

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

State of Illinois, Department of	)	
Central Management Services	)	
(Department of Veterans' Affairs),	)	
	)	
Petitioner	)	Cons. Case Nos.
	)	S-DE-14-178
and	)	S-DE-14-179
	)	S-DE-14-180
American Federation of State, County	)	S-DE-14-181
and Municipal Employees, Council 31,	)	S-DE-14-182
	)	S-DE-14-183
Labor Organization-Objector	)	S-DE-14-184 &
	)	S-DE-14-185
Dee Easley and Diane Schultz,	)	
	)	
Employee-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. These cases, which we consolidate for disposition, involve such designations made on the Governor's behalf by the Illinois Department of Central Management Services (CMS). From January 31 through February 4, 2014, Administrative Law Judge Anna Hamburg-Gal issued Recommended Decision and Orders (RDOs) in the above-referenced cases, finding the designations comport with the requirements of Section 6.1. We agree with her assessment.

All eight petitions designate for exclusion employment positions at the Illinois Department of Veterans' Affairs. More specifically, the following positions were designated in

the following cases: in Case No. S-DE-14-178, 2 Dietary Manager Is; in Case No. S-DE-14-179, 3 Dietary Manager IIs; in Case No. S-DE-14-180, 4 Health Information Administrators; in Case No. S-DE-14-181, 1 Laundry Manager I; in Case No. S-DE-14-182, 9 Public Service Administrator (PSA) Option 1s; in Case No. S-DE-14-183, 2 PSA Option 2s<sup>1</sup>; in Case No. S-DE-14-184, 1 PSA Option 6; and in Case No. S-DE-14-185, 1 PSA Option 8S. All of these designations were made pursuant to Section 6.1(b)(5) of the Act which allows designations of positions with “significant and independent discretionary authority.”<sup>2</sup>

The American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections in each case 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 two of the employees holding designated positions.<sup>3</sup> AFSCME raised general objections with respect to all the positions, and specific objections with respect to several. The ALJ declined to rule on the constitutional objections, rejected the other general objections, and also found insufficient the specific objections.

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

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<sup>1</sup> Originally filed with respect to six positions, CMS withdrew four of the positions from this petition.

<sup>2</sup> 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.

<sup>3</sup> Dee Easley, one of the Option 1s designated in Case No. S-DE-14-182, and Diane Schultz, holding the sole position at issue Case No. S-DE-14-185.

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/ 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.

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

State of Illinois, Department of Central	)	
Management Services, (Department of	)	
Veterans' Affairs),	)	
	)	
Petitioner,	)	Case No. S-DE-14-178
	)	
and	)	
	)	
American Federation of State, County	)	
and Municipal Employees, Council 31,	)	
	)	
Labor Organization-Objector	)	

**ADMINISTRATIVE LAW JUDGE'S  
RECOMMENDED DECISION AND ORDER**

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) *added by* Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. There are three broad categories of positions which may be so designated: 1) positions which were first certified to be in a bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008, 2) positions which were the subject of a petition for such certification pending on April 5, 2013 (the effective date of Public Act 97-1172), or 3) positions which have never been certified to have been in a collective bargaining unit. Only 3,580 of such positions may be so designated by the Governor, and, of those, only 1,900 positions which have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, the position must fit one of the following five categories:

- 1) it must authorize an employee in the position to act as a legislative liaison;
- 2) it must have a title of or authorize a person who holds the position to exercise substantially similar duties as a Senior Public Service Administrator, Public Information Officer, or Chief Information Officer, or as an agency General

Counsel, Chief of Staff, Executive Director, Deputy Director, Chief Fiscal Officer, or Human Resources Director;

- 3) it must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), see 20 ILCS 415/4 through 4d (2012);
- 4) it must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
- 5) it must authorize an employee in that position to have “significant and independent discretionary authority as an employee” by which the Act means the employee is either
  - (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
  - (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. It also requires the Illinois Labor Relations Board to determine, in a manner consistent with due process, whether the designation comports with the requirements of Section 6.1, and to do so within 60 days.<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 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On January 16, 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 27, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules. Based on my review of the designation, the documents submitted as part of the designation, the objections, and the documents and arguments submitted in support of those objections, I find that the designation was properly submitted, that it is consistent with the requirements of Section 6.1 of the Act, and that the objections fail to raise an issue of law or fact that might overcome the presumption that the designation is proper. 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 any existing inclusion of these positions within any collective bargaining unit.

The following two Dietary Manager I positions within the Department of Veterans' Affairs are at issue in this designation:

12501-34-30-210-80-01  
12501-34-40-110-20-01

Huner, Devin  
Meuser, Marsha

CMS's petition indicates the positions at issue qualify for designation under Section 6.1(b)(5) of the Act which permits designation if the position authorizes an employee in that position to have "significant and independent discretionary authority."<sup>2</sup> AFSCME objects to the designation of all listed positions.

### **I. Objections**

First, AFSCME states that Section 6.1 of the Act is unconstitutional, on its face and as applied, both under the Illinois Constitution and the Constitution of the United States of America because it deprives AFSCME of due process and violates the equal protection clauses, the

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<sup>2</sup> CMS filed position descriptions (CMS-104s) for the positions and affidavits in support of its assertion. These positions are currently represented by AFSCME.

prohibition against impairment of contracts, and the separation of powers clause of the Illinois Constitution.

Further, AFSCME generally objects to the use of position descriptions to support the petition and to the allocation of the burden of proof. AFSCME also argues that there can be no showing of managerial authority based solely on an affidavit, which states that the position at issue is authorized to effectuate departmental policy, where the position description does not reference any specific policy. Similarly, AFSCME states that the position descriptions set forth only potential responsibilities, not actual ones. In the same vein, AFSCME asserts that CMS has presented no evidence that the employees at issue ever exercised their referenced supervisory or quasi-managerial authority. Likewise, AFSCME asserts that CMS has not shown that it told the employees they possessed such authority. In addition, AFSCME argues that the positions at issue are professional and not managerial.

Finally, AFSCME advances specific objections with respect to the position held by Devin Huner and requests that Huner be retained in the unit for “the reasons stated in his questionnaire and because of the information contained therein.” 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 this 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.

## **II. Material Facts**

### **a. Devin Huner**

Devin Huner is a Dietary Manager I at the Illinois Veterans Home at Quincy. He reports to Dietary Manager II Chuck Eckhoff.

Huner’s position description states that he is a supervisor of 68 subordinates. It provides that he prepares and discusses annual performance evaluations with staff, initiates recommendations for commendatory or disciplinary measures based upon observed work performance, assists in the preparation of work schedules, and approves or denies employees’ use of benefit time. Huner admits that he “directs employees if [he] notices something being done improperly.” Yet, he denies that any employees report directly to him and asserts that all his purported subordinates report directly to Dietary Manager II Chuck Eckhoff, his own

supervisor.<sup>3</sup> Huner’s position description also provides that he spends 10% of his time acting as supervisor of dietary operation in the absence of the Dietary Manager II and assisting the Dietary Manager II in the planning and direction of all phases of a comprehensive food services program.

### **III. Discussion and Analysis**

#### **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, violates provisions of the United States and Illinois constitutions. State of Ill., Dep’t of Cent. Mgmt. Serv., 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.”)). Accordingly, these issues are not addressed in this decision.

#### **b. Non-Constitutional General Objections**

AFSCME’s general objections are without merit and do not raise issues of fact or law that might rebut the presumption that the designation is 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. See State of Ill., Dep’t of Cent. Mgmt. Serv., 30 PERI ¶ 80 and all subsequent Board designation cases.

Here, most of AFSCME’s objections may be restated as objections to this now well-established framework because they presuppose that CMS must initially prove that the designation is proper. For example, AFSCME argues that CMS “failed to carry its burden of proof” and “presented no evidence” that the employees at issue ever exercise their purported authority or were told they possessed it. Similarly, AFSCME asserts that “there can be no showing of managerial authority based solely on [an] affidavit,” which is phrased in general terms. Likewise, AFSCME states that “there is no demonstration [by CMS] that the employees at issue have...authority to complete the job duties...[in their]...position descriptions.” Finally,

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<sup>3</sup> CMS designated Chuck Eckhoff’s position in Case No. S-DE-14-179. His position was properly designated as supervisory under Sections 6.1(b)(5) and (c)(ii) of the Act.

AFSCME generally asserts that CMS's affidavits are unreliable because there is no indication that they are accurate.

Contrary to AFSCME's general assertion, the burden is on AFSCME, not CMS. Accordingly, these objections must be rejected because they ignore the presumption and misallocate the burden.

Second, the Board has similarly rejected AFSCME's objections based on the bald statement that the designated position does not have significant and independent discretionary authority because it is professional rather than managerial. State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Cent. Mgmt. Servs.), 30 PERI ¶ 85 (IL LRB-SP 2013). The terms managerial and professional are not mutually exclusive and there is no exception for professional employees in the language of Section 6.1(c)(i). State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing Dep't of Cent. Mgmt. Servs. / Ill. Pollution Control Bd., 2013 IL App (4th) 110877). As such, where a position meets one of the two alternative tests set out in Section 6.1(c)(i), it may appropriately be designated by the Governor for exclusion from collective bargaining rights regardless of whether it is also a professional position. Id.

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

c. 12501-34-40-110-20-01 - Meuser, Marsha

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no specific evidence to suggest that CMS has limited the position holder's discretion or independent authority, within the meaning of Section 6.1(c)(i) or (ii). State of Ill. Dep't of Cent. Mgmt. Serv., 30 PERI ¶ 164 (IL LRB-SP 2014) (objectors must provide specific examples to negate each of the three tests in Section 6.1(c)); see also State of Ill. Dep't of Cent. Mgmt. Serv., 30 PERI ¶ 85 (IL LRB-SP 2013).

AFSCME has not raised issues of fact for hearing by asserting that there is a "high likelihood" that the position description is 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).<sup>4</sup>

Thus, CMS properly designated this position.

d. 12501-34-30-210-80-01 - Huner, Devin

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority, within the meaning of Section 6.1(c)(ii) or (i).

First, Huner is properly designated within the meaning of Section 6.1(c)(ii) because he qualifies as supervisory.

Under Section 6.1(c)(ii) of the Act, a position authorizes its holder with the requisite authority if the position is supervisory within the meaning of the National Labor Relations Act and the National Labor Relations Board's case law. 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., 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., 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, Inc., 348 NLRB at 689.

An employee with the purported authority to responsibly direct must carry out such

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<sup>4</sup> The alleged constitutional implications of this ruling are not addressed here for reasons set forth in section IV.a. of this RDO.

direction with independent judgment. Further, “it must be shown that the employer delegated to the putative supervisor the authority...to take corrective action, if necessary.” In addition, there must be a “prospect of adverse consequences for the putative supervisor” arising from his direction of other employees. Id.

Where an employee substitutes for a supervisor, the substitute will be deemed supervisory if he spends a regular and substantial portion of his working time performing supervisory tasks. Hexacomb Corp. and Western Temporary Services, Inc., 313 NLRB No. 148 (1994); Aladdin Hotel, 270 NLRB No. 122, 4 (1984). If the substitution is merely sporadic and insignificant, the substitute is not held to be a statutory supervisor. Aladdin Hotel, 270 NLRB No. 122, 4 (1984). Employees who substitute as supervisors during vacations or other unscheduled occasions do not qualify as statutory supervisors under the NLRA. Hexacomb Corp. and Western Temporary Services, Inc., 313 NLRB at 3.

