STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

State of Illinois, Department of Central, Management Services (Department of Corrections),	)	
Petitioner	)	
and	)	
American Federation of State, County and Municipal Employees, Council 31,	)	
Labor Organization-Objector	)	Case No. S-DE-14-055
and	)	
Mary L. Miller,	)	
Employee-Objector	)	
Lois Lindorff,	)	
Employee-Objector	)	
and	)	
Deborah Fuqua,	)	
Employee-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. 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 may be positions which have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, the 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 allows the Governor 365 days from that date to make such designations. The Board promulgated emergency rules to effectuate Section 6.1, which became effective on April 22, 2013, 37 Ill. Reg. 5901 (May 3, 2013), and the Board promulgated permanent rules for the same purpose which became effective on 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 August 20, 2013, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designation pursuant to Section 6.1 of the Act and Section 1300.50 of the Board's Rules. On August 30, 2013, Mary L. Miller, Lois Lindorff, and Deborah Fuqua, the State of Illinois employees who occupy the positions designated in this matter (collectively, employees), filed timely objections to this designation. On September 6, 2013, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed timely objections.[2] Pursuant to Rule 1300.70, a hearing in this matter was held on September 12, 2013, in Chicago, Illinois. At that time, all parties appeared and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally.

Based on the testimony, documentary evidence, and arguments adduced at 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 positions at issue in this matter as set out below and, to the extent necessary, amend any

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[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.

[2] On August 27, 2013, AFSCME filed a motion for an extension of time in which to file its objections in this matter. The Board's General Counsel issued an order on August 28, 2013, granting this motion. The General Counsel's order extended AFSCME's time to file objections up to and including September 6, 2013.

applicable certifications of exclusive representatives to eliminate any existing inclusion of these positions within any collective bargaining unit:

37015-29-97-210-00-01	Health Care Unit Administrator
37015-29-98-260-00-01	Health Care Unit Administrator
37015-29-98-210-00-01	Health Care Unit Administrator

I. ISSUES AND CONTENTIONS

The instant petition designates three positions at the Illinois Department of Corrections (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 neither currently represented for the purposes of collective bargaining nor subject to an active petition for certification in a bargaining unit. The employees and AFSCME (collectively, objectors) argue that the positions at issue are not properly designable because the employees in these positions are not authorized to have significant and independent discretionary authority in their positions, as is required under Section 6.1(b)(5).

At the hearing in this matter, CMS and the objectors stipulated that the employees are not authorized to have significant and independent discretionary authority as that term is defined in Section 6.1(c)(ii) of the Act. ("A person has significant and independent discretionary authority as an employee if he or she... qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act..." 5 ILCS 315/6.1(c) (2012)). Instead, CMS states that the employees are authorized to have significant and independent discretionary authority under Section 6.1(c)(i). Therefore, the issue to be resolved is whether the positions are properly designable under Section 6.1(b)(5) because the employees in these positions are authorized: (1) to engage in executive and management functions of a State agency and to be charged with the effectuation of management policies and practices of a State agency; or (2) to represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency. Because Section 6.1(d) establishes a presumption that the instant designation is proper, the objectors have the burden of demonstrating that the employees in the positions at issue are not so authorized.

Additionally, AFSCME contends that the designated positions were certified in a bargaining unit on or after December 2, 2008. CMS asserts that the positions have never been certified into a bargaining unit.

II. FINDINGS OF FACT

The employees in the three positions designated by CMS are all employed by the DOC as Health Care Unit Administrators (HCUAs). All of these positions are classified as Public Service Administrators (PSAs) by the employer. Mary L. Miller is employed as a PSA Option 6 at the Danville Correctional Center. Lois Lindorff is employed as a PSA Option 8N at the Hill Correctional Center. Deborah Fuqua is employed as a PSA Option 8N at the Western Illinois Correctional Center. All three are licensed nurses.

Correctional Center Health Care Units

The Unified Code of Corrections, 730 ILCS 5, requires all facilities and institutions of the DOC to provide committed persons with medical care. 730 ILCS 5/3-7-2(d) (2012). At some DOC facilities, this function is the responsibility of DOC employees. However, at the Danville, Hill, and Western Illinois Correctional Centers, medical services are provided through a vendor, the Wexford Corp. Forrest Ashby is the Assistant Warden of Programs at the Western Illinois Correctional Center, and serves as Fuqua's direct supervisor. He oversees the health care unit, academic program, and barbershop in the facility. The health care unit is the largest program under his responsibility, and he testified that the contract with Wexford is a more than $5 million budget item for the facility.

