

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

State of Illinois, Department of Central)	
Management Services, (Department of)	
Human Services),)	
)	
Petitioner,)	
)	
and)	Case No. S-DE-14-058
)	
American Federation of State, County)	
and Municipal Employees, Council 31,)	
)	
Labor Organization-Objector)	

**ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED DECISION AND ORDER**

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) *added by* Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. 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; or

- 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 rules

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.

for the same purpose effective on August 23, 2013, 37 Ill. Reg. 14,070 (Sept. 6, 2013) (collectively referred to as the Board's rules). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On August 21, 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 September 9, 2013, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules.

The following 16 positions within the Department of Human Services are at issue in this designation:

37015-10-17-521-60-02	Vacant	
37015-10-17-000-10-01	Vacant	
37015-10-17-300-12-01	Scott Gertz	Assistant General Counsel
37015-10-17-300-12-01	Mark Weintraub	Assistant General Counsel
37015-10-17-300-14-01	Vacant	
37015-10-17-400-14-01	Robert Grindle	Assistant General Counsel
37015-10-17-521-30-01	Donald McLaughlin	Hearing Officer - Supervisor
37015-10-17-521-40-02	William Burfeind	Hearing Officer - Supervisor
37015-10-17-521-50-02	Patricia Brown	Hearing Officer - Supervisor
37015-10-17-521-70-02	Patrick Casey	Hearing Officer - Supervisor
37015-10-17-600-11-01	Vacant	
37015-10-17-600-12-88	C. Thomas Helsel	Assistant General Counsel
37015-10-17-700-12-01	Vacant	
37015-10-17-700-13-01	Daniel Rosman	Assistant General Counsel
37015-10-17-700-13-01	Vacant	
37015-10-76-111-10-01	Patrick Knepler	Legal Liaison

CMS's petition indicates the positions at issue qualify for designation under Section 6.1(b)(5) of the Act.²

AFSCME objects to designation of the following 9 positions:

37015-10-17-000-10-01	Vacant	
37015-10-17-300-12-01	Scott Gertz	Assistant General Counsel
37015-10-17-300-12-01	Mark Weintraub	Assistant General Counsel
37015-10-17-400-14-01	Robert Grindle	Assistant General Counsel

² CMS filed position descriptions (CMS-104) for the positions in support of its assertion.

37015-10-17-600-11-01	Vacant	
37015-10-17-600-12-88	C. Thomas Helsel	Assistant General Counsel
37015-10-17-700-12-01	Vacant	
37015-10-17-700-13-01	Daniel Rosman	Assistant General Counsel
37015-10-17-700-13-01	Vacant	

On September 16, 2013, a hearing on the matter was conducted concerning the significant and independent discretionary authority of the positions held by Daniel Rosman and Mark Weintraub. I determined that there were no issues of fact or law for hearing with respect to the remaining positions. Based on my review of the designations, the documents submitted as part of the designation, the objections, the documents and arguments submitted in support of those objections and evidence presented at hearing, I find that the designation was properly submitted and that it is 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 in this matter as set out below and, to the extent necessary, amend any applicable certifications of exclusive representatives to eliminate any existing inclusion of these positions within any collective bargaining unit.

I. Stipulations

1. CMS is a public employer within the meaning of Section 3(o) of the Illinois Public Labor Relations Act and the Board has jurisdiction over this matter pursuant to Section 5(a) and 20(b) of the Act.
2. AFSCME is a labor organization within the meaning of Section 3(i) of the Illinois Public Labor Relations Act.
3. The issue is whether the designated positions authorize the position holders with “significant and independent discretionary authority” within the meaning of Section 6.1(c)(i).
4. The Technical Advisor IIs within the Department of Human Services are attorneys represented by AFSCME for purposes of collective bargaining in unit RC-10.

II. AFSCME's Objections

First, AFSCME argues that it was not afforded due process because CMS submitted no information indentifying the basis for the exclusion and merely stated generally that the positions qualify for designation under Section 6.1(b)(5). Accordingly, AFSCME asserts that it had no notice of the basis for the exclusion. Nevertheless, AFSCME accurately observes that none of the designated positions (to which it objects) have subordinates. AFSCME infers that CMS contends the position meet the criteria for designation under Section 6.1(c)(i).

Second, AFSCME argues that the Board should review this designation petition using the standard for managerial authority set forth in case law from the National Labor Relations Board. In addition, AFSCME urges the Board to hold that the party raising the exclusion bears the burden of proof. As such, AFSCME asserts that CMS must demonstrate that the positions in question both possess and exercise the requisite significant and independent discretionary authority.

Third, AFSCME asserts that the positions in question are professional and do not possess significant and independent discretionary authority within the meaning of Section 6.1(c)(i). Instead, the positions primarily provide legal, professional services under the direction of a Deputy General Counsel. Further, AFSCME asserts that the position description for position number 37015-10-17-000-10-01 only refers to legal duties and does not on its face support the exclusion.

Fourth, AFSCME asserts that neither Mark Weintraub nor Daniel Rosman actually perform the tasks outlined in their respective position descriptions. In support, AFSCME submitted affidavits from the employees to that effect.³ Based on these affidavits, AFSCME contends that these positions do not possess the requisite authority to qualify for designation.

Fifth, AFSCME asserts that one of the vacant positions does not possess the requisite authority to qualify for designation because it has the same number as Weintraub's position. AFSCME concludes that "there is no reason to believe that the duties of that position would not be similar to the duties performed by Mr. Weintraub."⁴

³ In its objections, AFSCME specifically describes these employees' duties as set forth by the employees. It is unnecessary to recount those here because the parties proceeded to hearing on these two positions.

⁴ There is no vacant position with the same position number as Weintraub's.

Finally, AFSCME states that Scott Gertz's position does not possess the requisite authority to qualify for designation because Gertz's duties are similar to Weintraub's.⁵

III. Evidence concerning positions which did not raise issues for hearing

a. 37015-10-17-000-10-01 – Vacant

This position works under the direction of the General Counsel for the Office of Legal Services to provide legal expertise by reviewing and interpreting state and federal law. It reviews DHS policies and researches litigation and non-litigation issues concerning all areas of DHS. In relevant part, it assists in the implementation and justification of policies and practices under the purview of the Office of Legal Services. Further, this position serves as technical specialist to the General Counsel, Office of Legal Services. It performs highly responsible administrative and technical work providing comprehensive advice and consultation on the legality of Department activities, including policy matters, rules, regulation procedures, administration, operation, and litigation. It provides legal expertise to the Department of Human Services Office of Legal Services by reviewing and interpreting laws, reviewing policies to assure consistency with laws, and conducting research of litigation and non-litigation issues.

It drafts substantive legal memos to the General Counsel, and at the direction of the General Counsel, to other attorneys in the Office of Legal Services and to Executive Staff. The position makes recommendations for the installation of needed changes in policies and procedures based on the outcome of various legal actions taken against the Department.

Further, it analyzes, drafts, and reviews proposed legislation and administrative rules for the Office of Legal Services. It advises the General Counsel regarding legislation and administrative rules pertaining to the Department. Further, it assists in drafting proposed legislation and rules for the Office.

Finally, it performs liaison work for the General Counsel with respect to the Divisions and operations. It confers with Assistant Counsels as to the interpretation and installation of policies and procedures. Lastly, it resolves issues and responds to inquiries from staff regarding procedures, policy, work rules, and administrative directives.

