

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

State of Illinois, Department of	)	
Central Management Services	)	
(Illinois Commerce Commission),	)	
	)	
Petitioner	)	
	)	
and	)	Case No. S-DE-14-152
	)	
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) Heather Sidwell issued a Recommended Decision and Order (RDO) in Case No. S-DE-14-152, finding the designations comport with the requirements of Section 6.1. We agree.

CMS’s petition designates for exclusion one position at the Illinois Commerce Commission (ICC), classified as Homeland Security Director, pursuant to Section 6.1(b)(3) of the Act. Section 6.1(b)(3) allows designation of positions which are “Rutan-exempt, as designated by the employer,” and “completely exempt from jurisdiction B of the Personnel Code.”

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. AFSCME raised a number of constitutional and other generally applicable objections to Section 6.1 and the manner in which we have implemented it. It also argued that the Governor lacked authority to designate positions at the ICC in that the ICC was not an agency directly responsible to the Governor within the meaning of Section 6.1(a), and that CMS failed to present sufficient evidence to support that the position was exempt from jurisdiction B of the Personnel Code. Relying on our previous decisions regarding these arguments, the ALJ concluded that the designation comported with the requirements of the Act. AFSCME subsequently 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. In its exceptions, AFSCME again argues that the Governor lacked authority to designate positions at the ICC. As noted by the ALJ, we previously rejected this argument in State of Ill., Dep't of Cent. Mgmt. Servs. (Various Agencies), 30 PERI ¶124, Cons. Case Nos. S-DE-14-092, S-DE-14-093 and S-DE-14-094 (IL LRB-SP Nov. 15, 2013), appeal pending, No. 1-13-3866 (Ill. App. Ct., 1st Dist.), and State of Ill., Dep't of Cent. Mgmt. Servs. (Workers' Comp. Comm'n), 30 PERI ¶ 171, Case No. S-DE-14-128 (IL LRB-SP Jan. 13, 2014), appeal pending, No. 1-14-0388 (Ill. App. Ct., 1st Dist.). In again rejecting it, we incorporate the rationale articulated in those decisions. In rejecting the remainder of AFSCME's exceptions, we incorporate the rationale we set out in our prior decision in State of Ill., Dep't of Cent. Mgmt. Servs., 30 PERI ¶80, Cons. Case Nos. S-DE-14-005 etc. (IL LRB-SP Oct. 7, 2013), appeal

pending, No. 1-13-3454 (Ill. App. Ct., 1st Dist.), as well as the rationale articulated in the RDO. We note that the nature of the test for designations made pursuant to Section 6.1(b)(3) is binary and should require little to no analysis. Though we find that the ALJ ultimately determined correctly that the at-issue position is exempt from jurisdiction B of the Personnel Code, we note that the level of analysis required to reach that conclusion would have been unnecessary had the petitioner shown a greater attention to detail.

Finding that the designations comport with the requirements of Section 6.1, we 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/ Michael G. Coli  
Michael G. Coli, Member

/s/ Albert Washington  
Albert Washington, Member

**Member Brennwald, dissenting:**

I respectfully dissent. For the reasons articulated in the Board's decision in State of Ill., Dep't of Cent. Mgmt. Servs. (Ill. Commerce Comm'n), 30 PERI ¶83, Cons. Case Nos. S-DE-14-047, S-DE-14-083 and S-DE-14-086 (IL LRB-SP Oct. 15, 2013), appeals pending, Nos. 4-13-1022, 4-13-1023 and 4-13-1024 (Ill. App. Ct., 4th Dist.), and in the dissents in State of Ill., Dep't of Cent. Mgmt. Servs. (Various Agencies), 30 PERI ¶124, Cons. Case Nos. S-DE-14-092, S-DE-14-093 and S-DE-14-094 (IL LRB-SP Nov. 15, 2013), appeal pending, No. 1-13-3866 (Ill. App. Ct., 1st Dist.), and State of Ill., Dep't of Cent. Mgmt. Servs. (Workers' Comp. Comm'n), 30

PERI ¶ 171, Case No. S-DE-14-128 (IL LRB- SP Jan. 13, 2014), appeal pending, No. 1-14-0388 (Ill. App. Ct., 1st Dist.), I would find that the Governor lacks authority under Section 6.1 to designate for exclusion positions at the Illinois Commerce Commission.