Wexford's activities in providing medical services for committed persons at the Danville, Hill, and Western Illinois Correctional Centers are governed by several sources of authority. First, Wexford must comply with State and federal law governing both health care services and correctional facilities. Second, Wexford must comply with directives issued by the DOC. Dr. Louis Shicker is the DOC's medical director. Dr. Shicker testified that he is responsible for annually reviewing and updating the administrative directives of the DOC. The day-to-day operation of the health care units is fully guided by the DOC's administrative directives. The HCUAs testified that there is no aspect of health care unit operations that is not covered by a directive. However, Dr. Shicker stated that, while these directives cover day-to-day operations, they cannot cover every idiosyncrasy that may arise in practice. Administrative directives establish guidelines for what Dr. Shicker characterized as the minimum standards for medical services in DOC facilities. Facilities may deviate from administrative directives only pursuant to an institutional directive specific to that facility. These institutional directives can only deviate from the administrative directives on which they are based insofar as they are more stringent

than the minimum standards. Wexford must also comply with the institutional directives specific to each facility at which it provides medical services. Finally, Wexford must comply with its own contract for services with the DOC.

Health Care Unit Administrators' Duty to Monitor Wexford

Wexford's performance of its obligations is measured by its compliance with State and federal law, the DOC's administrative and institutional directives, and the terms of its contract. Each month, the employees in the designated positions are responsible for completing a Healthcare Contract Performance Adjustments Monthly Report for Administrative Performance Guarantees. The report itself is comprised of a list of Wexford's duties, broken down into subcategories. Each contains a performance criterion, Wexford's target goal for this criterion, and the penalty assessed against Wexford for failing to meet the performance goal. DOC employees fill out a fourth column that indicates whether Wexford is in compliance with each criterion. Wexford is evaluated on the following criteria: paying all subcontractor invoices within 60 days of receipt; having zero court findings that it has committed an act of deliberate indifference or discrimination against an offender; having zero occurrences of misrepresenting or falsifying information furnished to the DOC; submitting reports within the contractually specified timeframe; 100% compliance with administrative directives when providing services; 100% compliance with the staffing schedule, meaning Wexford ensures all positions are filled and all scheduled hours are covered; and providing on-site specialty clinics as provided in the contract. The report also indicates the number of inmates in the preceding month that were transferred to an outside medical center for inpatient and outpatient treatment, the number of those approved in advance by Dr. Shicker, and a report on whether Wexford failed to comply with any other contract provisions not already identified. Finally, the report includes a page dedicated to each performance criterion on which the specifics of each incident of non-compliance, if any, are detailed.

This monthly report contains six pages of instructions for completing the report; meanwhile, the report itself, less the specifics of any incident of non-compliance, is two pages. These instructions were developed by the DOC in conjunction with the Illinois Department of Healthcare and Family Services, who previously administered the Wexford contract. They were developed pursuant to negotiations with Wexford concerning the manner in which its performance would be measured. Dr. Shicker was involved in these negotiations. The

instructions remind HCUAs to include adequate back-up documentation for each incident of non-compliance reported. For the compliance with administrative directives performance criterion, HCUAs are instructed to only report violations which they find significant. Fuqua testified that she reports every incident of non-compliance with an administrative directive. Dr. Shicker testified that he would not, for example, find one incident in which Wexford missed a required inmate physical significant, though he would consider a pattern significant. The instructions also provide that, for the staffing performance criterion, a reporter should identify only incidents that he or she wants to report; there is no need to report incidents of staffing non-compliance if the reporter is okay with a position being vacant, hours not being worked, or a clinic not being held. Testimony established that the HCUAs report all vacant positions, hours not worked, or clinics not held, providing raw data on these issues to their facility's business administrator. It is then the business administrator who determines whether to report any non-compliance evidenced by this data as a violation.

Each performance criterion corresponds to a penalty for violating the performance objective. Dr. Shicker testified that a fine could eventually be imposed on Wexford for non-compliance, but that has not happened during his tenure as medical director. The HCUAs do not have the authority to impose a fine or penalty for a violation they report; this decision is made at the DOC executive office. Ashby testified that, if a decision was made that Wexford must pay back hours not worked under the contract, Fuqua would meet with the Wexford director of nursing to relay this decision.

