

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

State of Illinois, Department of Central Management Services (Department of Children & Family Services),)	
)	
Petitioner)	
)	
and)	Case No. S-DE-14-169
)	
American Federation of State, County and Municipal Employees, Council 31,)	
)	
Labor Organization-Objector)	
)	
Kathleen Anderson, Cynthia Brisbon, Erin Buhl, Johnetta Byers, Jennifer Cleveland, Daniel Davlantis, LaWhawn Eddings, Mary Jo Long, Marjorie Moore and Jacob Smith,)	
)	
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). On February 20, 2014, Administrative Law Judge Michelle Owen issued a Recommended Decision and Order (RDO) in Case No. S-DE-14-169, finding the designations comport with the requirements of Section 6.1. We agree with her assessment.

The petition at issue designated 44 Public Service Administrator (PSA) Option 8L positions at the Department of Children and Family Services. All were designated for exclusion pursuant to Section 6.1(b)(5) of the Act. Section 6.1(b)(5) allows designations of positions with “significant and independent discretionary authority.”¹

The American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections pursuant to Section 1300.60 of the Board’s rules for implementing Section 6.1 of the Act, 80 Ill. Admin. Code §1300.60, and so did 10 of the 44 Option 8Ls.² AFSCME raised general objections with respect to all the positions. It also raised specific objections with respect to 25 of the 44 positions.³

The ALJ determined that the objectors had failed to raise issues warranting a hearing, and, based on the documentary evidence and arguments, ultimately concluded that all the designations were proper. She declined to rule on AFSCME’s constitutional arguments, found its other generally applicable objections to be without merit, and found that the specific

¹ Section 6.1(c) defines that term:

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.

² Filing objections were Kathleen Anderson, Cynthia Brisbon, Erin Buhl, Johnetta Byers, Jennifer Cleveland, Daniel Davlantis, LaShawn Eddings, Mary Jo Long, Marjorie Moore and Jacob Smith. The working title for Brisbon is Supervisory Regional Counsel, that for Mary Jo Long is Legal Counsel, and the rest hold the working title of Litigation Attorney.

³ In addition to the positions held by individuals filing their own objections, AFSCME raised specific objections with respect to positions held by Lawrence Alberg, Bret Angelos, Susan Barker, Colleen Flaherty, Kelly Hancock, Brittany Hawkins, Rhonda Hawkins, Erin Knowles, Carol Melton, Stanley Mondala, Vanessa Peterson, Christina Schneider, Jeffrey Shore, Robin Sims-Powell, Beth Solomon, Jami Webster-Hall, Irvin Williamson, Michael Winkler and Faith Wynn Seals.

objections filed by both AFSCME and the individual employees failed to overcome the presumption under Section 6.1(d) that the designations were proper.

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, and so did Litigation Attorneys Jacob Smith and Daniel Davlantis. Based on our review of the exceptions, the record, and the RDO, we reject the exceptions and adopt the RDO. We specifically reject Davlantis' contention that the fact that our regulations require any hearing to take place within 14 days after the petition was filed binds the ALJ to issue a recommended decision and order within that same period in situations like this, where no issue has been raised warranting the holding of a hearing.

We also reject Davlantis' suggested interpretation of Section 6.1(c)(i). As previously noted, Section 6.1(c)(i) provides:

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

Davlantis interprets this language as establishing a single two-element test with alternative means of meeting the second element, as if it read:

- (i) is engaged in executive and management functions and
 - a. is charged with the effectuation of management policies and practices of a State agency or
 - b. represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency

Under this formulation, the employee would have to "engage in executive and management functions" in every instance, and Davlantis argues that element is not met in his case.

We have been interpreting (c)(i) as containing one test requiring both engagement in executive and management functions combined with being charged with the effectuation of

management policies, followed by a second stand-alone test merely requiring that the employee represent management interest by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.

- (i) a. (1) is engaged in executive and management functions and
(2) is charged with the effectuation of management policies and practices of a State agency or
- b. represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency

We have done so based on the legal landscape at the time Section 6.1(c)(i) was enacted and with reference to a simultaneous change to another section of the Illinois Public Labor Relations by Public Act 97-1172 that we find informs the proper interpretation of Section 6.1(c)(i).

At the time that Public Act 97-1182 passed, the legislature was no doubt aware of the two-part definition of a managerial employee that had existed in Section 3(j) of the Act for over 25 years:

“Managerial employee” means an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices.

It is obvious that, except for deletion of the word “predominantly,” the first two clauses of new Section 6.1(c)(i) track this existing statutory definition:

[1] is engaged in executive and management functions of a State agency and [2] charged with the effectuation of management policies and practices of a State agency or [3] represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency ...

