

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

State of Illinois, Department of)	
Central Management Services)	
(Department of Corrections),)	
)	
Petitioner)	
)	Consolidated Case Nos.
and)	S-DE-14-246 & S-DE-14-248
)	
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. These consolidated cases involve such designations made on the Governor’s behalf by the Illinois Department of Central Management Services (CMS). On April 25, 2014, Administrative Law Judge (ALJ) Heather R. Sidwell issued a Recommended Decision and Order (RDO) in these cases, finding that the designations were properly made. We agree.

In Case No. S-DE-14-246, CMS petitioned to designate for exclusion a single vacant position at the Illinois Department of Corrections classified as a Public Service Administrator (PSA) Option 1 position with the working title of Statewide Recruitment Coordinator. In Case No. S-DE-14-248, CMS designated for exclusion another vacant position at that same agency

classified as a PSA Option 9B position with the working title of Internal Auditor.¹ They were both 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 both petitions 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, but no objections specific to the position at issue. The ALJ consolidated both cases for decision and issued an RDO. She declined to address the constitutional objections, rejected the other generally applicable objections, and concluded that the in each instance the designation comported with the requirements of Section 6.1(b).

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 designations comport with the requirements of Section 6.1. We direct the Executive Director to issue certifications consistent with that finding.

¹ CMS regulations classify Public Service Administrator positions as Option 1 if they are in the field of general administration, business, marketing, labor or personnel and Option 9B if they require a special license as a certified information systems auditor. 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 May 13, 2014;
written decision issued at Springfield, Illinois, May 22, 2014.

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

State of Illinois, Department of Central)	
Management Services, (Department of)	
Corrections),)	
)	
Petitioner)	
)	Consolidated Case No. S-DE-14-246
and)	and S-DE-14-248
)	
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 (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 March 27, 2014, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designations pursuant to Section 6.1 of the Act and Section 1300.50 of the Board's Rules. On April 4, 2014, the American Federation of State, County and Municipal Employees (AFSCME) filed timely objections to both designations.

Based on my review of the designations, the documents submitted therewith, the objections filed by AFSCME, and the arguments submitted in support of those objections, I have determined that AFSCME has failed to raise an issue that would require a hearing in these matters. Therefore, I find the designations 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 these matters 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 petition filed in Case No. S-DE-14-246 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. The petition filed in Case No. S-DE-14-248 also designates one position at DOC for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act. CMS states that these positions qualify for designation under Section 6.1(b)(5). CMS also states that these positions are currently represented by AFSCME for the purposes of collective bargaining. In support of its contentions, CMS has filed CMS-104s containing the position descriptions for the designated positions.

AFSCME objects to the designations on the grounds that CMS has failed to demonstrate that the designated positions are properly designable under Section 6.1 of the Act. AFSCME raises several arguments in support of its contention that the designated positions are neither supervisory nor managerial under the relevant definitions. AFSCME next argues that the designations violate due process and are 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 position designated in Case No. S-DE-14-246 is classified as Public Service Administrator (PSA) Option 1 and is employed by DOC in the working title of Statewide Recruitment Coordinator. It was first certified to be in a collective bargaining unit on January 20, 2010, Case No. S-RC-08-036. The position was vacant at the time the instant designation was filed.

The position designated in Case No. S-DE-14-248 is classified as a PSA Option 9B and is employed by DOC in the working title of Internal Auditor. It was first certified to be in a collective bargaining unit on September 24, 2012, Case No. S-UC-13-002. The position was vacant at the time the instant designation was filed.

III. POSITION DESCRIPTIONS

The CMS-104 submitted along with the designation in Case No. S-DE-14-246 lists the following relevant responsibilities that the Statewide Recruitment Coordinator is authorized to complete “[u]nder administrative direction”: plan, coordinate, and evaluate the operation of the statewide recruitment program for DOC; implement policies and procedures for the operation of the program; verify Executive Order 15 goals and objectives are adhered to; monitor the steps taken to assist DOC in meeting affirmative action/workforce diversity goals when hiring opportunities occur; and establish and maintain ongoing recruitment efforts to identify candidates for vacancies from diverse backgrounds.

