

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

State of Illinois, Department of)	
Central Management Services)	
(Department of Commerce and)	
Economic Opportunity),)	
)	
Petitioner)	
)	
and)	Case No. S-DE-14-253
)	
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 30, 2014, Administrative Law Judge (ALJ) Deena Sanceda issued a Recommended Decision and Order (RDO) in this case, finding that the designations were properly made. We agree.

On April 4, 2014, CMS filed a petition to designate for exclusion two positions at the Illinois Department of Commerce and Economic Opportunity classified as Public Service Administrator Option 1 positions with the working titles of Policy and Grants – Grants Office and Policy and Grants – Special Populations. Both positions were vacant, and both were originally designated for exclusion pursuant to two subsections of Section 6.1(b): Section

6.1(b)(3), which allows designation of positions that are exempt from jurisdiction B of the Personnel Code, 20 ILCS 415 8b through 415/8b.20 (2012), and also exempt from the restrictions imposed by the settlement entered in Rutan v. Republican Party of Illinois, 479 U.S. 62 (1990); and Section 6.1(b)(5), which allows designation of positions with “significant and independent discretionary authority.”¹ April 4, 2014, was the last possible day to file petitions for exclusion under Section 6.1 because Section 6.1(d) indicates that the Governor must exercise the authority granted under Section 6.1 within 365 days of the April 5, 2013, effective date of Public Act 97-1172.

On April 8, 2014, CMS filed a motion to file an amended petition, this one making the designation exclusively pursuant to Section 6.1(b)(5), but also altering one of the two position numbers contained on the spreadsheet made a part of the petition form. The spreadsheet originally filed listed two positions numbers in column four, 37015-42-40-730-30-01 and 37015-42-35-230-~~20~~-01, while the spreadsheet accompanying the amended petition listed the same first number, then listed 37015-42-35-230-~~40~~-01.

The American Federation of State, County and Municipal Employees, Council 31 (AFSCME) objected to the motion to amend, arguing that CMS was attempting to designate a position for exclusion under Section 6.1 outside the one-year statutory time period for making such designations. CMS responded, arguing that it was merely correcting a typographical error

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.

on the original petition. The ALJ allowed the filing of the amended petition by means of an Interim Order issued on April 10, 2014. In so doing, she relied on three points.

First, the ALJ noted that position numbers are not the only means by which positions are identified. She noted, for example, that in Case Number S-DE-14-209 we certified for exclusion three positions sharing a single position number, and two more positions sharing another.

Second, she observed that the CMS-104 position descriptions that accompanied both petitions (and which were incorporated by reference into column 14 of both spreadsheets) contained the same position numbers in each instance—the numbers that matched the amended spreadsheet.

Finally, the ALJ explained that Section 6.1 of the Act does not require the Governor to list position numbers while making designations. The Board's rules do, 80 Ill. Admin. Code §1300.50(a), but the Board's rules also provide that “[f]ailure to fully complete the form *could* result in rejection of the filing of the designation by the Board,” 80 Ill. Admin. Code §1300.50(b) (emphasis added), suggesting that an incomplete form is not critical.

AFSCME filed other 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. It raised constitutional and other generally applicable objections, but no objections specific to the positions at issue, other than its allegation that one of the positions was being designated outside the statutory time frame. The ALJ declined to address the constitutional objections, and rejected the other generally applicable objections. She did not revisit the issue regarding the timing of the designation addressed in her Interim Order. She concluded the designations met the requirements of Section 6.1.

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, again raising its constitutional and other general objections, and also arguing that the designation of one of the positions was outside the 365 calendar day period permitted by Section 6.1.

Based on our review of the exceptions, the record, the Interim Order, and the RDO, we reject the exceptions, adopt the RDO, and adopt the reasoning in the ALJ's interim order. AFSCME is correct that no positions may be designated for exclusion after April 4, 2014. Consequently, an amendment to change a position designation would be inappropriate. The question is whether this amendment changes the position designated, or merely clarifies a previously designated position. We find CMS's amendment is a clarification.