The third clause nearly as clearly follows recent judicial precedent, more specifically an Appellate Court decision issued in December 2010 incorporating language from the U.S. Supreme Court. Dep’t of Cent. Mgmt. Servs./Ill. Commerce Commn. v. Ill. Labor Relations Bd., 406 Ill. App. 3d 766 (4th Dist. 2010) (citing National Labor Relations Bd. v. Yeshiva Univ., 444

U.S. 672 (1980)). The same language was added to a portion of Section 3(j) applicable to employees of constitutional officers other than the Governor, and in that context is clearly intended to be a stand-alone test. In fact, this amendment to Section 3(j) places the word “or” between the first two clauses of what had been the two-part definition of a managerial employee, and adds the third clause again prefaced by the word “or” such that it creates three, one-element tests:

With respect only to State employees in positions under the jurisdiction of the Attorney General, Secretary of State, Comptroller, or Treasurer (i) that were certified in a bargaining unit on or after December 2, 2008, (ii) for which a petition is filed with the Illinois Public Labor Relations Board on or after April 5, 2013 (the effective date of Public Act 97-1172), or (iii) for which a petition is pending before the Illinois Public Labor Relations Board on that date, “managerial employee” means an individual who is engaged in executive and management functions **or** who is charged with the effectuation of management policies and practices **or** who represents management interests by taking or recommending discretionary actions that effectively control or implement policy.

5 ILCS 315/3(j) (2012) (emphasis added).

Within this portion of Section 3(j), the clause reading “who represents management interests by taking or recommending discretionary actions that effectively control or implement policy” has to be a stand-alone test. In using the same language in new Section 6.1(c)(i), we assume the legislature intended the same. Davlantis complains that our analysis ignores years of precedent, but in passing Public Act 97-1182 it was clearly the intent of the legislature to change things, and we find our interpretation of Section 6.1(c)(i) reflects the change intended.

We conclude that the designations comport with the requirements of Section 6.1, and for that reason 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/ 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 March 11, 2014;
written decision issued at Springfield, Illinois, March 17, 2014.

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, 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

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

I. PETITION

On January 14, 2014, 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. The petition designates 44 Public Service Administrator (PSA), Option 8L positions at the Department of Children and Family Services (DCFS) for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act. The petition indicates that all of the positions qualify for designation under Section 6.1(b)(5). The petition indicates that the positions were certified on August 3, 2010 in Case No. S-RC-10-146.

In support of its petition, CMS provided position descriptions (CMS-104s) for each position and affidavits from individuals who supervise the listed positions. CMS also provided documentation identifying the position number, title, name of incumbent, bargaining unit, certification date and case number, statutory category that serves as the basis for the exemption, and a list of the job duties that support the presumption that the position is supervisory and/or managerial.

II. OBJECTIONS

On January 16, 2014, Kathleen Anderson, Erin Buhl, Johnetta Byers, Jennifer Cleveland, LaShawn Eddings, and Marjorie Moore, employees in designated positions, filed objections to the exclusion of their positions from collective bargaining rights. On January 22, 2014, Cynthia Brisbon and Jacob Smith, employees in designated positions, filed objections to the exclusion of their positions from collective bargaining rights. On January 24, 2014, Daniel Davlantis, an

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.

employee in a designated position, filed an objection to the exclusion of his position from collective bargaining rights. On January 27, 2014, Mary Jo Long, an employee in a designated position, filed an objection to the exclusion of her position from collective bargaining rights.² All of the individual objectors included personal statements with attachments.

On January 24, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to the exclusion of all 44 positions. In support of its objections, AFSCME provided affidavits from Tracy Abman, the Director of Organizing for AFSCME, and information forms completed by Lawrence Alberg, Bret Angelos, Susan Barker, Cynthia Brisbon, Jennifer Clark, Daniel Davlantis, LaShawn Eddings, Colleen Flaherty, Kelly Hancock, Brittany Hawkins, Rhonda Hawkins, Erin Knowles, Carol Melton, Stanley Mondala, Vanessa Peterson, Christina Schneider, Jeffrey Shore, Robin Sims-Powell, Jacob Smith, Levander Smith, Beth Solomon, Jami Webster-Hall, Irvin Williamson, Michael Winkler, and Faith Wynn Seals.

AFSCME generally objects to the petition arguing that Section 6.1 of the Act violates due process, the separation of powers doctrine of the Illinois Constitution, equal protection under Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments of the United States Constitution, and the prohibition against impairment of contracts of the Illinois Constitution.

AFSCME next objects to the petition arguing that the designated positions are not managerial under decisions of the National Labor Relations Board. AFSCME further objects to the use of position descriptions to support the petitions and to the allocation of the burden of proof. AFSCME asserts that the evidence submitted by CMS in the form of position descriptions, organizational charts, and affidavits merely acknowledges the position's potential responsibilities. Likewise, AFSCME argues that CMS has failed to provide specific evidence that the positions at issue have actual authority to perform the listed job duties. As such, AFSCME argues that the employees in the positions at issue were never informed of their significant and independent discretionary authority to perform supervisory or managerial functions and CMS has not met its burden of demonstrating that the positions possess the requisite significant and independent discretionary authority. In addition, AFSCME argues that

² On January 28, 2014, I extended the date for filing objections to January 29, 2014.

the positions at issue are professional and not managerial. AFSCME also maintains that to the extent the affidavits state an employee at issue effectuates policies or is authorized to effectuate policy, and the position description does not define a policy, there can be no showing that the employee is managerial, and the burden is on CMS to show why different duties should not apply to others holding the same title. Therefore, AFSCME maintains that the positions at issue are neither supervisory nor managerial within the meaning of Section 6.1 of the Act.

