STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

State of Illinois, Department of Central Management Services (Department of Natural Resources),	)	
Petitioner	)	
and	)	Consolidated Case Nos. S-DE-14-144 & S-DE-14-145
American Federation of State, County and Municipal Employees, Council 31,	)	
Labor Organization-Objector	)	
Amina Everett & Megan Buskirk,	)	
Employee-Objectors	)	

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) in two petitions filed in Case Nos. S-DE-14-144 and S-DE-14-145. Administrative Law Judge (ALJ) Sarah Kerley consolidated these cases for decision, and on February 19, 2014, issued a Recommended Decision and Order (RDO), finding the designations comport with the requirements of Section 6.1. We agree with her assessment.

Each petition designates for exclusion a single position at the Illinois Department of Natural Resources. The petition filed in Case No. S-DE-14-144 designated a Public Service

Administrator (PSA) Option 1 position held by Amina Everett, while the petition filed in Case No. S-DE-14-145 designated a PSA Option 2 position held by Megan Buskirk.[1] Both positions were designated for exclusion pursuant to Section 6.1(b)(5) of the Act, which allows designation of positions that "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 petitions 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. Everett and Buskirk did as well. Finding that an issue had been raised warranting a hearing, the ALJ held one on January 30, 2014. Based on the evidence and arguments presented, she concluded the petitions were proper and recommended that the Board find it comported with the requirements of Section 6.1 and that the positions should be excluded from collective bargaining. After providing a thorough recitation of the relevant facts, and of the various tests for the managerial-like component of Section 6.1(c)(i) and the supervisor-like component of Section 6.1(c)(ii), she concluded that Everett's position met the requirements of Section 6.1(c)(ii), and

[1] Everett's and Buskirk's positions were previously included in larger groups designated for exclusion in consolidated Case Nos. S-DE-14-140, S-DE-14-141 and S-DE-14-142, but were subsequently withdrawn by CMS from the petitions filed in those cases.

Buskirk's position met the requirements of Section 6.1(c)(i). She did not address whether each of the positions also met the other component of Section 6.1(c).

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. 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 that 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/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting held by videoconference in Chicago, Illinois, and Springfield Illinois, on February 28, 2014; written decision issued at Springfield, Illinois, March 10, 2014.

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Employer	)	
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and	)	
Amina Everett and Megan Buskirk,	)	
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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) (Act) *added by* Public Act 97-1172 (effective 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 (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 properly qualify for designation, the employment position must meet one or more of the following five requirements:

(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, 479 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]

[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 here.

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 August 23, 2013, 37 Ill. Reg. 14,066 (September 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On January 9, 2014, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designation petitions pursuant to Section 6.1(b)(5) of the Act and Section 1300.50 of the Board's Rules. The following PSA-Option 1 position at the Illinois Department of Natural Resources ("Department" or "DNR") is identified for designation in case number S-DE-14-144:

Position No.	**Incumbent**
37015-12-05-500-20-01	Amina Everett

The following PSA-Option 2 position at DNR is identified for designation in case number S-DE-14-145:

Position No.	**Incumbent**
37015-12-05-400-00-01	Megan Buskirk

In support of its petitions,[2] CMS filed position descriptions (CMS-104s) for each position and affidavits from individuals with knowledge of the duties and responsibilities of the at-issue positions. The petitions indicate that the PSA-Option 1 position was certified on January 20, 2010, and the PSA-Option 2 position was certified on November 18, 2009.

American Federation of State, County and Municipal Employees, Council 31 ("AFSCME") and both individuals filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules.

I reviewed the documents accompanying the designation petitions, the objections raised by AFSCME, the objections raised by individual employees, and the documents submitted in support of the objections. My review indicated that an issue of law or fact exists that might overcome the presumption that the designation is proper such that a hearing is be necessary as to the propriety of those designations. A hearing on the propriety of these petitions was held on January 30, 2014.

[2] These positions had previously been designated for exclusion in case numbers S-DE-14-140 and S-DE-14-141 respectively. However, on January 6, 2014, CMS withdrew the petitions as they related to the positions held by Ms. Everett and Ms. Buskirk. CMS later refiled the current petitions seeking to designate the positions for exclusion.

