

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

State of Illinois, Department of)	
Central Management Services)	
(Department of Revenue),)	
)	
Petitioner)	
	)	Case Nos.
and	)	S-DE-14-202
	)	S-DE-14-203
American Federation of State, County	)	S-DE-14-204
and Municipal Employees, Council 31,	)	S-DE-14-205 &
	)	S-DE-14-206
Labor Organization-Objector)	
)	
Mary Duesterhaus, Angela Miller, Gary Krol,)	
Robert J. Orr and David Marshall,)	
)	
Employee-Objectors)	

**DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012), allows the Governor to designate certain employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be available under Section 6 of the Act. These five cases, which we consolidate for disposition, involve such designations made on the Governor's behalf by the Illinois Department of Central Management Services (CMS).

On February 26, 2014, Administrative Law Judge (ALJ) Anna Hamburg-Gal issued separate Recommended Decisions and Order (RDOs) in Case Nos. S-DE-14-202, S-DE-14-203 and S-DE-14-204, finding that designations made by CMS pursuant to Section 6.1 were properly made. On March 5, 2014, she did the same in Case Nos. S-DE-14-205 and S-DE-14-206. The petition filed in Case No. S-DE-14-202 designated 34 Public Service Administrator (PSA)

Option 1 positions, that filed in Case No. S-DE-14-203 designated seven PSA Option 7 positions, that filed in Case No. S-DE-14-204 designated a single PSA Option 8L position, that filed in Case No. S-DE-14-205 designated a single PSA Option 9A position while that filed in Case No. S-DE-14-206 designated a single PSA Option 9B position.¹ In all five cases CMS's petitions designated for exclusion positions at the Department of Revenue pursuant to Section 6.1(b)(5) of the Act which allows designations of positions with "significant and independent discretionary authority."²

Five employees occupying designated positions filed objections to the petition pursuant to Section 1300.60 of the Board's rules for implementing Section 6.1 of the Act, 80 Ill. Admin. Code §1300.60.³ The American Federation of State, County and Municipal Employees, Council 31 (AFSCME), did the same.⁴ In each case, the ALJ declined to rule on those objections that alleged Section 6.1 was unconstitutional and rejected other of AFSCME's generally applicable

¹ Regulations promulgated by the Department of Central Management Services provide the following options for PSA positions:

Option 1: General Administration/Business Marketing/Labor/Personnel

Option 7: Law Enforcement/Correctional

Option 8L: Special License - Law License

Option 9A: Special License - Certified Internal Auditor

Option 9B: Special License - Certified Information Systems Auditor

80 Ill. Admin. Code 310.50.

² 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.

³ These were Mary Duesterhaus and Angela Miller in Case No. S-DE-14-202 and Gary Krol, Robert J. Orr and David Marshall in Case No. S-DE-14-203.

⁴ In Case No. S-DE-14-202, AFSCME filed objections and two sets of supplemental objections in a single day.

objections. For those positions for which no specific exceptions were filed, the ALJ found that AFSCME had not overcome the presumption of appropriateness established by Section 6.1(d).

The ALJ also considered the appropriateness of the designation of the positions for which specific objections had been filed, and found in each instance that the designation comported with Section 6.1(b)(5) either through one of the managerial tests articulated in Section 6.1(c)(i) or the supervisory test in Section 6.1(c)(ii). For example, she found in Case No. S-DE-14-204 that Attorney Craig Callahan's position meets the requirements of Section 6.1(c)(i) because he makes recommendations to the Informal Conference Board concerning the settlement of disputed tax liabilities and claims for refund. Callahan had introduced no evidence that his recommendations were not accepted, and when accepted they implement the policy of the Department in ensuring it fulfills its tax collection function while operating efficiently.

AFSCME filed exceptions in each of these cases, again raising arguments that Section 6.1 is unconstitutional, arguments which we decline to rule on for the reasons articulated by the ALJ. We similarly reject its other generally applicable objections and its objections tailored for specific positions for the reasons given by the ALJ.

Attorney Callahan filed his own exceptions to the ALJ's RDO concerning his position, the sole position at issue in Case No. S-DE-14-204. He relies on Department of Central Management Services/Illinois Commerce Commission v. Illinois Labor Relations Board, 406 Ill. App. 3d 706 (4th Dist. 2010), to argue that he is not a surrogate for the Informal Conference Board he advises, and for that reason is not a managerial employee as a matter of law. He states that the retention of ultimate authority by the ICB precludes him from executing managerial functions and effectuating policy. Consequently, he argues that he does not meet the first two-part test under Section 6.1(c)(i)

[i]n that the ICB has the exclusive authority to issue the Action Decision, whose content is supported by my legal recommendation, the latter is not the execution of a management function, nor am I charged with the effectuation of management policies and practices. My recommendations are similar to the ALJs' recommendations in the 2010 appellate court decision. Therefore, my public employee position is not a designated position under the first test.

He argues that he does not meet the second test

[i]n that my recommendations are legal memorandums which support the content of the Action Decisions, they are similar to the recommendations issued by the ALJs which do not effectuate the management policies and practices of the State agency, because it is the ICB who executes the Action Decisions. Therefore, my public employee position is not a designated position under the second test.

Notably, the Appellate Court decision Callahan relies upon remanded the matter to the Board to consider the degree to which the recommendations made by the ALJs at issue in that case were accepted and thus effective. It does not hold that simply because the Illinois Commerce Commission has final say, the ALJs at issue could not be managerial employees within the meaning of Section 3(j), much less within the meaning of subsequently promulgated Section 6.1(c)(i). In rejecting what it perceived to be the Board's position that recommendations can render an employee managerial only if there is no independent review of that recommendation, the Court stated:

Rather, the test is the effectiveness, power, or influence of the recommendations. Granted, acceptance of recommendations after only a cursory review could suggest a heavy reliance on the recommendations; but thorough reviews would not necessarily negate a reliance on the recommendations. Theoretically, a superior could always perform an independent investigation of the facts and yet almost invariably defer to the subordinate's judgment as to what to do about those facts. Or, alternatively, a superior could always perform an independent review of the recommendations, both in their facts and in their evaluation of the facts, and although the superior almost always approves the recommendations, it is not because of the influence of the recommendations themselves, but rather it is because the recommendations are almost always correct. All this is a way of saying that the criterion, properly speaking, is the effectiveness of the recommendations. The extent of review *could* be an indication of the effectiveness of the recommendations, but review is not the

litmus test. Rather, the litmus test is the influence of the recommendations, *i.e.*, whether they almost always persuade the superiors.