By design, the spreadsheets accompanying our Section 6.1 designation forms are part of the designation petition—our forms require spreadsheets if multiple positions are being designated by means of a single petition. The spreadsheets in this case, and in most if not all of the Section 6.1 designation cases we have seen, explicitly incorporate the CMS-104 position descriptions that are attached as a means of listing the positions' job duties (a requirement both of Section 6.1 of the Act and Section 1300.50 of our rules). The petition as originally filed in this case thus designated two positions described (1) by working titles, (2) by position numbers listed in the fourth column of the spreadsheet, and (3) by position numbers on CMS-104 forms incorporated into the 13th column of the spreadsheet. For one of the designated positions there was an ambiguity in that the number in column four did not match the number in column 13. The working title was correct, as was one of the two numbers, and the amended petition merely resolves the ambiguity and clarifies that the number incorporated into column 13 was the correct one. And it always had been the correct one: there was no change here. The petition, as

originally filed, not only met all requirements of the Act, as noted by the ALJ, but also met our regulations' requirement that the petition provide the position number.

We find, as did the ALJ, that the amended petition does not designate a different position, but clarifies which of two position numbers in the original petition was correct. We adopt the RDO, conclude that the designations comport with the requirements of Section 6.1, and direct the Executive Director to issue a certification consistent with that finding.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ John J. Hartnett
John J. Hartnett, Chairman

/s/ Paul S. Besson
Paul S. Besson, Member

/s/ James Q. Brennwald
James Q. Brennwald, Member

/s/ Michael G. Coli
Michael G. Coli, Member

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting held 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)	
Commerce and Economic Opportunity),)	
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Petitioner)	
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**ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED DECISION AND ORDER**

I. BACKGROUND

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). In order for a designation to be proper the position must be *eligible for designation* based upon its bargaining unit status, the position must *qualify for designation* based upon its job title and/or job duties, and the Governor must provide the Illinois Labor Relations Board (Board) with *specific information* as identified in the Act.

Section 6.1 identifies three broad categories of employment positions that may be *eligible* for designation based upon the position's status in a certified bargaining unit. 1) positions which were first certified to be in a bargaining unit by the 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.

To *qualify* for designation, the employment position must meet one or more of five requirements identified in Sections 6.1(b) of the Act. Relevant to this case, Section 6.1(b)(5) of the Act allows the designation of an employment position if the position authorizes an employee

in that position to have “significant and independent discretionary authority as an employee,” which under section 6.1(c) of the Act means that 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 [(NLRB)].

Section 6.1(b) also provides that in order for a position to be properly designated, the Governor or his agent shall provide in writing to the Board the *following information*: the job title of the designated employment position, the job duties of the employment position, the name of the employee currently in the employment position, the name of the State agency employing the incumbent employee, and the category under which the position qualifies for designation.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. The Board promulgated rules to effectuate Section 6.1, 37 Ill. Reg. 14,070 (Sept. 6, 2013). See 80 Ill. Admin. Code Part 1300.

On April 4, 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. On April 8, 2014, CMS filed a motion for leave to file an amended petition, with the proposed amended petition and supporting documents attached to the motion. On April 9, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to CMS’s motion. On April 10, 2014, the undersigned issued an interim order amending the designation petition pursuant to CMS’s motion. The amended petition seeks to exclude the following Public Service Administrators at the Illinois Department of Commerce and Economic Opportunity (DCEO):

<u>Position No.</u>	<u>Working Title</u>	<u>Incumbent</u>
37015-42-40-720-30-01	Policy and Grants - Grants Office	vacant
37015-42-40-720-40-01	Policy and Grants - Special Populations	vacant

On April 22, 2014, AFSCME, pursuant to Section 1300.60(a)(3) of the Board’s Rules, filed objections to the amended designation petition.

II. ISSUES AND CONTENTIONS

The issue is whether the designation of the positions as identified in the amended petition and supporting documentation comport with Section 6.1 of the Act. CMS contends that the designations are proper, and AFSCME contends that the designations are improper.