After consideration of the information before me, including the testimony and evidence presented at the hearing, I find that the designations are properly submitted and are consistent with the requirements of Section 6.1 of the Act. Accordingly, I recommend that the Executive Director certify the designation of the positions at issue in this consolidated matter and, to the extent necessary, amend any applicable certifications of exclusive representatives to eliminate any existing inclusion of these positions within any collective bargaining unit.

I. ISSUES AND OBJECTIONS

I find that the only issue for hearing is whether the petitioned-for positions currently filled by Amina Everett and Megan Buskirk are authorized to have significant and independent discretionary authority, as that term is further defined by Section 6.1(c) of the Act.

AFSCME objects to the designation for a number of reasons. AFSCME argues that Section 6.1 violates provisions of the United States and Illinois Constitutions in a number of ways: first, the designation is an improper delegation of legislative authority to the executive branch; second, selective designation results in employees being treated unequally based on whether an individual's position was subject to a designation petition; and, third, the designation unlawfully impairs the contractual rights of individuals whose positions were subject to the provision of a collective bargaining agreement prior to the position being designated for exclusion. AFSCME also contends that because the "employees holding the position identified by this petition are covered by a collective bargaining agreement which CMS entered into subsequent to the enactment of [Section] 6.1," the designation of these positions "violates due process and is arbitrary and capricious."

AFSCME further contends that under the National Labor Relations Board ("NLRB") precedent and case law interpreting the same, "any claim of supervisory or managerial status requires that *the party raising the exclusion bear the burden of proof*."[3] AFSCME argues that CMS seeks the exclusion of employees who are not "supervisors" or "managers" as defined by the National Labor Relations Act ("NLRA"), 29 U.S.C. 152 *et seq.*, or the NLRB. AFSCME contends that CMS has presented evidence only that the "at-issue positions are *authorized* to complete such job duties,"[4] not that the employees actually exercise that authority. Accordingly, AFSCME argues that CMS should bear the burden of proving that the designated employees

[3] Emphasis in original.
[4] Emphasis in original.

exercise duties that would make them supervisory or managerial, that the position exercises managerial discretion rather than just professional discretion, and that the designated position has different duties than a position with the same title that performs "wholly professional" duties.

In addition to the general objections described above, AFSCME and the individuals provided written statements and testimony as evidence in support of the conclusion that the positions at issue do not comport with Section 6.1(c) of the Act.

II. FINDINGS OF FACT

The Illinois Department of Natural Resources is a State agency that receives funding from both State appropriations and federal sources. In order to retain federal funding and to comply with state and federal law, the Department is subject to financial reporting requirements and audits from various external entities.

A. Amina Everett

Amina Everett is employed as a PSA-Option 1 in the Office of Resource Conservation's Federal Aid Division. She reports to Federal Aid Fiscal Review Manager[5] Jennifer Aherin. Ms. Everett is responsible for submitting federal financial reports and preparing and executing federal "drawdowns," which is the mechanism by which DNR obtains federal reimbursement for certain expenditures pursuant to federal grants. Her position is currently represented by AFSCME for the purposes of collective bargaining, as first certified by the Board on January 20, 2010.

Ms. Everett supervises one subordinate, Conservation Grants Administrator II Debbie Dix. Ms. Everett's position is authorized to direct the work of Ms. Dix. Ms. Everett exercises this authority. Ms. Everett reviews Ms. Dix's work prior to submitting it for further approval. If Ms. Everett uncovers errors or problems with Ms. Dix's work, Ms. Everett returns it to Ms. Dix and directs that Ms. Dix corrects it and resubmits it for Ms. Everett's review. When Ms. Everett receives directives from Ms. Aherin, she, in turn, directs Ms. Dix to perform certain tasks.

Ms. Everett has the authority to approve or disapprove her subordinate's requests for time off. Ms. Everett recommended approval of Ms. Dix's request for a flexible schedule. That recommendation was followed. Ms. Everett monitors Ms. Dix's time use and has directed Ms. Dix to adhere to her approved working hours. Ms. Everett has attended training on discipline, because "everyone who had a supervisory role was supposed to attend that training." Ms.