Here, Huner is properly designated as supervisory because his position description states he substitutes as a supervisor for 10% of his work time and there is no evidence to suggest that this substitution is merely sporadic, unscheduled, and insignificant. Aladdin Hotel, 270 NLRB No. 122, 4 (1984) (employees who regularly substituted for their superiors on average at least two times per month over a three-month period were supervisory); Sewell, Inc., 207 NLRB 325, 330-332 (1973) (finding two relief employees supervisory where they worked 1 day every two weeks, and two of out 8 working days as substitute supervisors); Swift & Co., 129 NLRB 1391 (1961) (excluding employee as supervisory where he exercised such authority for 15% of his work time in which he substituted for his superior); but see Hexacomb Corp. and Western Temporary Services, Inc., 313 NLRB at 3. In light of the presumption and in the absence of evidence that Huner only substitutes as a supervisor during vacations or other unscheduled occasions, rather than prescheduled ones, the designation is presumed properly made.<sup>5</sup>

Second, Huner is likewise properly designated within the meaning of Section 6.1(c)(i) of the Act because he represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.

Under Section 6.1(c)(i) “a person has significant and independent discretionary authority as an employee if he or she “[1] is engaged in executive and management functions of a State

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<sup>5</sup> As noted in Case No. S-DE-14-179, Huner’s superior, Charles Eckhoff, is properly designated as supervisory.

agency and charged with the effectuation of management policies and practices of a State agency or [2] represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.” When addressing the meaning of Section 6.1(b)(5), one must first look to the language of that section of the Act. The Board may consider case precedent pertaining to the traditional managerial exclusion under Section 3(j) to the extent that the precedent explains the meaning of terms commonly used in both Section 3(j) and section 6.1(b)(5). State of Ill., Dep’t of Cent. Mgmt. Servs. (Dep’t of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing City of Bloomington v. Ill. Labor Relations Bd., 373 Ill. App. 3d 599, 608 (4th Dist. 2007) (“When statutes are enacted after judicial opinions are published, it is presumed that the legislature acted with knowledge of the prevailing case law.”)). Finally, the burden is on AFSCME to prove that the designation is improperly made. State of Ill., Dep’t of Cent. Mgmt. Servs. (Dep’t of Commerce & Economic Opportunity), 30 PERI ¶ 86.

Here, Huner has authority to represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency because he assists the Dietary Manager II in the planning and direction of all phases of a comprehensive food services program for the Department of Veterans’ Affairs. The policy of the Illinois Department of Veterans’ Affairs is to “empower veterans and their families to thrive” by providing critical programs that augment the benefits provided by the United States Department of Veterans’ Affairs <sup>6</sup> The food services program is integral to implementing that policy because it helps ensure that veterans receive adequate nutrition and care. Huner’s responsibility to assist in planning and directing the food services program shows that he has the authority to represent management interests in achieving that mission. Finally, Huner takes or recommends discretionary action when performing this task because the designation is presumed properly made and the position description does not limit the position holder’s discretion or independent authority.

Thus, the designation is properly made.

#### **IV. Conclusions of Law**

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

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<sup>6</sup> <http://www2.illinois.gov/veterans/about-us/Pages/default.aspx>

**V. Recommended Order**

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

12501-34-30-210-80-01  
12501-34-40-110-20-01

Huner, Devin  
Meuser, Marsha

**VI. Exceptions**

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,<sup>7</sup> parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than 3 days after service of the recommended decision and order. All exceptions shall be filed and served in accordance with Section 1300.90 of the Board's Rules. Exceptions must be filed by electronic mail to [ILRB.Filing@illinois.gov](mailto:ILRB.Filing@illinois.gov). Each party shall serve its exceptions on the other parties. If the original exceptions are withdrawn, then all subsequent exceptions are moot. A party not filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

**Issued at Chicago, Illinois this 3rd day of February, 2014**

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

*/s/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**

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<sup>7</sup> Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>.

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

State of Illinois, Department of Central Management Services, (Department of Veterans' Affairs),	)	
	)	
	)	
Petitioner,	)	Case No. S-DE-14-179
	)	
and	)	
	)	
American Federation of State, County and Municipal Employees, Council 31,	)	
	)	
Labor Organization-Objector	)	

**ADMINISTRATIVE LAW JUDGE'S  
RECOMMENDED DECISION AND ORDER**

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) *added by* Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. There are three broad categories of positions which may be so designated: 1) positions which were first certified to be in a bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008, 2) positions which were the subject of a petition for such certification pending on April 5, 2013 (the effective date of Public Act 97-1172), or 3) positions which have never been certified to have been in a collective bargaining unit. Only 3,580 of such positions may be so designated by the Governor, and, of those, only 1,900 positions which have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, the position must fit one of the following five categories:

- 1) it must authorize an employee in the position to act as a legislative liaison;
- 2) it must have a title of or authorize a person who holds the position to exercise substantially similar duties as a Senior Public Service Administrator, Public Information Officer, or Chief Information Officer, or as an agency General

Counsel, Chief of Staff, Executive Director, Deputy Director, Chief Fiscal Officer, or Human Resources Director;

- 3) it must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), see 20 ILCS 415/4 through 4d (2012);
- 4) it must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
- 5) it must authorize an employee in that position to have “significant and independent discretionary authority as an employee” by which the Act means the employee is either
  - (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
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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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On January 16, 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 27, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules. On January 30, 2014, AFSCME filed a supplemental objection. Based on my review of the designation, the documents submitted as part of the designation, the objections, and the documents and arguments submitted in support of those objections, I find that the designation was properly submitted, that it is consistent with the requirements of Section 6.1 of the Act, and that the objections fail to raise an issue of law or fact that might overcome the presumption that the designation is proper. 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 any existing inclusion of these positions within any collective bargaining unit.

The following three Dietary Manager II positions within the Illinois Department of Veterans' Affairs are at issue in this designation:

12502-34-30-210-80-01	Eckhoff, Charles
12502-34-40-110-20-01	Gebhardt, Diane
12502-34-60-210-00-01	Barnhart, Dixie

CMS's petition indicates the positions at issue qualify for designation under Section 6.1(b)(5) of the Act which permits designation if the position authorizes an employee in that position to have "significant and independent discretionary authority."<sup>2</sup> AFSCME objects to the designation of all listed positions.

### **I. Objections**

First, AFSCME states that Section 6.1 of the Act is unconstitutional, on its face and as

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applied, both under the Illinois Constitution and the Constitution of the United States of America because it deprives AFSCME of due process and violates the equal protection clauses, the prohibition against impairment of contracts, and the separation of powers clause of the Illinois Constitution.

Further, AFSCME generally objects to the use of position descriptions to support the petition and to the allocation of the burden of proof. AFSCME also argues that there can be no showing of managerial authority based solely on an affidavit, which states that the position at issue is authorized to effectuate departmental policy, where the position description does not reference any specific policy. Further, AFSCME states that CMS has presented no evidence that the employees at issue ever exercised their referenced supervisory or quasi-managerial authority. Similarly, AFSCME asserts that CMS has not shown that it told the employees they possessed such authority. In addition, AFSCME argues that the positions at issue are professional and not managerial. Finally, AFSCME urges the Board not to rely on the Petitioner's affidavits because the affidavits do not explain how the affiant is familiar with the job duties of the positions at issue.

AFSCME also filed position-specific exceptions with respect to the positions held by Charles Eckhoff and Dixie Barnhart. It requests that these employees be "retained in the bargaining unit for reasons stated in [their] questionnaire[s] and because of the information contained therein." In particular, AFSCME asserts that although CMS claims that Barnhart is a supervisor, the organizational chart CMS submitted with the Petition shows that she has no subordinates.

AFSCME concludes that there is a high likelihood that all the position descriptions are inaccurate because two individuals identified inaccuracies in their own position descriptions. On this 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.

## **II. Material Facts**

### a. 12502-34-30-210-80-01 - Eckhoff, Charles

Charles Eckhoff directly oversees one subordinate, Dietary Manager I Devin Huner.<sup>3</sup> Eckhoff's position description provides that he supervises the staff assigned to the dietary department by observing and evaluating their work performance, initiating commendatory or disciplinary action and other personnel actions, approving time off, providing guidance and training, and determining staffing needs to achieve program objectives. Eckhoff admits that he assigns work to his subordinate and that he has final say as to the tasks assigned to all employees in the department. Further, he notes that he works in conjunction with the Dietary Manager I, the Support Service Coordinator Is and the Cook II to develop job duties for each dietary position. He admits that he makes recommendations concerning employee discipline. He does not deny that his superiors accept his recommendations. Further, Eckhoff admits that he directs the Dietary Manager I and his subordinates "as needed to effectively complete all tasks and duties as required within the dietary department." Eckhoff explains that "one cannot be the manager of a department and not give direction to the employees.

Finally, Eckhoff asserts that he is responsible for writing and submitting for approval all policies pertaining to the dietary department. These policies include administrative policies, diet and diet therapy policies, menu and menu planning policies, and service policies. Eckhoff concludes that his superiors have approved all his recommended policies.

### b. 12502-34-40-110-20-01 - Gebhardt, Diane

Diane Gebhardt serves as the Department Head of the Dietary Department and performs key administrative and managerial responsibilities by directing all phases of a complex and comprehensive clinical dietetic and food service program.

### c. 12502-34-60-210-00-01 - Barnhart, Dixie

Barnhart works under "administrative direction" at the Anna Veterans Home. She admits that the Business Administrator directed her to review dietary policies for the Home. She further admits that she undertook such review and made changes to the policy. Finally, Barnhart admits that her superior approved her changes and updated the policies according to her revisions.

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<sup>3</sup> CMS designated Huner's position in Case No. S-DE-14-178. The designation was properly made.

### **III. Discussion and Analysis**

#### **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, violates provisions of the United States and Illinois constitutions. State of Ill., Dep't of Cent. Mgmt. Serv., 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.")). Accordingly, these issues are not addressed in this decision.

#### **b. Non-Constitutional General Objections**

AFSCME's general objections are without merit and do not raise issues of fact or law that might rebut the presumption that the designation is 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. See State of Ill., Dep't of Cent. Mgmt. Serv., 30 PERI ¶ 80 and all subsequent Board designation cases.

Here, most of AFSCME's objections may be restated as objections to this now well-established framework because they presuppose that CMS must initially prove that the designation is proper. For example, AFSCME argues that CMS "failed to carry its burden of proof" and "presented no evidence" that the employees at issue ever exercise their purported authority or were told they possessed it. Similarly, AFSCME asserts that "there can be no showing of managerial authority based solely on [an] affidavit," which is phrased in general terms. Likewise, AFSCME states that "there is no demonstration [by CMS] that the employees at issue have...authority to complete the job duties...[in their]...position descriptions." Finally, AFSCME generally asserts that CMS's affidavits are unreliable because there is no indication that they are accurate.

Contrary to AFSCME's general assertion, the burden is on AFSCME, not CMS. Accordingly, these objections must be rejected because they ignore the presumption and misallocate the burden.

Second, the Board has similarly rejected AFSCME's objections based on the bald statement that the designated positions do not have significant and independent discretionary authority because they are professional rather than managerial positions. State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Cent. Mgmt. Servs.), 30 PERI ¶ 85 (IL LRB-SP 2013). The terms managerial and professional are not mutually exclusive and there is no exception for professional employees in the language of Section 6.1(c)(i). State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing Dep't of Cent. Mgmt. Servs. / Ill. Pollution Control Bd., 2013 IL App (4th) 110877). As such, where a position meets one of the two alternative tests set out in Section 6.1(c)(i), it may appropriately be designated by the Governor for exclusion from collective bargaining rights regardless of whether it is also a professional position. Id.

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

c. 12502-34-40-110-20-01 - Gebhardt, Diane

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no specific evidence to suggest that CMS has limited the position holder's discretion or independent authority, within the meaning of Section 6.1(c)(i) or (ii). State of Ill. Dep't of Cent. Mgmt. Serv., 30 PERI ¶ 164 (IL LRB-SP 2014) (objectors must provide specific examples to negate each of the three tests in Section 6.1(c)); see also State of Ill. Dep't of Cent. Mgmt. Serv., 30 PERI ¶ 85 (IL LRB-SP 2013).