AFSCME specifically objects to the positions held by Lawrence Alberg, Bret Angelos, Susan Barker, Cynthia Brisbon, Jennifer Clark, Daniel Davlantis, LaShawn Eddings, Colleen Flaherty, Kelly Hancock, Brittany Hawkins, Rhonda Hawkins, Erin Knowles, Carol Melton, Stanley Mondala, Vanessa Peterson, Christina Schneider, Jeffrey Shore, Robin Sims-Powell, Jacob Smith, Levander Smith, Beth Solomon, Jami Webster-Hall, Irvin Williamson, Michael Winkler, and Faith Wynn Seals. AFSCME provided written statements as evidence in support of the conclusion that the positions at issue are not managerial or supervisory within the meaning of the Act. AFSCME asserts that there is a high likelihood that all the position descriptions are inaccurate because specific individuals identified inaccuracies in their own position descriptions. On that basis, AFSCME asserts that the Board should order a hearing on all positions at issue because to decline to do so would compel speech in violation of the First Amendment. As noted above, Kathleen Anderson, Cynthia Brisbon, Erin Buhl, Johnetta Byers, Jennifer Cleveland, Daniel Davlantis, LaShawn Eddings, Mary Jo Long, Marjorie Moore, and Jacob Smith also filed individual objections.

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

III. DISCUSSION

A. Constitutional 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 violated provisions of the United States and Illinois constitutions." State of Ill., Dep't of Cent. Mgmt. Servs., 30 PERI ¶ 80 (IL LRB-SP 2013), citing Goodman v. Ward, 241 Ill. 2d 398, 411 (2011) ("Administrative agencies . . . have no authority to declare statutes unconstitutional or even to question their validity. [citations omitted] When they do so, their actions are a nullity and cannot be upheld.") Thus, AFSCME's constitutional arguments are not addressed in this decision.³

B. Non-Constitutional General Objections

AFSCME objects that the positions at issue are not those of managers within the definition used by the National Labor Relations Board. However, the Board has specifically rejected AFSCME's argument that the Board should look first to NLRB precedent in interpreting Section 6.1(c)(i). State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Commerce and Econ. Opportunity), 30 PERI ¶ 86 (IL LRB-SP 2013) ("To the extent precedent is relevant to interpretation of Section 6.1(c)(i), we look first to precedent established by Illinois courts, this Board, and where relevant the Illinois Educational Labor Relations Board, then to federal precedent interpreting similarly worded provisions of the NLRA.")

AFSCME's remaining general objections are without merit and do not raise issues of fact or law that might rebut the presumption that the designations have been properly made. First, the Board has previously rejected AFSCME's objections concerning the statutorily-mandated presumption, the burden of proof, and the manner in which ALJs have applied them. State of Ill., Dep't of Cent. Mgmt. Servs., 30 PERI ¶ 80 (IL LRB-SP 2013) ("Submission of position descriptions that are consistent with the designation made, combined with the presumption of appropriateness, and in the absence of any contrary evidence from objectors like AFSCME that might demonstrate that the designation is inappropriate, leads to the conclusion that the designation comports with the requirements of Section 6.1.") AFSCME's arguments regarding

³ Davlantis' objection also asserted that Section 6.1 violates equal protection and that the Act's "cut off" date" of December 2, 2008, is arbitrary and capricious and not rationally related to a legitimate governmental interest. Davlantis noted that the Board is not empowered to adjudicate the issue, and the issue was being merely raised to preserve the issue.

the use of position descriptions, organizational charts, and affidavits to support the petition; the burden of proof; and CMS' failure to provide specific evidence that the positions at issue have actual authority to perform the listed job duties must be rejected because these arguments ignore the presumption and misallocate the burden, which is on AFSCME, not CMS.

The Board has also rejected AFSCME's objections relating to the distinction between managerial and professional status. Dep't of Commerce & Econ. Opportunity, 30 PERI ¶ 86. The terms managerial and professional are not mutually exclusive and "there certainly is no exception for professional employees in the language of Section 3(c)(i) [sic]." Id. Accordingly, the Board has held that a position may be appropriately designated for exclusion if it meets one of the two alternative tests set out in Section 6.1(c)(i), regardless of whether the position is also professional, and even if the position fails to meet the definition of a managerial employee in Section 3(j) of the Act. Id.

In sum, AFSCME's general objections do not raise issues of fact or law that might rebut the presumption that the designations were properly made.

C. Designation under Section 6.1(b)(5)

A position is properly designable under Section 6.1(b)(5) if it authorizes an employee in that position to have "significant and independent discretionary authority as an employee." The Act provides two tests in Section 6.1(c)(i) and one test in Section 6.1(c)(ii) by which a person can be found to have "significant and independent discretionary authority."⁴

The first test in Section 6.1(c)(i) is substantively similar to the traditional test for managerial status articulated in Section 3(j). Section 6.1(c)(i) provides that a position authorizes an employee to have significant and independent discretionary authority if he or she "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." Though similar to the Act's general definition of a managerial employee in Section 3(j), the Section 6.1(c)(i) definition is broader in that it does not include a predominance requirement 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 or she

⁴ I ultimately find that the employees in the designated positions qualify for exclusion under Section 6.1(c)(i). Thus, it is unnecessary to examine whether the employees also qualify for exclusion under Section 6.1(c)(ii).