⁵ In fact, it is Gertz's position that holds the same number as Weintraub's. This issue was not raised in the objections. It is therefore waived.

b. 37015-10-17-400-14-01 – Robert Grindle

This position works under the administrative direction and supervision of the Deputy General Counsel to represent and advise the Department on collection and reimbursement issues. In relevant part, this position serves as attorney for the Department on all legal matters regarding the collection and reimbursement of the Department's accounts. It manages and coordinates the Department's collection of accounts receivable with the Illinois Attorney General's Revenue Litigation Section. Further, it develops and revises policies concerning collection and reimbursement of the Department's accounts receivable. In addition, it confers with the Auditor General and the Illinois Attorney General's office in developing an effective process for writing uncollectable debts in order to prevent audit findings against the Department. Next, it serves as Special Assistant Attorney General as appointment by the Attorney General's Office in all collection matters for the Department.

c. 37015-10-17-300-12-01 - Scott Gertz

Under administrative direction, this position provides a full range of legal services to designated state-operated facilities/schools, provides legal advice to Central Office on recipient rights and recipient abuse and neglect, and directs and participates in investigations and research.

In relevant part, the position collaborates with the Offices of Legislation and Community Relations to offer legal advice, to draft proposed legislation, and to respond to proposed legislation which affects the Department. Further, the position drafts and edits policy directives and rules applicable to facility and Central Office operations concerning recipient abuse and neglect policy for the Division of Mental Health and Developmental Disabilities management staff.

d. 37015-10-17-700-12-01 – Vacant

This position works under the administrative direction and supervision of the Deputy General Counsel to represent and advise the Department in litigation. It also advises and counsels administrators of the Department on a wide range of legal issues.

In relevant part, the position researches, files, and develops case evidence for litigation in defense of Departmental actions or in issues brought by the Department. The position summarizes information and develops findings, opinions, and recommendations for the

Secretary, and develops and presents oral and written legal opinions. Further, the position advises the General Counsel and management staff through decision memorandums as to whether to settle, as to alternatives to settlement, and as to whether to explore non-monetary settlement. Finally, the position drafts proposed legislation, amendments, resolutions, procedures, rules, and regulations.

e. 37015-10-17-700-13-01 – Vacant

This position acts under the direction and supervision of the Deputy General Counsel to represent and advise the department in litigation, and to advise and counsel administrators of the Department on a wide range of legal issues. The position also serves as lead attorney on Olmsted related litigations at DHS.

In relevant part, the position represents the Department as lead counsel in administrative hearings, researches, files and develops case evidence for litigation in defense of Departmental actions or in issues brought by the Department, and summarizes information and develops findings, opinions, and recommendations for the Secretary. Further, the position conducts analysis on individual law suits regarding exposure of the Department, conducts professional legal searches of court documents, reviews and evaluates major issues and determines possible impact on Department policy and programs, summarizes results, presents findings, and makes recommendations for management review and decision. Further, it advises the General Counsel and management staff through decision memorandums as to whether to settle, as to alternatives to settlement, and as to whether to explore non-monetary settlement. Finally, the position drafts proposed legislation, amendments, resolutions, procedures, rules, and regulations.

f. 37015-10-17-600-12-88 – C. Thomas Helsel

This position works under the direction of the Deputy General Counsel of Legal Services for Sexually Violent Persons Program and Forensics, Office of Legal Services, and provides legal advice and legal services regarding the Treatment and Detention Facility (TDF). Further, it directs and participates in legal issues regarding employees and contractors. It also independently performs difficult research and casework, and serves as on-site liaison with the Office of Legal Services, private law firms, and with the Attorney General's Office.

In relevant part, the position serves as the Office of Legal Services (OLS) representative at meetings at the TDF. Further, it regularly advises the Deputy General Counsel and General Counsel on all activities and of emergency legal issues. In addition, it drafts and reviews all necessary legal documents between the TDF and other contractors of State agencies. Further, it advises the TDF on compliance with employment laws regarding union and non-union staff. Finally, it serves as the usual and regular legal representative for the TDF program at State-wide committees, task forces and department meetings, as assigned by the Deputy General Counsel.

g. 37015-10-17-600-11-01 – Vacant

This position works under the direction of the Deputy General Counsel for Treatment and Detention Facility and Forensics (TDF). In relevant part, it assists in drafting laws, rules, and legislation, and policies concerning TDF. It advises program staff and administration of the nature and effect of pending litigation which may impact the TDF program of the Division of Mental Health, Forensic Treatment Program or the Office of Developmental Disabilities. Next, it provides legal direction, counsel, analysis and leadership to GOMB, Governor's Counsel, Central Office and Division of Mental Health on issues dealing with the TDF program, facilities and recipients, and /or those affecting the Office of the Inspector General (OIG). Finally, it participates in review of investigations, compliance, and monitoring issues, and coordination with other State agencies.

h. Evidence from hearing concerning Daniel Rosman and Michael Weintraub

i. Overview of the Department of Human Services Office of the General Counsel

Brian Dunn, General Counsel of the Department of Human Services, serves as the leader of the Office of the General Counsel (OGC) for the Department of Human Services. Dunn has 10 direct reports including eight deputies. There are 80 total employees within the office and approximately 40 of those are attorneys. There are nine divisions within the OGC: (1) Community Health and Prevention, Alcoholism and Substance Abuse, (2) Human Capital Development, (3) Mental Health and Rehabilitation Services, (4) Administrative Support, (5) Administrative Hearings and Rules, (6) Treatment and Detention Facility and Forensics, (7) Litigation, (8) HIPPA, FOIA, and Legislative Affairs, and (9) Civil Affairs.

ii. Daniel Rosman – Division of Litigation

Daniel Rosman is Public Service Administrator (PSA) Option 8L attorney in the Division of Litigation. Deputy General Counsel Meghan Maine oversees his work and the division. The Division also includes two Technical Advisor IIs, one administrative assistant, and one vacant PSA position. AFSCME represents the Technical Advisor IIs in bargaining unit RC-10.

1. Liaison with the Attorney General's Office

Rosman serves as in-house counsel for DHS. In that capacity, he works with the Attorney General's Office (AG's office) to manage a litigation caseload primarily focused on employment, civil rights, and Medicaid litigation.

Rosman is responsible for ensuring that the AG's office asserts the interests of the Department. Accordingly, he must raise relevant defenses if the AG's office has not raised them. Further, he must inform the attorneys in the AG's office when he believes their actions are inappropriate or when he disagrees with a position taken by that office.⁶ He also reviews motions drafted by the AG's office which are filed on the Department's behalf. Maine testified that Rosman's review of the AG's motions represents a comprehensive review and that Rosman does not merely provide final edits.

Maine further testified that the Department's attorneys should be very involved in litigation and should be active participants in the case.⁷ They should advise the Attorney General on matters of Departmental policy, identify whether a Department policy is beneficial to the department's litigation position, and inform the AG's office of the Department's roles and their unique features.

Rosman develops case strategy in conjunction with the AG's office. Case strategy includes assessing the allegations and determining the relevant defenses, determining whether to file certain motions, preparing discovery, reviewing discovery requests, and determining the scope of information the Department should provide in response to those requests. Rosman stated that he does "not necessarily" create the impetus for actions taken by the AG's office in

⁶ Rosman noted that when he disagrees with a position taken by the AG's office it is "generally" because the office has failed to file a motion or failed to identify an affirmative defense.

⁷ In contrast, Rosman testified that his participation in developing case strategy is limited.

litigation.⁸ The AG's office has final authority to determine the course of action taken in particular case.

Rosman also participates in settlement matters when the AG's office determines that the case should be settled or when the plaintiff's attorney makes a settlement offer. Under those circumstances, the AG's office writes a letter recommending settlement. Rosman then writes a decision memo which compiles his understanding of the case, his insights, the factual background, his assessment of the damages, and the likelihood that the Department will lose the case. In the memo, Rosman makes a recommendation on settlement in which he requests a dollar amount for settlement authority. He bases his monetary evaluation of the case on the nature of the proof, past judgments, and the elements of the case. Rosman then sends the decision memo to Maine who takes a critical look at the memo, makes grammatical corrections, and gives Rosman her thoughts. She reviews it for form and substance.