The CMS-104 submitted along with the designation in Case No. S-DE-14-248 lists the following relevant responsibilities that the Internal Auditor is authorized to complete “[u]nder general direction of the Chief Internal Auditor”: serve as Auditor-in-Charge on various complex routine and non-routine audits; ensure internal controls within information systems application are in compliance with various requirements, including industry standards, federal and state statutes, and DOC policy and procedure; ensure the confidentiality, integrity, and availability of data in accordance with these requirements; review DOC programs, operations, and records for completeness, accuracy, and compliance with DOC standards and procedures; plan and write audit programs; draft final audit findings and develop audit reports for submission to the Audit Manager.

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 submissions are consistent with the designations.

CMS's initial filings clearly indicate, and AFSCME does not deny, that the positions at issue in Case Nos. S-DE-14-246 and S-DE-14-248 were first certified to be in a bargaining unit on January 20, 2010, and September 24, 2012, respectively. The first statutory requirement is thus satisfied. As to the second statutory requirement, the submissions are consistent with the designations because the CMS-104s tends to show that employees in the designated positions are 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 that term is 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

² Because I find that employees in the positions at issue are 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 designations are proper, I will not address the assertion that employees in the designated positions are also authorized to exercise significant and independent discretionary authority as that term is defined in Section 6.1(c)(ii).

recommending discretionary actions that effectively control or implement the policy of a State agency.

At the outset, I note that several points raised in AFSCME’s general objections are inconsistent with the plain language of Section 6.1 and Board precedent regarding the same. AFSCME broadly objects that the positions at issue are not managers within the definition used by the National Labor Relations Board (NLRB). However, the Board has specifically rejected AFSCME’s contention that it should look first to NLRB precedent in interpreting Section 6.1(c)(i). State of Illinois, Department of Central Management Services (Department of Commerce and Economic 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.”). The Board has likewise rejected AFSCME’s allegation, based on its erroneous application of NLRB precedent, that CMS should have the burden of demonstrating that a designation meets the statutory standards enumerated in Section 6.1. Id. Finally, the Board rejected AFSCME’s contention that Section 6.1(c)(i) requires the Board to distinguish between merely professional employees and employees with managerial authority. Id. (“Where a position meets one of the two alternative tests set out in Section 3(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...”). With these principles in mind, CMS’s submission is consistent with its assertion that employees in the positions at issue are authorized to have significant and independent discretionary authority.

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 Section 6.1(c)(i). Id. 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

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.

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)). Meanwhile, the requirement 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)(5), an employee in that position need only be charged with carrying out agency policy.

A position is also designable under Section 6.1(b)(5) where an employee in that position is authorized to take or recommend discretionary action that effectively controls or implements policy. State of Illinois, Department of Central Management Services (Department of Commerce and Economic Opportunity), 30 PERI ¶ 163 (IL LRB-SP 2014). The Board has held that this 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. Id.

CMS's submission is consistent with its assertion that an employee in the position of Statewide Recruitment Coordinator is authorized to have significant and independent discretionary authority because he or she is responsible for implementing DOC policy and procedure for the operation of the statewide recruitment program. In fulfilling this responsibility, the Statewide Recruitment Coordinator by definition implements DOC policy, particularly policy regarding affirmative action and workforce diversity.

CMS's submission is also consistent with its assertion that an employee in the position of Internal Auditor is authorized to have significant and independent discretionary authority because he or she is charged with auditing DOC's information systems. In doing so, the Internal Auditor is engaged in executive and management functions because he or she is responsible for ensuring the effectiveness of DOC information systems—specifically, the confidentiality,

integrity, and availability of data. In doing so, the Internal Auditor is also charged with the effectuation of management policies and practices because he or she is responsible for ensuring that DOC's systems are in compliance with DOC policy.