[5] The undersigned takes administrative notice of Ms. Aherin's title, as evidenced by Ms. Aherin's filing in Case No. S-DE-14-140.

Everett has never recommended discipline.

Ms. Everett evaluates Ms. Dix's performance. Ms. Everett, with input from Ms. Aherin, set objectives for Ms. Dix to meet for the 2013-2014 evaluation period. Those objectives included specific direction for Ms. Dix to follow the "chain of command" by way of seeking Ms. Everett's review and approval of Ms. Dix's work product. Ms. Everett also directed Ms. Dix to continue weekly meetings with Ms. Dix to "review issues, reporting requirements and status of all … grants that may not be addressed in day[-]to[-]day discussion."

Ms. Everett is accountable for her subordinate's performance. "Leadership" and "Subordinate Development" are two of the ten appraisals upon which Ms. Aherin evaluates Ms. Everett. Ms. Aherin notes in Ms. Everett's evaluation that with ongoing professional development, and the support of her supervisor, Ms. Everett will utilize best practices to obtain performance success for Ms. Dix. Ms. Aherin evaluated Ms. Everett's performance in the appraisal of "Human Relations," noting it was an issue early in the reporting period, but that she and Ms. Everett were working together to seek the best methodology to improve Ms. Dix's behavior.

The poor relationship between Ms. Everett and Ms. Dix was affecting the work of the unit. Because of the effect on their work, Ms. Aherin got involved. Ms. Aherin counseled Ms. Everett and recommended that both Ms. Everett and Ms. Dix attend training designed to improve working relationships. Ms. Aherin has specifically authorized Ms. Everett to issue directives to Ms. Dix, but, in the context of this situation, Ms. Aherin indicated the specific nature of the direction Ms. Everett should take with Ms. Dix.

B. Megan Buskirk

Megan Buskirk is employed as the GAAP[6] Coordinator and Audit Liaison for the Department and reports directly to Chief Financial Officer Scott Harper. Ms. Buskirk's position is currently represented by AFSCME for the purposes of collective bargaining, as first certified by the Board on November 18, 2009.

Ms. Buskirk has a Master's degree in accounting, and is responsible for keeping abreast of changes to the accounting standards established by professional organizations[7] that seek to provide for consistent applications of accounting procedures across the United States. Ms.

[6] GAAP is the acronym for "generally accepted accounting principles."

[7] Ms. Buskirk specifically mentioned the American Institute of Certified Public Accountants, the Federal Accounting Standards Board, and the Government Accounting Standards Board.

Buskirk has no authority or input in the determinations of accounting procedures developed by the various professional organizations. Similarly, Ms. Buskirk does not have the authority to alter the financial forms the Department is required by the Illinois Office of the Comptroller to complete and submit. However, in compiling certain financial reports[8] for each of the Department's approximately 50 funds, Ms. Buskirk has "considerable discretion in deciding what adjusting journal entries will accurately reflect the Department's assets or income and expenses." Ms. Buskirk regularly exercises this discretion.

Ms. Buskirk is responsible for compiling information from the Department's various accounting systems and other areas of the Department to provide to various outside entities, including: the Department's contractors, who then use the information to develop the Department's "indirect cost proposal;" the Illinois Office of the Comptroller; the Auditor General; or federal auditing agencies. Ms. Buskirk also coordinates the Department's audit response functions. When an external auditor is seeking information from the Department, those requests are directed to Ms. Buskirk to coordinate. She directs portions of the audit request to the area of the Department she anticipates controls the requested information. The area administrators are expected to examine the audit requests and notify Ms. Buskirk if they can provide the requested information. When an auditing entity or the Comptroller's Office sets deadlines for responses from the Department, in order to comply with those deadlines, Ms. Buskirk sets internal deadlines with which area administrators are expected by the Director of DNR to comply. Regarding audit requests, the Director of DNR has made it clear to Office Directors, executive staff, and the EEO Director to give special attention to "[e]verything that [Ms. Buskirk] directs [them] to do."