A. Amended Designation Petition

CMS filed the amended designation petition with an attached CMS-104 position description for each position. The filed documents allege that the positions at issue qualify for designation under Section 6.1(b)(5) of the Act, and also allege that the Board certified the positions into bargaining unit RC-63 on September 20, 2010.

1. Position No. 37015-42-40-720-30-01

Effective November 16, 2013, the CMS-104 position description contains the “complete current and accurate statement” of position no. 37015-42-40-720-30-01’s “essential functions.” Position no. 37015-42-40-720-30-01 is the Policy and Grants position in the Grants Office Unit of the Office of Employment & Training/Office of Program Development within the DCEO. The CMS-104 provides that, subject to management approval, the Policy and Grants incumbent plans, develops administrative guidelines, recommends, organizes, and implements the program functions associated with Special Grants, Formula Grants, Competitive Grants and National Emergency Grant Projects. This Policy and Grants position is also a working supervisor who assigns and reviews work, provides guidance and training to its two subordinates, counsels its subordinates regarding work performance, reassigns its subordinates to meet day-to-day operating needs, approves time off and prepares and signs performance evaluations.

2. Position No. 37015-42-40-720-40-01

Effective December 1, 2013, the CMS-104 position description contains the “complete current and accurate statement” of position no. 37015-42-40-720-40-01’s “essential functions.” Position no. 37015-42-40-720-40-01 is the Policy and Grants position in the Special Populations Unit of the Office of Employment & Training/Office of Program Development within the DCEO. The CMS-104 for this position provides that, under the general direction of the Policy and Grants Manager, the Policy and Grants incumbent develops, recommends, organizes, and implements programs for special populations, develops and recommends strategies to enhance and expand workforce programs and services statewide to special populations such as people

with disabilities. This position also serves as the coordinator on policy and program issues that impact special populations. The position coordinates research, and coordinates the development and maintenance of grants, including drafting scopes of work, preparing budgets, and reviewing grant activity and expenditures. This Policy and Grants position also serves a working supervisor who assigns and reviews work, provides guidance and training to its subordinate, counsels its subordinate regarding work performance, reassigns its subordinate to meet day-to-day operating needs, approves time off and prepares and signs performance evaluations.

B. Objections

AFSCME argues that the motion to amend the designation petition should not have been granted, that the CMS-104s provide insufficient bases for designation, that the at-issue employees are not managers or supervisors within the meaning of the National Labor Relations Act (NLRA), and that the designations are unconstitutional.¹ AFSCME also argues that an oral hearing should be held to determine the legal basis for the exclusion of the petitioned-for positions from said bargaining unit, and to determine the effect of such exclusion.

III. DISCUSSION AND ANALYSIS

AFSCME's objections to not raise issues that require an oral hearing to determine whether the designations are proper. The Board rules provide that an Administrative Law Judge (ALJ) may make factual findings that the designation is proper based solely on the information submitted to the Board, or if the ALJ finds that the objections submitted raise an issue of fact or law that might overcome the presumption that the designation is proper under Section 6.1 of the Act, the ALJ will order a hearing in order to determine whether the designation is proper. 80 Ill. Admin Code 1300.60(d)(2). AFSCME does not argue that the facts alleged by CMS in its filing are inaccurate, as such there is no issue of fact to be resolved by an oral hearing. AFSCME's arguments involve solely issues of law. I find that these arguments do not raise issues sufficient for hearing, because as set out below, these issues have already been resolved by the Board. I also interpret AFSCME's request for an oral hearing in order to determine the "legal basis" for the designation of the petitioned for employment positions as essentially requesting that a hearing be held to determine the constitutionality of Section 6.1 of the Act as applied to this

¹ AFSCME makes several constitutional arguments, one of which is based upon the at-issue positions' status in bargaining unit RC-63. "As noted above the positions at issue are certified into the AFSCME bargaining unit known as RC-63[.]"

matter. Also as explained below, these arguments do not raise any issue requiring an oral hearing before the Board. Absent an oral hearing, my determination of whether the designations comport with Section 6.1 of the Act will be based on the documents submitted by the parties.

