

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

State of Illinois, Department of)	
Central Management Services)	
(Department of Corrections),)	
)	
Petitioner)	
)	
and)	Case No. S-DE-14-218
)	
American Federation of State, County)	
and Municipal Employees, Council 31,)	
)	
Labor Organization-Objector)	

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

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012), allows the Governor to designate certain employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be available under Section 6 of the Act. This case involves such a designation made on the Governor’s behalf by the Illinois Department of Central Management Services (CMS). On March 21, 2014, Administrative Law Judge (ALJ) Heather R. Sidwell issued a Recommended Decision and Order (RDO) in this case, finding that the designation was properly made. We agree.

CMS petitioned to designate for exclusion a single position at the Illinois Department of Corrections classified as Public Service Administrator Option 8T with the working title of Educational Facility Administrator and held by Jenny Wheat.¹ The designation was made

¹ Regulations promulgated by the Department of Central Management Services provide classification of a PSA position as Option 8T for “Special License - Administrative Certificate issued by the Illinois State Board of Education.” 80 Ill. Admin. Code 310.50.

pursuant to Section 6.1(b)(5) of the Act, which allows designations of positions with “significant and independent discretionary authority.”²

The American Federation of State, County and Municipal Employees, Council 31 (AFSCME) 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. The objections raised constitutional and other generally applicable objections, as well objections specific to this position.

The ALJ declined to rule on those objections that alleged Section 6.1 was unconstitutional. She also rejected other of AFSCME’s generally applicable objections, and regarding the specific objections, found that AFSCME’s objections appeared based in part on statements made by other Educational Facility Administrators whose positions were at issue in a prior gubernatorial designation case, positions which the Board had already determined were properly designated for exclusion.³ She found they were also based in part on statements made by Wheat that she did not have discretion to assign educators to specific classes, students or facilities and that her proposal for an additional class had been rejected. The ALJ found that the mere fact that Wheat’s position was governed by policy did not mean she did not control the

² This phrase is defined by Section 6.1(c) of the Act:

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 Wheat’s position had originally been included along with those of the other Educational Facility Directors in a petition filed in Case No. S-DE-14-191, but her position was subsequently withdrawn. The Board determined these positions were properly excluded in a consolidated decision issued on March 18, 2014. See www.state.il.us/ilrb/subsections/pdfs/FY14ILRBDecisions.PDF

day-to-day operations of a core function of the Department of Corrections. Based on the record, she concluded that Wheat's position met the managerial requirements of Section 6.1(c)(i).

AFSCME filed timely exceptions to the ALJ's RDO pursuant to Section 1300.130 of the Board's rules, 80 Ill. Admin. Code §1300.130. Based on our review of the exceptions, the record, and the RDO, we reject the exceptions and adopt the RDO. We find the designation comports 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 7, 2014.

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ADMINISTRATIVE LAW JUDGE’S
RECOMMENDED DECISION AND ORDER

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

Moreover, to be properly designated, a position must fall into one of the following five categories:

- 1) it must authorize an employee in the position to act as a legislative liaison;
- 2) it must have a title of, or authorize a person who holds the position to exercise substantially similar duties as, an Agency General Counsel, Agency Chief of Staff, Agency Executive Director, Agency Deputy Director, Agency Fiscal

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

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

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

On February 5, 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 18, 2014, the American Federation of State, County and Municipal Employees (AFSCME) filed timely objections to the designation.

Based on my review of the designation, the documents submitted therewith, the objections filed by AFSCME, and the documents and arguments submitted in support of those objections, I have determined that AFSCME has failed to raise an issue that would require a hearing in this matter. Therefore, I find the designation to have been properly submitted and consistent with the requirements of Section 6.1 of the Act and I recommend that the Executive Director certify the designation of the 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.

I. ISSUES AND CONTENTIONS

The instant petition designates one position at the Department of Corrections (DOC) for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act. CMS states that this position qualifies for designation under Section 6.1(b)(5). CMS also states that this position is currently represented by AFSCME for the purposes of collective bargaining. In support of its contentions, CMS has filed a CMS-104 containing the position description for the designated position along with an affidavit from DOC's Administrator of the Office of Adult Education and Vocational Services stating, among other things, that the CMS-104 fairly and accurately represents the duties that an employee in the designated position is authorized to perform.

AFSCME objects to the designation on the grounds that it does not comport with the requirements of Section 6.1. In support thereof, AFSCME alleges that CMS has failed to provide the job duties of the designated position as required by Section 6.1 and that the designated position does not qualify for designation under Section 6.1(b)(5). AFSCME next argues that the designation violates due process and is arbitrary and capricious. Finally, AFSCME alleges that

P.A. 97-1172 is unconstitutional under several provisions of the Illinois and United States Constitutions.

