

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

State of Illinois, Department of Central)	
Management Services (Department of)	
Human Services),)	
)	
Petitioner)	
)	
and)	
)	
American Federation of State, County)	
and Municipal Employees, Council 31,)	
)	Case No. S-DE-14-057
Labor Organization-Objector)	
)	
Brain Dawson,)	
)	
Employee-Objector)	
)	
Janice Evans,)	
)	
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 positions which have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, the position must fit one of the following five categories:

- 1) it must authorize an employee in the position to act as a legislative liaison;
- 2) it must have a title of or authorize a person who holds the position to exercise substantially similar duties as a Senior Public Service Administrator, Public Information Officer, or Chief Information Officer, or as an agency General Counsel, Chief of Staff, Executive Director, Deputy Director, Chief Fiscal Officer, or Human Resources Director;
- 3) it must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 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 is either
 - (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
 - (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. It also requires the Illinois Labor Relations Board to determine, in a manner

consistent with due process, whether the designation comports with the requirements of Section 6.1, and to do so within 60 days.¹

As noted, Public Act 97-1172 and Section 6.1 of the Illinois Public Labor Relations Act became effective on April 5, 2013, and allow the Governor 365 days from that date to make such designations. The Board promulgated 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 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 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. CMS' petition designates the exclusion of the following five Public Service Administrators in the Department of Human Services based on Section 6.1(b)(5) of the Act:

Bureau Chief (vacant) 37015-10-07-720-00-01

Budget Analyst (vacant) 37015-10-08-410-30-01

Budget Analyst (Cheryl Custer) 37015-10-08-420-00-01

Support Services Administrator (Brian Dawson) 37015-10-81-630-00-21

Business Administrator (Janice Evans) 37015-10-82-310-00-21

On August 28, 2013, AFSCME moved for an extension of time to file objections from September 3, 2013 to September 17, 2013. The General Counsel of the Illinois Labor Relations Board granted AFSCME an extension of time to the close of business September 6, 2013. Subsequently, AFSCME moved to extend the time for filing objections to close of business September 9, 2013 and later moved to file to 11:59 p.m., September 9, 2013. The General Counsel granted both motions.

On August 30, 2013, Brian Dawson filed objections to the exclusion of the Support Services Administrator position which he currently occupies. On September 6, 2013, Janice

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.

Evans filed objections to exclusion of the Business Administrator position which she currently occupies. On September 9, 2013, AFSCME filed objections to the exclusion of the following positions: Budget Analyst (vacant) position number 37015-10-08-410-30-01, Budget Analyst (Cheryl Custer) position number 37015-10-08-420-00-01 and Business Administrator (Janice Evans) position number 37015-10-82-310-00-21. All parties filed objections to the designations pursuant to Section 1300.60(a)(3) of the Board's Rules.

Based on my review of the designations, the documents submitted as part of the designation, the objections, and the documents and arguments submitted in support of those objections, here are my findings:

I. ISSUES AND CONTENTIONS

CMS' gubernatorial designation of exclusion petition indicates that the positions at issue are properly designated under Section 6.1(b)(5) of the Act as supervisory or managerial in nature. In support of this contention, CMS has provided position descriptions (CMS-104s) for each of the designated positions.

Brian Dawson and Janice Evans individually object to the petition arguing that they are not supervisors in accordance with the Act. Specifically, Dawson maintains that his job description does not accurately address his job duties. He argues that he does not perform any supervisory duties that would exclude him from collective bargaining. Evans also disputes the accuracy of the job description provided, related to the job duties she performs.²

AFSCME maintains that due to CMS filing a large number of petitions in a short period, the failure of the Board to provide procedures for obtaining additional information for AFSCME to support its objections, and the General Counsel's denial of sufficient time to review the information provided and seek additional information, it was impossible for it file specific objections. As such, AFSCME argues that the Board's procedures are inconsistent with the requirements of the Act that the designation procedures comport with due process.

AFSME also contends that CMS provided no evidence that the job descriptions tendered accurately depict the job duties of the employees at issue, to support the assertion that they are supervisory or managerial, as they lack affidavits or in other ways vouch for accuracy.

² In addition, Evans argues that she is being discriminately identified for exclusion where other non-minorities, who perform the same or similar job duties, have not been petitioned for exclusion from collective bargaining. Because the Illinois Labor Relations Board is not the proper forum to decide this argument, I will not address it.