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

Decision made at the State Panel's public meeting in Chicago, Illinois, on February 11, 2014; written decision issued at Springfield, Illinois, March 10, 2014.

**STATE OF ILLINOIS**  
**ILLINOIS LABOR RELATIONS BOARD**  
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State of Illinois, Department of Central	)	
Management Services, (Illinois Commerce	)	
Commission),	)	
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American Federation of State, County	)	
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	)	
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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 (Act). Three broad categories of positions may be so designated: (1) positions that were first certified to be in a bargaining unit by the Illinois Labor Relations Board (Board) on or after December 2, 2008; (2) positions that 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 that have never been certified to have been in a collective bargaining unit. Only 3,580 such positions may be so designated by the Governor, and of those, only 1,900 may be positions that have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, a position must fall into 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, an Agency General Counsel, Agency Chief of Staff, Agency Executive Director, Agency Deputy Director, Agency Fiscal

Officer, Agency Human Resources Director, Senior Public Service Administrator, Public Information Officer, or Chief Information Officer;

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

On January 10, 2014, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designation pursuant to Section 6.1 of the Act and Section 1300.50 of the Board's Rules. On January 21, 2014, AFSCME filed timely objections.

Based on my review of the designation, the documents submitted therewith, AFSCME's objections, and the arguments and documentation submitted in support of those objections, I have determined that AFSCME has failed to raise an issue that would require a hearing. Therefore, I find the designation to have been properly submitted and consistent with the requirements of Section 6.1 of the Act and I recommend that the Executive Director certify the designation of the position at issue in this matter as set out below and, to the extent necessary, amend any applicable certifications of exclusive representatives to eliminate any existing inclusion of this position within any collective bargaining unit.

#### **I. ISSUES AND CONTENTIONS**

The instant petition designates one position at the Illinois Commerce Commission (ICC) for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act. CMS states that this position qualifies for designation under Section 6(b)(3) because it is both Rutan-exempt and completely exempt from Jurisdiction B of the Personnel Code. CMS also states that this position is currently represented for the purposes of collective bargaining. In support of its contentions, CMS has provided the ICC's official description for this position. This description indicates that the position at issue is both Rutan-exempt and a "non-CMS" position.

AFSCME raises both general and specific objections to the instant designation. First, AFSCME argues the instant designation is improper because Section 6.1 does not authorize the Governor to designate employees at the ICC. Next, AFSCME alleges that CMS has failed to demonstrate the Jurisdiction B-exempt status of this position. Finally, AFSCME states that the instant designation violates due process and is arbitrary and capricious and that Section 6.1 is unconstitutional under several provisions of both the Illinois and United States Constitutions.<sup>2</sup>

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<sup>2</sup> AFSCME also alleges that the designated position does not meet the criteria for designation under Section 6.1(b)(5). AFSCME's perceived need to raise objections related to Section 6.1(b)(5) is understandable—while the Petition in this matter clearly indicates that Section 6.1(b)(3) is the basis for designation, CMS nonetheless

## **II. FINDINGS OF FACT**

The position designated by CMS is an employee of the ICC in the working title of Homeland Security Director in the Executive Director's Office. The position is currently represented by AFSCME for purposes of collective bargaining, as certified by the Board on May 14, 2010, Case No. S-RC-10-130.

At the time this designation was filed, the position at issue was held by Robert Bensko. Bensko reports to the Executive Director of the ICC, Jonathan Feipel. By affidavit, Feipel asserts that he is familiar with Bensko's duties and that the position description submitted by CMS fairly and accurately represents the duties Bensko is authorized to perform. This position's description recites that the position of Homeland Security Director is exempt from the requirements of Rutan and is a "non-CMS" position. According to this description, an employee in this position,

"[s]ubject to management approval, develops and implements a plan to coordinate the continuous collection and dissemination of information related to the security of Illinois public service infrastructure, including transportation and utilities. Analyzes and evaluates the likely consequences of disruption in service. Develops reports, studies, and recommendations for presentation to the Executive Director, Commissioners, and senior-level staff. Protects the security of related information."