Based on my review of the amended designation petition, the documents submitted in support of the amended petition, the objections, and the arguments and documents submitted in support of those objections, I find the designations to have been properly submitted and are consistent with the requirements of Section 6.1 of the Act. Consequently, I recommend that the Executive Director certify the designation of the positions at issue as set out below, and, to the extent necessary, amend the applicable certification of the exclusive representative to eliminate the existing inclusion of these positions within the collective bargaining unit.

A. Burden

The objector bears the burden to demonstrate that the designation of the employment positions at issue are improper because the objector's stance is contrary to the policy of Section 6.1 and because the presumption articulated in Section 6.1(d) requires that the objector overcome the presumption that the designation is proper. The Illinois Appellate Court has held that the party opposing the public policy as demonstrated in the language of the statute at issue has the burden to prove the party's position. See Ill. Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., State Panel, 2011 IL App (4th) 090966. Section 6.1 specifically allows the Governor to exclude certain public employment positions from collective bargaining rights which might otherwise be granted under the Act. Section 6.1 also allows the exclusion of 1,900 positions that are already certified into bargaining units. AFSCME is opposing the State's public policy to exclude certain positions from collective bargaining, as stated in Section 6.1 of the Act, thus the burden is on AFSCME to demonstrate that the employment positions at issue are not properly designated for such exclusion. Ill. Dep't Cent. Mgmt. Serv. (Ill. State Police) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶109 (IL LRB-SP 2013), No. 13-3600 (Ill. App. Ct. 1st Dist.). Section 6.1(d) states that any designation for exclusion made by the Governor or his agents under Section 6.1 "shall be presumed to have been properly made." Like all presumptions, this presumption can be rebutted. Dep't of Cent. Mgmt. Serv. /Dep't of Healthcare & Fmly. Serv. v. Ill. Labor Rel. Bd. State Panel, 388 Ill. App. 3d 319, 335 (4th Dist. 2009). If contrary evidence is introduced that sufficiently rebuts the presumption, then it vanishes and the issue will be determined as if no presumption ever existed. Id. To rebut the presumption, the evidence must

be sufficient to support a finding that the presumed fact does not exist. *Id.* at 335-336. The objector is burdened to present evidence that the position is ineligible for designation, does not qualify for designation, or that the designation is otherwise improper because the submission does not comport with the requirements of Section 6.1 of the Act.

B. Interim Order Amending the Designation Petition

The interim order granting CMS's motion to amend the petition is not reviewable at this stage in the proceedings. Section 1300.100(f) provides that "[r]ulings on motions are not appealable to the Board, unless as otherwise provided by the Board." Pursuant to §1300.70(h) of the Board's Rules, AFSCME "may raise objections to such intermediate rulings in their exceptions to the Administrative Law Judge's recommended decision." As such, AFSCME's objection to the interim order amending the designation petition is premature and should be presented to the Board through any exceptions to this recommended decision and order.

C. Constitutionality

AFSCME's arguments regarding the constitutionality of Section 6.1 are similarly not matters to be decided in this recommended decisions and order. Section 6.1(d) of the Act grants the Board the authority to determine whether the designation of the employment positions at issue comport with Section 6.1 of the Act. As an administrative agency, the Board has no authority to rule that the Act, as amended by Public Act 97-1172, is unconstitutional, either on its face or as applied. Ill. Dep't Cent. Mgmt. Serv. (Gaming Bd.) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶234 (IL LRB-SP 2014)) appeal pending, No. 1-14-0278 (Ill. App. Ct. 1st Dist.); State of Ill. Dep't of Cent. Mgmt. Serv. and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶80 (IL LRB-SP 2013) appeal pending, No. 1-13-3454 (Ill. App. Ct. 1st Dist.); see also Metro. Alliance of Police, Coal City Police Chapter No. 186, No. 6 v. Ill. State Labor Rel. Bd., 299 Ill. App. 3d 377, 379 (3rd Dist. 1998) (noting that administrative agencies lack the authority to invalidate a statute on constitutional grounds or even to question its validity). Analysis of the Act's constitutionality is beyond my limited authority as an administrative law judge for the Board and any such arguments will not be considered.