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 of Cent. Mgmt. Servs. (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 379, 387 (1st Dist. 2004); State of Ill., Dep't of Cent. Mgmt. Servs. (Healthcare & Family Servs.), 23 PERI ¶ 173 (IL LRB-SP 2007). However, in order to meet the first test set out in Section 6.1(c)(i), a position holder need not develop the means and methods of reaching policy objectives. It is sufficient if the position holder is charged with carrying out the policy in order to meet its objectives.

The test in Section 6.1(c)(i) 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. Servs. (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.” Healthcare & Family Servs., 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 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) also relates to the traditional test for managerial status by reflecting the manner in which the courts have interpreted that test. A designation is proper under this test if the position holder “represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.” The Illinois Appellate Court has observed that the definition of a managerial employee in Section 3(j) is very similar to the definition of managerial employee set out in the Supreme Court’s decision in National Labor Relations Board v. Yeshiva University, 444 U.S. 672 (1980). Dep't of Cent. Mgmt. Servs./Ill. Commerce Comm'n v. Ill. Labor Rel. Bd., 406 Ill. App. 766, 776 (4th Dist. 2010), citing Yeshiva, 444 U.S. at 683. Further, the Appellate Court noted that the ILLRB, like its federal counterpart, “incorporated ‘effective recommendation’ into its interpretation of the term ‘managerial employee.’” ICC, 406 Ill. App. at 776. Indeed, the Court

emphasized that “the concept of effective recommendations . . . [set forth in Yeshiva] applies with equal force to the managerial exclusion under the Illinois statute.” Id. In light of this analysis, the second test under Section 6.1(c)(i) is similar to the expanded traditional test of Section 3(j) because the second test is virtually identical to the statement of law in Yeshiva, which the Illinois Appellate Court and the Illinois Supreme Court have incorporated into the traditional managerial test. Id., quoting Chief Judge of the Sixteenth Judicial Circuit v. Ill. State Labor Rel. Bd., 178 Ill. 2d 333, 339-40 (1997). However, “Section 6.1(c)(i) does not require that an employee engage in policy making; rather it allows designation if the employee merely takes discretionary action that effectively implements agency policy.” Ill. Dep’t of Cent. Mgmt. Servs. (Dep’t of Commerce & Econ. Opportunity), 30 PERI ¶ 163 (IL LRB-SP 2014).

1. Lawrence Alberg, Kathleen Anderson, Erin Buhl, Johnetta Byers, Jennifer Cleveland, Daniel Davlantis, LaShawn Eddings, Carol Melton, Marjorie Moore, Jacob Smith, Michael Winkler

Anderson, Buhl, Byers, Cleveland, Davlantis, Eddings, Melton, Moore, Smith, and Winkler are Litigation Attorneys with the Office of Legal Services’ Administrative Hearings Litigation Unit. Alberg is a Senior Litigation Attorney with the Unit.

The Abused and Neglected Child Reporting Act (ANCRA) gives alleged perpetrators of indicated child abuse/neglect reports the right to a hearing with DCFS seeking to amend or expunge DCFS’ record of an indicated report. An indicated report means a report made under the ANCRA for which an investigation determines that credible evidence of the alleged abuse or neglect exists. An unfounded report means a report made under the ANCRA for which it is determined after an investigation that no credible evidence of abuse or neglect exists.

According to the CMS-104s submitted, these eleven positions present evidence on behalf of DCFS at administrative hearings and service appeals, including examining and cross-examining witnesses; argue facts and points of law and present and argue pre-hearing and post-hearing motions and other legal pleadings, both orally and by written brief, in consultation with the Assistant Deputy General Counsel; prepare and file written exceptions to decisions of administrative law judges; prepare case files for use by the Attorney General’s Office in post-administrative proceedings in federal and state court; and evaluate cases involving clients where DCFS is seeking expunction or indication to determine if they meet statutory and DCFS rule

requirements, and consult with and give direction to DCFS staff regarding what evidence is necessary to meet statutory and DCFS rule requirements for such actions.

CMS contends that these employees are charged with effectuating agency policy and representing the agency's best interest when evaluating, preparing, and presenting evidence at child welfare administrative hearings and service appeals. CMS also maintains that these employees are authorized to represent agency interests by arguing motions and other legal pleadings as required.⁵

AFSCME and the designated employees maintain that their job duties are highly circumscribed by established laws, rules, procedures, and policies that have been previously formulated and implemented without their input. They argue that they do not have any independent discretion to change an indicated report to an unfounded report when they believe there is not enough evidence to meet DCFS's burden at the administrative hearing. They contend that they do not have any discretion to add or remove allegations in a case when they believe the evidence supports doing so. They also maintain that they do not have any discretion in implementing DCFS policies; do not oversee any department, division, or unit; play no role in the budget process; do not write any policy or recommend the adoption of any policies; do not have authority to decide how policies or legislation will be implemented; and do not recommend any actions that control or implement legislation that affects policy.