If Maine disagrees with the recommendation, Rosman changes it. If Maine signs off on the decision memo, Dunn reviews the recommendation in the same manner as Maine reviewed it. Rosman did not know whether there were cases in which Dunn and Rosman accepted his recommendations in toto. He testified that, in general, Dunn and Maine request that he make some changes. Rosman did not testify as to the frequency with which Dunn and Maine required him to make substantive changes.⁹

After Dunn reviews the memo, he authorizes Rosman with maximum monetary settlement authority. Rosman cannot exceed that authority without Dunn's permission. Sometimes the settlement authority that Rosman seeks is the authority Dunn gives him.

There are some cases in which Maine and Dunn accept Rosman's settlement recommendations in toto. These are lapse appropriation claims in which an individual asserts that the Department owes them a particular amount of money. AFSCME did not introduce evidence as to the manner in which Rosman formulates his recommendation concerning the settlement of lapse appropriation claims. However, Rosman does not write a decision memo in these cases.

⁸ Specifically, he stated that they do not "necessarily come from" him.

⁹ Rosman sometimes consults with Maine when he believes that the Department might face exposure in certain cases and they discuss potential ways to resolve the matter. This could include a policy issue or a monetary settlement. When Rosman raises such an issue with Maine, other individuals are brought into the discussion and the department takes a collaborative approach to resolving the issue.

Rosman also recommends changes to department policy when a policy is implicated in litigation and when Rosman determines it is more appropriate to change it and settle the case than to take the case to trial. These recommendations arise in cases where a plaintiff directly challenges the Department's policies and when those policies are the subject of the law suit. In one such employment law case, Rosman assessed a settlement offer by a plaintiff which proposed certain changes. Rosman agreed with the proposed changes and recommended that the Department adopt those changes as part of the case settlement. Rosman has applied this procedure in more than one case. Maine testified that the Department agreed to Rosman's recommended change in at least one case.¹⁰ Maine further testified that the Department is currently considering other such recommendations, but has not made a determination on them. AFSCME introduced no evidence as to the frequency with which the Department accepts Rosman's recommendations on changes to policies implicated in litigation.

2. Participation in class action lawsuits

There are three large class action cases that impact the Department. These are called the Olmsted litigations and they concern individuals with disabilities. They include Williams v. Quinn, Ligas v. Hamos, and Colbert v. Quinn.¹¹ Each case involves multiple state defendants and state agencies. The State decided to settle these cases. Representatives from various agencies, the plaintiffs' attorneys, and representatives from the AG's office met to discuss and negotiate the terms of the settlement. Ultimately, the court approved a consent decree agreement.

After the court approved the consent decree, the parties' representatives met to coordinate its implementation, monitor the plan, and problem solve. Rosman attended some meetings on the Williams v. Quinn case concerning the implementation plan. He was the Department's only legal representative at the meetings on the dates that he attended; however, other representatives from the program and operations side of DHS side were also present.¹²

¹⁰ Maine could not recall whether that case pertained to a particular policy or to some training which the Department agreed to implement.

¹¹ Citations are omitted.

¹² During this time, Rosman was also Acting General Counsel but held the same position he now occupies.

Rosman testified that he did not attend the meeting to represent management. Rather, he attended to take notes, to listen to what was said, to identify issues that might arise, and to report the information to Dunn and Maine. Rosman described his role at the meetings as a passive one and stated that he had no meaningful input as to “where it [was] going.” If there were differences of opinion between agencies, then the governor’s office would have the final say.

Meghan Maine took over Rosman’s role at the meetings when she joined the Department. Maine testified that she is the legal representative of the department. As such, she ensures that the legal issues affecting the department are adequately addressed and that the department is advised appropriately. Maine has asked Rosman to attend such a meeting in her stead. Rosman held the same responsibilities as Maine during the meetings when he attended them. Rosman testified that he no longer performs duties with respect to these class action lawsuits.

3. Lead counsel in administrative hearings

Rosman acts as first chair and lead counsel to represent the Department in administrative hearings. He primarily defends employment discrimination cases before the Human Rights Commission, but has also represented the Department in cases before other State agencies including Healthcare and Family Services and the Illinois Department of Labor. He handles all phases of the litigation process. As such, he investigates the legal and factual basis for the lawsuit, prepares pleadings, conducts discovery, interviews witnesses, negotiates settlements, conducts trials, and engages in post-hearing proceedings.

Maine reviews Rosman’s non-routine pleadings such as motions to dismiss or motions for summary decision. Rosman drafts such motions and develops relevant arguments based on the facts and the law. Maine does not review Rosman’s routine motions such as motions for a continuance or motions to compel. Routine motions are non-substantive and are drawn from a template.

Rosman may write a decision memo if he believes settlement is appropriate. The decision memo process follows the same framework as it does in court cases. If Rosman receives a counteroffer that is greater than his settlement authority, he determines whether he should ask for greater settlement authority. He bases his decision to request additional settlement authority on the legal probability of winning or losing a case and the difference

between the plaintiff's offer of settlement and the defendant's last offer. If Rosman determines it is appropriate to request additional settlement authority, he provides Maine and Dunn his justification for settling at a higher amount. Dunn and Maine critically consider his recommendation.

4. Providing counsel to administrators on legal issues

Rosman's performance evaluation provides that he is responsible for advising and counseling administrators on a wide variety of legal issues, conducting professional and legal research, drafting legal documents, and interpreting state and federal rules and regulations. Further, he must advise the administration of legal developments affecting operations.¹³

The evaluation noted that Rosman provided counsel to Central Administration. If issues arise at the program level, Rosman may address them before they escalate into a lawsuit when he believes the issues pose a litigation threat. However, Rosman testified that he provides only limited advice and counsel to administrators. He stated that his advice is usually incidental to pending cases and lawsuits that are filed.

Further, he routinely advises the Department's Bureau of Collections on bankruptcy and OBRA Trust issues. An Omnibus Budget Reconciliation Act (OBRA) trust is designed for individuals with disabilities who wish to take their assets and place them into a trust so that they may still qualify for Medicaid while setting money aside to pay for expenses that Medicaid will not cover. To create a trust, these individuals must first give notice to the Department. When Rosman receives the notice, he sends it to the Bureau of Collections which determines whether the Department should file an objection to the trust.

Finally, Rosman regularly works with the Department's Bureau of Human Resources on Payroll and Garnishment issues.¹⁴ Bankruptcy issues arise when a DHS employee files for bankruptcy. Rosman alerts individuals in payroll and collections of the bankruptcy notice and ensures that they do not try to collect the debt. Garnishment issues arise when the court renders a judgment against one of DHS's employees and the judgment creditor begins post-judgment collection action. The creditor sends the OCG a citation to discover assets. Rosman forwards those to the payroll department which performs the remaining necessary tasks.

¹³ The first three objectives are similar to the objectives set forth for all attorneys in the litigation division.

¹⁴ This function is largely performed by the Bureau of Administrative Support. The litigation division becomes involved when there is a case filed.

5. Procurement Business Cases and Contract Agreement Approval Forms

Rosman's performance evaluation provides that he gathers all information necessary to complete the Procurement Business Cases (PBCs) and Contract Agreement Approval Forms (CAAFs) that are required to meet the litigation needs of the Department. A PBC sets out the justification and the need for entering into a contract. A CAAF is a way for the budget employees to track the Department's expenditures. Further, the evaluation states that Rosman is responsible for drafting and monitoring all PBCs and CAAFs from inception to approval. Rosman no longer performs much work related to CAAFs and PCBs. The office transitioned his procurement responsibilities to another employee around October 2011.

