

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

State of Illinois, Department of)	
Central Management Services)	
(Illinois State Police),)	
)	
Petitioner)	
)	
and)	Case Nos. S-DE-14-237
)	& S-DE-14-238
American Federation of State, County)	
and Municipal Employees, Council 31,)	
)	
Labor Organization-Objector)	

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

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012), allows the Governor to designate certain employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be available under Section 6 of the Act. This case involves such designations made on the Governor's behalf by the Illinois Department of Central Management Services (CMS). On March 31, 2014, Administrative Law Judge (ALJ) Sarah R. Kerley issued a Recommended Decision and Order (RDO) in these consolidated cases, finding that the designations were properly made. We agree.

In Case No. S-DE-14-237 CMS petitioned to designate for exclusion eight positions at the Illinois State Police classified as Public Service Administrator Option 1. In Case No. S-DE-14-238 it petitioned to designate three more positions at that agency classified as Public Service

Administrator Option 2.¹ All were designated for exclusion pursuant to Section 6.1(b)(5) of the Act, which allows designation 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 as objections specific to the positions. The ALJ declined to address the constitutional objections, rejected the other generally applicable and specific objections and found that the positions met the requirements of Section 6.1(b)(5) of the Act and thus were properly designated.

AFSCME filed timely exceptions to the ALJ’s RDO pursuant to Section 1300.130 of the Board’s rules, 80 Ill. Admin. Code §1300.130. Based on our review of the exceptions, the record, and the RDO, we reject the exceptions and adopt the RDO. We find the designations comport with the requirements of Section 6.1, and direct the Executive Director to issue a certification consistent with that finding.

¹ CMS regulations classify a Public Service Administrator position as Option 1 if it is in the field of “General Administration/Business Marketing/Labor/Personnel” and Option 2 if it is in the field of “Fiscal Management/Accounting/Budget/Internal Audit/Insurance/Financial.” 80 Ill. Admin. Code 310.50.

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.

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 in Chicago, Illinois, on April 15, 2014;
written decision issued at Springfield, Illinois, April 29, 2014.

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

State of Illinois, Department of Central)	
Management Services (Illinois State Police),)	
)	
Employer)	
)	
and)	Case Nos. S-DE-14-237
)	S-DE-14-238
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) (Act) *added by* Public Act 97-1172 (effective 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 (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 properly qualify for designation, the employment position must meet one or more of the following five requirements:

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

Officer, or Human Resources Director;

- (3) it must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 479 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), *see* 20 ILCS 415/4 through 4d (2012);
- (4) it must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
- (5) it must authorize an employee in that position to have “significant and independent discretionary authority as an employee” by which the Act means the employee is either
 - (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
 - (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

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

As noted, Public Act 97-1172 and Section 6.1 of the Illinois Public Labor Relations Act became effective on April 5, 2013, and allow the Governor 365 days from that date to make such designations. The Board promulgated rules to effectuate Section 6.1, which became effective on August 23, 2013, 37 Ill. Reg. 14,066 (September 6, 2013). These rules are contained in Part 1300 of the Board’s Rules and Regulations, 80 Ill. Admin. Code Part 1300.

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 here.

On February 18, 2014, the Illinois Department of Central Management Services (“CMS”), on behalf of the Governor, filed the above-captioned designation petitions pursuant to Section 6.1(b)(5) of the Act and Section 1300.50 of the Board’s Rules. The petition in case number S-DE-14-237 identified the following PSA-Option 1 positions at the Illinois State Police (“Department” or “ISP”) for designation:

<u>Position No.</u>	<u>Working Title</u>	<u>Incumbent</u>
37015-21-14-110-00-01	Fleet Manager	Scott Nichols
37015-21-14-500-00-01	Facility/Telecom Section Manager	David Copi
37015-21-22-400-00-01	Alcohol & Substance Testing Section Supervisor	Nancy Easum
37015-21-32-000-30-01	Forensic Diagramming & Animation Section Manager	Brian Miller
37015-21-43-310-00-01	Assistant Operations Officer	Vacant
37015-21-43-311-00-01	AFIS/Fingerprint Unit Manager	Vacant
37015-21-43-520-00-01	Support Services Manager-Bureau of Identification	Cynthia Fox
37015-21-43-530-00-01	Customer Tech Support Manager	Lynne Johnston

The petition indicates that the PSA-Option 1 positions were certified on January 20, 2010.

The petition in case number S-DE-14-238 identified the following PSA-Option 2 positions at ISP for designation:

<u>Position No.</u>	<u>Working Title</u>	<u>Incumbent</u>
37015-21-12-231-31-01	Grant Compliance Unit Manager	Fran Schnorf
37015-21-12-231-31-01	Financial Reporting Manager	Patricia Morgan
37015-21-12-240-00-01	Supervisor of Statewide Seizure and Forfeiture document program and asset seizure management system	Sherri Vorreyer

The petition indicates that the PSA-Option 2 positions were certified on November 18, 2009.

In support of its petitions, CMS filed the position descriptions for the positions, organizational charts, and affidavits from individuals familiar with the work of the position. Pursuant to Section 1300.60(a)(3) of the Board’s Rules, on March 26, 2014, the American Federation of State, County and Municipal Employees, Council 31 (“AFSCME”) objected to the petitions.

I reviewed the designation petitions and accompanying position descriptions, affidavits submitted with the petitions, and the objections raised by AFSCME. My review indicates that no issue of law or fact exists that might overcome the presumption that the designation is proper such that a hearing is necessary as to the propriety of the designation.

After consideration of the information before me, I find that the designations are properly submitted and are consistent with the requirements of Section 6.1 of the Act. Accordingly, I recommend that the Executive Director certify the designations of the positions at issue in this matter and, to the extent necessary, amend any applicable certification of exclusive representatives to eliminate any existing inclusion of these positions within any collective bargaining unit.