Alberg, Anderson, Buhl, Byers, Cleveland, Davlantis, Eddings, Melton, Moore, Smith, and Winkler are authorized to have significant and independent discretionary authority because they are authorized to take discretionary action that effectively implements agency policy by acting on behalf of DCFS when they evaluate cases to determine if they meet statutory and DCFS rule requirements and consult with and give direction to DCFS staff regarding what evidence is necessary to meet statutory and DCFS rule requirements for such actions. As noted, Section 6.1(c)(i) allows designation of a position where an employee merely takes discretionary action that effectively implements agency policy. Dep't of Commerce & Econ. Opportunity, 30

⁵ CMS also argues that Alberg, Barker, Brisbon, Clark, Flaherty, Hancock, B. Hawkins, R. Hawkins, Mondala, Peterson, Schneider, Shore, Sims-Powell, Smith, Webster-Hall, Williamson, and Wynn Seals are authorized to, among other things, assign, responsibly direct, and review the work of their subordinates with independent judgment; assign and review work, counsel staff regarding work performance, take corrective action, monitor work flow, and reassign staff to meet day to day operating needs. As stated, I have determined that these employees satisfy the test for exclusion under Section 6.1(c)(i), and therefore there is no need to determine if they also satisfy the test under Section 6.1(c)(ii).

PERI ¶ 163. Although these positions may be largely circumscribed by rules, procedures, and policies, the employees and AFSCME have failed to show that the positions do not exercise significant and independent discretionary authority when they represent DCFS at administrative hearings. Thus, the designation of these positions is proper.

2. Mary Jo Long

Long is a Legal Counsel in DCFS' Office of the Guardian. Her position description states that she provides legal counsel and guidance in matters of policy, rules, legislation, regulations, and procedures of DCFS and the Office of the Guardian regarding all areas of child welfare, child abuse, neglect, adoption, foster care, and consents; monitors; plans and conducts legal research on issues affecting DCFS, specifically those which have a direct impact on the Office of Guardian; prepares opinions based on research; reviews and critiques proposed legislation and provides input into the conceptualization and drafting of new and amendatory legislation affecting DCFS and the Office of the Guardian; and performs legal review and analysis of existing and proposed programmatic and administrative policy and procedures to ensure compliance with state and federal law and legal consistency in planning and policy.

CMS contends that as legal Counsel, Long is charged with effectuating agency policy and representing the agency's best interest when providing legal counsel to the DCFS Guardian and Assistant Guardian.

Long asserts that she does not write policies or recommend the adoption of policies; play any role in the budget process; have the authority to decide how policies or legislation will be implemented; or recommend any actions that control or implement legislation that affects her agency or agency policy.

Long is authorized to have significant and independent discretionary authority because she is authorized to take or recommend discretionary action that effectively implements or controls agency policy by reviewing and critiquing proposed legislation and providing input into the conceptualization and drafting of legislation affecting DCFS and the Office of the Guardian. Further, the Board has held that duties that are typical of in-house attorneys, which would not be sufficient to justify exclusion under Section 3(j) of the Act, are sufficient to justify exclusion under Section 6.1(c)(i), which "sweeps broader." Ill. Dep't of Cent. Mgmt. Servs. (Illinois Gaming Bd.), 30 PERI ¶ 167 (IL LRB-SP 2014). Thus, the designation of her position is proper.

3. Vanessa Peterson

Peterson is an Attorney/Investigator in the Office of Affirmative Action. She reviews civil rights discrimination complaints; responds to inquiries regarding Office of Affirmative Action operations and process; reviews and advises on legal orders, decrees, and judgments; provides counsel and mediation to employees and clients regarding alleged civil rights discrimination complaints; and completes investigation fact finding reports. Her position description states that she develops and formulates statewide policies, procedures, and programs; provides input into the overall planning, development, and coordination of activities of the Affirmative Action Program, particularly those involving human rights and affirmative action investigations; provides legal analysis and consultation to the Chief of Affirmative Action regarding investigations and other Affirmative Action and Departmental activities; serves as spokesperson for the Chief in his/her absence, or as directed, regarding issues related to Affirmative Action; composes a variety of special reports on the adequacy and efficiency of operations; develops, implements, analyzes, and evaluates research and initiatives designed to affect operational practice; develops statewide guidelines based on findings; establishes and maintains contact with high level staff who work directly with the Director's Office; administers and conducts sensitive, complex investigations and reviews of civil rights complaints alleging discrimination; conducts interviews of complainants and employers; gathers, reviews, and analyzes information; advises the Chief of findings and makes recommendations for appropriate action; conducts civil rights/sexual harassment training sessions on an agency-wide basis; conducts audits of Affirmative Action Plans for agency contractors; and makes recommendations to ensure contractor compliance with guidelines, policies, rules, and regulations.

CMS contends that she is charged with effectuating DCFS policies and practices when providing legal advice and by managing programs and subordinate staff engaged in conducting investigations and reviews of civil rights complaints.

Peterson maintains that the position description that CMS provided is not the most current position description for her position. However, Peterson did not provide an updated position description. Peterson also did not dispute that she advises the Chief of Affirmative Action regarding investigation findings and makes recommendations for appropriate action and makes recommendations to ensure contractor compliance with guidelines, policies, rules, and

regulations. The objections fail to show that Peterson does not represent management interests by taking or recommending discretionary actions that effectively control or implement DCFS policy when she makes these recommendations. Thus, the designation of her position is proper.