However, Rosman still sometimes performs such work in relation to procuring outside counsel. The need for outside counsel arises when the AG's office determines that it has a conflict with respect to one of the Department's cases. Rosman draws up the recommendation for obtaining outside counsel, also known as a Special Assistant Attorney General Appointment (SPAAG). He selects three potential firms and makes a recommendation for one of them based on policy guidelines from the governor's office which provide that the Department must consider the firms' quality of services (e.g., experience, cost, and understanding of agency needs) and the desired outcome. The OGC circulates the document to governor's office and CMS. Between seven and ten individuals review Rosman's recommendation. In the past year, Rosman made one recommendation for outside counsel. The Department did not reject that recommendation but the AG's office did.¹⁵

¹⁵ Rosman does not determine the amount or the cost of the contract. Rosman does not determine whether a contract is needed.

6. Creating guide for others in the department

One objective on Rosman's evaluation states that Rosman should develop and draft a memorandum that provides a general overview of the law and procedures that govern employment discrimination investigation and lawsuits pending before the Illinois Human Rights Department and the Illinois Human Rights Commission for use as a practical guide for DHS attorneys.

The evaluation noted that Rosman was not able to meet this objective because of his voluminous caseload and lack of time. However, Rosman is authorized and encouraged to perform this work.

iii. Mark Weintraub - 37015-10-17-300-12-01

Mark Weintraub is a Public Service Administrator (PSA) Option 8L attorney in the Division of Mental Health & Developmental Disabilities, Rehabilitation Services and Office of the Inspector General. Deputy General Counsel Robert Connor oversees his work and the Division. The Division also includes one vacant Technical Advisor II position, one vacant office coordinator position, and two other PSA Option 8L positions, one of which is vacant.

Weintraub works with mental health facilities, vocational rehabilitation, and the blind vendor program. Further, he reviews trusts to ensure that individuals who use those trusts are still Medicaid eligible.¹⁶

1. Work with Mental Health Facilities and Vocational Rehabilitation Facilities

Weintraub determines whether a mental health facility or a vocational rehabilitation facility must comply with a subpoena it receives from a third party. These facilities forward Weintraub the subpoenas they receive. Weintraub reviews the subpoenas in light of statutory language, including the Confidentiality Act and the Mental Health Code, and determines whether the subpoena is valid and whether the facility must comply with it. For example, if the facility receives a subpoena without a court order, Weintraub instructs the facility not to respond to it because the relevant statute requires the serving party to obtain a court order. Similarly, if

¹⁶ Scott Gertz holds the same position number as Weintraub. However, he reports to a different Deputy General Counsel, in addition to reporting to Connor, and performs different work.

Weintraub receives a subpoena for medical information that does not specifically request HIV-related information, then Weintraub instructs the facility to withhold HIV-information because the statute requires that the serving party must specifically request that information in order to receive it.

Weintraub also receives questions from facility employees concerning certifications for involuntary commission, medication orders, or advance directives. For example, a doctor might ask Weintraub how the facility can ensure that that an involuntary commission remains in force.¹⁷ Similarly, a facility employee might ask Weintraub to determine whether a medication order satisfies the statutory or regulatory criteria and whether the facility may dispense the medication. Weintraub answers these questions by email after consulting the relevant statutes or regulations and often quotes those sources in his answers.

The statutes at issue set forth specific parameters and compliance rules concerning the information disclosure and involuntary commission processes. Weintraub does not consult Connor with respect to these straightforward issues because they are matters in which Weintraub applies the statutory language to a set of facts.

Weintraub consults Connor only when he receives an inquiry which requires him to interpret the statute. However, Connor testified that he never informed Weintraub that Weintraub was required to consult Connor if the statute was unclear. In fact, Connor testified that Weintraub knows more than he does about certain areas of the law including the vocational rehabilitation program.

Weintraub does not speak with, or give legal advice to, Bureau Chiefs or Division Directors. He generally does not give advice to Associate Divisions Directors. Weintraub further stated that he does not act “proactively” to provide legal advice and does not make pronouncements to Division Directors or Associate Division Directors concerning their course of action. However, Weintraub might alert the Directors to a change in case law, but he has not yet taken such action.

2. Work with the Blind Vendor Program

The Blind Vendor Program is part of the Division of Rehabilitation Services. The program is a service which helps blind citizens in the state by giving them preference in

¹⁷ Usually such questions concern the length of time available to file certain legal documents.

establishing commissaries and vending machines on State and Federal property. The program, in part, implements the Randolph-Sheppard Act. That law also provides due process to aggrieved blind vendors to help them resolve disputes with State agencies through hearings, arbitrations, and Federal court appeals.

The Blind Vendor Program contacts Weintraub when a dispute arises with respect to a blind vendor. The program asks Weintraub to help them bring the dispute to arbitration. Weintraub discusses the matter with Connor. With Connor's approval, Weintraub refers the matter to the litigation department. Connor testified that Weintraub knows more than he does about certain areas of the law including the Blind Vendor Program. Weintraub then initiates the arbitration process, as required by the rules and the statute, at the program's request. The AG's office performs the actual filings. Occasionally, an employee from the Blind Vendor Program asks Weintraub to try and convince the State of the blind vendor's position. Weintraub attempts to do so by pointing to the language of the statute. Weintraub testified that when he gives legal advice to individuals from Blind Vendor Program he uses his skills as a lawyer.

3. Review of Trusts

Weintraub reviews OBRA payback trusts and self-needs trusts.¹⁸ Assets placed into such trusts are not calculated in determining Medicaid eligibility. Accordingly, the trusts allow individuals to remain eligible for Medicaid while setting money aside to pay for expenses that Medicaid will not cover. Weintraub reviews these trusts in light of the Medicaid rules. He ensures that the trusts meet all the statutory requirements that they remain valid. In doing so, he reviews the trust and the statutory language. Weintraub testified that he applies "statutory bright-line" tests to evaluate the trusts.

4. Review of legislation and draft rules

Weintraub's performance evaluation states that one of his objectives is to "analyze complex proposed state and federal legislation which might impact his area of assigned legal expertise" and to "prepare dot-point memos for the Deputy General Counsel as requested." To that end, Weintraub has reviewed one or two state bills and has given Connor his comments.¹⁹

¹⁸ These arise under Home Services, a Medicaid waiver program.

¹⁹ He testified that has never prepared a dot-point memo. Connor confirmed this assertion.

He reviews legislation to ascertain whether it violates any of the statutes with which he customarily works. Weintraub testified that he does not find out what happens with respect to his comments or the legislation after he provides his input. However, he also testified that no one takes his comments and incorporates them into the legislation.²⁰

Weintraub also reviews draft rules for the Department. Currently, the Department is revising its hearing rules to comply with Federal Medicaid regulations. The Hearing Bureau, headed by Division Chief Matt Langer, drafts those rules. Weintraub reviews the draft rules pertaining to program divisions to ascertain whether the rules comply with the relevant statutes. In particular, Weintraub determines whether the rules conflict with any existing legislation or regulations. Connor testified that Weintraub exercises his independent judgment to determine whether there is a conflict. Further, he stated that if there is a conflict, Weintraub might suggest that the Department should add another provision or exception to the rule at issue.

Weintraub observed that there were problems with the proposed rules concerning vocational rehabilitation because some of them conflicted with Federal regulations. He discussed his ideas with Connor. They in turn discussed their ideas with Langer. Connor testified that rule making is a group effort of many attorneys within the OGC. However, Connor testified that Weintraub had influence on the rules and that “he’s been very helpful.”

In the future, Weintraub will be involved in revising or amending Department’s CILA rules and will help recraft them to ensure that the Department is in compliance with ObamaCare.

5. Application of Departmental Policies

Weintraub’s evaluation sets forth a number of objectives. One of those objectives provides that Weintraub should analyze, plan, research, and coordinate various factual, legal and administrative projects assigned by the Deputy General Counsel for the Division. Connor testified that, to this end, Weintraub analyzes and applies rules and policies of the Department. Specifically, Connor stated that Weintraub’s participation in rule-making and rule-revision falls under this objective.