AFSCME has not raised issues of fact for hearing by asserting that there is a "high likelihood" that the position description is 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).<sup>4</sup>

Thus, CMS properly designated this position.

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<sup>4</sup> The alleged constitutional implications of this ruling are not addressed here for reasons set forth in section IV.a. of this RDO.

a. 12502-34-30-210-80-01 - Eckhoff, Charles

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority within the meaning of Section 6.1(c)(ii) of the Act.

Under Section 6.1(c)(ii) of the Act, a position authorizes its holder with the requisite authority if the position is supervisory within the meaning of the National Labor Relations Act and the National Labor Relations Board's case law. 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., 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., 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, Inc., 348 NLRB at 689.

An employee with the purported authority to responsibly direct must carry out such direction with independent judgment. Further, "it must be shown that the employer delegated to the putative supervisor the authority...to take corrective action, if necessary." In addition, there must be a "prospect of adverse consequences for the putative supervisor" arising from his direction of other employees. Id.

In this case, Eckhoff possesses significant and independent discretionary authority because he has authority to responsibly direct his subordinates. Eckhoff's position description states that his position supervises the staff assigned to the dietary department by evaluating his subordinates' work, providing guidance and training, and determining staffing needs to achieve

program objectives. Position holder Eckhoff admits that he directs the Dietary Manager I and his subordinates “as needed to effectively complete all tasks and duties as required within the dietary department.” Indeed, he notes that, “one cannot be the manager of a department and not give direction to the employees.” Based on this evidence, the position holder exercises the use of independent judgment and is accountable for his subordinates’ work because the designation is presumed proper under Section 6.1(d) of the Act and the position description does not expressly limit the position holder’s discretion, independent authority, or accountability.

Thus, the designation of this position is properly made.

b. 12502-34-60-210-00-01 - Barnhart, Dixie

CMS’s designation of this position is proper because the designation is presumed to be properly made and the evidence presented supports this conclusion because it shows that position holder Barnhart represents management interests by taking or recommending discretionary actions that effectively control or implement the policies of a State agency.

Under Section 6.1(c)(i) “a person has significant and independent discretionary authority as an employee if he or she “[1] 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 [2] represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.” When addressing the meaning of Section 6.1(b)(5), one must first look to the language of that section of the Act. The Board may consider case precedent pertaining to the traditional managerial exclusion under Section 3(j) to the extent that the precedent explains the meaning of terms commonly used in both Section 3(j) and section 6.1(b)(5). State of Ill., Dep’t of Cent. Mgmt. Servs. (Dep’t of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing City of Bloomington v. Ill. Labor Relations Bd., 373 Ill. App. 3d 599, 608 (4th Dist. 2007) (“When statutes are enacted after judicial opinions are published, it is presumed that the legislature acted with knowledge of the prevailing case law.”)). Finally, the burden is on AFSCME to prove that the designation is improperly made. State of Ill., Dep’t of Cent. Mgmt. Servs. (Dep’t of Commerce & Economic Opportunity), 30 PERI ¶ 86.

Here, Barnhart represents management interests by taking or recommending discretionary actions that effectively control or implement the policies of a State agency because she makes effective recommendations concerning changes to dietary policies that govern the Veterans’

Home. Barnhart represents management interests by revising such policies because the policies impact the services provided at the Home. She exercises significant discretion when she recommends changes to those dietary policies because she must initially determine whether it is appropriate to change established policies and then must determine the manner in which they should be altered. Barnhart's tasks in this regard control or implement the policies of the Department of Veterans' Affairs because Barnhart's recommendations help maintain adequate care standards within the Veterans' system, a necessary component of the Department's mission, and Barnhart's superior changes the policies in line with Barnhart's recommendations. See State of Ill., Dep't of Cent. Mgmt. Servs. (Ill. Gaming Bd.), Case No. S-DE-14-121 (IL LRB-SP Jan. 3, 2014)(employee satisfied the second test under Section 6.1(c)(i) even where he merely implemented policies that related to the subject matter of the agency's regulatory authority and did not affect the policies of his agency more broadly).

Thus, the designation of this position is properly made.

#### **IV. Conclusions 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 positions in the Illinois Department of Veterans' Affairs are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

12502-34-30-210-80-01	Eckhoff, Charles
12502-34-40-110-20-01	Gebhardt, Diane
12502-34-60-210-00-01	Barnhart, Dixie

#### **VI. Exceptions**

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,<sup>5</sup> parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than 3 days

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<sup>5</sup> Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>.

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 to [ILRB.Filing@illinois.gov](mailto:ILRB.Filing@illinois.gov). Each party shall serve its exceptions on the other parties. If the original exceptions are withdrawn, then all subsequent exceptions are moot. A party not filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

**Issued at Chicago, Illinois this 3rd day of February, 2014**

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

*/s/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**

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

State of Illinois, Department of Central	)	
Management Services, (Department of	)	
Veterans' Affairs),	)	
	)	
Petitioner,	)	Case No. S-DE-14-180
	)	
and	)	
	)	
American Federation of State, County	)	
and Municipal Employees, Council 31,	)	
	)	
Labor Organization-Objector	)	

**ADMINISTRATIVE LAW JUDGE'S  
RECOMMENDED DECISION AND ORDER**

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) *added by* Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. There are three broad categories of positions which may be so designated: 1) positions which were first certified to be in a bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008, 2) positions which were the subject of a petition for such certification pending on April 5, 2013 (the effective date of Public Act 97-1172), or 3) positions which have never been certified to have been in a collective bargaining unit. Only 3,580 of such positions may be so designated by the Governor, and, of those, only 1,900 positions which have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, the position must fit one of the following five categories:

- 1) it must authorize an employee in the position to act as a legislative liaison;
- 2) it must have a title of or authorize a person who holds the position to exercise substantially similar duties as a Senior Public Service Administrator, Public Information Officer, or Chief Information Officer, or as an agency General

Counsel, Chief of Staff, Executive Director, Deputy Director, Chief Fiscal Officer, or Human Resources Director;

- 3) it must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), see 20 ILCS 415/4 through 4d (2012);
- 4) it must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
- 5) it must authorize an employee in that position to have “significant and independent discretionary authority as an employee” by which the Act means the employee is either
  - (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
  - (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. It also requires the Illinois Labor Relations Board to determine, in a manner consistent with due process, whether the designation comports with the requirements of Section 6.1, and to do so within 60 days.<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 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On January 16, 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 27, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules. Based on my review of the designation, the documents submitted as part of the designation, the objections, and the documents and arguments submitted in support of those objections, I find that the designation was properly submitted, that it is consistent with the requirements of Section 6.1 of the Act, and that the objections fail to raise an issue of law or fact that might overcome the presumption that the designation is proper. 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 any existing inclusion of these positions within any collective bargaining unit.

The following four Health Information Administrator positions within the Department of Veterans' Affairs are at issue in this designation:

18041-34-30-140-00-01	Randall, Bridgette
18041-34-40-220-00-01	Schoeph, Nancy
18041-34-50-140-00-01	Harrington, Susan
18041-34-60-130-20-01	Brimm, Carole

CMS's petition indicates the positions at issue qualify for designation under Section 6.1(b)(5) of the Act which permits designation if the position authorizes an employee in that position to have "significant and independent discretionary authority."<sup>2</sup> AFSCME objects to designation of all listed positions.

### **I. Objections**

First, AFSCME states that Section 6.1 of the Act is unconstitutional, on its face and as

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<sup>2</sup> CMS filed position descriptions (CMS-104s) for the positions and affidavits in support of its assertion. These positions are currently represented by AFSCME.

applied, both under the Illinois Constitution and the Constitution of the United States of America because it deprives AFSCME of due process and violates the equal protection clauses, the prohibition against impairment of contracts, and the separation of powers clause of the Illinois Constitution.

Further, AFSCME generally objects to the use of position descriptions to support the petition and to the allocation of the burden of proof. AFSCME also argues that there can be no showing of managerial authority based solely on an affidavit, which states that the position at issue is authorized to effectuate departmental policy, where the position description does not reference any specific policy. Similarly, AFSCME states that the position descriptions set forth only potential responsibilities, not actual ones. In the same vein, AFSCME asserts that CMS has presented no evidence that the employees at issue ever exercised their referenced supervisory or quasi-managerial authority. Likewise, AFSCME asserts that CMS has not shown that it told the employees they possessed such authority. In addition, AFSCME argues that the positions at issue are professional and not managerial.

AFSCME has advanced no specific objections with respect to the positions at issue.

## **II. Material Facts**

- a. 18041-34-30-140-00-01 - Randall, Bridgette; 18041-34-40-220-00-01 - Schoeph, Nancy; 18041-34-50-140-00-01 - Harrington, Susan; 18041-34-60-130-20-01 - Brimm, Carole

All the employees listed above work as directors of the medical records program at their respective facilities.

## **III. Discussion and Analysis**

- 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, violates provisions of the United States and Illinois constitutions. State of Ill., Dep't of Cent. Mgmt. Serv., 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.”)). Accordingly, these issues are not addressed in this decision.

b. Non-Constitutional General Objections

AFSCME’s general objections are without merit and do not raise issues of fact or law that might rebut the presumption that the designation is 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. See State of Ill., Dep’t of Cent. Mgmt. Serv., 30 PERI ¶ 80 and all subsequent Board designation cases.

Here, most of AFSCME’s objections may be restated as objections to this now well-established framework because they presuppose that CMS must initially prove that the designation is proper. For example, AFSCME argues that CMS “failed to carry its burden of proof” and “presented no evidence” that the employees at issue ever exercise their purported authority or were told they possessed it. Similarly, AFSCME asserts that “there can be no showing of managerial authority based solely on [an] affidavit,” which is phrased in general terms. Likewise, AFSCME states that “there is no demonstration [by CMS] that the employees at issue have...authority to complete the job duties...[in their]...position descriptions.” Finally, AFSCME generally asserts that CMS’s affidavits are unreliable because there is no indication that they are accurate.

Contrary to AFSCME’s general assertion, the burden is on AFSCME, not CMS. Accordingly, these objections must be rejected because they ignore the presumption and misallocate the burden.

Second, the Board has similarly rejected AFSCME’s objections based on the bald statement that the designated positions do not have significant and independent discretionary authority because they are professional rather than managerial positions. State of Ill., Dep’t of Cent. Mgmt. Servs. (Dep’t of Cent. Mgmt. Servs.), 30 PERI ¶ 85 (IL LRB-SP 2013). The terms managerial and professional are not mutually exclusive and there is no exception for professional employees in the language of Section 6.1(c)(i). State of Ill, Dep’t of Cent. Mgmt. Servs. (Dep’t of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing Dep’t of Cent. Mgmt. Servs. / Ill. Pollution Control Bd., 2013 IL App (4th) 110877). As such, where a position meets one of the

two alternative tests set out in Section 6.1(c)(i), it may appropriately be designated by the Governor for exclusion from collective bargaining rights regardless of whether it is also a professional position. Id.

In sum, AFSCME’s general objections do not raise issues of fact or law that might rebut the presumption that CMS’s designation is properly made.

- c. 18041-34-30-140-00-01 - Randall, Bridgette; 18041-34-40-220-00-01 - Schoeph, Nancy; 18041-34-50-140-00-01 - Harrington, Susan; 18041-34-60-130-20-01 - Brimm, Carole

CMS’s designation of these positions is proper because the designation is presumed to be properly made and AFSCME has introduced no specific evidence to suggest that CMS has limited the position holders’ discretion or independent authority, within the meaning of Section 6.1(c)(i) or (ii). State of Ill. Dep’t of Cent. Mgmt. Serv., 30 PERI ¶ 164 (IL LRB-SP 2014) (objectors must provide specific examples to negate each of the three tests in Section 6.1(c)); see also State of Ill. Dep’t of Cent. Mgmt. Serv., 30 PERI ¶ 85 (IL LRB-SP 2013).

Thus, CMS properly designated the position referenced above.