4. Beth Solomon

Solomon is an Associate General Counsel in the Office of Legal Services. Her main duties involve providing legal research, analysis, advice and consultation on federal litigation; serving as a liaison with the Attorney General's Office and assisting in the defense of civil litigation in which DCFS and DCFS employees have been named as defendants. She also monitors compliance with various consent decrees and advises DCFS staff on the specific requirements of the consent decrees. She also provides advice and counsel regarding litigation strategies and various aspects of litigation.

CMS argues that Solomon is charged with effectuating agency policy and representing the agency's best interest when identifying legal strategies or risks and serving as a Special Assistant Attorney General, representing the agency in federal lawsuits.

Solomon maintains that she has no authority to decide how policies or legislation will be implemented. However, she admits that she may provide advice and counsel to other DCFS staff regarding the legal requirements of court orders, state law, and/or federal law. She contends that the decision on whether or not to follow that advice is made by the individual DCFS employee. Solomon also asserts that she may recommend actions that need to be taken in response to court rulings that could impact the agency or agency actions. She admits that, to the extent that litigation may involve allegations that DCFS or DCFS employees failed to comply with a particular statute, she may recommend, in the context of the litigation, specific actions to be taken. She contends that as an attorney, she only has the ability to make the recommendation to the client, who has the ultimate authority to make a decision to follow or disregard her recommendations.

Solomon is authorized to have significant and independent discretionary authority because she is authorized to take or recommend discretionary action that effectively implements or controls agency policy by monitoring compliance with consent decrees, and recommending actions to be taken in response to court rulings that could impact DCFS. Thus, the designation of her position is proper.

5. Bret Angelos

Angelos is a Special Assistant General Counsel in the Office of Legal Services. He researches legal issues based on assignments from his supervisor, DCFS General Counsel. He is assigned to work groups that focus on issues facing DCFS. He also handles the processing and coordinates responses related to Freedom of Information Act requests. Angelos maintains that ultimately, the DCFS Deputy Director of Communications is responsible for all outgoing FOIA responses. On all, but the most routine responses, he asserts that he must get approval from the Deputy Director of Communications or the DCFS General Counsel or both prior to the response being issued.

Angelos maintains that he is given assignments to make recommendations to the DCFS General Counsel, who has final approval on any official DCFS legal opinions. He asserts that if he is in a work group considering a policy, the group makes a recommendation to the Deputy Director of Child and Family Policy and then the DCFS Director has final approval. He asserts that he does not recommend any actions that control or implement legislation that affect DCFS or DCFS policy, but is sometimes asked to analyze and make a recommendation to the DCFS General Counsel on how legislation would affect DCFS. However, he asserts that the final opinion always comes from the General Counsel.

CMS argues that Angelos is charged with effectuating agency policy and representing the agency's best interest when providing legal advice and counsel to professional staff and the Deputy Director of Communications. CMS also maintains that Angelos is authorized to represent agency interests by directing and coordinating activities related to FOIA.

Angelos is authorized to have significant and independent discretionary authority because he is authorized to take or recommend discretionary action that effectively implement or control agency policy by making recommendations to the DCFS General Counsel on how legislation may affect DCFS. Thus, the designation of his position is proper.

6. Erin Knowles

Knowles is a Special Assistant to the General Counsel in the Office of Legal Services. Knowles drafts intergovernmental agreements between DCFS and other state agencies, as well as memoranda of understanding between DCFS and outside entities. She also works with the DCFS' Division of Licensing to determine the application of licensing rules.

Knowles asserts that in her position she is bound to follow statutes, rules, and procedures, and thus does not act with independent discretion. Knowles contends that she does not decide what will be included in agreements and memoranda of understanding, other than ensuring that DCFS is complying with confidentiality agreements. She maintains that she reviews policies and rules, but asserts that her review is merely technical. She admits that she drafts legislation, but maintains that she simply uses her professional expertise to draft what is being asked of her and to ensure that the language works within the current statute. She also asserts that she has no authority to draft language without her supervisor's approval.

CMS argues that she is charged with effectuating agency policy and representing the agency's best interest when providing legal advice and counsel to the central office staff. Further, CMS asserts that she is authorized to represent agency interest in reviewing and analyzing proposed legislation.

Knowles is authorized to have significant and independent discretionary authority because she is authorized to take discretionary action that effectively implements agency policy by reviewing and analyzing proposed legislation. Regardless of whether Knowles must obtain her supervisor's approval on draft language, the Act does not require a person to exercise exclusive authority in the effectuation of management policies. Thus, the designation of her position is proper.

7. Susan Barker, Cynthia Brisbon, Jennifer Clark, Brittany Hawkins, Rhonda Hawkins, Stanley Mondola, Jeffrey Shore, Robin Sims-Powell, Levander Smith, Jami Webster-Hall, Irvin Williamson, Faith Wynn Seals

These twelve employees hold the position of Supervisory Regional Counsel for their respective regions. They represent DCFS at hearings in the Juvenile Courts of their assigned counties, appear in court, provide advice and legal counsel to regional administrative staff, conduct technical legal screening, and serve as agency liaisons to the judiciary, the State's Attorney Office, and the Attorney General's Office. They also advise their supervisors of pertinent developments and emergency situations in their regions.