²⁰ These two pieces of testimony are inconsistent with each other.

6. Representation of the Division in High-Level Confidential Meetings.

Another objective in Weintraub's evaluation provides that he should "represent legal services, particularly the Legal Division of Disabilities and Behavioral Health Services at internal high-level confidential meetings with top administrative, clinical, and programmatic executive staff."

Weintraub testified that he has never met with top administrative, clinical, and programmatic staff and that he does not attend many meetings anymore, given the personnel shortage. Instead, Connor asks the top administrative, clinical, and programmatic executive staff to identify any legal issues so that Weintraub or Connor may address them.

For example, when the acting head of the Department of Mental Health sought to vacate an order of commitment, he contacted Weintraub who informed Connor of the circumstances. In that case, the acting head determined that the committed individual could not safely be held in one of the Department's facilities. With Connor's approval, Weintraub forwarded the relevant information to the AG's office so that they could vacate the order.

7. High-level projects of critical importance to DHS

Another objective in Weintraub's evaluation provides that he should "conduct high-level confidential projects of critical importance to DHS as assigned by the Deputy General Counsel of the Division." Connor testified that such projects, referenced in the evaluation, are confidential because they involve decision-making in the Department or because they involve confidential patient data.

Weintraub testified that he could not think of any high-level confidential projects of critical importance to DHS that he had undertaken. However, he admitted that he attends meetings and has conversations with high-level individuals such as facility directors who make decisions that affect the clinical care provided by the Department. During these interactions, he imparts his advice. Weintraub does not usually consult Connor before dispensing this advice and only raises an issue with Connor if it has complex aspects. Under such circumstances, Weintraub tells Connor the advice he intends to provide to the facility directors. Connor testified that he agrees almost all the time with the course of action that Weintraub recommends.

Connor testified that Weintraub does not make critical decisions for the entire agency. However, he noted that Weintraub's recommendations or decisions concern the facilities and patient care, matters of critical importance to the agency.

8. Work concerning Clinical, Administrative and Program Support (OCAPS), Community Integrated Living Arrangement (CILA), and Trusts.

Weintraub's evaluation states that he "assumed many new responsibilities dealing with Office of Clinical, Administrative and Program Support (OCAPS) and the community providers issues under the Community Integrated Living Arrangement (CILA) certification process."

Weintraub has not dispensed any legal advice to OCAPS concerning their work. Further, OCAPS has not contacted Weintraub for legal advice. However, Connor has trained Weintraub on their regulations and their procedures. Weintraub no longer performs CILA-related duties. Connor testified that Weintraub might perform such work in the future.

9. Work with medical by-laws

Weintraub performs some work with medical by-laws. In one case, an individual from a DHS facility sought to suspend a doctor from service²¹ and asked Weintraub if the medical by-laws would support such action. Weintraub reviewed the by-laws and told Connor his understanding of them. Connor and Weintraub discussed the issue. Weintraub then conveyed the results of his discussion with Connor to his facility contact.

10. Future objectives

Weintraub's evaluation contains a future objective that he "prepare extensive legal training materials to be used in presentations for legal education throughout DHS either by Legal Services itself, or the various training bureaus." Weintraub testified that he has not yet been asked to prepare extensive legal material for use in legal education throughout DHS. He stated he currently does not train attorneys at DHS.

²¹ The facility learned that the doctor had criminal charges pending against him.

IV. Discussion and Analysis

a. Procedural Issues

The character of CMS's submissions to the Board did not deprive AFSCME of due process because those submissions adequately placed AFSCME on notice as to the basis of the designation.

Here, CMS's petition placed AFSCME on notice as to the basis of the petition because CMS indicated that it sought exclusion under Section 6.1(b)(5) of the Act and submitted position descriptions for the positions in question to support its designation. As such, CMS clearly sought exclusion based on the assertion that the positions authorize the holders with "significant and independent discretionary authority." Accordingly, AFSCME had notice as to grounds for the petition.

Notably, AFSCME received proper notice, even though CMS did not specify whether the nature of that authority was supervisory or quasi-managerial, because the CMS-104s describe the positions and express, with a checkbox, whether the positions in question are deemed supervisory or not. Accordingly, AFSCME had ample information from which to ascertain the basis for the proposed exclusion and properly proceeded to argue against both of them.

Thus, the character of CMS's submissions to the Board did not deprive AFSCME of due process.

b. Substantive Issues

i. Analytical framework and Relevant Tests

AFSCME has the burden to demonstrate that the designation is improperly made and the Board must follow Illinois case law pertaining to the traditional managerial test, where applicable, to evaluate a position's "significant and independent discretionary authority" under Section 6.1(b)(5) and (c)(i).

First, the Act states that the objector (here, AFSCME) bears the burden of proving that the designation is not proper because the Act provides that "any designation made by the Governor...shall be presumed to have been properly made." 5 ILCS 315/6.1 (2012). In this case, CMS designated this position under Section 6.1(b)(5) which provides that the position must "authorize an employee in that position to have significant and independent discretionary authority as an employee." 5 ILCS 315/6.1(b)(5) (2012). Thus, the burden is on the objector to

demonstrate that the designation is not proper and that the employer has not conferred significant discretionary authority upon that position.

Second, the Board must follow Illinois case law pertaining to the traditional managerial test, where applicable, to evaluate a position's authority under Section 6.1(b)(5) and (c)(i) because the "significant and independent discretionary authority" inquiry substantially reflects the existing traditional managerial exclusion under Section 3(j) and the legislature intended the Board to apply Illinois case law to this analysis. The discussion below first addresses the nature of the tests and then addresses the applicability of Illinois case law.

Section 6.1(b)(5) of the Act provides that a position is designable if it "authorize[s] an employee in that position to have significant and independent discretionary authority as an employee."²² Section 6.1(c) establishes three tests to determine whether a position authorizes its holder with that authority. Section 6.1(c)(i) sets forth the first two tests while Section 6.1(c)(ii) sets forth a third. The parties stipulated that the issue in this case is whether the designated positions authorize the position holders with "significant and independent discretionary authority" within the meaning of Section 6.1(c)(i). Accordingly, the analysis below pertains only to the tests articulated in Section 6.1(c)(i).

The first test under Section 6.1(c)(i) is substantively similar to the traditional test for managerial exclusion articulated in Section 3(j). To illustrate, Section 6.1(c)(i) provides that a position authorizes an employee in that position with significant and independent discretionary authority if "the employee 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." 5 ILCS 315/6.1(c)(i) (2012). Similarly, Section 3(j) provides that a managerial employee is one who "is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices." 5 ILCS 315/3(j) (2012).

These definitions differ from each other in two primary respects, both of which indicate that the legislature intended the new definition to be broader than the traditional definition it echoes. First, the traditional definition contains a predominance element while the new definition does not. Second, the traditional definition requires the employee to be "charged with

²² Section 6.1 also sets forth three broad categories of designable positions. AFSCME does not dispute that the positions at issue fall within one of those categories. Accordingly, these are not discussed below.

the responsibility of directing the effectuation” of policies while the new definition merely requires that the employee be “charged with the effectuation” of policies. (emphasis added) Taken together, these differences indicate that the first test under 6.1(c)(i) was intended cover a wider swath of positions than the traditional test.