Ms. Buskirk's position is the "chief architect" of the Department's responses to proposed audit findings. Ms. Buskirk often completes the first draft of the Department's response to audit findings, which formulates what the Department should do to remediate the finding, address it, and may propose changes to policies and procedures to avoid recurrence of the audit finding. Ms. Buskirk's advice is generally accepted with little or no alteration.

Ms. Buskirk drafted and proposed identity protection policies and procedures for the Department to adopt in order to satisfy a proposed audit finding. In the past, she has successfully

[8] Mr. Harper referred to the "balance sheet, income statement, and statement of changes and financial position" (also known as "cash flow") for the Department's funds.

represented the Department's interests in reversing proposed findings that could have jeopardized DNR's federal funding. In appeasing the auditing agency's concerns, Ms. Buskirk was involved in developing the production timekeeping system by which DNR captures specific data regarding which employees are working for certain grants. Ms. Buskirk was involved in specifying what the system would do, what it would look like, what codes needed to be included – basically conceptualizing the categories into which people would report their time.

Ms. Buskirk often speaks on behalf of the Department with external auditing entities. Ms. Buskirk has also served as the DNR Director's chief coach in preparing for his testimony before the legislative Audit Commission. She also attends the Commission hearings as a potential witness, should the Director be asked a question to which he did not know the answer. In recent years, the Legislative Audit Commission and individual legislators have used audit findings as a deciding factor when making funding decisions.

The Chief Financial Officer seeks and receives recommendations from Ms. Buskirk regarding the propriety and acceptability of documentation the Department provides to auditors. These recommendations are generally accepted.

Mr. Haper has not encountered any problems, nor learned of any problems, with Ms. Buskirk performing her duties while being in a bargaining unit.

III. DISCUSSION AND ANALYSIS

The law creates a presumption that designations made by the Governor are properly made. In order to overcome the presumption of a properly submitted designation under Section 6.1(b)(5), the objectors would need to raise an issue of law or fact that the position does not meet either of the managerial tests set out in Section 6.1(c)(i) or the supervisory test set out in Section 6.1(c)(ii).

A. Procedural Arguments

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, violates provisions of the United States and Illinois constitutions. State of Ill., Dep't of Cent. Mgmt. Servs., 30 PERI ¶80, Case No. S-DE-14-005 etc. (IL LRB-SP Oct. 7, 2013) appeal pending, No. 1-13-3454 (Ill. App. Ct. 1st Dist.)(*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.”)). Accordingly, these issues are not addressed in this recommended decision and order.

AFSCME argued in its objections and at the hearing in this matter, that CMS should bear the burden in at least two ways. First, it argues that because CMS is seeking an exclusion, under NLRA case law, CMS should bear the burden of proof, and should have had to present its case-in-chief first at the hearing. In so arguing, AFSCME fails to appreciate that Section 6.1 is a wholly new legislative creation. The Act’s provision that “any designation made by the Governor…shall be presumed to have been properly made,” 5 ILCS 315/6.1(d), shifts the burden of proving that a designation is improper on the objector. Therefore, AFSCME and the individual employees have the burden to demonstrate that the designation is improper.

B. Tests for Designations made under Section 6.1(b)(5)

Section 6.1(b)(5) allows the Governor to designate positions that authorize an employee to have “significant and independent discretionary authority.” 5 ILCS 315/6.1(b)(5). The Act goes on to provide three tests by which a person can be found to have “significant and independent discretionary authority.” Section 6.1(c)(i) sets forth the first two tests, while Section 6.1(c)(ii) sets forth a third.[9] In its petition, CMS contends that the at-issue positions confer on the position holder “significant and independent discretionary authority” as further defined by either Section 6.1(c)(i) or both Section 6.1(c)(i) and (ii).

In order to meet the burden to raise an issue that might overcome the presumption that the designation is proper, the objector must provide specific examples to negate each of the three tests set out in Section 6.1(c). If even one of the three tests is met, then the objector has not sufficiently raised an issue, and the designation is proper. Ill. Dep’t Cent. Mgmt. Serv., 30 PERI ¶ 85.

Each of the three tests are discussed below.

