STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

State of Illinois, Department of Central Management Services (Department of Employment Security),	)	
Petitioner	)	
and	)	Case No. S-DE-14-240
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 April 9, 2014, Administrative Law Judge (ALJ) Michelle Owen 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 Employment Security classified as a Public Service Administrator Option 1 with the working title of Local Area Unemployment Statistics Program Manager and occupied by Richard

Reinhold. It was designated for exclusion pursuant to Section 6.1(b)(5) of the Act, which allows designation of positions with "significant and independent discretionary authority."[1]

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 position at issue. The ALJ declined to address the constitutional objections, rejected the other generally applicable objections, and with respect to the position-specific objections found that Reinhold's position met the managerial component of a Section 6.1(b)(5) designation as set out in Section 6.1(c)(i) of the Act.

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, adopt the RDO, and find that the designation comports with the requirements of Section 6.1. We 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

[1] 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.

/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 May 13, 2014; written decision issued at Springfield, Illinois, May 20, 2014.

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Employer	)	
	)	Case No. S-DE-14-240
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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. 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, 479 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), see 20 ILCS 415/4 through 4d (2012);
4) it must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
5) it must authorize an employee in that position to have "significant and independent discretionary authority as an employee" by which the Act means the employee is either
    (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
    (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

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

As noted, Public Act 97-1172 and Section 6.1 of the Illinois Public Labor Relations Act became effective on April 5, 2013, and allow the Governor 365 days from that date to make such designations. The Board promulgated rules to effectuate Section 6.1, which became effective on August 23, 2013, 37 Ill. Reg. 14,070 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

[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.

I. PETITION

On March 21, 2014, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designation petition pursuant to Section 6.1 of the Act and Section 1300.50 of the Board's Rules. The petition designates one Public Service Administrator (PSA), Option 1 position at the Department of Employment Security (IDES) for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act. The petition indicates that the position qualifies for designation under Section 6.1(b)(5). The petition indicates that the position was certified on January 20, 2010 in Case No. S-RC-08-036.

In support of its petition, CMS provided a position description (CMS-104) for the position and an affidavit from an individual who supervises the listed position. CMS also provided documentation identifying the position number, title, name of incumbent, bargaining unit, certification date and case number, statutory category that serves as the basis for the exemption, and a list of the job duties that support the presumption that the position is supervisory and managerial.

II. OBJECTIONS

On April 2, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed timely objections to the exclusion of the position. In support of its objections, AFSCME provided an information form completed by Richard Reinhold, the employee in the designated position, and supporting attachments.

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

AFSCME next objects to the petition arguing that the designated position is not managerial under decisions of the National Labor Relations Board, and courts interpreting the same. AFSCME further objects to the use of a position description to support the petition and to the allocation of the burden of proof. AFSCME asserts that the evidence submitted by CMS in the form of a position description, organizational chart, and affidavit merely acknowledges the position's potential responsibilities. Likewise, AFSCME argues that CMS has failed to provide

specific evidence that the position at issue has actual authority to perform the listed job duties. As such, AFSCME argues that the employee in the position at issue was never informed of his significant and independent discretionary authority to perform supervisory or managerial functions and CMS has not met its burden of demonstrating that the position possesses the requisite significant and independent discretionary authority. In addition, AFSCME argues that the position at issue is professional and not managerial. AFSCME also maintains that to the extent the affidavit states the employee at issue effectuates policies or is authorized to effectuate policy, and the position description does not define a policy, there can be no showing that the employee is managerial, and the burden is on CMS to show why different duties should not apply to others holding the same title. Therefore, AFSCME maintains that the position at issue is neither supervisory nor managerial within the meaning of Section 6.1 of the Act. AFSCME also specifically objects to the position held by Richard Reinhold. AFSCME provided a written statement as evidence in support of the conclusion that the position at issue is not managerial or supervisory within the meaning of the Act.

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 have determined that AFSCME has failed to raise an issue that would require a hearing. I find the designation to have been properly submitted and consistent with the requirements of Section 6.1 of the Act and consequently I recommend that the Executive Director certify the designation of the position at issue in this matter as set out below and, to the extent necessary, amend any applicable certifications of exclusive representatives to eliminate the existing inclusion of the position within any collective bargaining unit.