Fuqua and Miller testified that they each spend 80% of their time monitoring Wexford for compliance with relevant law, directives, and contract provisions. Lindorff estimated that her time spent on these activities would total 70- 80% of her work load. Each testified that she had never encountered a situation in which the question of whether Wexford was in compliance with a requirement was a close call. Miller instead stated that the issue of non-compliance versus compliance is black and white.

The HCUAs testified that they also have the option of reporting any non-compliance by Wexford first to their supervisor and up the DOC chain of command. The HCUAs may then be involved in a meeting with Wexford staff to discuss the violation.

Additionally, the HCUAs hold monthly staff meetings with Wexford employees. At these meetings, the HCUAs relate new directives issued in the preceding month.

Other Duties of the HCUAs

Health care units at DOC facilities undergo regular internal and external audits. Each employee in the positions at issue has been asked to externally audit another facility. Likewise, each HCUA is themselves audited. Fuqua testified that the performance measure for these audits is compliance with administrative directives; when conducting an audit, she merely reports compliance or non-compliance with directives. The audit coordinator is then responsible for determining whether non-compliance constitutes an audit finding. Additionally, CMS submitted as evidence Fuqua's most recent performance evaluation completed by Ashby. This evaluation lists 21 objectives for Fuqua's job performance, 18 of which involve maintaining compliance with various administrative directives. Each HCUA stated that she had never authorized a deviation from an administrative directive. Dr. Shicker testified that the HCUAs only authority in terms of deviating from an administrative directive is to comply instead with a more stringent institutional directive. In that case, Dr. Shicker stated that the HCUAs should comply with the institutional directive without deviating. Both Dr. Shicker and the HCUAs testified that complying with these directives is important because it helps the health care unit avoid liability in the event an offender complains about DOC medical services.

The CMS-104 position description for the positions at issue lists several additional duties. The employees stated that they were neither consulted nor contacted by CMS when the CMS-104 for their position was drafted. Fuqua detailed several inaccuracies in the description of her position, and Miller and Lindorff each testified that the descriptions of their positions contained the same inaccuracies. According to Fuqua, these inaccuracies are: rather than coordinating and implementing DOC policies and procedures, Fuqua describes her role as monitoring the health care unit and reporting violations; Wexford, and not Fuqua, is responsible for coordinating patient care assignments; Fuqua's only role in connection with training and educating Wexford staff is to communicate new directives at monthly staff meetings; and no one has ever asked Miller, Lindorff, or Fuqua whether the Wexford contract should be terminated or renewed. Though the CMS-104 form states that Fuqua is responsible for effectively recommending termination or renewal of the Wexford contract, Dr. Shicker stated that the HCUAs have no authority concerning the renewal of the Wexford contract. He testified that the HCUAs report the information on which that decision is based. Finally, the HCUAs do not assign and review work, provide guidance and training to staff, counsel staff regarding performance, reassign staff

to meet operating needs, approve time off, or prepare and sign performance evaluations at their facilities because medical services are provided by Wexford rather than DOC employees.

When an offender needs or requests specialty medical care that Wexford is unable to provide, Wexford employees are responsible for determining whether specialty care is medically necessary, and then approving or denying the referral. If a referral is denied, administrative directive 04.03.103 provides that the referral must be submitted to the HCUA for a "Utilization Review in accordance with [a]dministrative [d]irective 04.03.125." According to administrative directive 04.03.125, the HCUA must conduct a weekly Utilization Review to ensure that offenders are receiving necessary and appropriate care. This review requires the HCUAs to assess the adequacy of alternative services and monitor for timeliness of the response to a referral request. The HCUAs must also independently assess each denial and appeal to Dr. Shicker when he or she is not satisfied that Wexford's alternative services are consistent with the offender's needs or when an offender files a grievance objecting to a denial.

The HCUAs are responsible for processing offender grievances. When a committed person is unhappy with the medical services he or she receives, he or she may file a grievance. Lindorff testified that she reviews these grievances and requests a response from the Wexford staff involved. She may be able to address some grievances herself, such as when the complained-of conduct is dictated by a directive.

Lindorff and Miller have both been assigned by their wardens to the DOC employee review board at their facility. When a DOC employee is accused of violating an administrative or institutional directive, the employee review board meets to determine whether a violation has occurred. The board then issues a recommendation to the Warden. For the 18 months preceding hearing, Miller was assigned as an alternate hearing officer; prior to this, she was a principal hearing officer. Miller testified that the Warden sometimes follows her recommendations as hearing officer, but typically does not. She also stated that she is typically told by the Warden what the outcome should be prior to the hearing. Lindorff testified that she did attend an employee review board hearing about two years prior to the hearing in this matter, but she was asked to merely sit in and concur with the proceedings, and she was unclear regarding her exact role. She does not know if she is currently assigned as part of the employee review board system.