CMS argues that these employees are authorized to effectuate department policy and represent management interests when representing the department by appearing in court in complex or high profile cases and providing legal advice and counsel to regional management staff.

The employees maintain that they do not do any of the following: oversee any department, division, or unit; write policies; recommend the adoption of policies; have authority to decide how policies or legislation will be implemented; recommend any actions that control or implement legislation that affect DCFS or its policies; or play any role in the budget process.

These employees are authorized to have significant and independent discretionary authority because they are authorized to take discretionary action that effectively implements agency policy by serving as agency liaisons to the judiciary, the State's Attorney Office, and the Attorney General's Office. Further, some of their duties are typical of in-house attorneys, which would not be sufficient to justify exclusion under Section 3(j) of the Act, but is sufficient to justify exclusion under Section 6.1(c)(i), which "sweeps broader." Gaming Bd., 30 PERI ¶ 167. Thus, the designation of their positions is proper.

8. Kelly Hancock

Hancock is a Legal Advisor for the Office of Legal Services. She provides legal advice and counsel to agency administrators, supervisors, and staff; reviews requests for attorney representation at administrative hearings; represents DCFS in court and administrative proceedings; and serves on committees and work groups.

CMS argues that she is authorized to effectuate department policy and represent agency interests when providing advice and counsel to Department staff, and in consideration of reviewing requests for attorney representation at administrative hearings.

Hancock asserts that she does not do any of the following: oversee any department, division, or unit; write policies or recommend the adoption of policies; play a role in the budget process; have authority to decide how policies or legislation will be implemented; or recommend any actions that control or effectively implement legislation that affects DCFS or DCFS policy.

Hancock is authorized to have significant and independent discretionary authority because she is authorized to take or recommend discretionary actions that effectively implement or control agency policy by providing legal advice and counsel to agency administrators, supervisors, and staff. As previously stated, duties that are typical of an in-house attorney, which would not be sufficient to justify exclusion under Section 3(j) of the Act, are sufficient to justify exclusion under Section 6.1(c)(i). Gaming Bd., 30 PERI ¶ 167. Thus, the designation of her position is proper.

9. Colleen Flaherty

Flaherty is a Supervisory Regional Counsel. She represents DCFS in cases involving child abuse and neglect. She also represents DCFS in service appeals and expungement hearings. Her position description states that she provides advice and legal counsel to all levels of staff; plans, directs, and conducts technical legal screening on complicated or difficult cases and provides consultation to caseworkers and supervisors; serves as agency liaison to the judiciary, State's Attorney's Offices, and the Attorney General's Office, and provides technical assistance to court liaison staff.

CMS argues that Flaherty is authorized to effectuate department policy and represent management interests when representing the department by appearing in court in complex or high profile cases and providing legal advice and counsel to regional management staff.

Flaherty maintains that she does not have significant independent authority to alter the legal position of DCFS. She maintains that she does not do any of the following: oversee any department, division, or unit; write policies or recommend the adoption of policies; play a role in the budget process; have authority to decide how policies or legislation will be implemented; or recommend any actions that control or effectively implement legislation that affects DCFS or DCFS policy.

Flaherty is authorized to have significant and independent discretionary authority because she is authorized to take or recommend discretionary action that effectively implements or controls agency policy by serving as agency liaison to the judiciary, the State's Attorney's Office, and the Attorney General's Office. Further, some of her duties are typical of an in-house attorney, which would not be sufficient to justify exclusion under Section 3(j) of the Act, but is sufficient to justify exclusion under Section 6.1(c)(i). Gaming Bd., 30 PERI ¶ 167. Thus, the designation of her position is proper.

10. Christina Schneider

Schneider is a Special Assistant General Counsel. She handles adoption and guardianship related issues for DCFS including coordinating legal screenings for permanency, conducting legal consultation and problem solving on individual adoption and guardianship related cases, and engaging in general child welfare related legal consultation. She also oversees and manages the DCFS Statewide Adoption Attorney Panel. She determines who can be on the

panel, and when necessary, she makes recommendations to the General Counsel regarding removal of attorneys from the Panel. She is also the Program Manager for two DCFS contracts with an outside entity. She participates in work groups/committees, which draft policies, rules, procedures, and occasional legislation related to adoption and permanency. The recommendations are submitted to her supervisor and the General Counsel, and they are usually accepted, although they are often revised by additional DCFS staff before finalization and completion. Schneider admits that she makes recommendations to the General Counsel on adoption and permanency related matters and the recommendations are generally approved.

Schneider is authorized to have significant and independent discretionary authority because she is authorized to take or recommend discretionary action that effectively implements or controls agency policy by overseeing the Adoption Attorney Panel; recommending attorneys for removal from the Attorney Adoption Panel; and drafting policies, rules, procedures, and legislation related to adoption and permanency. Thus, the designation of her position is proper.