D. Eligibility

As stated above, positions which were first certified to be in a bargaining unit by the Board on or after December 2, 2008 are eligible for designation. The parties agree that the at-

issue positions have been certified into bargaining unit RC-63, and it is uncontested that the certification was on January 10, 2010. Thus, I find the presumption that the at-issue positions are eligible for designation remains unrebutted.

E. Information Provided by CMS

In order to properly designate an employment position, CMS must submit in writing to the Board: the job title of the designated employment position, the job duties of the employment position, the name of the State employee currently in the employment position, the name of the State agency employing the incumbent employee, and the category under which the position qualifies for designation under this Section of the Act. In the amended designation petition and the supporting documentation CMS includes the CMS-104 position description for each position and identifies that the at-issue positions are PSA's with the working title of Policy and Grants employed at the DCEO. CMS also identifies that the at-issue positions are currently vacant and alleges that these positions qualify for designation under Section 6.1(b)(5) of the Act.

AFSCME argues that the submitted CMS-104s do not meet the job duties requirement because the duties identified in the CMS-104s are subject to management approval and thus are not the duties the positions are actually authorized to exercise. This argument fails to overcome the presumption that this requirement is satisfied because the Board has previously determined that CMS-104s are sufficient to meet the "job duties" requirement of Section 6.1 of the Act. See State of Ill. Dep't of Cent. Mgmt. Serv. and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶80 (IL LRB-SP 2013; Ill. Dep't Cent. Mgmt. Serv. (Dep't of Commerce and Econ. Opp.) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶163 (IL LRB-SP 2014) appeal pending, No. 1-14-0276 (Ill. App. Ct. 1st Dist.). Thus, AFSCME has not overcome the presumption that CMS has provided the statutorily required information.

F. Qualifications

AFSCME does not overcome the presumption that the positions at issue qualify for designation under Section 6.1(b)(5) of the Act because its objections only contain arguments to support the manner in which it believes the Board should apply the tests articulated in Section 6.1(c), and the Board has previously rejected these arguments. See Ill. Dep't Cent. Mgmt. Serv. (Gaming Bd.) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶167 (IL LRB-SP 2014) appeal pending, No. 1-14-0278 (Ill. App. Ct. 1st Dist.); Ill. Dep't Cent. Mgmt. Serv.

(Dep't of Commerce and Econ. Opp.) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶163 (IL LRB-SP 2014).

An employment position may be properly designated under Section 6.1(b)(5) only if the position authorizes an employee in that position to have significant and independent discretionary authority as articulated in the statutory tests provided in Section 6.1(c)(i) and Section 6.1(c)(ii) of the Act. 5 ILCS 315/6.1. There is a presumption that the designation is proper; accordingly, there is also a presumption that the requirements that *qualify* the position for designation are satisfied. In other words, there is a presumption that the position qualifies for designation under at least one of the categories identified in Section 6.1(b)(1) through (5). To qualify for designation under Section 6.1(b)(5) an employee must meet one of the statutory tests articulated in Section 6.1(c). Since there is a presumption that this position *qualifies* for designation under Section 6.1(b)(5), there is also a presumption that the positions satisfy *at least* one of the requisite tests articulated in Section 6.1(c). Section 6.1(c) identifies three statutory tests. 6.1(c)(i) establishes two of these tests and 6.1(c)(ii) establishes the third test.

1. (c)(ii)

Section 6.1(c)(ii) of the Act provides that an employee is a supervisor if the employment position authorizes the employee in that position to “qualif[y] as a supervisor of a State agency as that term is defined under Section 152 of the [(NLRA)], or any orders of the [(NLRB)] interpreting that provision or decisions of courts reviewing decisions of the [NLRB].” The NLRA defines a supervisor as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C.A § 152(11). In their interpretations, the NLRB and the Courts have held that employees are statutory supervisors under the NLRA if “1) they hold the authority to engage in any one of the 12 listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer.” NLRB v. Kentucky River Comm. Care, Inc., 532 U.S. 706, 713 (2001) (internal quotes omitted); see also Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006).