406 Ill. App. 3d at 777. As noted by the ALJ here, the objectors provided no evidence that Callahan's recommendations are not accepted.

The Appellate Court's discussion assumes final authority is not required to establish managerial status, and that was explicitly stated in a decision of the Illinois Supreme Court cited by both the Appellate Court and the ALJ in this case: Chief Judge of the Sixteenth Judicial Circuit v. Ill. State Labor Relations Bd., 178 Ill. 2d 333, 339-40 (1997). Therefore, the proposition which Callahan argues negates either test under Section 6.1(c)(i)—that final say by the ICB means he cannot be managerial—is inconsistent with Illinois law, even the case he relies upon. We find Callahan provides no sound reason to overturn the ALJ's RDO in Case No. S-DE-14-204.

Based on our review of the exceptions, the record, and the RDOs, we reject the exceptions and adopt the RDOs. We find the designations comport with the requirements of Section 6.1, and direct the Executive Director to issue a certification consistent with that finding.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ John J. Hartnett
John J. Hartnett, Chairman

/s/ Paul S. Besson
Paul S. Besson, Member

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

/s/ Michael G. Coli
Michael G. Coli, Member

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting held via videoconference in Chicago, Illinois and Springfield, Illinois, on April 1, 2014; written decision issued at Springfield, Illinois, April 4, 2014.

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STATE PANEL**

State of Illinois, Department of Central)	
Management Services, (Department of)	
Revenue),)	
)	
Petitioner)	Case No. S-DE-14-202
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and)	
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American Federation of State, County)	
and Municipal Employees, Council 31,)	
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Labor Organization-Objector)	
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and)	
)	
Mary Duesterhaus and Angela Miller,)	
)	
Employee-Objectors)	

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

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

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

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

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

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

¹ Public Act 98-100, which became effective July 19, 2013, added subsections (e) and (f) to Section 6.1 which shield certain specified positions from such Gubernatorial designations, but none of those positions are at issue in this case.

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 February 3, 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 February 5, 2014, Mary Duesterhaus, 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 February 10, 2014, Angela Miller, 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 February 13, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) similarly filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules. On February 13, 2014, AFSCME also filed two supplemental objections. 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 34 positions within the Illinois Department of Revenue are at issue in this designation:

37015-25-48-260-00-01	High Risk & Lien Payoffs Supervisor	Branham, Terri
37015-25-48-300-00-01	Technical & Collection Support Division Manager	Carey, Teena
37015-25-55-100-00-01	Chicago Metro Liquor Compliance Manager	Cass, II, Richard
37015-25-41-000-10-01	Staff Assistant to Audit Program Administrator	Cochran, Beth

37015-25-42-321-00-01	Payroll, Benefits & Timekeeping Manager	Davis, Stacy
37015-25-81-000-00-01	Problems Resolution Manager	
37015-25-55-300-00-01	Metro South #2 Liquor Compliance Manager	Doyle, Gary
37015-25-42-311-00-01	Classifications Manager	Duesterhaus, Mary
37015-25-42-300-40-01	Business IT Analyst	Garbett, Michael
37015-25-42-324-00-01	Administrative Transactions/FMLA Manager	Kirk, Stephanie
37015-25-42-300-20-01	Customer Service Liaison	Klintworth, David
37015-25-33-160-10-01	Assistant Division Manager - Alcohol, Tobacco & Fuel	Knoles, Trent
37015-25-05-200-10-01	Gentax Liaison	Letterly, Max
37015-25-71-110-00-01	Licensing Manager	Marijan, Dusanka
37015-25-42-313-00-01	Hiring Posting Manager	Miller, Angela
37015-25-17-000-00-01	Operational/Special Services Division Manager	Neposchlan, Jay
37015-25-45-100-10-01	Advanced Training Specialist	Reid, John
37015-25-55-400-00-01	Downstate Area #3 Liquor Compliance Manager	Robinson, Bonds
37015-25-13-000-00-01	Property Management & Telecommunications Division Manager	Romang, Joseph
37015-25-10-200-20-01	Procurement Office Supervisor	Stephens, Jr, Don
37015-25-31-170-00-01	Chicago Operations Division Manager	Washington, Latanya
37015-25-06-000-30-01	Audit Liaison	
37015-25-82-120-30-01	Exemptions Manager	
37015-25-00-100-00-01	Assistant to Director of Revenue	
37015-25-05-200-00-01	Assistant to Associate Director	
37015-25-07-500-10-01	Assistant Division Manager -Litigation Office	
37015-25-31-160-10-02	Assistant Division Manager- Records Management	
37015-25-00-000-10-01	Assistant to Chief of Staff	
37015-25-03-300-00-01	Publications Management Division Manager	
37015-25-08-200-00-01	Planning Office Manager	
37015-25-83-110-30-01	Technology Support Supervisor	

37015-25-42-300-10-01	Executive Assistant to Human Resources Director
37015-25-45-100-00-01	Training & Development Manager
37015-25-02-100-00-01	Research Analyst

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."² AFSCME objects to designation of all listed positions. Mary Duesterhaus and Angela Miller object to the designation of their own 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 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 Mary Duesterhaus, Michael Garbett, Dave Klintworth, Angela Miller, Bonds Robinson Jr., Max

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

Letterly, and Gary Doyle. It requests that these employees “be retained in the bargaining unit for reasons stated in [their] questionnaire and because of the information contained therein.” In particular, AFSCME asserts that Garbett and Klintworth are professional and that they have 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.

II. Material Facts

a. 37015-25-42-311-00-01 - Duesterhaus, Mary

Mary Duesterhaus’s job description provides that she serves as a working supervisor, assigns and reviews work, provides guidance and training to assigned staff, counsels staff regarding work performance, reassigns staff to meet day-to-day operating needs, establishes annual goals and objectives, approves time off, and prepares and signs performance evaluations. Duesterhaus attached documents to her objections including a recommendation to Acting ARSSC Human Resources Director Matt Bilinsky that subordinate Kathy Barrow receive a 5% wage increase.