The education and training required for this position includes a master's degree and a minimum of two years of experience in emergency preparedness and contingency planning in the facilities field or a bachelor's degree and a minimum of four years of related experience. The position also requires "[k]nowledge of and experience with current continuity planning techniques, technologies, and methodologies and ability to analyze and evaluate existing or propose emergency plans or procedures.

## **III. DISCUSSION AND ANALYSIS**

As stated above, a position is properly designatable, among other circumstances, if: (1) it was first certified to be in a collective bargaining unit 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). Additionally, it is presumed that any designation made by the Governor under Section 6.1 of the Act is properly made. 5 ILCS

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submitted an affidavit from the Executive Director of the ICC asserting that the position qualifies for designation under Section 6.1(b)(5). Despite this inconsistency, the designability of this position under Section 6.1(b)(5) is not at issue, and I will not address AFSCME's objections on the topic.

315/6.1(d) (2012). Rule 1300.60(d)(2)(A) permits an Administrative Law Judge (ALJ) to find that a designation is proper 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). Furthermore, the Board has held that the submission of position descriptions that are consistent with a designation, combined with the presumption under Section 6.1(d) and the absence of any evidence that the designation is inappropriate, leads to the conclusion that the designation comports with Section 6.1. State of Illinois, Department of Central Management Services (Department of Commerce and Economic Opportunity), 30 PERI ¶ 86 (IL LRB-SP 2013).

**A. CMS's submission is consistent with the designation.**

CMS's initial filing clearly indicates, and AFSCME does not contest, that the designated position was first certified in a bargaining unit on May 14, 2010, thus satisfying the first statutory requirement. As to the second statutory requirement, the submission clearly indicates, and AFSCME again does not contest, that the position of Homeland Security Director is designated as Rutan-exempt. Further, I conclude that the submission is consistent with CMS's assertion that the position is also Jurisdiction B-exempt.

The position description clearly indicates that the position of Homeland Security Director is a "non-CMS" position. CMS is authorized by statute to administer the Personnel Code (20 ILCS 415). 20 ILCS 415/3 (2012) and 20 ILCS 405/405-100 (2012). All employment positions in the service of the State are subject to the provisions of the Personnel Code, as administered by CMS, unless the Personnel Code or another statute provides that a position is exempt. 20 ILCS 415/4 (2012). The notation on the description that the position at issue is a "non-CMS" position thus suggests that the position is not subject to CMS's administration of the Personnel Code; AFSCME has proposed no contrary interpretation. This inference is further supported by the existence of a Personnel Code provision that exempts the technical and engineering staffs of the ICC from Jurisdictions A, B, and C. 20 ILCS 415/4c(12) (2012). The use of the adjective technical in Section 4c(12) suggests exempt positions exhibit a degree of specialization or require special or practical knowledge. See "technical" Merriam-Webster.com. 2014. <http://www.merriam-webster.com/dictionary/technical> (January 27, 2014). Nothing on the face of the position description, which describes the role of the Homeland Security Director as having special knowledge relating to emergency preparedness and contingency planning in the field and

the responsibility to evaluate the likely consequences of service disruption and make recommendations to the ICC Commissioners, Executive Director, and staff, is inconsistent with this reading of Section 4c(12). Therefore, I conclude that CMS's submission is consistent with its assertion that the position at issue is designable under Section 6.1(b)(3).

**B. AFSCME has raised no assertions that, if proven, might demonstrate that the designation is inappropriate.**

In its objections, AFSCME argues that the position at issue is not designable because: (1) the ICC is not a State agency directly responsible to the Governor, and its employees are thus not subject to designation under Section 6.1; and (2) CMS has failed to demonstrate that the position is fully exempt from Jurisdiction B of the Personnel Code.