III. DISCUSSION

A. Constitutional Arguments

It is beyond the Board's "capacity to rule that the Illinois Public Labor Relations Act, as amended by Public Act 97-1172, either on its face or as applied violated provisions of the United States and Illinois constitutions." State of Ill., Dep't of Cent. Mgmt. Servs., 30 PERI ¶ 80 (IL LRB-SP 2013), citing Goodman v. Ward, 241 Ill. 2d 398, 411 (2011) ("Administrative agencies . . . have no authority to declare statutes unconstitutional or even to question their validity.

[citations omitted] When they do so, their actions are a nullity and cannot be upheld.") Thus, AFSCME's constitutional arguments are not addressed in this decision.

B. Non-Constitutional General Objections

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

AFSCME's remaining general objections are without merit and do not raise issues of fact or law that might rebut the presumption that the designation has been properly made. First, the Board has previously rejected AFSCME's objections concerning the statutorily-mandated presumption, the burden of proof, and the manner in which ALJs have applied them. State of Ill., Dep't of Cent. Mgmt. Servs., 30 PERI ¶ 80 ("Submission of position descriptions that are consistent with the designation made, combined with the presumption of appropriateness, and in the absence of any contrary evidence from objectors like AFSCME that might demonstrate that the designation is inappropriate, leads to the conclusion that the designation comports with the requirements of Section 6.1.") AFSCME's arguments regarding the use of a position description, organizational chart, and affidavit to support the petition; the burden of proof; and CMS' failure to provide specific evidence that the position at issue has actual authority to perform the listed job duties must be rejected because these arguments ignore the presumption and misallocate the burden, which is on AFSCME, not CMS.

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

professional, and even if the position fails to meet the definition of a managerial employee in Section 3(j) of the Act. Id.

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

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

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

The first test in Section 6.1(c)(i) is substantively similar to the traditional test for managerial status articulated in Section 3(j). Section 6.1(c)(i) provides that a position authorizes an employee to have significant and independent discretionary authority if he or she "is engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency." Though similar to the Act's general definition of a managerial employee in Section 3(j), the Section 6.1(c)(i) definition is broader in that it does not include a predominance requirement and requires only that the employee is "charged with the effectuation" of policies, not that the employee is responsible for "directing the effectuation." An employee directs the effectuation of management policy when he or she oversees or coordinates policy implementation by developing the means and methods of reaching policy objectives, and by determining the extent to which the objectives will be achieved. Ill. Dep't of Cent. Mgmt. Servs. (Ill. State Police), 30 PERI ¶ 109 (IL LRB-SP 2013), citing Cnty. of Cook (Oak Forest Hospital) v. Ill. Labor Rel. Bd., 351 Ill. App. 3d 379, 387 (1st Dist. 2004); State of Ill., Dep't of Cent. Mgmt. Servs. (Healthcare & Family Servs.), 23 PERI ¶ 173 (IL LRB-SP 2007). However, in order to meet the first test set out in Section 6.1(c)(i), a position holder need not develop the means and methods of reaching policy objectives. It is sufficient if the position holder is charged with carrying out the policy in order to meet its objectives.

The test in Section 6.1(c)(i) is unlike the traditional test where a position is deemed managerial only if it is charged with "directing the effectuation" of policies. Under the traditional test, for example, "where an individual merely performs duties essential to the employer's ability to accomplish its mission, that individual is not a managerial employee," Ill.

Dep't of Cent. Mgmt. Servs. (Dep't of Revenue), 21 PERI ¶ 205 (IL LRB-SP 2005), because "he does not determine the how and to what extent policy objectives will be implemented and the authority to oversee and coordinate the same." Healthcare & Family Servs., 23 PERI ¶ 173, citing City of Evanston v. Ill. Labor Rel. Bd., 227 Ill. App. 3d 955, 975 (1st Dist. 1992). However, under Section 6.1(c)(i), a position need not determine the manner or method of management policies. Performing duties that carry out the agency or department's mission is sufficient to satisfy the second prong of the first managerial test.