Duesterhaus admits that she oversees six subordinates and that she gives her subordinates direction and instructions on special requests and projects. She further admits that she assigns work to her subordinates.

b. 37015-25-42-313-00-01 - Miller, Angela

Angela Miller is a Public Service Administrator Option 1, Hiring/Posting Manager. She oversees five subordinates. Miller admits that she has authority to recommend discipline and suspension. Further she states that she directs employees. She specified that she directs employees to perform special projects outside their daily routine and that she provides guidance and direction to them in accomplishing the task.

c. 37015-25-55-300-00-01 - Doyle, Gary

Gary Doyle oversees five subordinates. He asserts that he has authority to assign his subordinates work and to “direct employees as to specific work schedules.” Doyle’s position description provides that he serves as a working supervisor.

d. 37015-25-05-200-10-01 - Letterly, Max

Max Letterly admits that he is responsible for making recommendations to Senior Staff and the Steering Committee regarding the GenTax system implementation and on-going development. He asserts that his recommendations are based on system limitations, best practices, and input from business areas impacted. He further asserts that any forthcoming policy decision is determined by the Steering Committee and Senior Staff.

Letterly also states that he has a role in the budget process by providing recommendations to Senior Staff and the Steering Committee on available upgrades and enhancements to the GenTax system. However, he asserts that Senior Staff and the Steering Committee make the decision to implement any of those recommendations.

e. 37015-25-42-300-40-01 - Garbett, Michael

Michael Garbett’s position description provides that he “performs complex professional and advisory functions in the development, maintenance and ongoing enhancement for [sic] the business functions in the human resource (HR) and fiscal information technology systems and administration of the SharePoint site.” Garbett asserts that he does not make the final decisions with respect to such matters and merely advises his superiors. He serves as business analyst by researching and analyzing HR and fiscal business functions for the development and/or improvement of the HR and fiscal systems through the use of business process maps. Further, he analyzes the HR and fiscal business functions to coordinate the integration of the IT systems with the broader state technology platforms and other internal systems. His performance evaluation provides that his objectives include planning and implementing through IT support, business function interfaces and links between the various HR and fiscal IT systems to provide the most expeditious and effective methods of establishing new and revised business processes.

f. 37015-25-42-300-20-01 - Klintworth, David

David Klintworth asserts that he is the Workers' Compensation Coordinator for eight state agencies. He states that he does not serve as a working supervisor and that he oversees no subordinates. However, he admits that he provides feedback, insights and vision for continuous Administrative and Regulatory Center updates and improvements. He denies collaborating with functional managers to develop policies and procedures related to the support function.

Jessica Nunes, Assistant Human Resources Director of Strategic Processes for the Administrative & Regulatory Shared Services Center, filed an affidavit with the Board asserting that Klintworth develops and conducts training programs on agency policies and procedures, HIPPA, FMLA, Ethics Act, Sexual Harassment Prevention, and any other mandatory training required by the State of Illinois. Klintworth admits that he maintains quality, productivity, and training standards as defined by service levels and internal standards. He further admits that he keeps all HR forms and manuals updated including training materials. However, Klintworth asserts that the only training he conducts is New Employee Orientation for the eight agencies he serves and Revenue-specific training for new employees to introduce them to the agency. He asserts that he does not perform human resources training and that he does not develop instructional manuals or lesson plans. Nevertheless, he admits that he develops handouts for training, makes PowerPoint presentations, conducts training presentations, and develops training evaluation surveys for completion by employees after training sessions. Finally, he admits that he reviews evaluation surveys, assesses progress towards accomplishment of the goals and objectives, and makes adjustments to training programs as needed.

g. 37015-25-55-400-00-01 - Robinson, Bonds

Bonds Robinson asserts that he oversees seven subordinates. His job description provides that he serves as a working supervisor and that he prepares and signs his subordinates' performance evaluations. It further states that he plans and reviews the activities of subordinate staff engaged in conducting investigations and enforcing provisions of the Illinois Liquor Control Act. He does not deny that he directs his subordinates.

III. Discussion and Analysis

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

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

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

i. The first test under 6.1(c)(i) — management and executive functions and effectuating management policies and practices

The first test under Section 6.1(c)(i) is substantively similar to the traditional test for managerial exclusion articulated in Section 3(j). To illustrate, Section 6.1(c)(i) provides that a position authorizes an employee in that position with significant and independent discretionary authority if “the employee is...engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency.” 5 ILCS 315/6.1(c)(i).

However, the Section 6.1(c)(i) definition is broader than the traditional test because it does not include a predominance element and requires only that the employee be “charged with the effectuation” of policies, not that the employee be responsible for directing the effectuation. An employee directs the effectuation of management policy when he oversees or coordinates policy implementation by developing the means and methods of reaching policy objectives, and by determining the extent to which the objectives will be achieved. Ill. Dep’t Cent. Mgmt. Serv. (Ill. State Police), 30 PERI ¶109 (IL LRB-SP 2013) (citing Cnty. of Cook (Oak Forest Hospital))

v. Ill. Labor Rel. Bd., 351 Ill. App. 3d at 387); INA, 23 PERI ¶173 (IL LRB-SP 2007). However, in order to meet the first test set out in Section 6.1, a position holder need not develop the means and methods of reaching policy objections. It is sufficient that the position holder be charged with carrying out the policy in order to meet its objectives.

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

- ii. The second test under 6.1(c)(i) — represents management interests by taking or recommending discretionary actions

The second test under Section 6.1(c)(i) also relates to the traditional test for managerial exclusion because it reflects the manner in which the courts have expanded that test. A designation is proper under this test if the position holder “represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.” 5 ILCS 315/6.1(c)(i). The Illinois Appellate Court has observed that the definition of a managerial employee in Section 3(j) is very similar to the definition of managerial employee in the Supreme Court’s decision in Nat’ l Labor Rel. Bd. v. Yeshiva Univ. (“Yeshiva”), 444 U.S. 672 (1980). Dep’t of Cent. Mgmt. Serv./ Illinois Commerce Com’n v. Ill. Labor Rel. Bd. (“ICC”), 406 Ill. App. 766, 776 (4th Dist. 2010)(citing Yeshiva, 444 U.S. at 683). Further, the Court noted that the ILRB, like its federal counterpart, “incorporated ‘effective recommendations’ into its interpretation of the term ‘managerial employee.’ ” ICC, 406 Ill. App. at 776. Indeed, the Court emphasized that “the concept of effective recommendations...[set forth in Yeshiva] applies with equal force to the managerial exclusion under the Illinois statute.” Id.