**IV. Conclusions 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 positions in the Department of Veterans’ Affairs are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

18041-34-30-140-00-01	Randall, Bridgette
18041-34-40-220-00-01	Schoeph, Nancy
18041-34-50-140-00-01	Harrington, Susan
18041-34-60-130-20-01	Brimm, Carole

**VI. Exceptions**

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,<sup>3</sup> parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than 3 days after service of the recommended decision and order. All exceptions shall be filed and served in accordance with Section 1300.90 of the Board's Rules. Exceptions must be filed by electronic mail to [ILRB.Filing@illinois.gov](mailto:ILRB.Filing@illinois.gov). Each party shall serve its exceptions on the other parties. If the original exceptions are withdrawn, then all subsequent exceptions are moot. A party not filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

**Issued at Chicago, Illinois this 4th day of February, 2014**

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

*/s/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**

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<sup>3</sup> Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>.

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

State of Illinois, Department of Central	)	
Management Services, (Department of	)	
Veterans' Affairs),	)	
	)	
Petitioner,	)	Case No. S-DE-14-181
	)	
and	)	
	)	
American Federation of State, County	)	
and Municipal Employees, Council 31,	)	
	)	
Labor Organization-Objector	)	

**ADMINISTRATIVE LAW JUDGE'S  
RECOMMENDED DECISION AND ORDER**

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) *added by* Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. There are three broad categories of positions which may be so designated: 1) positions which were first certified to be in a bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008, 2) positions which were the subject of a petition for such certification pending on April 5, 2013 (the effective date of Public Act 97-1172), or 3) positions which have never been certified to have been in a collective bargaining unit. Only 3,580 of such positions may be so designated by the Governor, and, of those, only 1,900 positions which have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, the position must fit one of the following five categories:

- 1) it must authorize an employee in the position to act as a legislative liaison;
- 2) it must have a title of or authorize a person who holds the position to exercise substantially similar duties as a Senior Public Service Administrator, Public Information Officer, or Chief Information Officer, or as an agency General

Counsel, Chief of Staff, Executive Director, Deputy Director, Chief Fiscal Officer, or Human Resources Director;

- 3) it must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), see 20 ILCS 415/4 through 4d (2012);
- 4) it must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
- 5) it must authorize an employee in that position to have “significant and independent discretionary authority as an employee” by which the Act means the employee is either
  - (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
  - (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. It also requires the Illinois Labor Relations Board to determine, in a manner consistent with due process, whether the designation comports with the requirements of Section 6.1, and to do so within 60 days.<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 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On January 16, 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 27, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules. Based on my review of the designation, the documents submitted as part of the designation, the objections, and the documents and arguments submitted in support of those objections, I find that the designation was properly submitted, that it is consistent with the requirements of Section 6.1 of the Act, and that the objections fail to raise an issue of law or fact that might overcome the presumption that the designation is proper. Consequently, 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.

The following Laundry Manager I position within the Department of Veterans' Affairs is at issue in this designation:

23191-34-30-110-50-01          Charles Taylor

CMS's petition indicates the position at issue qualifies for designation under Section 6.1(b)(5) of the Act which permits designation if the position authorizes an employee in that position to have "significant and independent discretionary authority."<sup>2</sup> AFSCME objects to the designation of the listed position.

### **I. Objections**

First, AFSCME states that Section 6.1 of the Act is unconstitutional, on its face and as applied, both under the Illinois Constitution and the Constitution of the United States of America because it deprives AFSCME of due process and violates the equal protection clauses, the

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<sup>2</sup> CMS filed a position description (CMS-104s) for the position and an affidavit in support of its assertion. This position is currently represented by AFSCME.

prohibition against impairment of contracts, and the separation of powers clause of the Illinois Constitution.

Further, AFSCME generally objects to the use of position descriptions to support the petition and to the allocation of the burden of proof. AFSCME also argues that there can be no showing of managerial authority based solely on an affidavit, which states that the position at issue is authorized to effectuate departmental policy, where the position description does not reference any specific policy. Similarly, AFSCME states that the position description sets forth only potential responsibilities, not actual ones. In the same vein, AFSCME asserts that CMS has presented no evidence that the employee at issue ever exercised his referenced supervisory or quasi-managerial authority. Likewise, AFSCME asserts that CMS has not shown that it told the employee he possessed such authority. In addition, AFSCME argues that the position at issue is professional and not managerial.

Finally, AFSCME advances specific objections with respect to the position held by Charles Taylor and requests that Taylor be retained in the unit for “the reasons stated in his questionnaire and because of the information contained therein.”

## **II. Material Facts**

### **a. 23191-34-30-110-50-01 - Charles Taylor**

Charles Taylor is a Laundry Manager I in the Department of Veterans’ Affairs. He oversees one Support Service Coordinator I, one Apparel/Dry Goods Specialist III, and one Support Service Lead. In relevant part, his position description provides that he “effectively recommends grievance resolutions.” Taylor never denied possessing this authority.

## **III. Discussion and Analysis**

### **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, violates provisions of the United States and Illinois constitutions. State of Ill., Dep’t of Cent. Mgmt. Serv., 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.”)). Accordingly, these issues are not addressed in this decision.

b. Non-Constitutional General Objections

AFSCME’s general objections are without merit and do not raise issues of fact or law that might rebut the presumption that the designation is 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. See State of Ill., Dep’t of Cent. Mgmt. Serv., 30 PERI ¶ 80 and all subsequent Board designation cases.

Here, most of AFSCME’s objections may be restated as objections to this now well-established framework because they presuppose that CMS must initially prove that the designation is proper. For example, AFSCME argues that CMS “failed to carry its burden of proof” and “presented no evidence” that the employee at issue ever exercised his purported authority or was told he possessed it. Similarly, AFSCME asserts that “there can be no showing of managerial authority based solely on [an] affidavit,” which is phrased in general terms. Likewise, AFSCME states that “there is no demonstration [by CMS] that the employee...at issue [has]...authority to complete the job duties...[in his]...position description.” Finally, AFSCME generally asserts that CMS’s affidavits are unreliable because there is no indication that they are accurate.

Contrary to AFSCME’s general assertion, the burden is on AFSCME, not CMS. Accordingly, these objections must be rejected because they ignore the presumption and misallocate the burden.

Second, the Board has similarly rejected AFSCME’s objections based on the bald statement that the designated position does not have significant and independent discretionary authority because it is professional rather than managerial. State of Ill., Dep’t of Cent. Mgmt. Servs. (Dep’t of Cent. Mgmt. Servs.), 30 PERI ¶ 85 (IL LRB-SP 2013). The terms managerial and professional are not mutually exclusive and there is no exception for professional employees in the language of Section 6.1(c)(i). State of Ill., Dep’t of Cent. Mgmt. Servs. (Dep’t of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing Dep’t of Cent. Mgmt. Servs. / Ill.

Pollution Control Bd., 2013 IL App (4th) 110877). As such, where a position meets one of the two alternative tests set out in Section 6.1(c)(i), it may appropriately be designated by the Governor for exclusion from collective bargaining rights regardless of whether it is also a professional position. Id.

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

c. 23191-34-30-110-50-01 - Charles Taylor

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority, within the meaning of Section 6.1(c)(ii).

Under Section 6.1(c)(ii) of the Act, a position authorizes its holder with the requisite authority if the position is supervisory within the meaning of the National Labor Relations Act and the National Labor Relations Board's case law. 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., 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., 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, Inc., 348 NLRB at 689.

Here, Taylor has significant and independent discretionary authority because he possesses authority to effectively recommend the adjustment of grievances. The position description states that the position holds the authority to "effectively recommend...grievance

resolutions” and Taylor never denied the authority to make such effective recommendations. Based on this evidence, the position holder exercises the use of independent judgment and adjusts grievances within the meaning of the NLRA because the designation is presumed proper under Section 6.1(d) of the Act and the position description does not expressly limit the position holder’s discretion, independent authority, or accountability.

Thus, the designation is properly made.

#### **IV. Conclusions 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 in the Department of Veterans’ Affairs is excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

23191-34-30-110-50-01      Charles Taylor

#### **VI. Exceptions**

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,<sup>3</sup> parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than 3 days after service of the recommended decision and order. All exceptions shall be filed and served in accordance with Section 1300.90 of the Board’s Rules. Exceptions must be filed by electronic mail to [ILRB.Filing@illinois.gov](mailto:ILRB.Filing@illinois.gov). Each party shall serve its exceptions on the other parties. If the original exceptions are withdrawn, then all subsequent exceptions are moot. A party not filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

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<sup>3</sup> Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>.

**Issued at Chicago, Illinois this 3rd day of February, 2014**

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

*/s/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**

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

State of Illinois, Department of Central Management Services, (Department of Veterans' Affairs),	)	
	)	
Petitioner,	)	Case No. S-DE-14-182
	)	
and	)	
	)	
American Federation of State, County and Municipal Employees, Council 31,	)	
	)	
Labor Organization-Objector,	)	
	)	
and	)	
	)	
Dee Easley,	)	
	)	
Employee-Objector	)	

**ADMINISTRATIVE LAW JUDGE'S  
RECOMMENDED DECISION AND ORDER**

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) *added by* Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. There are three broad categories of positions which may be so designated: 1) positions which were first certified to be in a bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008, 2) positions which were the subject of a petition for such certification pending on April 5, 2013 (the effective date of Public Act 97-1172), or 3) positions which have never been certified to have been in a collective bargaining unit. Only 3,580 of such positions may be so designated by the Governor, and, of those, only 1,900 positions which have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, the position must fit one of the following five categories:

- 1) it must authorize an employee in the position to act as a legislative liaison;

- 2) it must have a title of or authorize a person who holds the position to exercise substantially similar duties as a Senior Public Service Administrator, Public Information Officer, or Chief Information Officer, or as an agency General Counsel, Chief of Staff, Executive Director, Deputy Director, Chief Fiscal Officer, or Human Resources Director;
- 3) it must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), see 20 ILCS 415/4 through 4d (2012);
- 4) it must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
- 5) it must authorize an employee in that position to have “significant and independent discretionary authority as an employee” by which the Act means the employee is either
  - (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
  - (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. It also requires the Illinois Labor Relations Board to determine, in a manner consistent with due process, whether the designation comports with the requirements of Section 6.1, and to do so within 60 days.<sup>1</sup>

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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.

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.

On January 16, 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 24, 2014, Dee Easley, an employee of the State of Illinois who occupies one of the positions designated as excluded from collective bargaining rights, filed an objection to the designation. On January 27, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules. Based on my review of the designation, the documents submitted as part of the designation, the objections, and the documents and arguments submitted in support of those objections, I find that the designation was properly submitted, that it is consistent with the requirements of Section 6.1 of the Act, and that the objections fail to raise an issue of law or fact that might overcome the presumption that the designation is proper. 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 any existing inclusion of these positions within any collective bargaining unit.

The following 10 Public Service Administrator positions within the Department of Veterans' Affairs are at issue in this designation:

37015-34-00-000-01-01	Veterans' Home Coordinator	Diehl, Gwen
37015-34-00-300-00-01	Public Service Administrator	Easley, Dee
37015-34-25-100-00-01	Central Division Supervisor	Tisdale, Lisa
37015-34-25-200-00-01	Northern Division Supervisor	Willis, William
37015-34-25-300-00-01	Southern Division Supervisor	White, Earl
37015-34-25-500-00-01	Metro Division Supervisor	Vaughn, Anthony
37015-34-30-210-10-01	Public Service Administrator	White, Carrol
37015-34-40-120-00-01	Adjutant	Pierard, Luann
37015-34-50-200-01-01	Public Service Administrator	vacant/Manteno/Fill
37015-34-60-110-00-01	Adjutant	Houghland, Donnie

CMS's petition indicates the positions at issue qualify for designation under Section 6.1(b)(5) of the Act which permits designation if the position authorizes an employee in that position to have "significant and independent discretionary authority."<sup>2</sup> AFSCME objects to the designation of all listed positions. Easley objects to the designation of her own position.