The HCUAs attend several meetings on a regular basis. First, they meet regularly, even daily, with their direct supervisor, the Assistant Warden of Programs at each facility. Ashby testified that some of his meetings with Fuqua are what he described as "confidential." He stated that he both solicits her opinion on matters affecting the health care unit and relates decisions he has made to her at these meetings. Ashby stated that he relies on Fuqua as a decision maker for the specific reason that he is not a registered nurse. He also meets weekly with Fuqua and Wexford's facility directors to discuss Wexford's performance. The HCUAs also attend a monthly meeting between the Warden at their facility and department heads. At this meeting they receive updates from the Warden regarding directives and share updates from the health care unit. The HCUAs meet with a Regional Nursing Coordinator from Dr. Shicker's office on a monthly basis. The Regional Nursing Coordinator also holds a quality improvement meeting with Wexford each month to discuss contract performance; the HCUAs are involved in these meetings. Finally, Dr. Shicker visits each facility on an annual basis. At these annual meetings, the HCUAs give Dr. Shicker an overview of the past year and discuss audit findings.

Dr. Shicker testified that he receives letters from offenders on a regular basis. If a letter raises a concern that he deems serious, Dr. Shicker contacts the HCUA and Wexford medical director at the offender's facility. Dr. Shicker testified that it is important for him to receive a response from the HCUAs because, if he did not, he or a member of his staff would have to drive to the facility to retrieve the offender's medical chart.

The HCUAs are responsible for sanitation inspections. Fuqua testified that these inspections are governed by an administrative directive detailing sanitation standards.

When Dr. Shicker's office is involved in statistical analysis of DOC medical care, the HCUAs are responsible for providing the raw data on which the analyses are based.

The HCUAs have no authority concerning the budget of the DOC or health care unit.

Finally, the HCUAs have some limited authority when the DOC is involved in litigation involving offender medical care. Lindorff testified that her role in such cases is to identify the directive governing the complained-of conduct and provide that directive to the Illinois Attorney General's Office to assist in representing the DOC.

DOC Policy and the Promulgation of Administrative and Institutional Directives

The health care units are governed by a mission statement detailing the DOC's objectives. The HCUAs did not assist in preparing the mission statement, and have no authority

to modify it. Fuqua testified that, while she cannot modify or deviate from an objective, if she had a suggestion for improvement she would report it up the chain of command.

The DOC's objectives are carried out through the administrative directives promulgated by Dr. Shicker. Fuqua testified that the Warden at her facility receives drafts of these administrative directives before they are finalized, but she usually does not see them. Each HCUA testified that no one in the administration has ever solicited her opinion regarding an administrative directive. Dr. Shicker testified that he solicits input on these directives, but the ultimate decision is his alone. According to Dr. Shicker, while HCUAs cannot independently amend administrative directives, he would welcome a call or email with suggestions to change an administrative directive. He stated that any input from HCUAs, or from the medical directors and directors of nursing employed by Wexford, would carry a lot of weight with him. Dr. Shicker testified that he is currently updating the administrative directive on clinics based on discussions with institutional staff. He stated that some of these discussions involved HCUAs, but he could not remember who.

Each employee testified that the administration has never sought her input on an institutional directive. Dr. Shicker stated that he assumed institutional directives include input from the HCUAs, though he did not know of any institutional directives instigated by HCUAs. Ashby testified that Fuqua is on the committee charged with ensuring that Western Illinois Correctional Center's institutional directives are in compliance with the Americans with Disabilities Act. Some institutional directives require Dr. Shicker's approval; he testified that he generally signs off on an institutional directive that is more stringent than the administrative directive on which it is based. Other institutional directives can be implemented without his approval.

While Dr. Shicker testified that the HCUAs should not deviate from the policies enumerated in existing directives, he stated that they are permitted to institute processes within these policies. The employees stated that they would contact their regional nursing coordinator or assistant warden of programs if they were unsure what procedures to use to implement a directive.