There is a presumption that the at-issue positions satisfy at least one of the tests articulated in Section 6.1(c) of the Act, but in this case, CMS does not allege which test or tests the at-issue positions satisfy. The CMS-104 for each position identifies that each Policy and Grant position is a supervisor of at least one subordinate and identifies the supervisory duties that each at-issue position is authorized to perform. Given the evidence presented, I find that there is a presumption that the employment positions qualify for designation because each position is a supervisor under Section 6.1(c)(ii). As stated above, there is a presumption that the positions at issue meet the test articulated in Section 6.1(c)(ii), thus, CMS is not required to prove every prong of the supervisory test articulated in this section of the Act. Rather, AFSCME has the burden to overcome the presumption that the supervisory test is satisfied by providing specific evidence negating at least one prong of the test. Absent contrary evidence the presumption that each position at issue qualifies for designation because it satisfies this test stands.

AFSCME does not overcome the presumption that the at-issue positions qualify for designation under Section 6.1(b)(5), because it fails to rebut the presumption that the supervisory test articulated in Section 6.1(c)(ii) is satisfied. The first prong of the NLRA supervisor test only requires that the employee *hold the authority* to engage in one of the enumerated supervisory functions. The issue is whether the employees are authorized to perform such duties, the CMS-104 provides evidence of such authorization, and AFSCME supplies no evidence to the contrary. Each CMS-104 position description authorizes the employee who holds that position to engage in all the duties listed within because, as stated above, the Board has already held that the functions identified in the CMS-104 are sufficient to constitute the positions' duties. AFSCME only contends that conducting performance evaluations and training subordinates are not supervisory functions. The CMS-104s for the positions at issue provide that these positions are also authorized to assign and review work, reassign staff, counsel staff regarding work performance and approve time off. "Assign" within the meaning of Section 152(11) of the NLRA is designating an employee "to a place, appoint an employee to a time, such as a shift or an overtime period, or give significant overall duties to an employee." Oakwood Healthcare Inc., 348 NLRB at 689. Approving time off falls within the meaning of "assign" as the term is used in Section 152(11) of the NLRA. Ill. Dep't Cent. Mgmt. Serv. (Ill. Dep't of Fin. and Prof. Reg.) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31 30 PERI ¶235 (IL LRB-SP 2014) appeal pending, No. 1-14-1024 (Ill. App. Ct. 1st Dist.). Since AFSCME presents no contrary

evidence to rebut the presumption that the at-issue positions are authorized to approve their subordinates' time off, the presumption that the first prong is met remains unrebutted.

AFSCME also fails to negate the second prong of the supervisory test. AFSCME argues that the second prong is not met because CMS has not provided a specific showing that the at-issue employees use independent judgment, AFSCME also argues that approving time off is merely routine, not requiring the use of independent judgment. As stated above, there is a presumption that all three prongs of the supervisory test are met and AFSCME has the burden to overcome that presumption. Since I have already found that the first prong is satisfied because the at-issue positions are authorized to assign their subordinates when they approve time off requests, there is also a presumption that this approval requires the use of independent judgment. Independent judgment within the meaning of the NLRA involves a degree of discretion that rises above the "routine and clerical," and is personal judgment based on personal experience, training, and ability. Oakwood Healthcare Inc., 348 NLRB at 693. Judgment is not independent if it is controlled by a higher authority, such as verbal or detailed instructions, or regulations. Id. AFSCME correctly argues that approving time off *can* be routine. See Conn. Humane Soc'y., 358 NLRB No. 31 (2012) (finding that employees did not exercise independent judgment when recommending the approval of subordinates' requests for time off because the approval was based on the availability of the dates or enforcement of employer's rules on frequency of vacation days). However, as the burden holder, AFSCME must provide specific evidence that the approval of time off is routine *in this case*. AFSCME provides no facts that demonstrate that approving time off does not require the at-issue positions to exercise independent judgment. Thus, the second prong of the supervisory test also remains unrebutted.