The second test under Section 6.1(c)(i) also relates to the traditional test for managerial status by reflecting the manner in which the courts have interpreted that test. A designation is proper under this test if the position holder "represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency." The Illinois Appellate Court has observed that the definition of a managerial employee in Section 3(j) is very similar to the definition of managerial employee set out in the Supreme Court's decision in National Labor Relations Board v. Yeshiva University, 444 U.S. 672 (1980). Dep't of Cent. Mgmt. Servs./Ill. Commerce Comm'n v. Ill. Labor Rel. Bd., 406 Ill. App. 766, 776 (4th Dist. 2010), citing Yeshiva, 444 U.S. at 683. Further, the Appellate Court noted that the ILRB, like its federal counterpart, "incorporated 'effective recommendation' into its interpretation of the term 'managerial employee.'" ICC, 406 Ill. App. at 776. Indeed, the Court emphasized that "the concept of effective recommendations . . . [set forth in Yeshiva] applies with equal force to the managerial exclusion under the Illinois statute." Id. In light of this analysis, the second test under Section 6.1(c)(i) is similar to the expanded traditional test of Section 3(j) because the second test is virtually identical to the statement of law in Yeshiva, which the Illinois Appellate Court and the Illinois Supreme Court have incorporated into the traditional managerial test. Id., quoting Chief Judge of the Sixteenth Judicial Circuit v. Ill. State Labor Rel. Bd., 178 Ill. 2d 333, 339-40 (1997). However, "Section 6.1(c)(i) does not require that an employee engage in policy making; rather it allows designation if the employee merely takes discretionary action that effectively implements agency policy." Ill. Dep't of Cent. Mgmt. Servs. (Dep't of Commerce & Econ. Opportunity), 30 PERI ¶ 163 (IL LRB-SP 2014).

1. Richard Reinhold

Reinhold serves as a Local Area Unemployment Statistics (LAUS) Program Manager for the Economic Information & Analysis Division of IDES. His position description states that he plans and directs the production of monthly and annual LAUS deliverables; analyzes and validates accuracy of monthly production and annual benchmark LAUS estimates prior to transmission to the Bureau of Labor Statistics (BLS); identifies and documents problems with LAUS state system PC software and reports them to BLS as necessary; works with the BLS and Information Services Bureau to maintain and improve accuracy of Unemployment Insurance claims data extracted from the Benefit Information System; develops and implements new and revised operating methods, and procedures; establishes goals and objectives to meet operational needs implementing methods and systems to monitor progress toward attaining the same; plans, assigns, reviews, and evaluates the work of subordinate staff comparing results achieved with established goals and objectives; prepares and signs performance evaluations; hears first level grievance and effectively implements disciplinary action; conducts staff meetings to keep staff abreast of changes in policy, procedures, and operation; discusses problem areas and coordinates the implementation of corrective measures; directs, reviews, and evaluates a variety of LAUS staff activities that employ statistical research and writing skills such as: evaluating the performance of LAUS employment and unemployment regression models and reporting the results to the BLS, writing monthly LAUS economic analysis, producing narrative and tables for statewide and metropolitan areas news releases, developing Areas of Substantial Unemployment as part of annual deliverables to the Employment and Training Administration (ETA) and Job Training Division, preparing Labor Surplus Area petitions to the ETA, writing articles for Illinois Labor Market Review newsletter or reports for presentation at research conferences describing trends in the labor force, and evaluating impact of new decennial Census and inter-censal population and labor force data on LAUS estimates; using database and spreadsheet software, produces customized reports as requested by agency staff, the Governor's Office, Public Information Office, and private customers; updates reports on the Labor Market Information Source Web site; serves as LAUS liaison between IDES and external organizations; participates in conferences and training sessions; and makes presentations and delivers speeches on the LAUS program. He has one subordinate: a Public Service Administrator, Option 2c, who

completes the monthly and annual deliverables for the LAUS program, including compiling and entering data on the reporting system.

CMS contends that Reinhold is authorized to be engaged in executive and management functions of IDES and charged with the effectuation of management policies and practices of IDES or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of IDES. CMS asserts that Reinhold is authorized to implement IDES policies in managing the LAUS program and provides supervision and direction to subordinate staff in the development of statewide and sub-state unemployment statistics for the State of Illinois. In addition, CMS contends that Reinhold is authorized to, in the interest of IDES, among other things, assign and review work, responsibly direct, counsel staff regarding work performance, take corrective action, monitor work flow, evaluate subordinates' work performance, and reassign staff to meet day to day operating needs with independent judgment.