In light of this analysis, the second test under Section 6.1(c)(i) is similar to the expanded traditional managerial test because it is virtually identical to the statement of law in Yeshiva which the Illinois Appellate Court and the Illinois Supreme Court have incorporated into the traditional managerial test. Id. (quoting Chief Judge of the Sixteenth Judicial Circuit v. Ill. State Labor Rel. Bd., 178 Ill. 2d 333, 339-40 (1997)).

iii. The third test under 6.1(c)(ii) — qualifies as a supervisor as defined by the NLRA

Under the NLRA, a supervisor is an employee who has “authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C.A. § 152(11).

In other words, “employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their authority is held ‘in the interest of the employer.’ ” NLRB v. Kentucky River Comm. Care, Inc. (“Kentucky River”), 532 U.S. 706, 713 (2001) (quoting NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-574 (1994); See also Oakwood Healthcare, Inc. v. United Auto Automobile, Aerospace and Agricultural Implement Workers of America (“Oakwood Healthcare”), 348 NLRB 686, 687 (2006). A decision that is “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement” is not independent. Oakwood Healthcare, 348 NLRB at 689.

b. 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.

c. 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.

- d. Vacant positions: 37015-25-81-000-00-01; 37015-25-06-000-30-01; 37015-25-82-120-30-01; 37015-25-00-100-00-01; 37015-25-05-200-00-01; 37015-25-07-500-10-01; 37015-25-31-160-10-02; 37015-25-00-000-10-01; 37015-25-03-300-00-01; 37015-25-08-200-00-01; 37015-25-83-110-30-01; 37015-25-42-300-10-01; 37015-25-45-100-00-01; 37015-25-02-100-00-01

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 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).³

Thus, CMS properly designated these positions.

- a. 37015-25-42-311-00-01 - Duesterhaus, 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)(ii).

³ The alleged constitutional implications of this ruling are not addressed here for reasons set forth in section IV.d. of this RDO.

Duesterhaus 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 act as a working supervisor and Duesterhaus confirms that she gives her subordinates direction and instructions on special requests and projects. Further, based on this evidence, the position holder, Duesterhaus, 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, the designation of this position is properly made.

b. 37015-25-42-313-00-01 - Miller, Angela

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).

Miller has significant and independent discretionary authority because she possesses authority to effectively recommend discipline and suspension. Miller admits that she has authority to recommend discipline and suspension. 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.

Thus, the designation is properly made.

e. 37015-25-55-300-00-01 - Doyle, Gary

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).

Doyle has significant and independent discretionary authority because he possesses authority to responsibly direct his subordinates. First, the position description states that the position holds the authority to act as a working supervisor and Doyle confirms that he gives his subordinates direction as to specific work schedules. Further, based on this evidence, the position holder, Doyle, 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.

f. 37015-25-55-400-00-01 - Robinson, Bonds

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).

Robinson has significant and independent discretionary authority because he possesses authority to responsibly direct his subordinates. First, the position description states that the position holder possesses the authority to act as a working supervisor and that he prepares and signs his subordinates' performance evaluations. Further, Robinson never denied that he directs his subordinates. Based on this evidence, the position holder, Robinson, 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.

g. 37015-25-05-200-10-01 - Letterly, Max

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 Letterly 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.

Here, Letterly is engaged in executive and management functions because he admits that he plays a role in the budget process by providing recommendations to Senior Staff and the Steering Committee on available upgrades and enhancements to the GenTax system. State of Ill. Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n) v. Ill. Labor Rel. Bd., State Panel (ICC, 406 Ill. App. 3d 766, 774, (4th Dist. 2010)(preparing the budget and ensuring the department runs effectively are executive and management functions).

Second, Letterly is charged with the effectuation of management policies and practices because he never denied that his superiors adopt his recommendations to expend resources that will upgrade or enhance the GenTax system almost all the time. Dep't of Cent. Mgmt. Serv./ Ill. Commerce Com'n, 406 Ill. App. 3d at 775 (effective recommendations are those that are accepted almost all the time without modification). Contrary to Letterly's assertion, it is immaterial that he does not have final authority to determine the contents of the budget. ICC at 775 (final independent authority not required, even under more restrictive test).

Thus, the designation of this position is properly made.

h. 37015-25-42-300-40-01 - Garbett, Michael

Garbett is 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.

Here, Garbett has authority to represent management interests in his capacity as business analyst because he helps maintain, develop, and enhance the business functions in the Human Resource and Fiscal sections of the department, thereby ensuring that the Department can continue to function efficiently. Further, he recommends discretionary actions because he admits that he provides advice to his superiors concerning such matters and that he waits for their approval before moving forward with certain projects. Finally, his recommendations effectively control or implement the Department of Revenue's policies because his recommendations serve to provide the Department with more efficient and expeditious IT systems and methods for processing transactions. This, in turn, ensures that the Department fulfills its primary tax collection function in a productive manner and meets its policy objectives.

Thus, the designation is properly made.

a. 37015-25-42-300-20-01 - Klintworth, David

Klintworth is 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.

Klintworth represents management interests when he conducts and develops new employee training for the Department of Revenue because he helps ensure that new employees

are properly oriented when they begin work with the Department. Klintworth takes discretionary action because he reviews evaluation surveys completed by the employees he trains, assesses progress towards accomplishment of training goals and objectives, and makes adjustments to training programs when he believes changes are needed. Klintworth's decisions concerning the content and manner of new employee training implements the policies of the Department of Revenue because it assures that new employees are aware of the Department's policies and that they are well-equipped to further those policies during the course of their employment.