### **I. Objections**

First, AFSCME states that Section 6.1 of the Act is unconstitutional, on its face and as applied, both under the Illinois Constitution and the Constitution of the United States of America because it deprives AFSCME of due process and violates the equal protection clauses, the prohibition against impairment of contracts, and the separation of powers clause of the Illinois Constitution.

Further, AFSCME generally objects to the use of position descriptions to support the petition and to the allocation of the burden of proof. AFSCME also argues that there can be no showing of managerial authority based solely on an affidavit, which states that the position at issue is authorized to effectuate departmental policy, where the position description does not reference any specific policy. Similarly, AFSCME states that the position descriptions set forth only potential responsibilities, not actual ones. In the same vein, AFSCME asserts that CMS has presented no evidence that the employees at issue ever exercised their referenced supervisory or quasi-managerial authority. Likewise, AFSCME asserts that CMS has not shown that it told the employees they possessed such authority. In addition, AFSCME argues that the positions at issue are professional and not managerial.

Finally, AFSCME advances specific objections with respect to the positions held by Gwen Diehl, Dee Easley, Carrol White, and Donnie Houghland "for the reasons stated in [their] questionnaire[s] and because of the information contained therein." In particular, AFSCME notes that Easley is not supervisory because she has no subordinates. AFSCME concludes that there is a high likelihood that all the position descriptions are inaccurate because specific individuals identified inaccuracies in their own position descriptions. On this 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.

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<sup>2</sup> CMS filed position descriptions (CMS-104s) for the positions and affidavits in support of its assertion. These positions are currently represented by AFSCME.

Dee Easley filed a separate objection to the designation of her position. However, in relevant part, it contains only the questionnaire she submitted to AFSCME.

## **II. Material Facts**

### a. 37015-34-00-000-01-01 - Diehl, Gwen

Gwen Diehl is the Veterans' Homes Coordinator. Diehl asserts that she oversees one subordinate who is an Administrative Assistant I and that she directs that employee in day-to-day tasks and responsibilities. Diehl states that the position description attached to the petition is inaccurate because it does not reflect the fact that she oversees the Administrative Assistant I position. Diehl explains that the job description for the Administrative Assistant I position provides that Diehl's position is the Administrative Assistant I position's immediate supervisor.

### b. 37015-34-00-300-00-01 - Easley, Dee

Dee Easley's position description states that she supervises agency personnel, payroll operations, and related programs and services. She serves as liaison between the agency and CMS in new personnel services areas. Further, she prepares written directives and memoranda on new policies and procedures established by the agency or CMS. She also develops position descriptions and organizational charts and initiates appropriate changes when required. She reviews all documents regarding personnel transactions to assure agency actions are in compliance with applicable CMS rules and regulations prior to submission to CMS or on-line entry. Finally, she is accountable for state property within her assigned division as determined by the department's property control policy. She maintains inventory control, completes required forms for property control, and monitors documentation to ensure completion of annual inventory.

Easley asserts, contrary to her position description, that she has no subordinates. She also states that she has no authority to decide how policies or legislation will be implemented. Further, she states that she does not recommend any actions that control or implement legislation that affects her agency or agency policy.

### c. 37015-34-30-210-10-01 - White, Carrol

Carrol White works under the general direction of the Business Administrator. She

oversees two Administrative Assistant Is. White's position description provides that she supervises subordinate staff, issues oral and written reprimands on her own initiative, and recommends disciplinary action including suspension and discharge. Further, it provides that she counsels employees on problems with productivity, quality of work, and conduct. She plans assigns, prioritizes, coordinates, evaluates, reviews, and maintains records of her subordinates' performance.

White admits that she supervises and disciplines the Administrative Assistants "as required by the union contract on time and attendance." She does not deny that she has the authority to impose or effectively recommend discipline for other infractions. Further, she admits that she completes performance evaluations for her subordinates.

d. 37015-34-60-110-00-01 - Houghland, Donnie

Donnie Houghland functions as the Adjutant of the Anna Veteran's Home. In that capacity he supervises social services, activities, and volunteer services. His position description states that he oversees four subordinates and serves as a "working supervisor." Houghland admits that he assigns work to one of his subordinates. He further asserts that he completes performance evaluations for his subordinates and establishes goals and objectives "through the direction of [his] supervisor and with his or her approval." Houghland adds that he has "never completed a performance evaluation that was not subject to approval by the Administrator and reviewed and adjusted."

Houghland's position description provides that he "plans, develops, organizes and evaluates the supportive programs and policies that affect the Department's mission of providing quality therapeutic care to Veterans' [and] exercises key management control by evaluation [sic] programs [and] developing and implementing program changes." Houghland asserts, contrary to his position description, that he has no authority to make any program changes. He does not deny that he plans, develops, organizes, and evaluates the supportive programs and policies that affect the Department's mission. He asserts that he has never written a policy or procedure. He further denies that he has the authority to decide how policies will be implemented. However, he does not deny that he has recommended the adoption of policies.

### **III. Discussion and Analysis**

#### **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, violates provisions of the United States and Illinois constitutions. State of Ill., Dep't of Cent. Mgmt. Serv., 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.")). Accordingly, these issues are not addressed in this decision.

#### **b. Non-Constitutional General Objections**

AFSCME's general objections are without merit and do not raise issues of fact or law that might rebut the presumption that the designation is 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. See State of Ill., Dep't of Cent. Mgmt. Serv., 30 PERI ¶ 80 and all subsequent Board designation cases.

Here, most of AFSCME's objections may be restated as objections to this now well-established framework because they presuppose that CMS must initially prove that the designation is proper. For example, AFSCME argues that CMS "failed to carry its burden of proof" and "presented no evidence" that the employees at issue ever exercise their purported authority or were told they possessed it. Similarly, AFSCME asserts that "there can be no showing of managerial authority based solely on [an] affidavit," which is phrased in general terms. Likewise, AFSCME states that "there is no demonstration [by CMS] that the employees at issue have...authority to complete the job duties...[in their]...position descriptions." Finally, AFSCME generally asserts that CMS's affidavits are unreliable because there is no indication that they are accurate.

Contrary to AFSCME's general assertion, the burden is on AFSCME, not CMS. Accordingly, these objections must be rejected because they ignore the presumption and misallocate the burden.

Second, the Board has similarly rejected AFSCME's objections based on the bald statement that the designated positions do not have significant and independent discretionary authority because they are professional rather than managerial positions. State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Cent. Mgmt. Servs.), 30 PERI ¶ 85 (IL LRB-SP 2013). The terms managerial and professional are not mutually exclusive and there is no exception for professional employees in the language of Section 6.1(c)(i). State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing Dep't of Cent. Mgmt. Servs. / Ill. Pollution Control Bd., 2013 IL App (4th) 110877). As such, where a position meets one of the two alternative tests set out in Section 6.1(c)(i), it may appropriately be designated by the Governor for exclusion from collective bargaining rights regardless of whether it is also a professional position. Id.

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

- c. 37015-34-25-100-00-01 - Tisdale, Lisa; 37015-34-25-200-00-01 - Willis, William; 37015-34-25-300-00-01 - White, Earl; 37015-34-25-500-00-01 - Vaughn, Anthony; 37015-34-40-120-00-01 - Pierard, Luann; 37015-34-50-200-01-01 - vacant/Manteno/Fill

CMS's designation of these positions is proper because the designation are presumed to be properly made and AFSCME has introduced no specific evidence to suggest that CMS has limited the position holders' discretion or independent authority within the meaning of Section 6.1(c)(i) or (ii). State of Ill. Dep't of Cent. Mgmt. Serv., 30 PERI ¶ 164 (IL LRB-SP 2014) (objectors must provide specific examples to negate each of the three tests in Section 6.1(c)); see also State of Ill. Dep't of Cent. Mgmt. Serv., 30 PERI ¶ 85 (IL LRB-SP 2013).

AFSCME has not raised issues of fact for hearing by asserting that there is a "high likelihood" 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).<sup>3</sup>

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<sup>3</sup> The alleged constitutional implications of this ruling are not addressed here for reasons set forth in section IV.a. of this RDO.

Thus, CMS properly designated the positions referenced above.

d. 37015-34-00-000-01-01 - Diehl, Gwen

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority within the meaning of Section 6.1(c)(ii).

Under Section 6.1(c)(ii) of the Act, a position authorizes its holder with the requisite authority if the position is supervisory within the meaning of the National Labor Relations Act and the National Labor Relations Board's case law. 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., 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., 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, Inc., 348 NLRB at 689.

An employee with the purported authority to responsibly direct must carry out such direction with independent judgment. Further, "it must be shown that the employer delegated to the putative supervisor the authority...to take corrective action, if necessary." In addition, there must be a "prospect of adverse consequences for the putative supervisor" arising from his direction of other employees. Id.

Here, Diehl has significant and independent discretionary authority because she possesses authority to responsibly direct her subordinates. First, the position description states that the position holds the authority to direct employees and Diehl confirms that she "directs [her

subordinate] employee in day-to-day tasks and responsibilities.” Further, based on this evidence, the position holder, Diehl, exercises the use of independent judgment and is accountable for her subordinate’s work because the designation is presumed proper under Section 6.1(d) of the Act and the position description does not expressly limit the position holder’s discretion, independent authority, or accountability.

Thus, the designation of this position is properly made.

e. 37015-34-00-300-00-01 - Easley, Dee

CMS’s designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no evidence to suggest that CMS has limited the position holder’s discretion or independent authority within the meaning of Section 6.1(c)(i).

Under Section 6.1(c)(i) “a person has significant and independent discretionary authority as an employee if he or she “[1] 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 [2] represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.” When addressing the meaning of Section 6.1(b)(5), one must first look to the language of that section of the Act. The Board may consider case precedent pertaining to the traditional managerial exclusion under Section 3(j) to the extent that the precedent explains the meaning of terms commonly used in both Section 3(j) and section 6.1(b)(5). State of Ill., Dep’t of Cent. Mgmt. Servs. (Dep’t of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing City of Bloomington v. Ill. Labor Relations Bd., 373 Ill. App. 3d 599, 608 (4th Dist. 2007) (“When statutes are enacted after judicial opinions are published, it is presumed that the legislature acted with knowledge of the prevailing case law.”)). Finally, the burden is on AFSCME to prove that the designation is improperly made. State of Ill., Dep’t of Cent. Mgmt. Servs. (Dep’t of Commerce & Economic Opportunity), 30 PERI ¶ 86.

Here, Easley represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency when she develops position descriptions and organizational charts. First, Easley represents management’s interests because she helps determine the responsibilities allocated to each position overseen by management and their proper location in the administrative hierarchy. Further, her duties require the exercise of discretion because she must “initiate appropriate changes when required”

and, to that end, must necessarily monitor the efficacy of existing position descriptions and organizational charts to determine whether they meet the agency's needs. Finally, her decisions concerning these managerial documents control or implement the policies of her state agency because well-crafted position descriptions and carefully thought-out hierarchical structures are integral to the smooth functioning of the agency as a whole and are therefore necessary components to the implementation of any and all of the agency's policies. See State of Ill., Dep't of Cent. Mgmt. Servs. (Illinois Gaming Bd.), Case No. S-DE-14-121 (IL LRB-SP Jan. 3, 2014)(employee satisfied the second test under Section 6.1(c)(i) "to the extent that [the employee's] role influenced a necessary component of [the agency's] very mission.")

Thus, the designation is properly made.

f. 37015-34-30-210-10-01 - White, Carrol

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority within the meaning of Section 6.1(c)(ii).

As noted above, "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., 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., 348 NLRB 686, 687 (2006).