Moreover, AFSCME asserts that Section 6 of the Act requires “significant and independent discretionary authority” when deciding supervisory and managerial authority. As such, AFSCME states that the supervisory exclusion requires a showing of actual authority and proof of the existence of authority, as well as exercise of that authority using independent judgment. Furthermore, AFSCME maintains that without a reliable description of job duties it cannot be reasonably concluded that the petitioned-for employees have “significant and independent discretionary authority” to execute management functions or have supervisory responsibilities as is understood by the NLRB or Federal Courts.

With regard to specific positions, AFSCME asserts that position number 37015-10-08-420-00-01 held by Cheryl Custer, is the subject of petition in Case Nos. S-RC-07-048 and S-RC-08-074 where CMS only argues that the position should be excluded as a confidential employee. As such, AFSCME maintains that CMS’ failure to object based on supervisory or managerial status in those cases is tantamount to CMS admitting that this position is neither. AFSCME further indicates that this position has only one subordinate. Regarding the above position and position number 37015-10-08-410-30-01 (vacant), AFSCME restates its argument that the evidence presented does not support a finding that either position exercises, or has significant and independent discretionary authority to exercise supervisory or managerial authority. AFSCME relies on the evidence and exhibits submitted by Janice Evans in her objections to the exclusion of position number 37015-10-82-310-00-21, to support its argument that said position is not properly designated.

II. FINDINGS OF FACT

Of the five positions designated, there are objections to four. CMS provided job descriptions as additional evidence of support that the designated positions are supervisory or managerial, and should be excluded from collective bargaining.

The job description for position number 37015-10-81-630-00-21 held by Brian Dawson, states, in pertinent part, that the position supervises subordinate staff and handles hiring, promotions and recommends salary increases. Further, it provides that the position recommends training curriculum, evaluates employee performances, issues oral and written reprimands and other disciplinary action leading to discharge, and adjusts grievances at the first level. Dawson’s objection denies that he exercises supervisory authority to hire, promote or recommend salary

increases. Dawson acknowledges that he does initiate discipline and adjust grievances at the first level, but states that final disposition is handled by labor relations.

For position number 37015-10-08-420-00-01 currently held by Cheryl Custer, the job description articulates supervisory authority by assigning duties and providing training to subordinate staff, setting schedules and approving time off, conducting annual performance evaluations, hearing grievances and recommending and performing necessary disciplinary action. This position also supervises and evaluates activities of staff, establishes goals and objectives for subordinate staff and counsels employees concerning work performance, productivity and conduct.

The job description for position number 37015-10-82-310-00-21 held by Janice Evans states, in pertinent part, that the position is that of a supervisor who assigns and reviews work, trains and counsels staff regarding work performance, approves time off, adjusts grievances at the first level, effectively recommends and imposes discipline and conducts performance evaluations. Evans' objection denies that she has supervisory authority to hire, promote or recommend salary increases. Evans also acknowledges that she does initiate discipline and adjust grievances at the first level but states that labor relations and human resources handles higher levels of discipline.

Lastly, CMS also provided a job description for position number 37015-10-08-410-30-01, currently vacant, which provides in pertinent part, that the position should be designated because the employee provides input, consultation and coordination in the following duties: development and preparation of operational budgets for several of the office's programs; development and implementation of resource allocation (spending plan) in compliance with Federal, Department and Bureau of Budget policies and procedures; and in monitoring actual and projected expenditures, keeps management apprized of spending patterns to alert them of potential budgetary problems. This position also provides critical analysis, evaluation and justification of program requirements and needs as they relate to overall Department objections.

III. DISCUSSION AND ANALYSIS

a. Procedural Issues

The Board's application of its rules requiring AFSCME to file its objections within 10 days, without offering a method in which information should be obtained, did not violate

AFSCME's due process rights. Due process in an administrative hearing normally requires an opportunity to be heard. East St. Louis Federations of Teachers, Local 1220 v. East St. Louis School District No. 189 Financial Oversight Panel, 178 Ill. 2d. 399, 419-20 (1997). See Segal v. Department of Financial & Professional Regulation, 404 Ill. App. 3d 998, 1002 (1st Dist. 2010). Due process requires notice and an opportunity to be heard. The Board's reasonable compliance with its rules does not impinge upon AFSCME's due process as it has received notice and an opportunity to be heard. In administrative hearings, failing to go to an oral hearing is not necessarily the denial of a hearing where written documents could suffice as a hearing. Department of Central Management Services (Illinois Commerce Commission) v. Illinois Labor Relations Board, State Panel, 406 Ill. App. 3d 766, 769-70 (4th Dist. 2010).