Reinhold contends that his position description is out of date and fails to include new, non-supervisory activities that he has assumed over the past several years. He maintains that the position description grossly inflates the percentage of time he devotes to planning and directing. He asserts that he actually spends less than five percent of his time planning and directing the activities of his subordinate. He contends that the majority of his time is spent on data estimation, edits, writing and analysis, and responding to customer inquiries. In addition, he maintains that he produces reports or data files to assist with the reporting of weekly Unemployment Insurance claims data to the federal government, but that this task is not included on his position description. Further, he maintains that his subordinate has completed all major deliverables for BLS in his absence on numerous occasions. In addition, he asserts that he does not direct, review, or evaluate a variety of LAUS staff activities. He maintains that he personally completes all of these tasks by himself.

Reinhold asserts that he does not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline employees. In addition, he contends that he cannot hear first level grievances or effectively implement disciplinary action. He maintains that these responsibilities are in fact handled by the Division manager. He asserts that he assigns work to employees only within the employee's existing job description. He maintains that he

does not have the authority to assign work for duties unrelated to what is described in the position description or to assign employees to other units. He admits that he directs employees, but asserts that very little direction is needed given the independent nature of his subordinate's work. He contends that all of the tasks performed by his subordinate are documented by memoranda and user guides written by BLS. He maintains that the BLS also provides training courses to state employees as well as on-site training if necessary. Further, he contends that any internal "how-to" documentation for the LAUS program operations was written by his subordinate. Thus, he maintains that there is no need to plan for or direct the day to day operations of his subordinate. In addition, Reinhold asserts that he does not have final authority to approve time off for his subordinates.

Reinhold also maintains that he does not write policies or recommend the adoption of policies; have a role in the budget process; have authority to decide how policies or legislation will be implemented; or recommend any actions that control or implement legislation that affects his agency or agency policy. In addition, he contends that he does not conduct staff meetings to keep staff abreast of changes to policy, procedures, and operations as described in his position description. He asserts that policy changes to the LAUS program are communicated by the BLS directly to state analysts via memoranda, email, or at national meetings.

The objections fail to establish that Reinhold is not engaged in executive and management functions and charged with the effectuation of management policies and practices of IDES and/or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of IDES when he plans and directs the production of monthly and annual LAUS deliverables; analyzes and validates accuracy of monthly production and annual benchmark LAUS estimates prior to transmission to BLS; identifies and documents problems with LAUS State System PC software and reports them to BLS as necessary; works with the BLS and Information Services Bureau to maintain and improve accuracy of Unemployment Insurance claims data extracted from the Benefit Information System; develops and implements new and revised operating methods and procedures; establishes goals and objectives to meet operational needs implementing methods and systems to monitor progress toward attaining same; and produces reports or data files to

assist with the reporting of weekly Unemployment Insurance claims data to the federal government.[2]

IV. CONCLUSION OF LAW

The Governor's designation in this case was 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 with the Department of Employment Security is excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

Position Number	Incumbent	Working Title
37015-44-14-520-00-01	Richard Reinhold	Local Area Unemployment Statistics Program Manager

VI. EXCEPTIONS

Pursuant to Section 1300.90 and Section 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 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 three days after service of the recommended decision and order. All exceptions shall be filed and served in accordance with Section 1300.90 of the Board's Rules. Exceptions must be filed by electronic mail sent to ILRB.Filing@Illinois.gov. Each party shall serve its exception on the other parties. If the original exceptions are withdrawn, then all subsequent exceptions are moot. A party not filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

Issued at Chicago, Illinois, this 9th day of April, 2014

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

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[2] CMS also asserts that Reinhold's position is properly designable under Section 6.1(c)(ii). Since Reinhold's position qualifies for exclusion under Section 6.1(c)(i), it is unnecessary to determine whether the position also qualifies for exclusion under Section 6.1(c)(ii).

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

/s/ Michelle Owen

Michelle Owen
Administrative Law Judge