The second test under Section 6.1(c)(i) also relates to the traditional test for managerial exclusion because it reflects the manner in which the courts have expanded that test. In Dep’t of Cent. Mgmt. Serv./Illinois Commerce Com’n (“ICC”), the Appellate Court observed that the definition of a managerial employee in Section 3(j) is very similar to the definition of managerial employee in Yeshiva. Dep’t of Cent. Mgmt. Serv./Illinois Commerce Com’n v. Ill. Labor Rel. Bd. (“ICC”), 406 Ill. App. 766, 776 (4th Dist. 2010)(citing Nat’l Labor Rel. Bd. v. Yeshiva Univ., 444 U.S. 672, 683 (1980)). Further, the Court noted that the ILRB, like its federal counterpart, “incorporated ‘effective recommendations’ into its interpretation of the term ‘managerial employee.’” ICC, 406 Ill. App. at 776. Indeed, the Court emphasized that “the concept of effective recommendations...[set forth in Yeshiva] applies with equal force to the managerial exclusion under the Illinois statute.” Id. In light of this analysis, the second test under Section 6.1(c)(i) is similar to the expanded traditional managerial test because it is virtually identical to the statement of law in Yeshiva which the Illinois Appellate Court and the Illinois Supreme Court have incorporated into the traditional managerial test. Id. (quoting Chief Judge of the Sixteenth Judicial Circuit v. Ill. State Labor Rel. Bd., 178 Ill. 2d 333, 339–40 (1997)). To illustrate, the U.S. Supreme Court in Yeshiva held that an employee may be excluded as managerial if “he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” Yeshiva Univ., 444 U.S. at 683. Similarly, the second test under Section 6.1(c)(i) states that a position authorizes an employee with significant discretionary authority if the employee “represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.”

In light of this precedent, the Board must apply Illinois case law addressing the traditional managerial exclusion to an analysis of a position’s executive/management functions and a position’s recommendations under Section 6.1(c)(i) because it is applicable both substantively and under the plain language of the Act. Substantively, Illinois precedent is applicable to evaluate a position’s executive and management functions because the courts make

an identical qualitative assessment of a position's duties when applying the traditional managerial test. See Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., 2011 IL App (4th) 090966 ¶ 10. Notably, the Court's quantitative assessment under the traditional test, applied pursuant to the predominance requirement, is easily separable from the qualitative assessment and therefore does not cloud the issue. Id.

Similarly, Illinois precedent is applicable to evaluate the nature of a position's recommendation because the test in Section 6.1(c)(i) merely codifies relevant aspects of existing case law pertaining to the traditional managerial exclusion. See Dep't of Cent. Mgmt. Serv./Ill. Commerce Com'n, 406 Ill. App. 3d at 775 (an advisory employee who makes effective recommendations can be managerial within the meaning of the Act, quoting Yeshiva). As the Employer notes, the second test under Section 6.1(c)(i) does not require the employee to be "engaged in executive or management functions." Nevertheless, the Illinois Appellate Court's analysis concerning effective recommendation is applicable here because the court's reasoning in those cases is separable from its analysis of the remaining prongs of the traditional test.

Thus, AFSCME has the burden to prove the designation is improperly made and the Board must consider Illinois case law with respect to traditional managerial exclusion, where applicable, to assess a position's "significant and independent discretionary authority" under Section 6.1(b)(5) and (c)(i).

- ii. Authority of the positions as defined under Section 6.1(b)(5) and (c)(i)
 - a. 37015-10-17-000-10-01 – Vacant

CMS's designation of this position is proper because the designation is presumed to be properly made, the position description supports that conclusion, and AFSCME has introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority, within the meaning of Section 6.1(c)(i).

First, the position description supports CMS's assertion that the position possesses the requisite authority because it states that the position analyzes, drafts, and reviews proposed legislation and administrative rules for the Office of Legal Services. Dep't of Cent. Mgmt. Serv. (Dep't of Healthcare and Family Serv.) v. Ill. Labor Rel. Bd ("DHFS"), 388 Ill. App. 3d 319, 332 (4th Dist. 2009) (finding those functions managerial, but holding that the predominance

element was not satisfied, and noting that superiors substantively reviewed all draft rules and legislation); Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n), 29 PERI ¶ 129 (IL LRB-SP 2013) (attorney, Favoriti, who helped draft proposed rules and amendments to legislation was engaged in executive and management functions).

Second, the position description does not expressly limit the position holder's discretion or independent authority, even though it states that the position holder works under the direction of the General Counsel for the Office of Legal Services. In fact, there is no evidence that the General Counsel substantively approves all draft rules and legislation or that the General Counsel fails to approve the proposed rules or legislation as a matter of course. But see, DHFS, 388 Ill. App. 3d at 332 (attorneys not managerial under the traditional test where superiors reviewed any rule or legislation they drafted and where there was no evidence that the superiors approved the proposed rule or legislation as a matter of course without substantive review).

Contrary to AFSCME's assertion, under the analysis set forth above, the position has the requisite authority, even though the holder also performs traditional legal work, because the position likewise performs some executive and management functions. Indeed, the position holder's exercise of independent professional judgment supports, rather than undermines, a finding of managerial authority because an employee's exercise of "professional expertise is indispensable to the formulation and implementation of [the employer's] policy." State of Ill., Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n), 29 PERI ¶ 76 (IL LRB-SP 2012) (citing, N.L.R.B. v. Yeshiva Univ., 444 U.S. 672, 689-690 (1980)("The Board nevertheless insists that these decisions are not managerial because they require the exercise of independent professional judgment. We are not persuaded by this argument.")). Notably, this argument applies with equal force to the remaining positions discussed below and, in the interests of brevity, will not be repeated.

Consequently, in light of these assigned duties, the statutory presumption, and the absence of evidence to the contrary, the Board must conclude that the character of the position holder's authority satisfies the requirements of Section 6.1(b)(5) and (c)(i) and that the position is properly designated.

1. 37015-10-17-400-14-01 – Robert Grindle

CMS’s designation of this position is proper because the designation is presumed to be properly made, the position description supports that conclusion, and AFSCME has introduced no evidence to suggest that CMS has limited the position holder’s discretion or independent authority, within the meaning of Section 6.1(c)(i).

First, the position description supports CMS’s assertion that the position possesses the requisite authority to qualify for designation because it states that the position develops and revises policies concerning collection and reimbursement of the Department’s accounts receivable. In this respect, the position is responsible both for developing new policies and for maintaining the solvency of the department, akin to those employees who prepare a department’s budget or those who ensure to an agency’s overall legal “health.” DHFS, 388 Ill. App. at 330 (preparing the budget and ensuring effective and efficient operations of the department are managerial functions); State of Ill., Dep’t of Cent. Mgmt. Serv. (Ill. Commerce Comm’n), 29 PERI ¶ 129 (IL LRB-SP 2013) (employee who recommended a course of action which broadly protected his employer from liability and protected the agency’s overall legal “health” was both engaged in management and executive functions and directed the effectuation of management policies and practices).

Second, the position description does not expressly limit the position holder’s discretion or independent authority, even though it states that the position holder works under the administrative direction and supervision of the Deputy General Counsel. Indeed, there is no evidence that the Deputy substantively reviews the position holder’s work, with respect to the above-referenced managerial/executive tasks, or fails to accept the holder’s recommendations on relevant issues as a matter of course.

In light of these assigned duties, the statutory presumption, and the absence of evidence to the contrary, the Board must conclude that the position likewise effectuates management policies, that the holder’s authority satisfies the requirements of Section 6.1(b)(5) and (c)(i), and that the designation is accordingly proper.

2. 37015-10-17-300-12-01 - Scott Gertz

CMS’s designation of this position is proper because the designation is presumed to be properly made, the position description supports that conclusion, and AFSCME has introduced

no evidence to suggest that CMS has limited the position holder's discretion or independent authority, within the meaning of Section 6.1(c)(i).

First, the position description supports CMS's assertion that the position has the requisite authority to qualify for designation because it states that the position drafts proposed legislation which affects the department and drafts and edits policy directives and rules applicable to facility and Central Office operations concerning recipient abuse and neglect policy for the Division of Mental Health and Developmental Disabilities management staff. See DHFS, 388 Ill. App. at 332 (drafting rules and policies is an executive and management function which may satisfy the managerial exclusion; finding predominance element was not met).