AFSCME does not overcome the presumption that the third prong of the supervisory test is satisfied. The third prong of the supervisory test requires that the employee's "authority is held in the interest of the employer." NLRB v. Kentucky River Comm. Care, Inc., 532 U.S. 706 at 713. AFSCME does not address whether the authority of the at-issue positions is held in the interest of the DCEO. Absent contrary evidence, the presumption remains unrebutted. Accordingly, because AFSCME's arguments do not negate any prong of the supervisory test, its objections do not overcome the presumption that the at-issue positions qualify for designation because they satisfy the test articulated in Section 6.1(c)(ii) of the Act.

2. (c)(i)

Section 6.1(c)(i) of the Act provides that an employment position is eligible for exclusion if the position authorizes the incumbent employee to be “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.” Section 6.1(c)(i) of the Act, provides two tests. The first test requires the employee to 1) be engaged in executive and management functions; and 2) be charged with the effectuation of management policies and practices of the Agency. The second test requires that the employee “represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of the Agency.”

The Board’s interpretation and subsequent application of Section 6.1(c)(i) is not controlled by the NLRB’s interpretation, or the Board’s own interpretation of a similar section of the Act. AFSCME argues that the tests for independent discretionary authority articulated in Section 6.1(c) essentially follow the managerial definition as developed by the NLRB, which has been adopted by the Board in its interpretation of manager under Section 3(j)² of the Act, and consequently, the Board should apply that interpretation to the meaning of Section 6.1(c)(i) of the Act. See State of Ill. Dep’t of Cent. Mgmt. Serv. and Am. Fed’n of State, Cnty. & Mun. Emp., Council 31, 26 PERI ¶83 (IL LRB-SP 2010); Ill. Cent. Mgmt. Serv. (Dep’t of Healthcare and Fmly. Serv.), 23 PERI ¶173 (IL LRB-SP 2007) (*aff’d Dep’t of Cent. Mgmt. Serv. /Dep’t of Healthcare & Fmly. Serv. v. Ill. Labor Rel. Bd. State Panel*, 388 Ill. App. 3d at 334-338). While Section 6.1(c)(i) does use the same language the Supreme Court used in interpreting a managerial employee as identified by the NLRB,³ but, unlike Section (c)(ii), Section (c)(i) is silent as to whether it also incorporates the Court’s interpretation of a managerial employee

² Section 3(j), in relevant part, defines managerial employee as “an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices.”

³ In Nat’l Labor Rel. Bd. v. Yeshiva Univ. the Supreme Court held that under the NLRA an employee may be excluded as managerial only if he “represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” 444 U.S. 672, 683 (1980). Section 6.1(c)(i) states, in relevant part, that an employment position authorizes an employee in that position to have independent discretionary authority as an employee if he or she “represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.” 5 ILCS 315/6.1.

under the NLRB. Thus applying the NLRB's analysis of managerial employee is not supported by the statute, and the only inquiry is whether the petitioned-for employment position comports with either of the tests *as written* in Section 6.1(c)(i) of the Act. Ill. Dep't Cent. Mgmt. Serv. (Dep't of Commerce and Econ. Opp.) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶163 (IL LRB-SP 2014)(specifically rejecting AFSCME's application of the historical origins of Section 6.1(c)(i)).

AFSCME's contention that because the Board has previously applied the Yeshiva analysis in determining whether an employee is a manager under Section 3(j) of the Act, the Board should apply that same analysis to Section 6.1(c)(i), fails for two reasons. First, the language of Sections 3(j) and 6.1(c)(i) differ. Second, and more to the point, the Board has already declined to apply the Yeshiva analysis to Section 6.1(c)(i) of the Act. See Id. The Board has specifically recognized that Section 6.1 "does not modify pre-existing means of determining collective bargaining units, but is a self-contained and entirely new means of decreasing the number of State employees in collective bargaining units." State of Ill. Dep't of Cent. Mgmt. Serv. and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶80 (IL LRB-SP 2013). Thus, the Yeshiva analysis is not applicable in this matter.