Here, the Board's Rules, which specify time limits for filing objections, does not deprive AFSCME of due process because they are reasonable considering the short statutory time frame in which the Board must process designation petitions. The Act provides that the Board has 60 days to determine whether the designation comports with the requirements of Section 6.1 of the Act. AFSCME has also been aware of the requirements of Section 6.1 of the Act since Public Act 97-1172 became effective on April 5, 2013, and aware of the Board's rules since they were published in the Illinois Register on May 3, 2013. Moreover, AFSCME was granted several extensions giving a total of 10 additional days to file its objections in this matter. As such, these factors demonstrate that the Board's time limit for filing objections is reasonable and does not deprive AFSCME of due process.

As to its lack of a method to obtain information necessary to formulate objections and the volume of cases, here, the four positions objected to are subject to active petitions. As the exclusive representative, AFSCME has obvious familiarity with the designated positions and easy access to information to support its objections to the filled positions. Where the positions are vacant, more specific information generally retrieved through employee testimony would be unavailable. As such, AFSCME has, or has relatively easy access to, all information necessary to file its objections to the designation of the position in this matter. Therefore, the Board did not deprive ASFMCE of its due process rights.

b. Substantive Issues

The Act provides that any designation made by the Governor is presumed proper and 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. 5 ILCS 315/6.1 (2012). Here, CMS' designation of the positions at issue is proper according to Section 6.1(b)(5) of the Act. Under the Act, to be properly designated, the position must authorize an employee in that position to have "significant and independent discretionary authority as an employee." 5 ILCS 315/6.1 (2012). 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 decision of the National Labor Relations Board. 5 ILCS 315/6.1 (2012).

1. Section 6.1(b)(5)(i)

Section 6.1's definition of "significant and independent discretionary authority" does not adopt the Act's proper definition of a "managerial employee" set out in Section 3(j), but the first portion is analogous, and consequently the case law interpreting that definition is useful here.

To determine whether an employee is "engaged in executive and management functions" and "charged with the effectuation of management policies and practices" we look to the managerial standard for guidance. The Board has interpreted the first prong of the managerial employee test to mean that an employee must possess and exercise a level of authority and independent judgment sufficient to broadly effect the organization's purposes or its means of effectuating those purposes. State of Illinois, Department of Central Management Services (Public Aid), 2 PERI ¶ 2019 (IL SLRB 1986). Executive and management functions are functions that specifically relate to running an agency or department, which may include formulating policy, preparing the budget and overseeing effective and efficient operations. City of Evanston v. Illinois State Labor Relations Board, 227 Ill. App. 3d 955, 974-975, (1st Dist. 1992). Executive functions require more than simply the exercise of professional discretion or

technical expertise. Elk Grove Village, 245 Ill. App. 3d at 122. If an employee's role in establishing policy is merely advisory and subordinate, the employee is not managerial. Id., Evanston, 227 Ill. App. 3d at 975.

As to the second prong of the test, it requires that the alleged managerial employee exercise responsibility for directing the effectuation of such management policies and practices. Elk Grove Village, 245 Ill. App. 3d at 122, Evanston, 227 Ill. App. 3d at 974. An employee directs the effectuation of management policy when he or she oversees or coordinates policy implementation by developing the means and methods of reaching policy objectives, and by determining the extent to which the objectives will be achieved. Elk Grove Village, 245 Ill. App. 3d at 122, Evanston, 227 Ill. App. 3d at 975. Such individuals must be empowered with a substantial measure of discretion to determine how policies will be effected. Elk Grove Village, 245 Ill. App. 3d at 122, Evanston, 227 Ill. App. 3d at 975. It is the final responsibility and independent authority to establish and effectuate policy that determines managerial status under the Act. Elk Grove Village, 245 Ill. App. 3d at 122, Evanston, 227 Ill. App. 3d at 975.

AFSCME is mistaken when it applies the NLRB definition to the 6.1(b)(5) exclusions as the Act does not apply the NLRB definitions to the first standard. AFSCME also contends that the job description of this vacant position does not support a finding, without additional evidence, that the position has significant and independent discretionary authority.