Certification of the PSA Option 6 and PSA Option 8N Classifications

On December 2, 2008, the Board issued a certification in Case Nos. S-RC-07-078 and S-RC-07-150. This certification provided that all employees of CMS classified as PSAs Option 6

were included in a collective bargaining unit represented by AFSCME, with the exception of all supervisory, managerial, and confidential employees and those specifically listed as excluded or in dispute. The designated positions were not listed as either excluded or in dispute when this certification issued.

On October 28, 2009, the Board issued a certification in Case No. S-RC-04-130. This certification provided that all employees of CMS classified as PSAs Option 8N were included in a collective bargaining unit represented by AFSCME, with the exception of positions employed at the Department of Veteran's Affairs, enumerated positions employed at the Department of Human Resources under the Working Title of Director of Nursing or Assistant Director of Nursing, and three enumerated titles at the DOC. The designated positions were not listed as excluded when this certification issued.

Prior to June 2013, the positions at issue were classified as Senior Public Service Administrators (SPSAs) by the employer. However, after the relevant certifications issued and following an audit of the duties performed by the employees, these positions were re-classified as PSAs in June 2013. Each employee testified that she believed she would become a member of the bargaining unit represented by AFSCME following the reclassification of her position as a PSA.

CMS and AFSCME are parties to a collective bargaining agreement with a memorandum of understanding relating to new positions within a split classification. This memorandum of understanding provides that, when a new positions is created within a classification that is part of a split classification: (1) CMS must notify AFSCME of its intent to create a new position within the split classification; (2) the parties must meet to determine whether the new position should be included or excluded from the bargaining unit and jointly stipulate that agreement to the Board; and (3) if the parties are unable to agree, AFSCME may file a representation petition with the Board.

III. DISCUSSION AND ANALYSIS

As stated above, a position is properly designable, among other circumstances, if: (1) it has never been certified into a collective bargaining unit or was first certified to be in a bargaining unit by the Illinois Labor Relations Board 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" as that term is defined in Section 6.1(c). 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).

Though CMS and AFSCME disagree on whether the positions at issue have been certified into a collective bargaining unit, it is undisputed that either they have never been certified or they were first certified on or after December 2, 2008. Furthermore, the parties have stipulated that the employees do not have significant and independent discretionary authority as that term is described in Section 6.1(c)(ii). Thus, on the issue of whether the positions are properly designable, the remaining inquiry is whether the positions authorize the employees to have significant and independent discretionary authority as described in Section 6.1(c)(i).

The significant and independent discretionary authority described in Section 6.1(c)(i) of the Act can be described as managerial authority. While Section 6.1 has yet to be interpreted by a court or by the Board, certain decisions of the Board, courts, and the National Labor Relations Board (NLRB) are instructive. For example, Section 6.1(c)(i) first provides that an employee has significant and independent discretionary authority if he or she is engaged in executive and management functions of a State agency and is charged with the effectuation of management policies and practices of that agency. 5 ILCS 315/6.1(c) (2012). Likewise, Section 3(j) of the Act provides that a managerial employee, who is not a public employee under the Act, is "an individual who [1] is engaged predominantly in executive and management functions and [2] is charged with the responsibility of directing the effectuation of management policies and practices." 5 ILCS 315/3(j) (2012). Thus, extensive Board precedent and case law have interpreted the language used in Section 6.1(c)(i) in the context of the Act's managerial exclusion. However, the language of Section 6.1 differs from the managerial exclusion in two important ways. First, while the exclusion for managerial employees focuses on the actual duties of a position, Section 6.1(b)(5) requires only that an employee in a designated position have the authority to fulfill the enumerated functions. See Department of Central Management Services/Illinois Commerce Commission (ICC) v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 774 (4th Dist. 2010) ("[T]he first part of the statutory definition of a 'managerial employee' describes the nature of the work to which the individual devotes most of his or her time.") and 5 ILCS 315/6.1(b)(5) (2012). This conclusion is supported by the legislature's decision to omit the preponderance requirement of Section 3(j) from the test for managerial authority in Section 6.1(c)(i). Second, while the party asserting the managerial exclusion has the

burden of proving its applicability, CMS in this case enjoys a presumption under Section 6.1(d) that the designation is proper. See County of Boone and Sheriff of Boone County, 19 PERI ¶ 74 (IL LRB-SP 2003), Chief Judge of the Circuit Court of Cook County, 18 PERI ¶ 2016 (IL LRB-SP 2002) and 5 ILCS 315/6.1(d) (2012). Thus, I must start from the assumption that the employees do have the authority to be engaged in executive and management functions of the DOC and to be charged with the effectuation of management policies and practices of that agency.