AFSCME's first assertion is contrary to Board precedent. The Board has expressly found that the Governor is authorized to designate employees at agencies enumerated in Section 3.1 of the Executive Reorganization Implementation Act, 15 ILCS 15, which includes the ICC in a list of agencies to which the description of "agency directly responsible to the Governor" does not apply. State of Illinois, Department of Central Management Services (Various Agencies), Case No. S-DE-14-092 (IL LRB-SP November 15, 2013).

AFSCME's second assertion is likewise insufficient to require a hearing. It is important to note that AFSCME never disputes that the position at issue is fully exempt from Jurisdiction B of the Personnel Code; AFSCME merely asserts that there is no evidence beyond the "non-CMS" notation on the position description to indicate that the determination of this position's exempt status has been made or was made correctly. AFSCME states that failure to hold a hearing to adduce such evidence constitutes a denial of due process. However, as discussed above, the "non-CMS" notation and duties listed in the position description are consistent with Jurisdiction B-exempt status. Coupled with the presumption under Section 6.1(d) and AFSCME's own failure to produce any evidence that the position is not exempt from Jurisdiction B, I conclude that the instant designation is properly made. Furthermore, due process does not require a hearing where AFSCME has failed to raise assertions which, if proven at hearing, would result in a determination that the instant designation is not proper.

**C. AFSCME’s remaining objections do not warrant dismissal of the instant designation.**

In its remaining objections, AFSCME argues that Section 6.1 is unconstitutional under several provisions of the Illinois Constitution and the United States Constitution, and that the instant designation is arbitrary and capricious and violates due process.

AFSCME alleges that P.A. 97-1172 violates the separation of powers provisions of the Illinois Constitution, the guarantee of equal protection under the Illinois and United States Constitutions, and the impairment of contract prohibitions of both the Illinois and United States Constitutions. However, 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. 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 generally argues that the instant designation violates due process and is arbitrary and capricious because the position at issue has previously been certified into a bargaining unit by the Board, the position’s job duties and functions have not changed since its certification, and the position is covered by a collective bargaining agreement which CMS entered into subsequent to the enactment of Section 6.1. Though AFSCME explains the legal standards related to the requirement of due process at length, it fails to relate these standards back to the facts of the instant designation or the Gubernatorial designation process as a whole.<sup>3</sup> As such, the grounds for its objections on these issues are unclear. However, I note that an agency’s action is arbitrary and capricious only 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). Furthermore, an agency is bound to follow its own rules. State of Illinois, Department of Central Management Services (Illinois Commerce Commission) v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 771 (4th Dist. 2010). As noted above, the plain language of the statute permits the designation of a position that is both Rutan- and Jurisdiction B-exempt.

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<sup>3</sup> AFSCME does state more specifically that CMS’s submission does not provide notice of the basis for designation of the instant position under Section 6.1(b)(5). Because the position’s designability under Section 6.1(b)(5) is not at issue, I will not address this assertion.

Furthermore, AFSCME has raised no claim that the Board has failed to follow its own Rules regarding the instant designation. Therefore, it is not arbitrary for the Board to permit designation of the positions at issue because it is adhering to its own Rules and the plain language of the Act in doing so. As to the requirements of due process, adequate notice of a proposed governmental action and a meaningful opportunity to be heard are the fundamental prerequisites of due process. Peacock v. Bd. of Tr. of the Police Pension Fund, 395 Ill. App. 3d 644, 654 (1st Dist. 2009) (citing Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970)). AFSCME has not articulated how it has been deprived of either in this case.

**IV. CONCLUSION OF LAW**

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

**V. RECOMMENDED ORDER**

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

75421-31-10-000-30-01      Homeland Security Director

**VI. EXCEPTIONS**

Pursuant to Section 1300.90 and Section 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300, parties may file exceptions to the Administrative 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 28<sup>th</sup> day of January, 2014

STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
STATE PANEL

*/s/ Heather R. Sidwell*

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Heather R. Sidwell  
Administrative Law Judge