II. FINDINGS OF FACT

The designated position is classified as a Public Service Administrator (PSA) Option 8T. It was first certified to be in a collective bargaining unit on September 28, 2009, in Case No. S-RC-08-152 and S-RC-09-002. This position has the working title of Educational Facility Administrator. At the time the instant designation was filed, this position was held by Jenny Wheat.

III. POSITION DESCRIPTIONS

The CMS-104 submitted by CMS lists the following relevant responsibilities that Wheat, as Educational Facility Administrator, is authorized to complete “[u]nder administrative approval”: plan and direct educational program including elementary/secondary education, vocational programs, special education, curriculum approval, work/shift assignments, etc.; develop academic, special education, and vocational programs, defining implementation dates, general curriculum content, staff expectations, equipment needs, counseling, testing and placement of students, and other variables with required attention/effort for a successful program; continually review and evaluate program goals and objectives; initiate remedial changes to assure progress toward established objectives; review performance of the overall educational program, defining organizational objectives, major job responsibilities for all staff; review and monitor target dates of program objectives; implement policies and procedures. The CMS-104 states that Wheat functions under a “broad latitude of independence guided preponderantly by [DOC] policies/procedures in program development, contractual commitments, [and] staff appointments.” By affidavit Christine Boyd, the Administrator of DOC’s Office of Adult Education and Vocational Services, asserts that she is familiar with the duties that the Wheat is authorized to perform as Educational Facility Administrator, and that those duties are fairly and accurately described by the CMS-104 for the position.

IV. DISCUSSION AND ANALYSIS

As stated above, a position is properly designable, among other circumstances, if: (1) it was first certified to be in a collective bargaining unit on or after December 2, 2008; and (2) it authorizes an employee in that position to have significant and independent discretionary authority as an employee. 5 ILCS 315/6.1 (2012). Additionally, it is presumed that any

designation made by the Governor under Section 6.1 of the Act is properly made. 5 ILCS 315/6.1(d) (2012). Rule 1300.60(d)(2)(A) permits an Administrative Law Judge (ALJ) to find that a designation is proper based solely on the information submitted to the Board in cases in which no objections sufficient to overcome this presumption are filed. 80 Ill. Admin. Code 1300.60(d)(2)(A). Furthermore, the Board has held that the submission of position descriptions that are consistent with a designation, combined with the presumption under Section 6.1(d) and the absence of any evidence that the designation is inappropriate, leads to the conclusion that a designation comports with Section 6.1. State of Illinois, Department of Central Management Services (Department of Commerce and Economic Opportunity), 30 PERI ¶ 86 (IL LRB-SP 2013).

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

CMS's initial filing clearly indicates, and AFSCME concedes, that the position at issue was first certified to be in a bargaining unit on September 28, 2009. The first statutory requirement is thus satisfied. As to the second statutory requirement, the submission is consistent with the designation because the CMS-104 for the designated position tends to show that an employee in that position is authorized to exercise significant and independent discretionary authority as that term is defined in Section 6.1(c)(i).²

An employee is authorized to have significant and independent discretionary authority as defined in Section 6.1(c)(i) if he or she is authorized to: (1) engage in executive and management functions of a State agency and be charged with the effectuation of management policies and practices of a State agency; or (2) represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency. To the extent that the legislature employed phrases in Section 6.1(c)(i) that it had previously used when enacting Section 3(j), Board precedent interpreting Section 3(j) is instructive in determining whether an employee is authorized to have significant and independent discretionary authority as defined in the first component of Section 6.1(c)(i). State of Illinois, Department of Central Management Services (Department of Commerce and Economic Opportunity), 30 PERI ¶ 86 (IL

² Because I find that an employee in the designated position is authorized to exercise significant and independent discretionary authority as that term is defined in Section 6.1(c)(i), and that finding alone is sufficient to support a conclusion that the instant designation is proper, I will not address the assertion that an employee in the designated position is also authorized to exercise significant and independent discretionary authority as that term is defined in Section 6.1(c)(ii).

LRB-SP 2013). The phrase “engaged in executive and management functions” is an example of language used in both Sections.³ The Board has held that “executive and management functions” amount to the running of an agency, such as establishing policies and procedures, preparing a budget, or otherwise assuring that an agency or department runs effectively. Department of Central Management Services/Illinois Commerce Commission (ICC) v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 774 (4th Dist. 2010) (citing, American Federation of State, County and Municipal Employees, Council 31, 25 PERI ¶ 68 (IL LRB-SP 2009); City of Freeport, 2 PERI ¶ 2052 (IL SLRB 1986)).