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 department runs effectively. ICC at 778 (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)). Other executive and management functions include using independent discretion to make policy decisions as opposed to following established policy, changing the focus of an employer's organization, being responsible for day to day operations, negotiating on behalf of an employer with its employees or the public, and exercising authority to pledge an employer's credit. Circuit Clerk of Champaign County, 17 PERI ¶ 2032 (ILRB SP 2001); City of Chicago (Chicago Public Library), 10 PERI ¶ 3016 (IL LLRB 1994); State of Illinois (Department of Central Management Services), 8 PERI ¶ 2052 (IL SLRB 1992). In ICC, the court held that an employee's involvement in executive and management functions may also be demonstrated by comparing an employee's job functions with the overall mission of the employer. ICC at 778 ("If the responsibilities of a job title encompass the agency's entire mission, or a major component of its mission, one might reasonably argue that by fulfilling those responsibilities, an employee helps to run the agency."). However, to support a finding that he or she is engaged in executive and management functions, an employee must possess authority to exercise discretion which broadly affects a department's goals and means of achieving its goals. Department of Central Management Services (Department of Corrections) v. Illinois Labor Relations Board, 278 Ill. App. 3d 79, 87 (4th Dist. 1996).

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. Generally, it is insufficient to establish managerial status that an employee's role in establishing and implementing policy is to "merely recommend policies or give advice that someone higher up is equally apt to take or leave." Id. at 775. However, in ICC the Fourth District made clear that an employee does not have to have final responsibility and independent authority in order to qualify as a managerial employee. Id. Instead, the court stated that we must "look beyond the formal structure of an employee's participation in the enterprise... and take account of the power that the employee actually yields." Id. at 779. Thus, if an employee's recommendations are implemented in the form of managerial orders, the recommendation and order are treated as the same for the purposes of determining whether the managerial exclusion applies. Id. Therefore, an advisory employee may nonetheless be a managerial employee if he or she makes effective recommendations. Id. at 775 (citing Chief Judge of the Sixteenth Judicial Circuit v. Illinois State Labor Relations Board, 178 Ill. 2d 333, 339- 40 (1997)). In determining whether an employee's recommendations are effective, the test is the influence of the recommendations. ICC at 777 (citing National Labor Relations Board v. Yeshiva University, 444 U.S. 672, 677 (1980)). While the review or scrutiny to which a recommendation is subjected may be indicative of its influence, the relevant inquiry is not whether an employee's superiors conduct de novo review of his or her recommendation, but whether the recommendation almost always persuades his or her superiors. ICC at 777.

The second provision of Section 6.1(c)(i) states that an employee also has significant and 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. This phrase was used by the Supreme Court in 1980 to describe when an employee is aligned with management such as to be excluded from the protections of the National Labor Relations Act. Yeshiva University, 444 U.S. at 683 (1980) ("Although the Board has established no firm criteria for determining when an employee is so aligned, normally 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."). As with the first test of managerial authority in Section 6.1(c)(i), it is the authority rather than the duties of the employees that controls the analysis, and CMS enjoys a presumption that the designation is proper. 5 ILCS 315/6.1(b)(5) and (d). I must therefore start from the presumption

that the employees do have the authority to represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of the DOC.

With these prior interpretations of similar language in mind, I will turn to the managerial authority of the designated positions, examining each of the employees' functions in turn. To prevail on their claim that the positions are not properly designable, the objectors must show:

(1) That the employees are not authorized to:

a. Engage in executive and management functions that amount to the running of the DOC; or

b. Be charged with the effectuation of management policies and practices; and

(2) That the employees are not authorized to represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of the DOC.

The objectors have failed to meet this burden with respect to at least two of the employees' functions. First, they have not rebutted the presumption that the HCUAs are authorized to have significant and independent discretionary authority as that term is defined in Section 6.1(c) when they monitor Wexford's compliance with applicable law, DOC directives, and its contract with the DOC. While these authorities establish the DOC's policy for the day-to-day operations of health care units, Dr. Shicker noted that even comprehensive policies may be insufficient to meet the idiosyncrasies of practice in the real world. One of these idiosyncrasies may not be clearly covered by a directive, in which case Wexford would be required to act quickly to provide medical services absent instruction from established policy. Likewise, though the HCUAs testified that Wexford has never asked them and they have never authorized Wexford to deviate from the law, contract, or a directive, Wexford might nonetheless deviate from a requirement in order to meet the exigencies of the moment. Finally, Wexford could willingly, either knowingly or unknowingly, fail to comply with a directive. It is then the HCUAs who have the authority to determine whether they find any of Wexford's actions—either acting without authority of established policy, deviating from a requirement, or willingly failing to comply with a requirement—of such significance that they should report the action as a violation in their monthly report. Furthermore, violations reported by the HCUAs may be used to penalize Wexford for their performance under the contract.