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 Illinois Department of Revenue are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-25-48-260-00-01	High Risk & Lien Payoffs Supervisor	Branham, Terri
37015-25-48-300-00-01	Technical & Collection Support Division Manager	Carey, Teena
37015-25-55-100-00-01	Chicago Metro Liquor Compliance Manager	Cass, II, Richard
37015-25-41-000-10-01	Staff Assistant to Audit Program Administrator	Cochran, Beth
37015-25-42-321-00-01	Payroll, Benefits & Timekeeping Manager	Davis, Stacy
37015-25-81-000-00-01	Problems Resolution Manager	
37015-25-55-300-00-01	Metro South #2 Liquor Compliance Manager	Doyle, Gary
37015-25-42-311-00-01	Classifications Manager	Duesterhaus, Mary
37015-25-42-300-40-01	Business IT Analyst	Garbett, Michael
37015-25-42-324-00-01	Administrative Transactions/FMLA Manager	Kirk, Stephanie

37015-25-42-300-20-01	Customer Service Liaison	Klintworth, David
37015-25-33-160-10-01	Assistant Division Manager - Alcohol, Tobacco & Fuel	Knoles, Trent
37015-25-05-200-10-01	Gentax Liaison	Letterly, Max
37015-25-71-110-00-01	Licensing Manager	Marijan, Dusanka
37015-25-42-313-00-01	Hiring Posting Manager	Miller, Angela
37015-25-17-000-00-01	Operational/Special Services Division Manager	Neposchlan, Jay
37015-25-45-100-10-01	Advanced Training Specialist	Reid, John
37015-25-55-400-00-01	Downstate Area #3 Liquor Compliance Manager	Robinson, Bonds
37015-25-13-000-00-01	Property Management & Telecommunications Division Manager	Romang, Joseph
37015-25-10-200-20-01	Procurement Office Supervisor	Stephens, Jr, Don
37015-25-31-170-00-01	Chicago Operations Division Manager	Washington, Latanya
37015-25-06-000-30-01	Audit Liaison	
37015-25-82-120-30-01	Exemptions Manager	
37015-25-00-100-00-01	Assistant to Director of Revenue	
37015-25-05-200-00-01	Assistant to Associate Director	
37015-25-07-500-10-01	Assistant Division Manager -Litigation Office	
37015-25-31-160-10-02	Assistant Division Manager- Records Management	
37015-25-00-000-10-01	Assistant to Chief of Staff	
37015-25-03-300-00-01	Publications Management Division Manager	
37015-25-08-200-00-01	Planning Office Manager	
37015-25-83-110-30-01	Technology Support Supervisor	
37015-25-42-300-10-01	Executive Assistant to Human Resources Director	
37015-25-45-100-00-01	Training & Development Manager	
37015-25-02-100-00-01	Research Analyst	

VI. Exceptions

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,⁴ 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. 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 26th day of February, 2014

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

/s/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**

⁴ 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 Revenue),)	
)	
)	
Petitioner	)	Case No. S-DE-14-203
)	
and)	
)	
American Federation of State, County and Municipal Employees, Council 31,)	
)	
Labor Organization-Objector)	
)	
and)	
)	
Gary Krol, Robert J. Orr, and David Marshall,)	
)	
)	
Employee-Objectors)	

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

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

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

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

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

consistent with due process, whether the designation comports with the requirements of Section 6.1, and to do so within 60 days.¹

As noted, Public Act 97-1172 and Section 6.1 of the Illinois Public Labor Relations Act became effective on April 5, 2013, and allow the Governor 365 days from that date to make such designations. The Board promulgated rules to effectuate Section 6.1, which became effective on 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 February 3, 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 February 4, 2014, Gary Krol and Robert J. Orr, employees of the State of Illinois who occupy some of the positions designated as excluded from collective bargaining rights filed objections to the designation. On February 13, 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 February 13, 2014, David Marshall, an employee of the State of Illinois who occupies one of the positions designated as excluded from collective bargaining rights similarly filed objections to the designation. 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 seven Public Service Administrator, Option 7 positions within the Illinois Department of Revenue are at issue in this designation:

¹ Public Act 98-100, which became effective July 19, 2013, added subsections (e) and (f) to Section 6.1 which shield certain specified positions from such Gubernatorial designations, but none of those positions are at issue in this case.

37015-25-09-100-00-01	Springfield Office Investigator	Vacant
37015-25-53-200-00-01	Southern Illinois Criminal Investigations Manager	Vacant
37015-25-53-100-00-01	Springfield Criminal Investigations Manager	Oglesby, Marilee
37015-25-09-100-10-01	Investigator-in-Charge	Orr, Robert
37015-25-09-200-00-01	Chicago Office Investigator	Marshall, David
37015-25-53-300-00-01	Northern Cook Criminal Investigations Manager	Krol, Gary
37015-25-53-400-00-01	Southern Cook Criminal Investigations Manager	Hoff, Michael

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.”² AFSCME objects to designation of all listed positions. Gary Krol, Robert J. Orr, and David Marshall each object to the designation of their own 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 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

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

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 Marilee Oglesby, Robert Orr, and David Marshall. It requests that these employees "be retained in the bargaining unit for reasons stated in [their] questionnaire and because of the information contained therein."

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.

Gary Krol, Robert J. Orr, and David Marshall each objected to the designation of their own positions. Krol's objections consist of the questionnaire that he submitted to AFSCME. Orr states that his designation is improper because he has no subordinates, no authority over policy and/or procedure, "no role in any budget process or the legislative [sic]." Marshall asserts that he is not in charge of special investigative projects and that he does not serve as the investigator in charge during special investigation projects.

II. Material Facts

a. 37015-25-09-100-10-01 Orr, Robert

Robert Orr is Investigator-In-Charge of special investigative projects at the Department of Revenue. His position description states that he enforces taxing measures administered by the Department, conducts investigations, searches, seizures, arrests, and performs other duties imposed under the provision of any law administered by the Department, particularly the duties of the most complex, controversial or sensitive criminal and non-criminal investigations involving revenue employees. It also provides that he initiates methods and techniques used in special investigative projects. Further, it states that in concurrence with his supervisor, he reports directly to the Director in those instances wherein investigations involve immediate members of the Director's staff who are alleged, suspected or accused of violating any law administered by the Department or of engaging in acts affecting the integrity of the Department or which are detrimental to the Agency's enforcement of taxing measures. During and upon

conclusion of the investigation, he personally meets with the Director to recommend and or to discuss the appropriate action to be taken.