11. 13 remaining positions

CMS' designation of the 13 remaining positions is proper because the designations are presumed to be properly made and no specific evidence has been introduced by AFSCME or incumbent employees to suggest that the positions at issue do not have "significant and independent discretionary authority as an employee." AFSCME has not raised issues of fact for hearing simply by asserting that the position descriptions are inaccurate because AFSCME has not specifically identified any such alleged inaccuracies. State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Revenue), 30 PERI ¶ 110 (IL LRB-SP 2013) (general statement that position description is inaccurate does not raise issues of fact for hearing). Since no evidence was provided that contradicts the positions' job duties and responsibilities, AFSCME has failed to raise an issue that overcomes the presumption that the designation of these 13 positions is proper. As such, there is no evidence that the positions do not have significant independent and discretionary authority when performing the tasks set forth in the position descriptions. Thus, CMS properly designated these positions.

IV. CONCLUSION OF LAW

The Governor's designations in this case were 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 positions with the Department of Children and Family Services are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

PSA, Opt.	Position Number	Name of Incumbent	Working Title
8L	37015-16-00-310-20-01	Vacant	Counsel, Office of Legislative Affairs
8L	37015-16-03-000-01-04	Anmarie Brandenburg	Special Assistant General Counsel
8L	37015-16-03-000-11-02	Beth Solomon	Associate General Counsel
8L	37015-16-03-000-20-01	Bret Angelos	Special Assistant General Counsel
8L	37015-16-03-070-00-01	Erin Knowles	Special Assistant to the General Counsel
8L	37015-16-03-110-37-01	Irvin Williamson	Supervisory Regional Counsel
8L	37015-16-03-110-37-02	Levander Smith	Supervisory Regional Counsel
8L	37015-16-03-110-38-01	Jeffrey Shore	Supervisory Regional Counsel
8L	37015-16-03-112-31-02	Cynthia Brisbon	Supervisory Regional Counsel
8L	37015-16-03-112-33-01	Deborah Stone-Zinke	Supervisory Regional Counsel
8L	37015-16-03-112-33-02	Karen Wilkerson	Supervisory Regional Counsel
8L	37015-16-03-112-33-03	Vacant	Supervisory Regional Counsel
8L	37015-16-03-112-33-05	Susan Barker	Supervisory Regional Counsel
8L	37015-16-03-130-32-01	Jami Webster-Hall	Supervisory Regional Counsel
8L	37015-16-03-130-35-01	Brittany Hawkins	Supervisory Regional Counsel
8L	37015-16-03-130-36-01	Jennifer Clark	Supervisory Regional Counsel
8L	37015-16-03-130-35-02	Vacant	Supervisory Regional Counsel
8L	37015-16-03-200-05-01	Robin Sims-Powell	Supervisory Regional

			Counsel
8L	37015-16-03-200-10-01	Vacant	Senior Supervisory Regional Counsel
8L	37015-16-03-200-20-01	Colleen Flaherty	Supervisory Regional Counsel
8L	37015-16-03-200-30-01	Christina Schneider	Supervisory Regional Counsel
8L	37015-16-03-200-47-03	Faith Wynn Seals	Supervisory Regional Counsel
8L	37015-16-03-200-48-02	Stanley Mondala	Supervisory Regional Counsel
8L	37015-16-03-200-49-03	Rhonda Hawkins	Supervisory Regional Counsel
8L	37015-16-03-200-60-01	vacant	Supervisory Regional Counsel
8L	37015-16-03-200-80-01	Kelly Hancock	Legal Advisor
8L	37015-16-03-300-10-01	Johnetta Byers	Litigation Attorney
8L	37015-16-03-300-20-01	Vacant	Litigation Attorney
8L	37015-16-03-300-30-01	Laurie Sikorski	Litigation Attorney
8L	37015-16-03-300-40-01	Kathleen Anderson	Litigation Attorney
8L	37015-16-03-300-50-01	vacant	Litigation Attorney
8L	37015-16-03-300-60-01	Carol Melton	Litigation Attorney
8L	37015-16-03-300-70-01	Rachel Diamond	Litigation Attorney
8L	37015-16-03-310-00-01	LaShawn Eddings	Litigation Attorney
8L	37015-16-03-320-00-01	Jacob Smith	Litigation Attorney
8L	37015-16-03-330-00-01	Jennifer Cleveland	Litigation Attorney
8L	37015-16-03-340-00-01	Lawrence Alberg	Litigation Attorney
8L	37015-16-03-350-00-01	Daniel Davlantis	Litigation Attorney
8L	37015-16-03-360-00-01	Marjorie Moore	Litigation Attorney
8L	37015-16-03-370-00-01	vacant	Litigation Attorney
8L	37015-16-03-380-00-01	Erin Buhl	Litigation Attorney
8L	37015-16-03-390-00-01	Michael Winkler	Litigation Attorney
8L	37015-16-05-100-00-01	Vanessa Peterson	Affirmative Action Legal Counsel/Investigations Administrator
8L	37015-16-24-400-10-01	Mary Jo Long	Legal Counsel

VI. EXCEPTIONS

Pursuant to Section 1300.90 and Section 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300,⁶ parties may file exceptions to the Administration Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than three days after service of the recommended decision and order. All exceptions shall be filed and served in accordance with Section 1300.90 of the Board's Rules. Exceptions must be filed by electronic mail sent to ILRB.Filing@Illinois.gov. 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 20th day of February, 2014

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

/s/ Michelle Owen

**Michelle Owen
Administrative Law Judge**

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