The requirement in the first component of Section 6.1(c)(i) that an employee be charged with the effectuation of management policies and practices diverges from similar language used in Section 3(j) in that Section 3(j) requires that an employee *direct*, rather than merely be charged with, the effectuation of management policies and practices. An employee *directs* the effectuation of management policies and practices if he or she oversees or coordinates policy implementation through development of means and methods of achieving policy objectives, determines the extent to which policy objectives will be achieved, and is empowered with a substantial amount of discretion to determine how policies will be effected. ICC at 775. However, for a position to be designable under Section 6.1(b), an employee in that position need only be *charged* with carrying out agency policy.

Finally, the Board has held the second component of Section 6.1(c)(i) does not require that an employee engage in policy *making*, merely that an employee take or recommend discretionary action that effectively *implements* policy. State of Illinois, Department of Central Management Services (Department of Commerce and Economic Opportunity), Case No. S-DE-14-115 (IL LRB-SP January 7, 2014), appeal pending, No. 1-14-0276 (Ill. App. Ct., 1st Dist.).

CMS’s submission is consistent with its contention that Wheat, as Educational Facility Administrator, is authorized to have significant and independent discretionary authority as that term is defined in both components of Section 6.1(c)(i). She is charged with planning and directing the daily operations of the educational program at her assigned facilities. In completing this task, she is engaged in executive and management functions. She is also charged with carrying out DOC policy; the CMS-104 for her position states that Wheat implements policies

³ Though, as the Board has noted, Section 3(j) requires an employee to be engaged *predominantly* in executive and management functions; Section 6.1(c)(i) contains no predominance requirement. Id.

and procedures. Furthermore, in fulfilling this responsibility, she by definition takes or recommends actions that effectively implement DOC policy; nothing on the face of CMS's submission indicates that she is not authorized to exercise discretion in doing so.

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

AFSCME raises both general and specific objections to the designation of the position at issue. Generally, AFSCME alleges that CMS has failed to provide the job duties of the designated position and that there is no rational basis for treating the designated position differently from other positions with the same title and/or similar duties that have not been designated. Specifically, AFSCME argues that the position at issue does not meet the requirements for designation.

Section 6.1(b) provides that CMS must provide, among other information, the job duties of a designated position when filing a Gubernatorial designation petition. 5 ILCS 315/6.1(b) (2012). AFSCME argues that the affidavit and CMS-104 are insufficient for this purpose because: (1) the affidavit merely states legal conclusions; (2) the CMS-104 lists only potential duties that are subject to the approval of the designated position's superior; and (3) the CMS-104 does not address the level of discretion an employee may exercise in performing the enumerated duties. However, AFSCME's allegation regarding the content of the affidavit is simply inaccurate. While it does contain the legal conclusions of the affiant as to the designability of the position at issue, the affidavit also contains the affiant's statement that she is familiar with the duties of the designated position and that the CMS-104 fairly and accurately describes those duties. I do not accept the affiant's conclusions as demonstrating the position's designability because that is the ultimate issue in this matter, and it is a question which the Board has been statutorily empowered to resolve. The affidavit does, however, have some value as foundation for the CMS-104.

AFSCME's objections to the use of the CMS-104 are also unpersuasive. Assuming, without so finding, that AFSCME's allegation that the CMS-104 lists only potential duties is accurate, this assertion alone is too speculative to provide a basis for finding that an employee in the designated position is not authorized to perform any particular enumerated duty which may support its designability. Given the presumption in Section 6.1(d), AFSCME must counter each duty that may support a position's designability with a specific assertion that, contrary to the

CMS-104, an employee in that position is not authorized to perform that duty. Likewise, where CMS's submission is not on its face inconsistent with a finding that an employee is authorized to exercise discretion, it is incumbent on AFSCME to object with a specific assertion that no discretion is authorized.

AFSCME also alleges that there is no rational basis for treating the position at issue differently from other positions with the same title and/or similar duties that have not been designated. AFSCME concludes that a hearing is necessary to determine whether there is a legal basis for such exclusion. This argument relates in part to AFSCME's contentions regarding the guarantee of equal protection, discussed below. To the extent AFSCME raises issues regarding the Board's basis for treating the designated position differently, its objections must be rejected. The mere lawful exercise of the Governor's power to designate a position is itself a rational basis for the Board to treat a designated position differently from an arguably similar undesignated position. As to the need for a hearing, while a hearing may be necessary to determine whether there is a *factual* basis for a designation in the event an objector successfully undermines CMS's submission, the lawful exercise of the power granted in Section 6.1 is again a sufficient *legal* basis for the exclusion and no hearing is necessary.