Orr asserts, contrary to his position description, that he has no authority over departmental policy or procedure.

b. 37015-25-53-300-00-01 Krol, Gary

Gary Krol is a Criminal Investigations Manager in the Bureau of Criminal Investigation in the Illinois Department of Revenue. He oversees six subordinates who are special agents. Krol's job description provides that he serves as their working supervisor. It further provides that, in that capacity, he assigns and reviews work; provides guidance and training to assigned staff; counsels staff regarding work performance; reassigns staff to meet day-to-day operating needs; establishes annual goals and objectives; approves time off; prepares and signs performance evaluations; and determines and recommends staffing needs. Krol admits that he oversees the daily activities of his subordinates and that he is responsible for his subordinates' work quality and completeness. He further admits that he assigns his subordinates work.

c. 37015-25-53-100-00-01 - Oglesby, Marilee

Marilee Oglesby admits that she oversees eight subordinates. She likewise admits that she assigns them work. Oglesby does not deny that she directs her subordinates. She asserts that she provides them with advice when they ask for it. Oglesby's position description provides that she serves as a working supervisor. It further states, in relevant part, that she assigns and reviews work, and prepares and signs performance evaluations.

d. 37015-25-09-200-00-01 - Marshall, David

David Marshall's position description states that he enforces taxing measures administered by the Department, conducts investigations, searches, seizures, arrests and performs other duties imposed under the provision of any law administered by the Department. He conducts and participates in highly controversial, complex or sensitive investigations involving high level employees who are alleged or suspected of violating laws administered by the department or which are detrimental to the agency's enforcement of taxing measures. Laine Krozel, Chief of Staff for the Department of Revenue, states that the position confers with the

Director and/or staff to personally discuss any controversial findings/situations prior to hiring or denying individuals' employment with the Department based on background investigations. Further, Marshall's position description provides that he innovates investigatory approaches.

Marshall asserts that he is not in charge of special investigative projects, that he does not serve as the investigator in charge during special investigation projects, and that he does not report directly to the Director.

III. Discussion and Analysis

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

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

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

i. The first test under 6.1(c)(i) — management and executive functions and effectuating management policies and practices

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

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

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

- b. The second test under 6.1(c)(i) — represents management interests by taking or recommending discretionary actions

The second test under Section 6.1(c)(i) also relates to the traditional test for managerial exclusion because it reflects the manner in which the courts have expanded that test. A designation is proper under this test if the position holder “represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.” 5 ILCS 315/6.1(c)(i). The Illinois Appellate Court has observed that the definition of a managerial employee in Section 3(j) is very similar to the definition of managerial

employee in the Supreme Court’s decision in Nat’l Labor Rel. Bd. v. Yeshiva Univ. (“Yeshiva”), 444 U.S. 672 (1980). Dep’t of Cent. Mgmt. Serv./ Illinois Commerce Com’n v. Ill. Labor Rel. Bd. (“ICC”), 406 Ill. App. 766, 776 (4th Dist. 2010)(citing Yeshiva, 444 U.S. at 683). Further, the Court noted that the ILRB, like its federal counterpart, “incorporated ‘effective recommendations’ into its interpretation of the term ‘managerial employee.’ ” ICC, 406 Ill. App. at 776. Indeed, the Court emphasized that “the concept of effective recommendations...[set forth in Yeshiva] applies with equal force to the managerial exclusion under the Illinois statute.” Id.

In light of this analysis, the second test under Section 6.1(c)(i) is similar to the expanded traditional managerial test because it is virtually identical to the statement of law in Yeshiva which the Illinois Appellate Court and the Illinois Supreme Court have incorporated into the traditional managerial test. Id. (quoting Chief Judge of the Sixteenth Judicial Circuit v. Ill. State Labor Rel. Bd., 178 Ill. 2d 333, 339-40 (1997)).

c. The third test under 6.1(c)(ii) — qualifies as a supervisor as defined by the
NLRA

Under the NLRA, a supervisor is an employee who has “authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C.A. § 152(11).

In other words, “employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their authority is held ‘in the interest of the employer.’ ” NLRB v. Kentucky River Comm. Care, Inc. (“ Kentucky River”), 532 U.S. 706, 713 (2001) (quoting NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-574 (1994); See also Oakwood Healthcare, Inc. v. United Auto Automobile, Aerospace and Agricultural Implement Workers of America (“ Oakwood Healthcare”), 348 NLRB 686, 687 (2006). A decision that is “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher

authority, or in the provisions of a collective bargaining agreement” is not independent. Oakwood Healthcare, 348 NLRB at 689.

d. 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.

e. 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.

- f. 37015-25-09-100-00-01 – Vacant; 37015-25-53-200-00-01 – Vacant;
37015-25-53-400-00-01 - Hoff, Michael

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 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).³

Thus, CMS properly designated these positions.

g. 37015-25-53-300-00-01 Krol, Gary

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).

Krol has significant and independent discretionary authority because he possesses authority to responsibly direct his subordinates. First, the position description states that the position holds the authority to act as a working supervisor and that the position is responsible for assigning and reviewing subordinates' work, establishing annual goals and objectives, and preparing and signing performance evaluations. Krol confirms that he responsibly directs his subordinates because he admits that he oversees the daily activities of his subordinates and that he is responsible for his subordinates' work quality and completeness. Based on this evidence, the position holder, Krol, exercises the use of independent judgment 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, accountability, or independent authority.

Thus, the designation of this position is properly made.

h. 37015-25-09-100-10-01 Orr, Robert;

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 the position holder represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.

Here, Orr represents management interests when he undertakes internal investigations of high level Department of Revenue employees because he performs investigations to uncover conduct detrimental to the agency's enforcement of taxing measures. Further, Orr takes or recommends discretionary action because he makes recommendations to the Director concerning

³ The alleged constitutional implications of this ruling are not addressed here for reasons set forth in section III.d. of this RDO.

the manner in which the Department should handle such high level criminal conduct. As such, these recommendations control or implement the policies of the department because they have the potential to dictate the manner in which the Department addresses corruption, maintains its integrity, and continues its efficient functionality as a tax collecting entity.