In this case, the exclusion of the Budget Analyst (position number 37015-10-08-410-30-01) as designated under 6.1(b)(5)(i) of the Act is proper. Moreover, this position is properly designated under the first portion of the test set forth in the Act. Because only one portion needs to be met for proper designation, I will not address whether this position also “represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency” in accordance with the Act.

By virtue of the job description, this position executes management functions when it coordinates in the development of and preparation of operational budgets and implementation of spending plans. There is also evidence of having final responsibility and independent authority when the position justifies program requirements and needs as they relate to the overall objective of the Department. Lastly, the position is empowered with a substantial measure of discretion when alerting management of potential budgetary problems and providing corrective actions.

Having provided little evidence to the contrary of the job description, AFSCME failed to overcome the presumption that the designation is proper. As such, there is no evidence that this position does not have significant independent and discretionary authority when performing the tasks set out in the job description. Therefore, I recommend the Board find the designation proper.

2. Section 6.1(b)(5)(ii)

The supervisory definition in this section does not follow the Act's definition in Section 3(r), but instead supervisory status is based on the following indicia in Section 2(11) of the National Labor Relations Act:

"The term "supervisor" means 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. §152 (11).

"Employees are statutory supervisors if (1) they hold the authority to engage in any 1 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 Community Care, Inc. 532 U.S. 706, 713 (2001) (quoting NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-574, (1994); See also Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006).

The term "assign" means "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." Oakwood Healthcare, Inc., 348 NLRB 686, 689 (2006).

A position has the responsibility to direct if the position holder has subordinates, decides what jobs his subordinates should perform next, and who should perform those tasks. Id. at 691-92. To be considered a supervisor with "responsibility to direct," there must be accountability on the supervisor's part if the directed task is not performed properly. Id. at 691-92

Discipline can be established by the initiation thereof. Mountaineer Park, 343 NLRB 1473 (2004) (authority to write up employees for proposed disciplinary and initiate disciplinary process); Progressive Transportation Services, 340 NLRB 1044, 1045-1046 (2003) (dispatcher by issuing and signing notices describing incidents, initiates disciplinary process, even though higher supervisor approves discipline, effectively recommends discipline); Sheraton Universal Hotel, 350 NLRB 1114, 1115-18 (2007) (front desk supervisor in hotel possesses authority to effectively recommend discipline, where he initiated disciplinary process by conducting couch and counsel session and effectively recommend issuance of written warning to higher management).

Here, the designation of the positions held by Dawson, Custer, and Evans is proper as there is no express evidence of limitations on their discretion, independent authority or accountability to assign, direct and discipline their subordinates. Specifically, neither Dawson nor Evans dispute that in their position they assign and review work, provide guidance and training to assigned staff, approve time off, or counsel subordinate staff regarding work performance, in accordance with their job descriptions. Moreover, both employees admit in their position they have the authority to adjust grievances at the first level and initiate discipline.

AFSCME failed to demonstrate that the designation of the position held by Custer is improper. AFSCME's argument that CMS only objected to Custer's position as a confidential employee in a representation petition currently before the Board is not evidence that Custer is not supervisory or managerial in accordance with Section 6.1 of the Act. Custer's job description provides that she in fact does exercise supervisory authority and the designation petition presumes that she does so with significant independent authority. Moreover, there is neither a preponderance nor minimum subordinate requirement with regard to supervisory status giving the fact that she only has one subordinate no significance on the supervisory nature of the position. AFSCME has provided no evidence to refute or articulate limitations on Custer's discretion, responsibility, accountability or independent authority.

IV. CONCLUSIONS OF LAW

The designations in this case are 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 are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

Bureau Chief (vacant) 37015-10-07-720-00-01

Budget Analyst (vacant) 37015-10-08-410-30-01

Budget Analyst (Cheryl Custer) 37015-10-08-420-00-01

Support Services Administrator (Brian Dawson) 37015-10-81-630-00-21

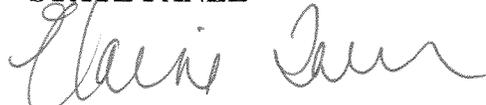
Business Administrator (Janice Evans) 37015-10-82-310-00-21

VI. EXCEPTIONS

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300, 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 the recommended decision and order. All exceptions shall be filed and served in accordance with Section 1300.90 of the Board's Rules and Regulations. Exceptions must be filed by electronic mail sent to ILRB.filing@illinois.gov. Each party shall serve its exceptions 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
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Elaine L. Tarver, Administrative Law Judge