Here, White has significant and independent discretionary authority because she possesses authority to responsibly direct her subordinates. First, the position description states that the position holds the authority to direct employees and White confirms that she supervises her subordinates and completes their performance evaluations. Further, based on this evidence, the position holder, White, exercises the use of independent judgment and is accountable for her subordinate's work because the designation is presumed proper under Section 6.1(d) of the Act and the position description does not expressly limit the position holder's discretion, independent authority, or accountability.

Similarly, White has significant and independent discretionary authority because she possesses authority to discipline her subordinates and effectively recommend discharge and

suspension. White admits that she has authority to discipline. Further, she never denied that she had authority to recommend suspension and discharge. Finally, these recommendations are presumed effective because White does not identify any circumstances in which her superiors ever rejected her recommendations, despite the fact that AFSCME specifically solicited such information from her on the questionnaire.

Notably, White's answers on the AFSCME questionnaire do not alter the conclusion that she exercises independent judgment. Although White asserts that she disciplines her subordinates on time and attendance "as required by the union contract," she does not assert that her disciplinary authority is limited to those subjects nor does she assert that the contract removes her discretion to initiate discipline or to determine the penalty imposed.

Thus, this designation is properly made.

g. 37015-34-60-110-00-01 - Houghland, Donnie

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority, within the meaning of Section 6.1(c)(ii).

As noted above, "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., 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., 348 NLRB 686, 687 (2006).

Here, Houghland has significant and independent discretionary authority because he possesses authority to assign work to his subordinates. First, the position description states that the position holds the authority to assign work to employees and Houghland confirms, by implication, that he assigns work to at least one of his subordinates. Although he denies assigning work to three of his four subordinates, he never denied assigning work to the fourth. Further, based on this evidence, the position holder, Houghland, exercises the use of independent judgment and materially effects his subordinates' terms and conditions of employment because the designation is presumed proper under Section 6.1(d) of the Act and the position description does not expressly limit the position holder's discretion or independent authority.

Thus, the designation is presumed properly made.

**IV. Conclusions 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 positions in the Department of Veterans' Affairs are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-34-00-000-01-01	Veterans' Home Coordinator	Diehl, Gwen
37015-34-00-300-00-01	Public Service Administrator	Easley, Dee
37015-34-25-100-00-01	Central Division Supervisor	Tisdale, Lisa
37015-34-25-200-00-01	Northern Division Supervisor	Willis, William
37015-34-25-300-00-01	Southern Division Supervisor	White, Earl
37015-34-25-500-00-01	Metro Division Supervisor	Vaughn, Anthony
37015-34-30-210-10-01	Public Service Administrator	White, Carrol
37015-34-40-120-00-01	Adjutant	Pierard, Luann
37015-34-50-200-01-01	Public Service Administrator	vacant/Manteno/Fill
37015-34-60-110-00-01	Adjutant	Houghland, Donnie

**VI. Exceptions**

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,<sup>4</sup> parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than 3 days after service of the recommended decision and order. All exceptions shall be filed and served in accordance with Section 1300.90 of the Board's Rules. Exceptions must be filed by electronic mail to [ILRB.Filing@illinois.gov](mailto:ILRB.Filing@illinois.gov). Each party shall serve its exceptions on the other parties. If the original exceptions are withdrawn, then all subsequent exceptions are moot. A party not filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

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<sup>4</sup> Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>.

**Issued at Chicago, Illinois this 3rd day of February, 2014**

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

*/s/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**

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

State of Illinois, Department of Central	)	
Management Services, (Department of	)	
Veterans' Affairs),	)	
	)	
Petitioner,	)	Case No. S-DE-14-183
	)	
and	)	
	)	
American Federation of State, County	)	
and Municipal Employees, Council 31,	)	
	)	
Labor Organization-Objector	)	

**ADMINISTRATIVE LAW JUDGE'S  
RECOMMENDED DECISION AND ORDER**

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) *added by* Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. There are three broad categories of positions which may be so designated: 1) positions which were first certified to be in a bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008, 2) positions which were the subject of a petition for such certification pending on April 5, 2013 (the effective date of Public Act 97-1172), or 3) positions which have never been certified to have been in a collective bargaining unit. Only 3,580 of such positions may be so designated by the Governor, and, of those, only 1,900 positions which have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, the position must fit one of the following five categories:

- 1) it must authorize an employee in the position to act as a legislative liaison;
- 2) it must have a title of or authorize a person who holds the position to exercise substantially similar duties as a Senior Public Service Administrator, Public

Information Officer, or Chief Information Officer, or as an agency General Counsel, Chief of Staff, Executive Director, Deputy Director, Chief Fiscal Officer, or Human Resources Director;

- 3) it must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), see 20 ILCS 415/4 through 4d (2012);
- 4) it must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
- 5) it must authorize an employee in that position to have “significant and independent discretionary authority as an employee” by which the Act means the employee is either
  - (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
  - (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. It also requires the Illinois Labor Relations Board to determine, in a manner consistent with due process, whether the designation comports with the requirements of Section 6.1, and to do so within 60 days.<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 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On January 16, 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, CMS withdrew its petition with respect to four of the six listed positions.<sup>2</sup> On January 27, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules. Based on my review of the designation, the documents submitted as part of the designation, the objections, and the documents and arguments submitted in support of those objections, I find that the designation was properly submitted, that it is consistent with the requirements of Section 6.1 of the Act, and that the objections fail to raise an issue of law or fact that might overcome the presumption that the designation is proper. 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 any existing inclusion of these positions within any collective bargaining unit.

The following two positions within the Department of Veterans' Affairs are at issue in this designation:

37015-34-00-310-00-01	Financial and Operations Reporting Manager	Long, Trudy
37015-34-00-310-00-02	Procurement Manager	Castor-Young, Mary

CMS's petition indicates the positions at issue qualify for designation under Section 6.1(b)(5) of the Act which permits designation if the position authorizes an employee in that position to have "significant and independent discretionary authority."<sup>3</sup> AFSCME objects to the designation of all listed positions.

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<sup>2</sup> These include the following position numbers: 37015-34-00-310-00-10, 37015-34-40-200-00-01, 37015-34-50-220-00-01, and 37015-34-30-210-00-01.

<sup>3</sup> CMS filed position descriptions (CMS-104s) for the positions and affidavits in support of its assertion. These positions are currently represented by AFSCME.

## **I. Objections**

First, AFSCME states that Section 6.1 of the Act is unconstitutional, on its face and as applied, both under the Illinois Constitution and the Constitution of the United States of America because it deprives AFSCME of due process and violates the equal protection clauses, the prohibition against impairment of contracts, and the separation of powers clause of the Illinois Constitution.

Further, AFSCME generally objects to the use of position descriptions to support the petition and to the allocation of the burden of proof. AFSCME also argues that there can be no showing of managerial authority based solely on an affidavit, which states that the position at issue is authorized to effectuate departmental policy, where the position description does not reference any specific policy. Similarly, AFSCME states that the position descriptions set forth only potential responsibilities, not actual ones. In the same vein, AFSCME asserts that CMS has presented no evidence that the employees at issue ever exercised their referenced supervisory or quasi-managerial authority. Likewise, AFSCME asserts that CMS has not shown that it told the employees they possessed such authority. In addition, AFSCME argues that the positions at issue are professional and not managerial.

Finally, AFSCME advances specific objections with respect to the positions held by Trudy Long and Mary Castor-Young for “the reasons stated in [their] questionnaire[s] and because of the information contained therein.” In particular, AFSCME notes that Long has no subordinates. Further, AFSCME asserts that both Long’s and Castor-Young’s position descriptions contain errors. AFSCME concludes that there is a high likelihood that all the position descriptions are inaccurate because specific individuals identified inaccuracies in their own position descriptions. On this 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.

## **II. Material Facts**

### **a. 37015-34-00-310-00-01 - Long, Trudy**

Trudy Long is a public Service Administrator Option 2. According to her job description, she is the Generally Accepted Accounting Standards and Principles (GAAP) Coordinator for the Department of Veterans’ Affairs. In that capacity, she directs the

Department's fiscal staff in the interpretation of the required financial accounting and reporting standards and principles of Illinois State Government used by all State agencies. She also directs the Department in complying with those standards. Further, she directs the Department's fiscal staff in complying with the US Office of Management and Budget (US OMB) and the US Department of Veterans' Affairs (US DVA) regulations so that the Department may receive and expend federal funds.

As the Department's GAAP coordinator, she interprets and provides administrative direction to the Department's administrators, fiscal administrators, and fiscal staff, agency-wide, in the preparation of the required financial statements and reports governed by the GAAP of the State of Illinois, the Governmental Accounting, Auditing and Financial Reporting (GAAFR) statements, the Governmental Accounting Standards Board Statement (GASBS) standards, US OMB regulations; the US DVA regulations, and the Illinois Office of the Comptroller, Statewide Accounting and Management System (SAMS) manual.

Further, she provides guidance to operations staff within the Department of Veterans' Affairs during developmental stages of programs and grant applications to ensure reporting requirements under the State and Federal Guidelines are met. She also directs the preparation of financial statement, reports and budgets required by other State or Federal agencies to fulfill grant application requirements.

Long's position description provides that she assists the Chief Fiscal Officer with division operating expense budgeting for all agency divisions. Long admits that the current Fiscal Supervisor sometimes asks her for assistance on how to calculate, prepare, and complete some budgetary projects.

Long asserts that she does not write policies or recommend the adoption of policies. However, she concedes that she has written certain procedures that assist others in performing their job duties. Long asserts that she has no authority to decide how policies or legislation will be implemented. Further, she states that she does not recommend any actions that control or implement legislation that affects her agency or agency policy.

b. 37015-34-00-310-00-02 - Castor-Young, Mary

Mary Castor-Young is the Agency Procurement Officer. She ensures that the agency conducts procurements in accordance with the Illinois Procurement Code and the associated

rules and policy directives issued by the Department of Central Management Services. She authorizes expenditures, assigns and maintains purchase order numbers, and monitors purchase order completion for Central Office and Field Services Divisions. She prepares Central Office and Field Division Procurement Business Cases and contracts. She reviews, approves, and maintains agency Procurement Business Cases and contract documents for execution by the Fiscal Officers or Agency Director. She supports and participates in the CMS Supplier Relationship Program, completes vendor surveys, and holds vendor meetings as needed. Castor-Young stated that all her procurements are approved by the State Procurement Officer.

### **III. Discussion and Analysis**

#### **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, violates provisions of the United States and Illinois constitutions. State of Ill., Dep't of Cent. Mgmt. Serv., 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.")). Accordingly, these issues are not addressed in this decision.

#### **b. Non-Constitutional General Objections**

AFSCME's general objections are without merit and do not raise issues of fact or law that might rebut the presumption that the designation is 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. See State of Ill., Dep't of Cent. Mgmt. Serv., 30 PERI ¶ 80 and all subsequent Board designation cases.

Here, most of AFSCME's objections may be restated as objections to this now well-established framework because they presuppose that CMS must initially prove that the designation is proper. For example, AFSCME argues that CMS "failed to carry its burden of proof" and "presented no evidence" that the employees at issue ever exercise their purported authority or were told they possessed it. Similarly, AFSCME asserts that "there can be no

showing of managerial authority based solely on [an] affidavit,” which is phrased in general terms. Likewise, AFSCME states that “there is no demonstration [by CMS] that the employees at issue have...authority to complete the job duties...[in their]...position descriptions.” Finally, AFSCME generally asserts that CMS’s affidavits are unreliable because there is no indication that they are accurate.

Contrary to AFSCME’s general assertion, the burden is on AFSCME, not CMS. Accordingly, these objections must be rejected because they ignore the presumption and misallocate the burden.