Second, the position description does not expressly limit the position holder's discretion or independent authority. Indeed, the position description suggest otherwise because it provides generally that Gertz works under only under "administrative direction."

Contrary to AFSCME's assertion, it is immaterial that Gertz holds the same position number as another employee who claims not to perform the duties set forth in the job description because there is no evidence to suggest that the job description is inaccurate with respect to Gertz's duties. Indeed, AFSCME never submitted a statement from Gertz to that effect.²³²⁴

Consequently, in light of these assigned duties, the statutory presumption, and the absence of evidence to the contrary, I must conclude that the character of the position's authority satisfies the requirements of Section 6.1(b)(5) and (c)(i) and that the position is properly designated.

ii. 37015-10-17-700-12-01 (Vacant); 37015-10-17-700-13-01 (Vacant)

CMS's designation of these positions is proper because the designation is presumed to be properly made, the position descriptions support that conclusion, and AFSCME has introduced no evidence to suggest that CMS has limited the position holders' discretion or independent authority, within the meaning of Section 6.1(c)(i).

²³ Notably, AFSCME did not raise issues for hearing on this position because it did not point out, until hearing, that Gertz and Weintraub held the same position number and that their positions should be treated similarly on that basis.

²⁴ Notably, at hearing, witnesses testified that Gertz and Weintraub perform different work and that Gertz, unlike Weintraub performs tasks for two separate Divisions within the Office of the General Counsel.

First, the position descriptions support CMS's assertion that the positions possess the requisite authority to qualify for designation because they state that the positions have authority to draft proposed legislation, amendments, resolutions, procedures, rules and regulations which impact the Department of Human Services. See DHFS, 388 Ill. App. 3d at 332 (drafting rules and policies is an executive and management function which may satisfy the managerial exclusion; finding employees were not managerial where they performed such work infrequently and where their superiors substantively reviewed it all); Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n), 29 PERI ¶ 129 (IL LRB-SP 2013) (drafting proposed rules and amendments to legislation impacting the agency renders employee managerial, even when the employee performs other purely professional, legal tasks).

Further, they advise the General Counsel as to whether the department should settle cases, explore non-monetary settlement, or pursue alternatives to settlement and there is no evidence that their recommendations are not effective. Attorneys who effectively recommend settlement of cases on behalf of their agencies engage in executive and management functions to effectuate the employer's policies. See DHFS, 388 Ill. App. 3d at 330 (attorneys did not decide the extent to which the employer's policy objectives would be achieved when they had no independent authority to settle case thus were not managerial) and ICC, 406 Ill. App. 3d at 777 ("exclusivity in the implementation of management policy is not a requirement" and that an employee maybe be deemed managerial as long as he makes recommendations on policy actions which are almost always accepted by the recommending employee's superiors).

Second, the position descriptions do not expressly limit the position holder's discretion or independent authority. Here, in the absence of evidence (or even an assertion) that the General Counsel does not always accept the position holders' recommendations on settlement, the Board must assume that he does because the designation is presumed proper.

Consequently, in light of these assigned duties, the statutory presumption, and the absence of evidence to the contrary, the Board must conclude that the character of the position holders' authority satisfies the requirements of Section 6.1(b)(5) and (c)(i) and that the positions are properly designated.

iii. 37015-10-17-600-12-88 (C. Thomas Helsel)

CMS's designation of this position is proper because the designation is presumed to be properly made, the position description supports that conclusion, and AFSCME has introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority, within the meaning of Section 6.1(c)(i).

First, the position description supports CMS's assertion that the position has the requisite authority to qualify for designation because it states that the position "regularly advises the Deputy General Counsel and General Counsel on all activities and of emergency legal issues" and therefore has authority to exercise power and influence over managerial decision-making. In Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n), the Board found an employee managerial on this basis under the traditional, more narrow managerial exclusion. This rationale applies equally to the first test articulated in Section 6.1(c) because that test is broader and more inclusive. Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n) 29 PERI ¶ 129 (IL LRB-SP 2013) (finding employee managerial on this basis when she flagged matters for the agency's attention which she deemed important, even though her recommendations regarding what actions to take were not necessarily followed)(citing ICC, 406 Ill. App. 3d at 776-77)). Here, the position's broad authority to provide legal advice on all Department activities including those that arise during an emergency, suggests that the position holder acts as a gatekeeper who looks for matters that are important from a legal perspective and addresses them to protect the agency's interests in an overarching manner, both with respect to internal matters and those that affect the direction of the department as a whole. As such, the position description suggests that the position's failure to raise or address certain issues might leave the Department unaware of them and might render the Department unable to address them. In this respect, CMS has authorized the employee in this position to have significant and independent discretionary authority because the position holder has power and influence over managerial decision-making. Id.

Second, the position description does not expressly limit the position holder's discretion or independent authority, even though it states that the position holder works under the direction of the Deputy General Counsel of Legal Services for Sexually Violent Persons Program and Forensics. In fact, there is no evidence that the Deputy substantively approves all draft rules and legislation or that the General Counsel fails to approve the proposed rules or legislation as a

matter of course.

Consequently, in light of these assigned duties, the statutory presumption, and the absence of evidence to the contrary, the Board must conclude that the character of the position holder's authority satisfies the requirements of Section 6.1(b)(5) and (c)(i) and that the position is properly designated.

iv. 37015-10-17-600-11-01 – Vacant

CMS's designation of this positions is proper because the designation is presumed to be properly made, the position description supports that conclusion, and AFSCME has introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority, within the meaning of Section 6.1(c)(i).

First, the position description supports CMS's assertion that the position has the requisite authority to qualify for designation because it states that the position assists in drafting laws, rules, and legislation, and policies concerning TDF. DHFS, 388 Ill. App. 3d at 332 (finding those functions managerial, but holding that the predominance element was not satisfied, and noting also that superiors substantively reviewed all draft rules and legislation); Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n), 29 PERI ¶ 129 (IL LRB-SP 2013) (attorney, Favoriti, who helped draft proposed rules and amendments to legislation was engaged in executive and management functions). Second, the position description does not expressly limit the position holder's discretion or independent authority. Although it states that the position holder works under the direction of the Deputy General Counsel for Treatment and Detention Facility and Forensics, there is no evidence that the Deputy substantively approves all draft rules and legislation or that the General Counsel fails to approve the proposed rules or legislation as a matter of course. But see, DHFS, 388 Ill. App. 3d at 332 (attorneys not managerial under the traditional test where superiors reviewed any rule or legislation they drafted and where there was no evidence that the superiors approved the proposed rule or legislation as a matter of course without substantive review).

Second, the position description does not expressly limit the position holder's discretion or independent authority. Although it states that the position holder works under the direction of the Deputy General Counsel for Treatment and Detention Facility and Forensics, there is no evidence that the Deputy substantively reviews the position holder's work, with respect to the

above-referenced managerial/executive tasks, or fails to accept the holder's recommendations on relevant issues as a matter of course.

Consequently, in light of these assigned duties, the statutory presumption, and the absence of evidence to the contrary, the Board must conclude that the character of the position holder's authority satisfies the requirements of Section 6.1(b)(5) and (c)(i) and that the position is properly designated.

b. Dan Rosman - 37015-10-17-700-13-01

CMS's designation of this position is proper because the designation is presumed to be properly made and the evidence presented at hearing supports this conclusion because it shows that its holder, Rosman, is engaged in executive and management functions of a State agency and is charged with the effectuation of management policies and practices of a State agency.