AFSCME's final argument also does not consider the language limited to the statutory text of Section 6.1 of the Act. AFSCME argues that the Board must distinguish between professional employees and managerial employees in reviewing these designations. Unlike the NLRA, Section 6.1 of the Act does not distinguish between managerial and professional employees. See Ill. Dep't Cent. Mgmt. Serv. (Dep't of Agric.) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶84 (IL LRB-SP 2013) appeal pending, No. 1-13-3598 (Ill. App. Ct. 1st Dist.). Since analysis of Section 6.1(c)(i) is limited to the language of the text and any Board decisions interpreting that language, AFSCME's argument regarding distinctions is unsupported by the statutory text and must be rejected.

Based upon the information provided by CMS, I find that the at-issue positions are authorized to represent management interests by taking discretionary actions that effectively control or implement DCEO policy by developing administrative guidelines, organizing, and implementing the program functions associated with special grants. Thus, there is a presumption that the at-issue positions qualify for designation under Section 6.1(b)(5) of the Act because they

satisfies the second test articulated in Section 6.1(c)(i). Since AFSCME presents no evidence to the contrary, this presumption is un rebutted.

3. subject to approval

Positions with authority subject to a superior's approval can qualify for designation under Section 6.1(b)(5). AFSCME argues that because the at-issue positions' duties are subject to management's approval, these duties *on their face* are not sufficient to find that these positions meet the requirements of Section 6.1(b)(5) of the Act. Section 6.1(c)(i) provides that an employee can qualify for designation under Section 6.1(b)(5) if it "represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency." Section 6.1(c)(ii), incorporates the NLRA supervisory definition which requires that the at-issue positions hold the authority to engage in any one of the 12 listed supervisory functions "or effectively to recommend such action." Making recommendations requires the approval of the individual to whom the recommendations are made. Thus, the language of the Act allows for employees in positions who take actions that require approval for superiors to qualify for designation under Section 6.1(b)(5). See Ill. Dep't Cent. Mgmt. Serv. (Dep't of Veterans' Affairs) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 30 PERI ¶111 (IL LRB-SP 2013) appeal pending, No. 1-13-3618 (Ill. App. Ct. 1st Dist.)(finding that the petitioned for positions qualified for designation under Section 6.1(b)(5) even though certain authorized duties were subject to a manager's approval).

In sum, AFSCME only protests that CMS has not met its burden of proof. In fact AFSCME has the burden, which it fails to meet because it does not argue that the at-issue positions are not authorized to exercise independent discretionary authority *as written* in the text of Section 6.1(c)(i) of the Act and it supplies no facts to negate the test in Section 6.1(c)(ii). AFSCME is required to provide specific facts to rebut the presumption that the positions qualify for designation, but it provides no facts to negate any of the three tests articulated in Section 6.1(c). Accordingly, AFSCME's objections fail to overcome the presumption that the at-issue positions qualify for designation.

IV. CONCLUSION

Pursuant to Section 1300.60 of the Board's Rules, I find that the designations comport with Section 6.1 because CMS has submitted the required information, the at-issue positions are

eligible and qualify for designation, and because AFSCME's objections do not overcome the presumption that the designations are proper under Section 6.1 of the Act.

V. RECOMMENDED ORDER

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

<u>Position No.</u>	<u>Working Title</u>
37015-42-40-720-30-01	Policy and Grants - Grants Office
37015-42-40-720-40-01	Policy and Grants - Special Populations

VI. EXCEPTIONS

Pursuant to Sections 1300.130 and 1300.90(d)(5) of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300,⁴ parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 3 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 their e-mail addresses as indicated on the designation form. Any exception to a ruling, finding, conclusion, or recommendation that is not specifically argued shall be considered waived. A party not filing timely exceptions waives its right to object to this recommended decision and order.

Issued at Chicago, Illinois this 30th day of April, 2014.

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

/s/ Deena Sanceda

**Deena Sanceda
Administrative Law Judge**

⁴ Available at www.state.il.us/ilrb/subsections/pdfs/Section1300IllinoisRegister.pdf