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[9] Section 6.1(c) reads in full 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.

5 ILCS 315/6.1(c).

1. Section 6.1(c)(i) sets out two tests for designation under Section 6.1 (b)(5)

The first test under Section 6.1(c)(i) is substantively similar to the traditional test for managerial exclusion articulated in Section 3(j). To illustrate, Section 6.1(c)(i) provides that a position authorizes an employee in that position with significant and independent discretionary authority if "the employee 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." 5 ILCS 315/6.1(c)(i).

Though similar to the Act's general definition of managerial employee in Section 3(j), 5 ILCS 315/3(j), the Section 6.1(c)(i) definition is broader in that it does not include a predominance element and requires only that the employee is "charged with the effectuation" of policies not that the employee is responsible for **directing** the effectuation. An employee **directs** the effectuation of management policy when he/she oversees or coordinates policy implementation by developing the means and methods of reaching policy objectives, and by determining the extent to which the objectives will be achieved. Ill. Dep't Cent. Mgmt. Serv. (Ill. State Police), 30 PERI ¶ 109 (IL LRB-SP 2013) (*citing* Cnty. of Cook (Oak Forest Hospital) v. Ill. Labor Rel. Bd., 351 Ill. App. 3d at 387); INA, 23 PERI ¶ 173 (IL LRB-SP 2007). However, in order to meet the first test set out in Section 6.1, a position holder need not develop the means and methods of reaching policy objections. It is sufficient that the position holder is charged with carrying out the policy in order to meet its objectives.

The Section 6.1(c)(i) test is unlike the traditional test where a position is deemed managerial only if it is charged with *directing* the effectuation of policies. Under the traditional test, for example, "where an individual merely performs duties essential to the employer's ability to accomplish its mission, that individual is not a managerial employee," Ill. Dep't of Cent. Mgmt. Serv. (Dep't of Revenue), 21 PERI ¶ 205 (IL LRB SP 2005), because "he does not determine the how and to what extent policy objectives will be implemented and the authority to oversee and coordinate the same." INA, 23 PERI ¶ 173 (*citing* City of Evanston v. Ill. Labor Rel. Bd., 227 Ill. App. 3d 955, 975 (1st Dist. 1992)). However, under Section 6.1(c)(i), a position need not determine the manner or method of implementation of management policies. Performing duties that carry out the agency or department's mission is sufficient to satisfy the second prong of the first managerial test.

The second test under Section 6.1(c)(i) indicates that a designation is proper if the

position holder "represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency." 5 ILCS 315/6.1(c)(i). This second test allows a position to be designated upon a showing that it either (a) takes discretionary actions that effectively control or implement agency policy or (b) effectively recommends such discretionary actions.

2. Section 6.1(c)(ii) establishes a third test for designation under Section 6.1(b)(5)

Under the NLRA, a supervisor is an employee who has "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, 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).

In other words, "employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 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. ("Kentucky River"), 532 U.S. 706, 713 (2001) (*quoting* NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-574 (1994); *See also* Oakwood Healthcare, Inc. v. United Auto Automobile, Aerospace and Agricultural Implement Workers of America ("Oakwood Healthcare"), 348 NLRB 686, 687 (2006). A decision that is "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement" is not independent. Oakwood Healthcare, 348 NLRB at 689.

C. The designation of the PSA-Option 1 position held by Amina Everett is proper.

Ms. Everett's position is designated under Section 6.1(b)(5), and CMS asserts that Ms. Everett's position meets the 6.1(b)(5) requirement as further defined both by Sections 6.1(c)(i) and (ii). Following a hearing on the matter, I find that Ms. Everett's position is properly

designated as it qualifies under Section 6.1(c)(ii).[10]

A designation on the grounds that the employee is supervisory as defined in Section 6.1(c)(ii) is appropriate where: (1) the designated employee has the authority to engage in any of the enumerated supervisory functions (hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances); (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. State of Ill., Dep't of Cent. Mgmt. Servs., (Dep't of Public Health) ("DPH"), Case No. S-DE-14-111 (IL LRB-SP November 27, 2013) appeal pending, No. 1-13-3911 (Ill. App. Ct. 1st Dist.) (*citing* Kentucky River, 532 U.S. at 713, and Oakwood Healthcare, 348 NLRB at 687.).