Thus, the designation of this position is properly made.

i. 37015-25-53-100-00-01 - Oglesby, Marilee

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).

Oglesby has significant and independent discretionary authority because she possesses authority to assign her subordinates work. First, the position description states that the position holds the authority to act as a working supervisor and that the position is responsible for assigning and reviewing subordinates' work and preparing and signing performance evaluations. Further, Oglesby admits that she assigns her subordinates work. Based on this evidence, the position holder, Oglesby, exercises the use of independent judgment and possesses the authority to affect her 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 of this position is properly made.

j. 37015-25-09-200-00-01 - Marshall, David

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 the position holder represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.

Here, Marshall represents management interests when he conducts and or participates in highly controversial complex investigations involving high level employees because he helps uncover and eradicate conduct that is detrimental to the agency's enforcement of taxing measures. Further, he takes discretionary action because he is responsible for innovating investigatory approaches. Finally, creating such novel approaches to investigatory procedures

implements the policy of the Department of Revenue by helping ensure that the department weeds out corruption at the highest level and with the greatest efficiency so that it can fulfill its primary tax collection purpose.

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 Illinois Department of Revenue are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-25-09-100-00-01	Springfield Office Investigator	Vacant
37015-25-53-200-00-01	Southern Illinois Criminal Investigations Manager	Vacant
37015-25-53-100-00-01	Springfield Criminal Investigations Manager	Oglesby, Marilee
37015-25-09-100-10-01	Investigator-in-Charge	Orr, Robert
37015-25-09-200-00-01	Chicago Office Investigator	Marshall, David
37015-25-53-300-00-01	Northern Cook Criminal Investigations Manager	Krol, Gary
37015-25-53-400-00-01	Southern Cook Criminal Investigations Manager	Hoff, Michael

VI. Exceptions

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,⁴ 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

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

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

Issued at Chicago, Illinois this 26th day of February, 2014

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

/s/ Anna Hamburg-Gal

**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 Revenue),)	
)	
)	
Petitioner	)	Case No. S-DE-14-204
)	
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.¹

As noted, Public Act 97-1172 and Section 6.1 of the Illinois Public Labor Relations Act became effective on April 5, 2013, and allow the Governor 365 days from that date to make such designations. The Board promulgated rules to effectuate Section 6.1, which became effective on

¹ Public Act 98-100, which became effective July 19, 2013, added subsections (e) and (f) to Section 6.1 which shield certain specified positions from such Gubernatorial designations, but none of those positions are at issue in this case.

August 23, 2013, 37 Ill. Reg. 14,070 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On February 3, 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 February 13, 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 8L position within the Illinois Department of Revenue is at issue in this designation:

37015-25-25-000-02-01 Craig Callahan

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."² AFSCME objects to 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

² 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. Further, AFSCME states that CMS has presented no evidence that the employees at issue ever exercised his referenced supervisory or quasi-managerial authority. Similarly, 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 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 Craig Callahan. It "requests that Mr. Callahan be retained in the bargaining unit for reasons stated in his questionnaire and because of the information contained therein."

II. Material Facts

a. 37015-25-25-000-02-01 - Craig Callahan

Craig Callahan represents the Department of Revenue in highly complex cases involving disputes over State tax liability. He negotiates proposed dispositions, conducts conferences with taxpayers to achieve equitable settlements of disputed liabilities and claims for refund, and prepares cases for issuance of assessment. Further, he prepares proposed dispositions for the Administrator of the Informal Conference Board indicating acceptance or rejection of taxpayer proposals based on information adduced at conferences.

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 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. 37015-25-25-000-02-01 - Craig Callahan

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 Callahan represents management interest by taking or recommending discretionary actions that effectively control or implement the policy of a state agency when he makes recommendations to the Informal Conference Board (ICB) concerning the settlement of disputed tax liabilities and claims for refund.

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, Callahan represents management's interests because he helps determine whether, or to what extent, the Department of Revenue should seek to collect on a disputed tax liability

and therefore, the manner in which it should perform its core function—tax collection. Further, he recommends discretionary action because he writes proposed dispositions for the Administrator of the Informal Conference Board which constitutes his advice on whether the ICB should accept or reject a taxpayer’s proposal concerning the taxpayer’s obligation and liability. Such recommendations, when accepted, implement the policy of the Department of Revenue because they necessarily ensure that the Department operates efficiently and that it does not proceed when there is uncertainty as to the correctness of a proposed audit adjustment. Notably, Callahan has introduced no evidence that the ICB has rejected his recommendations.

Contrary to Callahan’s assertion, he may satisfy this test for exclusion even though he asserts that he merely applies the facts to the law. State of Ill., Dep’t of Cent. Mgmt. Servs. (Dep’t of Cent. Mgmt. Servs.), 30 PERI ¶ 85 (professional employees are not exempt from exclusion as managerial under Section 6.1). Similarly, the designation is properly made even though it is the Informal Conference Board and not Callahan that ultimately makes a determination as to whether an adjustment is appropriate. Chief Judge of the Sixteenth Judicial Circuit v. Ill. State Labor Relations Bd., 178 Ill. 2d 333, 339-40 (1997) (final authority not required even under more restrictive, traditional test).

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 Illinois Department of Revenue is excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-25-25-000-02-01 Craig Callahan

VI. Exceptions

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,³ 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. 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 26th day of February, 2014

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

/s/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**

³ 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 Revenue),)	
)	
)	
Petitioner	)	Case No. S-DE-14-205
)	
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.¹

As noted, Public Act 97-1172 and Section 6.1 of the Illinois Public Labor Relations Act became effective on April 5, 2013, and allow the Governor 365 days from that date to make such designations. The Board promulgated rules to effectuate Section 6.1, which became effective on

¹ Public Act 98-100, which became effective July 19, 2013, added subsections (e) and (f) to Section 6.1 which shield certain specified positions from such Gubernatorial designations, but none of those positions are at issue in this case.

August 23, 2013, 37 Ill. Reg. 14,070 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On February 3, 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 February 13, 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 9A position within the Illinois Department of Revenue is at issue in this designation:

37015-25-06-000-50-01 Denise Behl

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."² AFSCME objects to 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

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

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 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 position held by Denise Behl. It requests that Behl "be retained in the bargaining unit for reasons stated in her questionnaire and because of the information contained therein."