The evidence supports the presumption that HCUAs are authorized to engage in executive and management functions in performing their responsibilities for monitoring Wexford because in doing so they ensure the health care units run effectively. The HCUAs' authority in this regard extends beyond routine observation, evaluating objective criteria, and reporting data; they are authorized to exercise discretion as to whether and how to report their observations. The employees stated that they have the option of reporting non-compliance directly to their superiors, which could result in a meeting with Wexford to discuss its performance. In doing so, the HCUAs are not merely determining based on objective criteria that Wexford's performance is deficient; they are also determining that this deficiency is of such significance that it should be addressed immediately rather than merely being included in the monthly report. Furthermore, in completing their monthly report, the HCUAs have the option to either report or omit Wexford's failure to comply with administrative directives based on their own determination of whether any non-compliance is of sufficient significance. The evidence also supports the presumption that the employees are authorized to be charged with the effectuation of management policies and practices of the DOC by determining the extent to which the DOC's objectives will be achieved because they have the discretion to essentially excuse non-compliance by choosing not to report it, report non-compliance, or flag non-compliance as so significant that it warrants more immediate attention. These decisions have a significant impact on Wexford because they may result in counseling regarding the vendor's performance, a penalty or fine, or even a decision not to renew Wexford's contract.

The objectors contend that the HCUAs do not exercise their discretion regarding reporting. They also suggest that these reports do not, in reality, have a significant impact on Wexford. Even assuming these contentions are accurate, they are insufficient to meet the objectors' burden. In the face of the statutory presumption and evidence indicating that the HCUAs exercise discretion regarding whether and how to report Wexford's non-compliance, the HCUAs' mere failure to exercise that discretion does not show that they lack the authority to do so. The simple fact that an employee does not do something fails to demonstrate that he or she cannot. Likewise, the fact that Wexford has not been penalized for its performance during Dr. Shicker's tenure as medical director does not negate the possibility of sanctions. In fact, the potential for a fine or even the DOC's decision not to renew Wexford's contract is a powerful

tool through which the DOC ensures that Wexford will comply with applicable authority and thus allow the DOC to meet its objectives regarding medical care.

Evidence also supports the presumption that the HCUAs are authorized to represent management interests by taking or recommending discretionary actions that effectively control or implement DOC policy in monitoring Wexford. By monitoring Wexford the HCUAs represent the DOC's interest, which is ensuring that statutorily required medical services are provided in a manner that complies with DOC policy. The importance of this compliance is clear: ensuring that medical services at all facilities meet minimum standards allows the DOC to avoid or mitigate liability in the event an offender files suit. As discussed above, the HCUAs' decision to report non-compliance immediately, include in the monthly report, or not report at all is also discretionary in that it is optional or voluntary. Finally, the HCUAs effectively control or implement DOC policy when making decision to immediately report non-compliance by Wexford, include non-compliance in their monthly report, or omit non-compliance from their reporting. They control policy through their discretion to waive non-compliance by not including it in a report. They implement policy because the penalties and meetings that may result from their monitoring and reporting are the means by which the DOC extracts Wexford's compliance with DOC policy. The HCUAs are authorized in the first instance to determine the method, if at all, by which Wexford's performance will be addressed when they decide whether or how to report non-compliance. The objectors' evidence on this point suggests that the HCUAs do not exercise their discretionary authority. As explained above, this is insufficient to rebut the statutory presumption that the HCUAs are nonetheless authorized to exercise the requisite authority.

