

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

State of Illinois, Department of	)	
Central Management Services	)	
(Department of Central Management	)	
Services),	)	
	)	
Petitioner	)	
	)	
and	)	Case No. S-DE-14-249
	)	
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 April 25, 2014, Administrative Law Judge (ALJ) Heather R. Sidwell issued a Recommended Decision and Order (RDO) in this case, finding that the designations were properly made. We agree.

CMS petitioned to designate for exclusion three vacant positions at the Illinois Department of Central Management Services classified as Public Service Administrator Option 8L positions<sup>1</sup> with the working title of either Business Enterprise Program Counsel or Property & Claims Support Counsel. All were designated for exclusion pursuant to Section 6.1(b)(5) of the

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<sup>1</sup> CMS regulations classify Public Service Administrator positions as Option 8L if they require a license to practice law. 80 Ill. Admin. Code 310.50.

Act, which allows designation of positions with “significant and independent discretionary authority.”<sup>2</sup>

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, but no objections specific to the positions at issue. The ALJ declined to address the constitutional objections, and rejected the other generally applicable objections. Finding no position-specific evidence supporting the proposition that the designations were improper, she concluded that they had been 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, adopt the RDO, and find that the designations comport 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

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<sup>2</sup> 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 22, 2014.

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

State of Illinois, Department of Central Management Services,	)	
	)	
Employer	)	
	)	
and	)	Case No. S-DE-14-249
	)	
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.<sup>1</sup>

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.

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<sup>1</sup> 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 March 27, 2014, the Illinois Department of Central Management Services (“Department” or “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-14-249 identified the following vacant, PSA-Option 8L positions at the Department for designation:

<b>Position Nos.</b>
37015-37-70-300-01-01
37015-37-70-300-02-01
37015-37-70-800-21-01

The petition indicates that the PSA-Option 8L positions were certified on August 3, 2010.

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 April 7, 2014, 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 designation is properly submitted and is consistent with the requirements of Section 6.1 of the Act. Accordingly, I recommend that the Executive Director certify the designation of the position at issue in this matter and, to the extent necessary, amend any applicable certification of exclusive representatives to eliminate any existing inclusion of this position within any collective bargaining unit.

**I. AFSCME OBJECTIONS**

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

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.

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.*"<sup>2</sup> 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. 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 position exercises managerial discretion rather than just professional discretion, and that the designated position has different duties than a position 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. Finally, 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.

## **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

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<sup>2</sup> Emphasis in original.

6.1(b)(5), an Objector 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 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 designation is 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 8L positions with the Illinois Department of Central Management Services are excluded from the self-organization and collective bargaining provisions of Section

6 of the Illinois Public Labor Relations Act:

<b>Position Nos.</b>
37015-37-70-300-01-01
37015-37-70-300-02-01
37015-37-70-800-21-01

**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,<sup>3</sup> 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](mailto: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 16th day of April, 2014.**

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

***Sarah R. Kerley***

**Sarah Kerley  
Administrative Law Judge**

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<sup>3</sup> Available at [www.state.il.us/ilrb/subsections/pdfs/Section1300IllinoisRegister.pdf](http://www.state.il.us/ilrb/subsections/pdfs/Section1300IllinoisRegister.pdf)