A position is authorized with the responsibility to direct if the position holder has subordinates, decides what jobs her subordinates should perform next, and who should perform those tasks. Id. *See also* Superior Officers Council and Cnty. of Cook, Sheriff of Cook Cnty. (Dep't of Corrections), 15 PERI ¶3022 (IL LLRB 1999)(in order for an alleged supervisor to effectively direct subordinates, the supervisor "must be actively involved in checking, correcting and giving instruction to subordinates."). Moreover, the position holder must be accountable for his subordinates' work and must carry out such direction with independent judgment. Oakwood Healthcare, 348 NLRB at 691-2. 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. In applying the second portion of the "responsibly direct" test, the statutory presumption that the designation is proper places the burden on the objector to demonstrate that there is not a prospect of adverse consequences for the position holder if she does not direct the work or does not take corrective action where necessary.

Ms. Everett is responsible for checking, identifying errors or problems with Ms. Dix's work, and instructing Ms. Dix to correct any problems before signing off and forwarding it for further approval. The evidence does not support that her review is merely routine or clerical in

[10] Because I find the designation proper under Section 6.1(b)(5) as further defined by Section 6.1(c)(ii), I do not address whether the designation is also proper under Section 6.1(b)(5) as further defined by Section 6.1c)(i).

nature. Ms. Everett testified that when her supervisor gives her direction, she can then turn around and direct Ms. Dix to complete certain tasks. No evidence was presented that Ms. Everett is limited in her ability to use independent judgment to determine whether to complete assignments herself or to assign them to Ms. Dix. Ms. Everett testified that she directed or assigned Ms. Dix[11] to complete an overview of Forestry Division projects. She then evaluated Ms. Dix on her performance on that project. In that same evaluation, Ms. Everett stressed the importance of Ms. Dix following the "chain of command" by submitting all of her work for Ms. Everett's approval prior to Ms. Aherin reviewing it.

Ms. Aherin has explicitly authorized Ms. Everett to direct her subordinate, but based on the specific situation, which included Ms. Aherin's responsibility to correct Ms. Everett's own conduct, Ms. Aherin was very involved in Ms. Everett's exercise of her authority. Because of the unique circumstances, I do not find that Ms. Aherin's involvement in Ms. Everett's direction of her subordinate to be an indication of a lack of authority. Further, no evidence was submitted that Ms. Everett's ability to direct the work of her subordinate has been limited in any way. Instead, I find that the evidence indicates that Ms. Everett's position is authorized to exercise independent discretionary authority in the direction of her subordinate.

No evidence was presented to support a contention that Ms. Everett is not held accountable for her subordinate's performance. Instead, Ms. Everett's testimony, as well as her performance evaluation, makes clear that she is accountable for her subordinate's work performance. Her supervisory responsibilities account for two of the ten performance categories upon which she was evaluated. Ms. Everett testified that she was counseled by her supervisor regarding her interaction with her subordinate, and that, due to the effect that supervisor-subordinate relationship was having on the unit's work, Ms. Aherin stepped in. Ms. Everett's efforts to use "best practices" to obtain Ms. Dix's performance success was also noted in Ms. Everett's performance evaluation.

Because Ms. Everett is authorized to responsibly direct the work of her subordinate employee with independent judgment and is held accountable for supervising her subordinate, her position is appropriately designated under Section 6.1(b)(5) as further defined in Section 6.1(c)(ii).

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[11] Ms. Everett repeatedly testified that she did things "through her supervisor." In response to a question from the undersigned, Ms. Everett clarified that by "through her supervisor" she meant that she receives direction from her supervisor (Ms. Aherin) and then she communicates direction to her subordinate (Ms. Dix).

