND ANALYSIS

a. Procedural Objections

First, 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, violate 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 maintains that it has taken necessary measures to prevent such a violation. Therefore, the Board held that consistent with judicial precedent it has "insured that the individual employees as well as their representative and potential representative receive notice soon after designation petitions are filed, usually within 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 by 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.

Regarding the burden of proof, AFSCME has the burden to demonstrate that the designation is not proper. The Act is clear in that “any designation made by the Governor...shall be presumed to have been properly made,” 5 ILCS 315/6.1 (2012). Therefore, the burden of proof shifts to the objector to prove that the designation is, in fact, improper.

Lastly, Illinois Appellate Courts have held that the Board’s consideration of job descriptions alone, is an adequate basis upon which to evaluate an exclusion. See Village of Maryville v. Illinois Labor Relations Board, 402 Ill. App. 3d 369 (5th Dist. 2010); Ill. Dep’t of Cent. Mgmt. Servs. V. Ill. Labor Rel. Bd., 2011 Ill App. (4th Dist.) 090966; but see Vill. of Broadview v. Ill. Labor Rel. Bd., 402 Ill. App. 3d 503, 508 (1st Dist. 2010); see also Ill. Dep’t of Cent. Mgmt. Servs. v. Ill. Labor Rel. Bd., 382 Ill. App. 3d 208, 228-29 (4th Dist. 2008); City of Peru v. Ill. Labor Rel. Bd., 167 Ill. App. 3d 284, 291 (3d Dist. 1988). Accordingly, the Board has sufficient evidence from which to establish whether the designation is proper.

b. Designations under Section 6.1(b)(5)

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-09-076 on January 6, 2009. At issue is whether the petitioned-for positions have significant and independent discretionary authority as described in Section 6.1(c), to be designated as either supervisory or managerial.

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 6.1(c) of the Illinois Public Labor Relations Act. CMS provided job descriptions, affidavits and listed the specified job duties as evidence of supervisory authority of the positions at issue. The petitioned-for positions are properly designated as supervisory and therefore I will not discuss whether they are also properly designated as managerial employees.

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. A position has responsibility to direct if the position holder has subordinates, decides what jobs his subordinates should perform next, and who should perform those tasks. Oakwood Healthcare, 348 NLRB at 691-2. In addition, the position holder must be accountable for his subordinates’ work and must carry out such direction with independent judgment. Id. In other words, “it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary,” and that

“there is a prospect of adverse consequences for the putative supervisor,” arising from his direction of other employees. *Id.* Unlike the definition of a supervisor in Section 3(r) of the Illinois Public Labor Relations Act, Section 6.1(c)(ii) does not have a preponderance of time component.

According to the job description for the Actuary III position currently filled by Judy Mottar, this position assigns and reviews the work of lower level actuarial staff engaged in performing loss reserve and financial analysis tests, directs staff in the method of conducting reserve and special studies involving actuarial techniques and prepares and conducts performance evaluations of lower level actuarial staff. The job description of the Actuary III position filled by Bruce Sartain provides that the position, among other things, is responsible as a working supervisor who assigns and reviews work, provides guidance and training to assigned staff, counsels staff, reassigns staff to meet day-to-day operating needs, approves time-off, and prepares and signs performance evaluations.

Based on the information above, the Actuary III position is supervisory within the meaning of Section 6.1(c)(ii) of the act. Although the job descriptions slightly differ, it is clear that both positions assign and responsibly direct their subordinates. They also assign or re-assign job duties to ensure goals are met. AFSCME does not refute that the petitioned-for positions are accountable for their subordinates’ performance and may suffer adverse consequences by failing to direct work or take necessary corrective action. Oakwood Healthcare, Inc., 348 NLRB 686, 692 (2006) (where accountability focuses on the supervisor's own conduct and judgment in exercising oversight and direction of employees in order to accomplish the work is supervisory under the Act).

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:

**Actuary III
Employed at Department of Insurance**

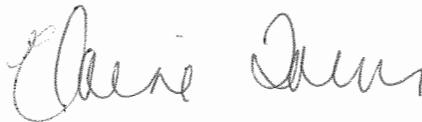
<u>Position Number</u>	<u>Working Title</u>	<u>Incumbent</u>
00203-14-11-100-00-01	Life Actuary	Bruce Sartain
00203-14100-200-00-01	Life Actuary	Judy Mottar

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 19th day of December, 2013

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



Elaine L. Tarver, Administrative Law Judge