Second, the Board has similarly rejected AFSCME’s objections based on the bald statement that the designated position does not have significant and independent discretionary authority because it is professional rather than managerial. State of Ill., Dep’t of Cent. Mgmt. Servs. (Dep’t of Cent. Mgmt. Servs.), 30 PERI ¶ 85 (IL LRB-SP 2013). The terms managerial and professional are not mutually exclusive and there is no exception for professional employees in the language of Section 6.1(c)(i). State of Ill, Dep’t of Cent. Mgmt. Servs. (Dep’t of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing Dep’t of Cent. Mgmt. Servs. / Ill. Pollution Control Bd., 2013 IL App (4th) 110877). As such, where a position meets one of the two alternative tests set out in Section 6.1(c)(i), it may appropriately be designated by the Governor for exclusion from collective bargaining rights regardless of whether it is also a professional position. Id.

In sum, AFSCME’s general objections do not raise issues of fact or law that might rebut the presumption that CMS’s designation is properly made.

c. 37015-34-00-310-00-01 - Long, Trudy

CMS’s designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no evidence to suggest that CMS has limited the position holder’s discretion or independent authority within the meaning of Section 6.1(c)(i).

Under Section 6.1(c)(i) “a person has significant and independent discretionary authority as an employee if he or she “[1] 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 [2] represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.” When addressing the meaning of

Section 6.1(b)(5), one must first look to the language of that section of the Act. The Board may consider case precedent pertaining to the traditional managerial exclusion under Section 3(j) to the extent that the precedent explains the meaning of terms commonly used in both Section 3(j) and section 6.1(b)(5). State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing City of Bloomington v. Ill. Labor Relations Bd., 373 Ill. App. 3d 599, 608 (4th Dist. 2007) (“When statutes are enacted after judicial opinions are published, it is presumed that the legislature acted with knowledge of the prevailing case law.”)). Finally, the burden is on AFSCME to prove that the designation is improperly made. State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Commerce & Econ. Opportunity), 30 PERI ¶ 86.

Long satisfies the first test under Section 6.1(c)(i) because she is engaged in executive and management functions of a State agency and is charged with the effectuation of management policies and practices of a State agency. First, Long is engaged in executive and management functions because she admitted that she helps the Fiscal Supervisor in calculating, preparing, and completing some budgetary projects. See Dep't of Cent. Mgmt. Serv. (Pollution Control Bd.), v. Ill. Labor Rel. Bd., State Panel, 2013 IL App (4th) 110877 ¶ 25 (preparing a budget constitutes an executive and management function); State of Ill. Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n) v. Ill. Labor Rel. Bd., State Panel, 406 Ill. App. 3d 766, 774, (4th Dist. 2010). Although Long asserted that her job duties do not include budgetary matters, her more specific statement belies this denial and compels the conclusion that Long is engaged in executive and management functions. Second, Long is charged with the effectuation of management policies and practices because it is the Department's policy to adhere to US OMB and US DVA regulations, and Long ensures that that the department achieves and maintains such compliance.

Similarly, Long satisfies the second test under Section 6.1(c)(i) because she has authority to represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency. Here, Long provides guidance to operations staff within the Department of Veterans' Affairs during the developmental stages of program creation and grant applications. In that capacity, she takes or recommends discretionary actions because she must necessarily exercise judgment in advising the Department of applicable laws, rules and procedures under the State and Federal Guidelines to ensure that the Department fulfills grant application and reporting requirements. As such, Long effectively controls or implements the policy of her agency because her duties ensure that the Department is eligible to

receive State and Federal funding necessary to achieve its core mission and implement its policies. See State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Commerce and Econ. Opportunity), 27 PERI ¶ 56 (IL LRB-SP 2011) (employees' involvement in seeking outside funding contributed to a finding of managerial status under the more restrictive test set forth in Section 3(j)).

Thus, the designation is properly made.

d. 37015-34-00-310-00-02 - Castor-Young, Mary

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority within the meaning of Section 6.1(c)(i).

Castor-Young satisfies the second test under Section 6.1(c)(i) of the Act because she has authority to represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency when she acts as the Agency Procurement Officer. In that capacity, she exercises significant discretion by making recommendations concerning contracts for services and authorization of expenditures which necessarily require her to choose among a wide array of service options. Castor-Young's recommendations on these matters are effective because the State Procurement officer approves all her procurement recommendations. In turn, these effective recommendations control or implement the policy of her agency because they determine the means by which the Department will obtain the raw materials that enable it to run effectively and to achieve its mission. Dep't of Central Mgmt. Servs. (Ill. Commerce Comm'n), 29 PERI ¶ 76 (IL LRB-SP 2012) (employees who advanced new methods of procurement through their effective recommendations satisfied the more restrictive test for managerial authority under Section 3(j)).

Thus, the designation is properly made.

#### **IV. Conclusions 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 positions in the Department of Veterans' Affairs are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-34-00-310-00-01	Financial and Operations Reporting Manager	Long, Trudy
37015-34-00-310-00-02	Procurement Manager	Castor-Young, Mary

**VI. Exceptions**

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,<sup>4</sup> parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than 3 days after service of the recommended decision and order. All exceptions shall be filed and served in accordance with Section 1300.90 of the Board's Rules. Exceptions must be filed by electronic mail to [ILRB.Filing@illinois.gov](mailto:ILRB.Filing@illinois.gov). Each party shall serve its exceptions on the other parties. If the original exceptions are withdrawn, then all subsequent exceptions are moot. A party not filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

**Issued at Chicago, Illinois this 4th day of February, 2014**

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

*/s/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**

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<sup>4</sup> Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>.

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

State of Illinois, Department of Central Management Services, (Department of Veterans' Affairs),	)	
	)	
	)	
Petitioner,	)	Case No. S-DE-14-184
	)	
and	)	
	)	
American Federation of State, County and Municipal Employees, Council 31,	)	
	)	
Labor Organization-Objector	)	

**ADMINISTRATIVE LAW JUDGE'S  
RECOMMENDED DECISION AND ORDER**

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) *added by* Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. There are three broad categories of positions which may be so designated: 1) positions which were first certified to be in a bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008, 2) positions which were the subject of a petition for such certification pending on April 5, 2013 (the effective date of Public Act 97-1172), or 3) positions which have never been certified to have been in a collective bargaining unit. Only 3,580 of such positions may be so designated by the Governor, and, of those, only 1,900 positions which have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, the position must fit one of the following five categories:

- 1) it must authorize an employee in the position to act as a legislative liaison;
- 2) it must have a title of or authorize a person who holds the position to exercise substantially similar duties as a Senior Public Service Administrator, Public Information Officer, or Chief Information Officer, or as an agency General

Counsel, Chief of Staff, Executive Director, Deputy Director, Chief Fiscal Officer, or Human Resources Director;

- 3) it must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), see 20 ILCS 415/4 through 4d (2012);
- 4) it must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
- 5) it must authorize an employee in that position to have “significant and independent discretionary authority as an employee” by which the Act means the employee is either
  - (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
  - (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. It also requires the Illinois Labor Relations Board to determine, in a manner consistent with due process, whether the designation comports with the requirements of Section 6.1, and to do so within 60 days.<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 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On January 16, 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 27, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules. Based on my review of the designation, the documents submitted as part of the designation, the objections, and the documents and arguments submitted in support of those objections, I find that the designation was properly submitted, that it is consistent with the requirements of Section 6.1 of the Act, and that the objections fail to raise an issue of law or fact that might overcome the presumption that the designation is proper. Consequently, 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.

The following Public Service Administrator, Option 6 position within the Department of Veterans' Affairs is at issue in this designation:

37015-34-50-110-00-01

Michael Barnett

CMS's petition indicates the position at issue qualifies for designation under Section 6.1(b)(5) of the Act which permits designation if the position authorizes an employee in that position to have "significant and independent discretionary authority."<sup>2</sup> AFSCME objects to the designation of the listed position.

### **I. Objections**

First, AFSCME states that Section 6.1 of the Act is unconstitutional, on its face and as applied, both under the Illinois Constitution and the Constitution of the United States of America because it deprives AFSCME of due process and violates the equal protection clauses, the

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<sup>2</sup> CMS filed a position description (CMS-104s) for the position and an affidavit in support of its assertion. This position is currently represented by AFSCME.

prohibition against impairment of contracts, and the separation of powers clause of the Illinois Constitution.

Further, AFSCME generally objects to the use of position descriptions to support the petition and to the allocation of the burden of proof. AFSCME also argues that there can be no showing of managerial authority based solely on an affidavit, which states that the position at issue is authorized to effectuate departmental policy, where the position description does not reference any specific policy. Similarly, AFSCME states that the position description sets forth only potential responsibilities, not actual ones. In the same vein, AFSCME asserts that CMS has presented no evidence that the employee at issue ever exercised his referenced supervisory or quasi-managerial authority. Likewise, AFSCME asserts that CMS has not shown that it told the employee he possessed such authority. In addition, AFSCME argues that the position at issue is professional and not managerial.

Finally, AFSCME advances specific objections with respect to the position held by Michael Barnett and requests that Barnett be retained in the unit for “the reasons stated in his questionnaire and because of the information contained therein.”

## **II. Material Facts**

### **a. Michael Barnett - 37015-34-50-110-00-01**

Michael Barnett is the Director of Social Work/Social Services at the Illinois Veterans Home in Manteno, Illinois. Barnett has three subordinates. His job description states that he “supervises lower level Social Workers and Social Service Aide Trainees.” He asserts that he approves his subordinates’ requests for time off and completes their annual evaluations (CMS-201s). Barnett does not deny that he directs his subordinates and notes that he “gives them follow-ups on issues [and] reports...issues that they follow up on.” He also states that he assigns work to employees by “asking them to follow up” on certain tasks. Barnett’s job description states that he participates in planning and conducting a social service staff development program and prepares training programs for individual areas of specialization.

Barnett's job description further states that he "directs and administers social work services programs for the veterans home and that he develops and directs the development of policies...procedures[,] and practices for the program." Barnett asserts that he wrote and revised the social service policy for the agency.

### **III. Discussion and Analysis**

#### **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, violates provisions of the United States and Illinois constitutions. State of Ill., Dep't of Cent. Mgmt. Serv., 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.")). Accordingly, these issues are not addressed in this decision.

#### **b. Non-Constitutional General Objections**

AFSCME's general objections are without merit and do not raise issues of fact or law that might rebut the presumption that the designation is 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. See State of Ill., Dep't of Cent. Mgmt. Serv., 30 PERI ¶ 80 and all subsequent Board designation cases.

Here, most of AFSCME's objections may be restated as objections to this now well-established framework because they presuppose that CMS must initially prove that the designation is proper. For example, AFSCME argues that CMS "failed to carry its burden of proof" and "presented no evidence" that the employee at issue ever exercise his purported authority or was told he possessed it. Similarly, AFSCME asserts that "there can be no showing of managerial authority based solely on [an] affidavit," which is phrased in general terms. Likewise, AFSCME states that "there is no demonstration [by CMS] that the employee...at issue [has]...authority to complete the job duties...[in his]...position description." Finally, AFSCME

generally asserts that CMS's affidavits are unreliable because there is no indication that they are accurate.

Contrary to AFSCME's general assertion, the burden is on AFSCME, not CMS. Accordingly, these objections must be rejected because they ignore the presumption and misallocate the burden.

Second, the Board has similarly rejected AFSCME's objections based on the bald statement that the designated position does not have significant and independent discretionary authority because it is professional rather than managerial. State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Cent. Mgmt. Servs.), 30 PERI ¶ 85 (IL LRB-SP 2013). The terms managerial and professional are not mutually exclusive and there is no exception for professional employees in the language of Section 6.1(c)(i). State of Ill, Dep't of Cent. Mgmt. Servs. (Dep't of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing Dep't of Cent. Mgmt. Servs. / Ill. Pollution Control Bd., 2013 IL App (4th) 110877). As such, where a position meets one of the two alternative tests set out in Section 6.1(c)(i), it may appropriately be designated by the Governor for exclusion from collective bargaining rights regardless of whether it is also a professional position. Id.

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

c. Michael Barnett - 37015-34-50-110-00-01

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority within the meaning of Section 6.1(c)(ii) of the Act.