D. The designation of the PSA-Option 2 position held by Megan Buskirk is proper.

This position is designated under Section 6.1(b)(5), as further defined by Section 6.1(c)(i) and (ii). Following a hearing on the matter, I find that Ms. Buskirk's position is properly designated, as it represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of the Department.[12]

The testimony of Chief Financial Officer Scott Harper made clear that Ms. Buskirk masterfully carries out her position's responsibilities related to coordinating audit response functions. The evidence presented at the hearing revealed that in doing so, Ms. Buskirk takes discretionary actions to schedule, compile, and coordinate information necessary to respond to the numerous external auditors that request information from the Department. These discretionary actions implement the policy of the Department. In fact, based on the testimony at the hearing, it appears that DNR's external audit compliance policies and procedures are essentially to just follow Ms. Buskirk's direction. With respect to audit compliance and response, the Director of DNR has made it clear to Office Directors, executive staff, and the EEO Director to give special attention to "[e]verything that [Ms. Buskirk] directs [them] to do."

Ms. Buskirk's position is also authorized to take discretionary actions with respect to adjusting journal entries so that they will accurately reflect the Department's assets or income and expenses. Ms. Buskirk regularly exercises this discretion. This discretionary action in turn implements the Department's financial reporting policies, as the adjusted entries become the information that is provided to external sources.

Ms. Buskirk's position is responsible for recommending discretionary actions related to responding to proposed finding and remediating final findings. Ms. Buskirk's position is the "chief architect" of the Department's responses to proposed audit findings. CMS presented evidence of Ms. Buskirk drafting and proposing identity protection policies and procedures for the Department to adopt in order to remediate a proposed audit finding. Ms. Buskirk often completes the first draft of the Department's response to audit findings, which includes formulating what the Department should do to remediate the finding and proposing changes to policies and procedures to avoid recurrence of the audit finding. Mr. Harper credibly testified

[12] Because I find Ms. Buskirk's position is properly designated under Section 6.1(b)(5) as more fully defined in Section 6.1(c)(i), I do not address the propriety of a designation under Section 6.1(b)(5) as more fully defined in Section 6.1(c)(ii).

that Ms. Buskirk's advice is generally accepted.

In the past, Ms. Buskirk was able to convince a federal auditing agency to reverse a proposed finding. The auditing agency was concerned that the Department was inappropriately recording time spent working on federal grants. Such a finding could have jeopardized DNR's federal funding. In appeasing the auditing agency's concerns, Ms. Buskirk was very involved in developing the production timekeeping system by which DNR now captures specific data regarding what employees are working for certain grants. Ms. Buskirk was involved in specifying what the system would do, what it would look like, what codes needed to be included – basically conceptualizing the categories into which people would report their time to avoid problems with the auditors in the future. Ms. Buskirk's recommendations were adopted and changed the manner in which the Department reported time spent working on grants.

Ms. Buskirk also represents management interests by recommending discretionary actions when she serves as the DNR Director's chief coach in preparing for his testimony before the Legislative Audit Commission. She also attends the Commission hearings as a potential witness, should the Director be asked a question to which he did not know the answer. In recent years, the Legislative Audit Commission and individuals legislators have used audit findings as a deciding factor when making funding decisions.

Because she represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of the Department, the designation of Ms. Buskirk's position is proper.

IV. CONCLUSIONS OF LAW

The Governor's designations in this case are properly made.

V. RECOMMENDED ORDER

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

Position No.	**Incumbent**
37015-12-05-500-20-01	Amina Everett
37015-12-05-400-00-01	Megan Buskirk

VI. EXCEPTIONS

Pursuant to Sections 1300.130 and 1300.90(d)(5) of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,[13] parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than three days after service of this recommended decision and order. Exceptions shall be filed with the Board by electronic mail at an electronic mail address designated by the Board for such purpose, ILRB.Filing@illinois.gov, and served on all other parties via electronic mail at its e-mail address as indicated on the designation form. Any exception to a ruling, finding, conclusion or recommendation that is not specifically urged shall be considered waived. A party not filing timely exceptions waives its right to object to this recommended decision and order.

Issued at Springfield, Illinois, this 19th day of February, 2014.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Sarah R. Kerley
Sarah Kerley
Administrative Law Judge

[13] Available at www.state.il.us/ilrb/subsections/pdfs/Section1300IllinoisRegister.pdf