II. Material Facts

a. 37015-25-06-000-50-01 - Denise Behl

Denise Behl is Auditor in Charge at the Department of Revenue. She asserts that she evaluates department processes and operations and provides guidance on improvements. She claims that she has no authority to implement changes or to require the department to adopt policies and that it is management's decision to adopt policies and incorporate feedback from the internal auditing division. However, Behl admits that she communicates additional controls for management's consideration which are then approved by the Chief Internal Auditor. Further, she notes that internal audit provides guidance on internal controls to decrease the Department's risk exposure. Behl claims that all work performed by her position "is under the established rules of the International Standards for the Professional Practice of Internal Auditing promulgated by the Institute of Internal Auditors and required for the State of Illinois under the Fiscal Control and Internal Auditing."

According to Behl's job description, Behl reviews agency programs, operations, and records for completeness, accuracy, and compliance with agency standards and procedures. She

further documents agency control structures for efficiency and effectiveness. Behl claims she does not write policies or recommend 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.

a. 37015-25-06-000-50-01 - Denise Behl

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 Behl 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 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, Behl represents management’s interests because she reviews agency programs, operations and records for completeness, accuracy, and compliance with agency standards and procedures. She recommends discretionary action in the course of these duties because she communicates additional controls for management’s consideration and provides guidance to her superiors concerning such internal controls to decrease the Department’s risk exposure. Finally, Behl’s recommendations implement the policies of the Department of Revenue because they ensure that the Department properly processes taxpayer information and adheres to international standards and statutory requirements pertaining to the financial reporting process.

Notably, there is no evidence that management ever rejects Behl’s recommendations concerning the adoption of additional internal controls. Moreover, contrary to the objector’s anticipated contention, there is no evidence or argument that the International Standards for the Professional Practice of Internal Auditing limit the position holder’s use of independent authority or discretion in recommending the establishment of internal controls.

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 Illinois Department of Revenue is excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-25-06-000-50-01 Denise Behl

VI. Exceptions

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,³ 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. 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 5th day of March, 2014

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

/s/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**

³ 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)	
Revenue),)	
)	
Petitioner	)	Case No. S-DE-14-206
)	
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.¹

As noted, Public Act 97-1172 and Section 6.1 of the Illinois Public Labor Relations Act became effective on April 5, 2013, and allow the Governor 365 days from that date to make such designations. The Board promulgated rules to effectuate Section 6.1, which became effective on

¹ Public Act 98-100, which became effective July 19, 2013, added subsections (e) and (f) to Section 6.1 which shield certain specified positions from such Gubernatorial designations, but none of those positions are at issue in this case.

August 23, 2013, 37 Ill. Reg. 14,070 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On February 3, 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 February 13, 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 9B position within the Illinois Department of Revenue is at issue in this designation:

37015-25-06-000-40-01 Stephen Gehlbach

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."² AFSCME objects to 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

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

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 his referenced supervisory or quasi-managerial authority. Similarly, 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 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 Stephen Gehlbach. It requests that Gehlbach "be retained in the bargaining unit for reasons stated in his questionnaire and because of the information contained therein." More specifically, AFSCME asserts that Gehlbach is a professional employee with no subordinates who does not have significant and independent discretionary authority.

II. Material Facts

a. 37015-25-06-000-40-01 - Stephen Gehlbach

Stephen Gehlbach asserts that he has authority to evaluate Department processes and operations and to provide guidance on improvements. However, he asserts that he has no authority to implement changes or to require the Department to adopt policies. Gehlbach asserts that all work performed by his position "is under the established rules of the International Standards for the Professional Practice of Internal Auditing promulgated by the Institute of Internal Auditors and required for the State of Illinois under the Fiscal Control and Internal Auditing."

Gehlbach asserts that he has no authority to decide how policies are implemented. However, he admits that he implements policies and legislation. Further, he notes that he provides feedback and opinions concerning the interpretation of legislation so that management may determine the course of action that the Department should adopt. Gehlbach states that he

provides guidance on internal controls to decrease the Department's risk exposure. However, he notes that it is within management's discretion to incorporate his guidance and feedback.

Gehlbach's job description states that he assists in the preparation of audit procedures and manuals. It further provides that he works independently of the technical staff by auditing and reviewing all processes to assure the accuracy of business records, to uncover internal control problems, and to identify operational difficulties. Further, he conducts research and tests of data maintained by the agency to ensure the confidentiality, integrity, and availability of the data in accordance with the standards outlined in the Control Objectives and Audit Guidelines for Information and Related Technology, the Federal Information Systems Controls Audit Manual, IRS Publication 1075, federal and state statutes, and agency policies and procedures. Gehlbach also performs audits of the security of infrastructure, network application, and internet. He documents the agency control structure for efficiency and effectiveness through the development of business process maps. He provides evaluations of operational efficiencies and makes reports to the Chief Internal Auditor and/or the Director on how to improve the overall IT structure and practices of the Department.

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.

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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.

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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.

a. 37015-25-06-000-40-01 - Stephen Gehlbach

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 Gehlbach 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 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, Gehlbach represents management's interests because he ensures the security of the Department through his audits of the Department's infrastructure, network application, and internet. He recommends discretionary action in the course of this work by providing evaluations of operational efficiency to the Chief Internal Auditor and/or the Director wherein he outlines the manner in which the Department may improve its overall IT structure and practices. As such, Gehlbach makes recommendations that control or implement the policies of the Department because his suggestions concerning potential improvements to the Department's IT structure and practices ensure that the Department properly processes taxpayer information in adherence with statutory and regulatory mandates.

Notably, there is no evidence or argument that the Director or the Chief Internal Auditor has ever rejected Gehlbach's recommendations to improve the Department's IT structure and practices. Moreover, contrary to the objector's anticipated contention, there is no evidence or

argument that the International Standards for the Professional Practice of Internal Auditing limit the position holder's use of independent authority or discretion in recommending such improvements.

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 Illinois Department of Revenue is excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-25-06-000-40-01 Stephen Gehlbach

VI. Exceptions

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,³ 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. 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.

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

Issued at Chicago, Illinois this 5th day of March, 2014

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

/s/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**