Under Section 6.1(c)(ii) of the Act, a position authorizes its holder with the requisite authority if the position is supervisory within the meaning of the National Labor Relations Act and the National Labor Relations Board's case law. 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., 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., 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, Inc., 348 NLRB at 689.

An employee with the purported authority to responsibly direct must carry out such direction with independent judgment. Further, “it must be shown that the employer delegated to the putative supervisor the authority...to take corrective action, if necessary.” In addition, there must be a “prospect of adverse consequences for the putative supervisor” arising from his direction of other employees. Id.

Here, Barnett is properly designated as supervisory under Section 6.1(c)(ii) because he has the authority to responsibly direct his subordinates. The position description states that his position “supervises lower level Social Workers and Social Service Aide Trainees.” Further, Barnett admits that he directs his subordinates and completes their performance evaluations. Based on this evidence, the position holder, Barnett, exercises the use of independent judgment and is accountable for his subordinates’ work because the designation is presumed proper under Section 6.1(d) of the Act and the position description does not expressly limit the position holder’s discretion, independent authority, or accountability.

Thus, the designation is properly made.

#### **IV. Conclusions 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 in the Department of Veterans' Affairs is excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-34-50-110-00-01      Michael Barnett

**VI. Exceptions**

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,<sup>3</sup> parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than 3 days after service of the recommended decision and order. All exceptions shall be filed and served in accordance with Section 1300.90 of the Board's Rules. Exceptions must be filed by electronic mail to [ILRB.Filing@illinois.gov](mailto:ILRB.Filing@illinois.gov). Each party shall serve its exceptions on the other parties. If the original exceptions are withdrawn, then all subsequent exceptions are moot. A party not filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

**Issued at Chicago, Illinois this 3rd day of February, 2014**

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

*/s/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**

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<sup>3</sup> Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>.

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

State of Illinois, Department of Central Management Services, (Department of Veterans' Affairs),	)	
	)	
Petitioner,	)	Case No. S-DE-14-185
	)	
and	)	
	)	
American Federation of State, County and Municipal Employees, Council 31,	)	
	)	
Labor Organization-Objector,	)	
	)	
and	)	
	)	
Diane Schultz ,	)	
	)	
Employee-Objector	)	

**ADMINISTRATIVE LAW JUDGE'S  
RECOMMENDED DECISION AND ORDER**

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) *added by* Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. There are three broad categories of positions which may be so designated: 1) positions which were first certified to be in a bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008, 2) positions which were the subject of a petition for such certification pending on April 5, 2013 (the effective date of Public Act 97-1172), or 3) positions which have never been certified to have been in a collective bargaining unit. Only 3,580 of such positions may be so designated by the Governor, and, of those, only 1,900 positions which have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, the position must fit one of the following five categories:

- 1) it must authorize an employee in the position to act as a legislative liaison;
- 2) it must have a title of or authorize a person who holds the position to exercise substantially similar duties as a Senior Public Service Administrator, Public Information Officer, or Chief Information Officer, or as an agency General Counsel, Chief of Staff, Executive Director, Deputy Director, Chief Fiscal Officer, or Human Resources Director;
- 3) it must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), see 20 ILCS 415/4 through 4d (2012);
- 4) it must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
- 5) it must authorize an employee in that position to have “significant and independent discretionary authority as an employee” by which the Act means the employee is either
  - (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
  - (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. It also requires the Illinois Labor Relations Board to determine, in a manner

consistent with due process, whether the designation comports with the requirements of Section 6.1, and to do so within 60 days.<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 August 23, 2013, 37 Ill. Reg. 14,070 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On January 16, 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, Diane Schultz, an employee of the State of Illinois who occupies the position designated as excluded from collective bargaining rights, filed an objection to the designation. On January 27, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules. Based on my review of the designation, the documents submitted as part of the designation, the objections, and the documents and arguments submitted in support of those objections, I find that the designation was properly submitted, that it is consistent with the requirements of Section 6.1 of the Act, and that the objections fail to raise an issue of law or fact that might overcome the presumption that the designation is proper. Consequently, 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.

The following Public Service Administrator, Option 8S position within the Department of Veterans' Affairs is at issue in this designation:

370418-34-30-000-00-01      Diane Schultz

CMS's petition indicates the position at issue qualifies for designation under Section 6.1(b)(5) of the Act which permits designation if the position authorizes an employee in that

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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.

position to have “significant and independent discretionary authority.”<sup>2</sup> AFSCME and Schultz object to the designation of the listed position.

### **I. Objections**

First, AFSCME states that Section 6.1 of the Act is unconstitutional, on its face and as applied, both under the Illinois Constitution and the Constitution of the United States of America because it deprives AFSCME of due process and violates the equal protection clauses, the prohibition against impairment of contracts, and the separation of powers clause of the Illinois Constitution.

Further, AFSCME generally objects to the use of position descriptions to support the petition and to the allocation of the burden of proof. AFSCME also argues that there can be no showing of managerial authority based solely on an affidavit, which states that the position at issue is authorized to effectuate departmental policy, where the position description does not reference any specific policy. Further, AFSCME states that CMS has presented no evidence that the employee at issue ever exercised her referenced supervisory or quasi-managerial authority. Similarly, AFSCME asserts that CMS has not shown that it told the employee she possessed such authority. In addition, AFSCME argues that the position at issue is professional and not managerial. Finally, AFSCME urges the Board not to rely on the Petitioner’s affidavit because the affidavit does not explain how the affiant is familiar with the job duties of the position at issue.

AFSCME also filed position-specific exceptions with respect to the position held by Diane Schulz. It “requests that Mr. Schultz be retained in the bargaining unit for reasons stated in his questionnaire and because of the information contained therein.”

Shultz filed a separate objection to the designation of her petition. It includes the questionnaire solicited by AFSCME and a document that outlines the Department’s policy-making process.

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<sup>2</sup> CMS filed a position description (CMS-104s) for the position and an affidavit in support of its assertion. This position is currently represented by AFSCME.

## **II. Material Facts**

Diane Schultz holds the title Director of Social Services in the Department of Veterans' Affairs. She oversees 11 employees including three Social Service Program Planners, six Social Worker IIs, one Registered Nurse II, and one Office Assistant.

In relevant part, Schultz's position description provides that she supervises subordinate staff in the assignment of duties; plans assigns, prioritizes, coordinates, evaluates, reviews, and maintains records of performance of subordinates; provides appropriate training, technical assistance and counseling for subordinates' development; provides feedback to subordinates concerning work performance; works with each subordinate to meet goals and objectives, establishes and revises goals as required; conducts and signs performance evaluations; counsels employees on problems with productivity, quality of work, conduct, etc; issues oral and written reprimands on her own initiatives and recommends disciplinary action including suspension and discharge.

Schultz asserts that she has no authority to transfer, suspend, layoff, recall, promote, discharge, or reward employees. She admits that she assigns work to staff in the Social Service Department. In addition, she states that she directs her subordinates. For example, she may provide suggestions for interventions regarding behavioral or mood issues of residents' care plans and for interventions related to crisis management, usually related to behavioral "discontrol" or discharge planning. She does not deny that she possesses the authority to discipline employees or to effectively recommend their suspension or discharge.

## **III. Discussion and Analysis**

### **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, violates provisions of the United States and Illinois constitutions. State of Ill., Dep't of Cent. Mgmt. Serv., 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.")). Accordingly, these issues are not addressed in this decision.

b. Non-Constitutional General Objections

AFSCME's general objections are without merit and do not raise issues of fact or law that might rebut the presumption that the designation is 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. See State of Ill., Dep't of Cent. Mgmt. Serv., 30 PERI ¶ 80 and all subsequent Board designation cases.

Here, most of AFSCME's objections may be restated as objections to this now well-established framework because they presuppose that CMS must initially prove that the designation is proper. For example, AFSCME argues that CMS "failed to carry its burden of proof" and "presented no evidence" that the employee at issue ever exercised her purported authority or was told she possessed it. Similarly, AFSCME asserts that "there can be no showing of managerial authority based solely on [an] affidavit," which is phrased in general terms. Likewise, AFSCME states that "there is no demonstration [by CMS] that the employee...at issue [has]...authority to complete the job duties...[in her]...position description." Finally, AFSCME generally asserts that CMS's affidavit is unreliable because there is no indication that it is accurate.

Contrary to AFSCME's general assertion, the burden is on AFSCME, not CMS. Accordingly, these objections must be rejected because they ignore the presumption and misallocate the burden.

Second, the Board has similarly rejected AFSCME's objections based on the bald statement that the designated position does not have significant and independent discretionary authority because it is professional rather than managerial. State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Cent. Mgmt. Servs.), 30 PERI ¶ 85 (IL LRB-SP 2013). The terms managerial and professional are not mutually exclusive and there is no exception for professional employees in the language of Section 6.1(c)(i). State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing Dep't of Cent. Mgmt. Servs. / Ill. Pollution Control Bd., 2013 IL App (4th) 110877). As such, where a position meets one of the two alternative tests set out in Section 6.1(c)(i), it may appropriately be designated by the Governor for exclusion from collective bargaining rights regardless of whether it is also a professional position. Id.

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

c. 370418-34-30-000-00-01 - Diane Schultz

CMS's designation of this position is proper because the designation is presumed to be properly made and neither AFSCME nor Schultz introduced evidence to suggest that CMS has limited the position holder's discretion or independent authority, within the meaning of Section 6.1(c)(ii) of the Act.

Under Section 6.1(c)(ii) of the Act, a position authorizes its holder with the requisite authority if the position is supervisory within the meaning of the National Labor Relations Act and the National Labor Relations Board's case law. 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., 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., 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, Inc., 348 NLRB at 689.

An employee with the purported authority to responsibly direct must carry out such direction with independent judgment. Further, "it must be shown that the employer delegated to the putative supervisor the authority...to take corrective action, if necessary." In addition, there must be a "prospect of adverse consequences for the putative supervisor" arising from his direction of other employees. Id.

In this case, Schultz possesses significant and independent discretionary authority

because she has authority to responsibly direct her subordinates. Schultz's position description states that her position holds the authority to direct employees. Position holder Schultz admits the same. Based on this evidence, the position holder exercises the use of independent judgment and is accountable for her subordinates' work because the designation is presumed proper under Section 6.1(d) of the Act and the position description does not expressly limit the position holder's discretion, independent authority, or accountability. Thus, Schulz holds the authority to responsibly direct her subordinates.

Further, Schultz possesses significant and independent discretionary authority because she has authority to discipline and effectively recommend discipline of her subordinates. The position description provides that Schultz has authority to issue oral and written reprimands on her own initiative. Schultz does not deny possessing that authority. In addition, her position description provides that she has authority to recommend disciplinary action including suspension and discharge. Schultz's recommendations are presumed effective because Schultz does not identify any circumstances in which her superiors ever rejected her recommendations, despite the fact that AFSCME specifically solicited such information from her on the questionnaire. Based on this evidence, the position holder exercises the use of independent judgment in taking and recommending disciplinary action because the designation is presumed proper under Section 6.1(d) of the Act and the position description does not expressly limit the position holder's discretion or independent authority. Consequently, Schultz holds the authority to discipline her subordinates and to make effective recommendations on disciplinary action.

Thus, the designation of this position is properly made.

#### **IV. Conclusions 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 in the Department of Veterans' Affairs is excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

**VI. Exceptions**

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,<sup>3</sup> parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than 3 days after service of the recommended decision and order. All exceptions shall be filed and served in accordance with Section 1300.90 of the Board's Rules. Exceptions must be filed by electronic mail to [ILRB.Filing@illinois.gov](mailto:ILRB.Filing@illinois.gov). Each party shall serve its exceptions on the other parties. If the original exceptions are withdrawn, then all subsequent exceptions are moot. A party not filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

**Issued at Chicago, Illinois this 31st day of January, 2014**

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

*/s/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**

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<sup>3</sup> Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>.