First, Rosman is engaged in executive and management functions when he effectively recommends changes in Department policy implicated by litigation and raised in settlement. The Court in Dep't of Healthcare & Family Servs. v. Ill. Labor Relations Bd. ("DHFS") stated that the "authority to settle a case"²⁵ and the formulation of policy constitute executive or management functions. DHFS, 388 Ill. App. 3d at 330. When one of the Department's policies becomes the subject of litigation, Rosman determines whether it is more favorable to change that policy or to litigate the case. In reaching that decision, Rosman exercises independent judgment because he not only considers the potential damages and the Department's prospective success in litigation, but also necessarily considers the value of the existing policy in light of the Department's overall functions. Accordingly, Rosman recommends that the Department should change the policy if he determines that the value of settling the case outweighs the value of maintaining the existing policy. Thus, Rosman engages in executive and management functions.

Second, Rosman is charged with the effectuation of management policies and practices because the designation is presumed proper and, in the absence of evidence to the contrary, the Board must presume that Rosman's recommendations influence the Department's policies. In fact, the Department has accepted Rosman's policy recommendations in at least one case.

²⁵ The Court referenced "independent authority" to settle cases; however, "exclusivity in the implementation of management policy is not a requirement" under Act. ICC, 406 Ill. App. 3d at 777 (effective recommendations are those that are influential.)

Further, Maine testified that the Department has not yet decided on several similar recommendations presented by Rosman. Finally, there is no evidence to suggest that the Department has ever rejected Rosman's recommendations on policy changes implicated in settlement. Notably, the critical review performed by Maine and Dunn of Rosman's decision memos does not alter the analysis set forth above. See ICC, 406 Ill. App. 3d at 777 (The test to determine whether a recommendation is effective is not the presence or absence of review, but rather the "effectiveness, power, or influence of the recommendation). Consequently, Rosman's recommendations influence departmental policy and are therefore effective. But see DHFS, 388 Ill. App. 3d at 329 (attorneys wrote settlement decision memos but were not found to be managerial; there was no indication that attorneys' decision memos implicated, affected, or altered Departmental policy).

Thus the character of Rosman's authority satisfies the requirements of Section 6.1(b)(5) and (c)(i) and his position is properly designated. Notably, since this single task satisfies the criteria under Section 6.1(b)(5) and (c)(i) it is unnecessary to analyze Rosman's remaining functions.

c. Mark Weintraub - 37015-10-17-300-12-01

CMS's designation of this position is proper because the designation is presumed to be properly made and the evidence presented at hearing supports this conclusion because it shows that its holder, Weintraub, is engaged in executive and management functions of a State agency and is charged with the effectuation of management policies and practices of a State agency.

First, Weintraub is engaged in executive and management functions because he reviews the Department's draft rules and recommends changes. See ICC, 406 Ill. App. 3d at 774 (first component of the traditional test references the nature of the employees' work). The Court and the Board have held that drafting rules and policies is an executive and management function. Secretary of State v. Ill. Labor Rel. Bd., State Panel, 2012 IL App (4th) 111075 ¶ 122 (establishing procedures for an agency constitutes a management function); DHFS, 388 Ill. App. 3d at 332 (drafting rules and policies is an executive and management function which may satisfy the managerial exclusion); Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n), 29 PERI ¶ 129 (IL LRB-SP 2013) (employee is engaged in executive and managerial functions when he drafts proposed rules and amendments to legislation affecting the department). By

extension, an employee's review of such draft rules is similarly executive and managerial where his input changes the rule or alters the agency's course of action because such a change constitutes the formulation of the agency's policy. DHFS, 388 Ill. App. 3d at 330 (formulating policy is an executive and management function).

Notably, Weintraub's review of the rules requires independent and significant discretion, rather than mere professional judgment, even though he initially assesses the rule in light of the statute to determine whether there is a conflict between the two. In fact, Weintraub does not merely identify a problem by rote, based on his legal knowledge or the application of a bright-line test, but advances a proposed solution to resolve the conflict, including but not limited to recommending that the Department expand the rule by adding another exception or provision.

Second, Weintraub's function in this regard similarly satisfies the second prong of the test because the evidence suggests that his authority extends beyond theorizing and into the realm of practice since it substantively influences the Department's rules. ICC, 406 Ill. App. 3d at 775. A managerial employee does not need final authority to effectuate policy; effective recommendation, control, or influence is the key.²⁶ Id.; State of Ill., Dep't of Cent. Mgmt. Servs. (Ill. Env't'l Protection Agency), 26 PERI ¶ 155 (IL LRB-SP 2011) (citing Chief Judge of the 16th Judicial Cir. v. Ill. Labor Relations Bd., 178 Ill. 2d 333, 339 (1997)). Here, Weintraub's supervisor Connor testified that Weintraub's suggestions to change the rules are influential and that Weintraub's input into the rules is "very helpful." The Board must presume that Weintraub's recommendations are effective in light of the presumption and in the absence of evidence that the Department has ever rejected Weintraub's recommendations.

Contrary to AFSCME's anticipated contention, it is immaterial that Connor characterized rule-making as a group effort because the appellate court, applying identical language in the traditional managerial test, held that an employee could satisfy that more restrictive exclusion even if he worked in conjunction with others. Dep't of Cent. Mgmt. Serv., 2011 IL App (4th) at ¶187. The same principle applies here, despite the mandate that position must have "independent" discretionary authority, because the legislature intended the 6.1(c)(i) test to be broader than the traditional managerial one applied by the court above.

²⁶ These cases address the question of whether employees "direct the effectuation of policy." As noted above, the legislature's decision to omit the word "direct" from Section 6.1(c)(i) indicates that any precedent applying the language of the traditional managerial exclusion should be applied more loosely in the designation context.

Finally, Weintraub’s position authorizes him with significant and independent discretionary authority even though his recommendations or decisions concern the legal aspects of the agency’s focus, with respect to the facilities and patient care. In fact, the Board has excluded employees under the traditional managerial test, even in the absence of a “tight fit” between the evidence and the statutory test when they “perform services enabling agencies to effectuate their programs rather than administer... the programs themselves.” State of Ill., Dep’t of Cent. Mgmt. Serv., 30 PERI ¶ 38 (IL LRB-SP 2013) (addressing IT employees). This statement is similarly applicable to attorneys in state government at issue here who likewise have the “authority to broadly affect one of the means” by which their agency effectively operates by developing the legal means through which the agency achieves its policy objectives. Id. (holding that employees who developed “the IT means” by which the agency achieved its policy objectives satisfied the narrower, traditional managerial test) (emphasis added).

Thus the character of Weintraub’s authority satisfies the requirements of Section 6.1(b)(5) and (c)(i) and his position is properly designated. Notably, since this single task satisfies the criteria under Section 6.1(b)(5) and (c)(i) it is unnecessary to analyze Weintraub’s remaining functions.

V. Conclusions of Law

The Governor’s designation in this case is properly made.

VI. Recommended Order

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

- 37015-10-17-521-60-02
- 37015-10-17-000-10-01
- 37015-10-17-300-12-01 Assistant General Counsel
- 37015-10-17-300-12-01 Assistant General Counsel
- 37015-10-17-300-14-01
- 37015-10-17-400-14-01 Assistant General Counsel
- 37015-10-17-521-30-01 Hearing Officer - Supervisor
- 37015-10-17-521-40-02 Hearing Officer - Supervisor

37015-10-17-521-50-02	Hearing Officer - Supervisor
37015-10-17-521-70-02	Hearing Officer - Supervisor
37015-10-17-600-11-01	
37015-10-17-600-12-88	Assistant General Counsel
37015-10-17-700-12-01	
37015-10-17-700-13-01	Assistant General Counsel
37015-10-17-700-13-01	
37015-10-76-111-10-01	Legal Liaison

VII. Exceptions

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,²⁷ parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, not 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. Exceptions must be filed by electronic mail 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 26th day of September, 2013

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

/s/ Anna Hamburg-Gal

**Anna Hamburg-Gal
Administrative Law Judge**

²⁷ Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>.