As to its specific objections, AFSCME's conclusion that the position at issue does not meet the requirements of Section 6.1 appear to be based, in part, on statements made by Educational Facility Administrators for DOC that work at other facilities whose positions were designated in Case Nos. S-DE-14-191.⁴ To the extent these statements are the basis of AFSCME's conclusion, both have already been rejected by the Board. State of Illinois, Department of Central Management Services (Department of Corrections), Case No. S-DE-14-186 et al. (IL LRB-SP March 18, 2014). AFSCME's conclusion is also based on Wheat's statement, submitted in response to a questionnaire provided by AFSCME. Wheat alleges that orders she has received regarding the assignment of educators to specific classes, students, and facilities, together with the failure of her superior to provide an additional class that she believes is necessary, demonstrate that she is not authorized to plan the education program or make work/shift assignments. She also states that she does not determine equipment needs and that student testing and placement is governed by DOC administrative directives. First, the fact that

⁴ The position at issue in the instant designation was also at issue in Case No. S-DE-14-191. That designation was withdrawn as to Wheat's position when it was discovered that CMS had failed to identify Wheat as the incumbent.

her work is governed by policy that she did not create and cannot change does not negate the fact that Wheat is responsible for the day-to-day operations of a core function of the DOC. Id. Even Wheat does not deny that she directs the educational program. Furthermore, Wheat does not deny that she implements DOC policy.⁵

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

AFSCME generally argues that the instant designation violates due process and is arbitrary and capricious. Finally, AFSCME alleges that P.A. 97-1172 is unconstitutional under provisions of the Illinois and United States Constitutions.

An agency's action is arbitrary and capricious only if the agency contravenes the legislature's intent, fails to consider a crucial aspect of the problem, or offers an explanation which is so implausible that it runs contrary to agency expertise. Deen v. Lustig, 337 Ill. App. 3d 294, 302 (4th Dist. 2003). Furthermore, an agency is bound to follow its own rules. State of Illinois, Department of Central Management Services (Illinois Commerce Commission) v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 771 (4th Dist. 2010). As noted above, the plain language of the statute permits the designation of a position based solely on the criteria enumerated in Sections 6.1(a) and (b)(5). Furthermore, AFSCME has raised no claim that the Board has failed to follow its own Rules regarding the instant designation. Therefore, it is not arbitrary for the Board to permit designation of the position at issue because it is adhering to its own rules and the plain language of the statute in doing so.

As to the requirements of due process, adequate notice of a proposed governmental action and a meaningful opportunity to be heard are the fundamental prerequisites of due process. Peacock v. Bd. of Tr. of the Police Pension Fund, 395 Ill. App. 3d 644, 654 (1st Dist. 2009) (citing Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970)). AFSCME alleges that CMS's submission does not provide it with notice of the factual basis for the instant designation. However, I decline to find that notice is lacking where CMS's submission clearly indicates that the position at issue qualifies for designation under Section 6.1(b)(5), the affidavit demonstrates CMS's contention that the position has significant and independent discretionary authority as

⁵ In response to AFSCME's questionnaire, Wheat states only that she does not write or recommend the adoption of policies, decide how policies or legislation will be implemented, or recommend any actions that control or implement legislation that affects DOC.

defined by the managerial portion of Section 6.1(c), and AFSCME has filed objections that are responsive to these contentions.

Beyond this assertion, AFSCME has not articulated how it has been deprived of either notice or an opportunity to be heard in this matter. Nonetheless, AFSCME's objections tout the dangers of accepting CMS's petition without inquiry. Therefore, I must note that I have not accepted CMS's designation without inquiry. Though I have not granted AFSCME an oral hearing in this matter, I have considered the submissions of both CMS and AFSCME. Having determined that the objections, if proven, would not warrant dismissal of the instant petition, no oral hearing was necessary.

AFSCME alleges that P.A. 97-1172 violates the separation of powers provisions of the Illinois Constitution, the guarantee of equal protection under the Illinois and United States Constitutions, and the impairment of contract prohibitions of both the Illinois and United States Constitutions. However, it is beyond the Board's capacity to rule that the Illinois Public Labor Relations Act, as amended by Public Act 97-1172, either on its face or as applied violates provisions of the United States and Illinois constitutions. Goodman v. Ward, 241 Ill. 2d 398, 411 (2011) ("Administrative agencies ... have no authority to declare statutes unconstitutional or even to question their validity. [citations omitted] When they do so, their actions are a nullity and cannot be upheld.").

V. CONCLUSION OF LAW

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

VI. RECOMMENDED ORDER

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

37015-29-10-401-00-01 Educational Facility Administrator

VII. EXCEPTIONS

Pursuant to Section 1300.90 and Section 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300, parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than three days after service of the recommended decision and order. All exceptions shall be filed and

served in accordance with Section 1300.90 of the Board's Rules. Exceptions must be filed by electronic mail sent to ILRB.Filing@Illinois.gov. Each party shall serve its exception on the other parties. 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 21st day of March, 2014

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

/s/ Heather R. Sidwell _____

**Heather R. Sidwell
Administrative Law Judge**