Additionally, the objectors have not rebutted the presumption that the HCUAs are authorized to have significant and independent discretionary authority as that term is defined in Section 6.1(c)(i) with respect to the promulgation and implementation of administrative and institutional directives. First, the evidence supports the presumption that they engage in executive and management functions because they establish policy and procedure. Dr. Shicker and Ashby both testified regarding the HCUAs' authority in the promulgation of institutional directives. Dr. Shicker stated that he assumes the HCUAs have input into institutional directives, and that they must sign off on institutional directives. Furthermore, he stated that he approves the institutional directives he is required to sign off on unless he believes that an institutional

directive is likely to lead to issues in the health care unit, suggesting that any input from HCUAs is effective as far as Dr. Shicker is concerned; some institutional directives may even be promulgated without his approval. Ashby meanwhile stated that the Warden, Assistant Wardens, and department heads, including the HCUAs, review institutional directives applicable to the Western Illinois Correctional Center yearly. He testified that Fuqua is involved in the review of directives related to the health care unit. Furthermore, Dr. Shicker's testimony suggests the HCUAs are authorized to make recommendations regarding administrative directives—he stated both that he would welcome a call or email from HCUAs who had ideas on improving administrative directives and that he would give HCUA opinions a lot of weight in promulgating administrative directives—and to develop processes. Evidence also supports the presumption that the HCUAs are charged with the effectuation of management policies and practices because they relay the requirements of DOC directives to Wexford employees at monthly staff meetings, are authorized to implement processes that comply with these directives, and have discretion as discussed above in monitoring and reporting Wexford's compliance with these directives. Finally, the evidence supports the presumption that the HCUAs are authorized to represent the DOC's interest by taking or recommending discretionary actions that effectively control or implement agency policy. The objectors' evidence on this point merely suggests that the HCUAs have not exercised their authority relating to administrative and institutional directives. Again, the fact that an employee does not do something fails to demonstrate that he or she cannot. The objectors have thus failed to overcome the presumption that the HCUAs are authorized to exercise significant and independent discretionary authority in the promulgation and implementation of institutional and administrative directives.

Arguably, the objectors have met their burden to negate the presumption that the HCUAs are authorized to exercise significant and independent discretionary authority with respect to many of their functions. For example, the objectors demonstrated that the HCUAs do not exercise discretion when they audit other facilities. Instead, the HCUAs observe, evaluate objective criteria, and report their observations. It is then the audit coordinator who reviews this raw data and exercises discretionary authority in determining whether it supports an audit finding. Likewise, the HCUAs' role in processing offender grievances appears to be limited to requesting a response from the Wexford employee whose actions form the basis of the grievance or relaying to the inmate information about the directive that dictates the complained-of conduct.

In providing information to Dr. Shicker's office when he is compiling statistical data or reviewing offender letters, the HCUAs merely identify and forward the requested information. Dr. Shicker seemed to acknowledge this when he stated that the HCUAs must respond to his requests for information on specific offenders because he or his staff would have to drive to the facility to retrieve the chart if the HCUAs did not reply. This statement implies that the HCUAs' response is limited to providing the appropriate medical chart. Likewise, assisting the Attorney General's Office when the DOC is involved in litigation merely requires the HCUAs to identify and forward directives applicable to the complained-of conduct. These activities do not require the type of discretion that would normally support a finding of managerial authority, and the evidence suggests that these activities are the limits of the HCUAs' authority in these matters. However, in order to show that the positions are not properly designable under Section 6.1(b)(5), the objectors must rebut the presumption that the HCUAs are authorized to have significant and independent discretionary authority as to every function they fulfill. The finding that the objectors have failed to do so as to the HCUAs' responsibilities to monitor Wexford and report on its compliance and to promulgate and implement administrative and institutional directives is sufficient to require my conclusion that the instant designation is proper.

Finally, I find that the positions at issue have never been certified into a bargaining unit. AFSCME submitted its collective bargaining agreement with CMS as evidence at the hearing in this matter. This agreement includes a provision for new positions in a split classification. A classification is split when some positions in that classification are included in a bargaining unit and some are excluded. The agreement provides that AFSCME must file a representation petition for a new position in a split classification if it is unable to come to an agreement with CMS on the position's inclusion or exclusion. Thus, the parties have an agreement that treats new positions in a split classification as excluded from the bargaining unit until they agree to the contrary or AFSCME prevails in a representation case and a new certification issues. It is undisputed that the designated positions became new positions in the classifications of PSA Option 6 and PSA Option 8N upon their reclassification in June 2013, and that these classifications are split classifications. Thus, because AFSCME and CMS have themselves agreed to treat these positions as excluded, I find that they have never been certified into a bargaining unit.

IV. CONCLUSION OF LAW

The Governor's designation in this case is 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 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:

37015-29-97-210-00-01	Health Care Unit Administrator
37015-29-98-260-00-01	Health Care Unit Administrator
37015-29-98-210-00-01	Health Care Unit Administrator

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 Administration 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 23rd day of September, 2013

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Heather R. Sidwell
Administrative Law Judge

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