B. AFSCME has raised no assertions that, if proven, might demonstrate that the designations are inappropriate.

AFSCME alleges that the positions at issue do not satisfy the relevant definition of a managerial position. In support of this contention, AFSCME states that: (1) CMS should have the burden, if not of proving that the relevant definition is satisfied, then of producing evidence in support of its designations; and (2) the CMS-104s are insufficient for this purpose because there is no demonstration of "actual authority" to perform the enumerated functions, the CMS-104s list only potential duties, and there is no evidence that employees in these positions have actually completed the enumerated duties or been instructed that they are authorized to do so.

First, AFSCME misconstrues the relevant issue in this matter. The pertinent question is not whether a position is managerial, but whether an employee in that position is authorized to have significant and independent discretionary authority of a managerial nature.⁴ The Board has already determined that a position that meets the requirements of Section 6.1 is properly designable even if it is not a managerial position as defined in Section 3(j) of the Act. State of Illinois, Department of Central Management Services (Department of Commerce and Economic Opportunity), 30 PERI ¶ 86 (IL LRB-SP 2013). Moreover, in providing a presumption that any Gubernatorial designation is properly made, the General Assembly clearly allocated the burden of proving that a designation is improper to the party who objects.⁵ See 5 ILCS 315/6.1(d) (2012).

⁴ A position is properly designable if it authorizes an employee to have significant and independent discretionary authority as an employee. 5 ILCS 6.1(b)(5) (2012). An employee has significant and independent discretionary authority as an employee 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 or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency. 5 ILCS 6.1(c)(ii) (2012). Substituting the legislature's definition of significant and independent discretionary authority, Section 6.1(b)(5) reads as follows: "[To be designable, a position]... must authorize an employee in that position 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."

⁵ AFSCME further argues that even if Section 6.1(d) shifts this burden—which it does—CMS has nonetheless failed to satisfy the burden of producing evidence to support the presumption that the designation is properly made. However, as previously discussed, CMS's submission tends to support its

Based on this allocation, it is not CMS which must provide evidence that an incumbent has actually completed the duties enumerated in the CMS-104 in order to demonstrate that he or she has authority to complete those duties, but AFSCME which must produce evidence that he or she does not have such authority. Furthermore, AFSCME's insistence on evidence that employees have "actual authority" to perform the duties listed in the CMS-104s or that employees have actually completed the enumerated duties or been instructed that they are authorized to do so is rooted in its insistence that the Board should apply NLRB precedent relating to managerial positions. As discussed above, these contentions have no foundation in either the plain language of the statute or Board precedent regarding the same.

Finally, AFSCME's objections to the use of the CMS-104s are also unpersuasive. Assuming, without so finding, that AFSCME's allegation that the CMS-104s list only potential duties is accurate, this assertion alone is too speculative to provide a basis for finding that an employee in a designated position is not authorized to perform any particular enumerated duty which may support that position's designability.

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

AFSCME generally argues that the instant designations violate due process and are arbitrary and capricious because the positions at issue have previously been certified into a bargaining unit by the Board, the positions' job duties and functions have not changed since their certification, and the positions are covered by a collective bargaining agreement which CMS entered into subsequent to the enactment of Section 6.1. 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

assertion that employees in the designated positions are authorized to exercise significant and independent discretionary authority.

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 designations. Therefore, it is not arbitrary for the Board to permit designation of the positions 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 has not articulated how it has been deprived of either in these matters.

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 designations in these cases are 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 positions at the Department of Corrections are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-29-00-154-00-01	Statewide Recruitment Coordinator
37015-29-00-800-40-01	Internal Auditor

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 25th day of April, 2014

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

/s/ Heather R. Sidwell

**Heather R. Sidwell
Administrative Law Judge**