I. AFSCME OBJECTIONS

AFSCME objects to the designation petitions in a number of ways. Through its written objections and documents, AFSCME makes the following arguments.

AFSCME argues that Section 6.1 violates provisions of the United States and Illinois constitutions in a number of ways. First, the designation is an improper delegation of legislative authority to the executive branch. Second, selective designation results in employees being treated unequally based on whether an individual's position was subject to a designation petition. Third, the designation unlawfully impairs the contractual rights of individuals whose positions were subject to the provision of a collective bargaining agreement prior to the position being designated for exclusion.

AFSCME also contends that because the "employees holding the position identified by this petition are covered by a collective bargaining agreement which CMS entered into subsequent to the enactment of [Section] 6.1," the designation of these positions "violates due process and is arbitrary and capricious."

More substantively, AFSCME contends that under the National Labor Relations Board ("NLRB") precedent and case law interpreting the same, "any claim of supervisory or managerial status requires that *the party raising the exclusion bear the burden of proof.*"² AFSCME argues that CMS seeks the exclusion of employees who are not "supervisors" or "managers" as defined by the National Labor Relations Act ("NLRA"), 29 U.S.C. 152 *et seq.*, or NLRB. AFSCME contends that CMS has presented evidence only of the "*potential* responsibilities that can be given to the employee within the position" and has not demonstrated that the employees have actual authority to complete the duties. Accordingly, AFSCME argues that CMS should bear the burden of proving that the employees in the designated positions exercise duties that would make them supervisory or managerial, that the positions exercise

² Emphasis in original.

managerial discretion rather than just professional discretion, and that the designated positions have different duties than positions with the same title that performs “wholly professional” duties.

AFSCME further contends that CMS cannot prove a position is managerial where the position description identifies that the position effectuates policies but does not identify specific policies the position effectuates. AFSCME argues that CMS cannot prove that an employee is a supervisor by generalizing supervisory functions rather than demonstrating that the employee has actual authority to act or effectively recommend one of the 11 enumerated supervisory functions. Finally, AFSCME contends that by presenting evidence of only the positions’ potential duties, CMS has failed to meet its burden.

II. DISCUSSION AND ANALYSIS

The law creates a presumption that designations made by the Governor are properly made. In order to overcome the presumption of a properly submitted designation under Section 6.1(b)(5), the objectors must raise an issue of law or fact that the position does not meet either of the managerial tests set out in Section 6.1(c)(i) or the supervisory test set out in Section 6.1(c)(ii).

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. Servs., 30 PERI ¶80, Case No. S-DE-14-005 etc. (IL LRB-SP Oct. 7, 2013) appeal pending, No. 1-13-3454 (Ill. App. Ct. 1st Dist.)(*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.”)) *see also* Arvia v. Madigan, 209 Ill.2d 520, 526 (2004)(administrative agency lacks authority to decide constitutional issues). Accordingly, these issues are not addressed in this recommended decision and order.

AFSCME argues in its objections that CMS should bear the burden in at least two ways. First, it argues that because CMS is seeking an exclusion, under NLRA case law, CMS should bear the burden of proof, and should have had to present its case-in-chief first at the hearing. In so arguing, AFSCME fails to appreciate that Section 6.1 is a wholly new legislative creation. The Act’s provision that “any designation made by the Governor...shall be presumed to have

been properly made,” 5 ILCS 315/6.1(d), shifts the burden of proving that a designation is improper on the objector. Therefore, AFSCME and the individual employees have the burden to demonstrate that the designation is improper.

In this case, neither AFSCME nor the individuals presently serving in the designated positions have provided any position-specific information or evidence to support that the designations are improper. Accordingly, they have failed to overcome the presumption of propriety, and I find the designations are proper.

III. CONCLUSIONS OF LAW

The Governor’s designations in these cases are properly made.

IV. RECOMMENDED ORDER

Unless this Recommended Decision and Order is rejected or modified by the Board, the following PSA-Option 1 positions with the Illinois Department of Human Services are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-21-14-110-00-01	Fleet Manager
37015-21-14-500-00-01	Facility/Telecom Section Manager
37015-21-22-400-00-01	Alcohol & Substance Testing Section Supervisor
37015-21-32-000-30-01	Forensic Diagramming & Animation Section Manager
37015-21-43-310-00-01	Assistant Operations Officer
37015-21-43-311-00-01	AFIS/Fingerprint Unit Manager
37015-21-43-520-00-01	Support Services Manager-Bureau of Identification
37015-21-43-530-00-01	Customer Tech Support Manager

Unless this Recommended Decision and Order is rejected or modified by the Board, the following PSA-Option 2 positions with the Illinois Department of Human Services are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-21-12-231-31-01	Grant Compliance Unit Manager
37015-21-12-231-31-01	Financial Reporting Manager
37015-21-12-240-00-01	Supervisor of Statewide Seizure and Forfeiture document program and asset seizure management system

V. EXCEPTIONS

Pursuant to Sections 1300.130 and 1300.90(d)(5) 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 no later than three days after service of this recommended decision and order. Exceptions shall be filed with the Board by electronic mail at an electronic mail address designated by the Board for such purpose, ILRB.Filing@illinois.gov, and served on all other parties via electronic mail at its e-mail address as indicated on the designation form. Any exception to a ruling, finding, conclusion or recommendation that is not specifically urged shall be considered waived. A party not filing timely exceptions waives its right to object to this recommended decision and order.

Issued at Springfield, Illinois, this 31st day of March, 2014.

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

Sarah R. Kerley

**Sarah Kerley
Administrative Law Judge**

³ Available at www.state.il.us/ilrb/subsections/pdfs/Section1300IllinoisRegister.pdf