

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

State of Illinois, Department of Central)	
Management Services (Department of)	
Employment Security),)	
)	
Employer)	
)	
and)	Case No. S-DE-14-066
)	
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;

- 3) it must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 479 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), see 20 ILCS 415/4 through 4d (2012);
- 4) it must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
- 5) it must authorize an employee in that position to have “significant and independent discretionary authority as an employee” by which the Act means the employee is either
 - (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
 - (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. It also requires the Illinois Labor Relations Board to determine, in a manner consistent with due process, whether the designation comports with the requirements of Section 6.1, and to do so within 60 days.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

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.

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 seven Public Service Administrator Option 8L positions in the Department of Employment Security based on Section 6.1(b)(5) of the Act:

Office of Legal Counsel, General Counsel (vacant)	37015-44-07-110-10-01
Office of Legal Counsel, Legal Opinions (vacant)	37015-44-07-120-10-01
Office of Legal Counsel, Legal Opinions (Natalie Stegall)	37015-44-07-130-10-01
Office of Legal Counsel, Legal Opinions (vacant)	37015-44-07-140-10-01
Office of Legal Counsel, Legal Opinions (Jennifer Cohen)	37015-44-07-210-00-01
Appeals, Administrative Hearings (Stanley Cygan)	37015-44-08-110-00-01
Appeals, Benefit Appeals (Stephen Wilson)	37015-44-08-260-00-01

On September 9, 2013, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed timely objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules.² 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, I have determined that AFSCME has failed to raise an issue that would require a hearing. I find the designation to have been properly submitted and consistent with the requirements of Section 6.1 of the Act and consequently I recommend that the Executive Director certify the designation of the positions at issue in this matter as set out below and, to the extent necessary, amend any applicable certifications of exclusive representatives to eliminate the existing inclusion of these positions within any collective bargaining unit.

² On September 9, 2013, AFSCME filed a motion for an extension of time to file objections, from the close of business on September 9, 2013, to 11:59 p.m. on September 9, 2013. On September 9, 2013, the Board's General Counsel granted the motion.

I. PETITION AND OBJECTIONS

The petition designates seven positions at the Department of Employment Security for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act. The petition indicates that the positions qualify for designation under Section 6.1(b)(5) and are neither currently represented for the purposes of collective bargaining nor subject to an active petition for certification in a bargaining unit. In support of its petition, CMS provided position descriptions for each position, which include the position's duties and responsibilities, and a spreadsheet, which includes the State agency employing the position, the statutory category that serves as the basis for the exemption, whether the position is subject to an active representation petition, and the job duties as identified in the attached position description.

AFSCME objects to the designation arguing that CMS has failed to meet its burden of showing that the positions at issue have "significant and independent discretionary authority" as that term is used in Section 6.1(b)(5) and 6.1(c) of the Act. In addition, AFSCME argues that the designation does not comport with the due process requirement in Section 6.1 because the petition does not indicate whether the positions qualify for exclusion because the positions engage in executive and management functions, represent management interests, or qualify as supervisors.

AFSCME contends that the definition of "significant and independent discretionary authority" in Section 6.1(c) essentially follows the managerial standard developed by the National Labor Relations Board (NLRB) and the reviewing courts, and specifically adopts the NLRB definition of supervisor. AFSCME asserts that the Board should therefore use the NLRB standard in determining whether the positions qualify for exclusion under Section 6.1(b)(5).

Finally, AFSCME asserts that the positions qualify as "professional" and not "managerial." AFSCME maintains that the majority of the position descriptions describe the position as performing legal work and acting as a technical advisor performing legal research. AFSCME contends that Section 6.1 does not limit the ability of professional employees to be covered by the Act, professional employee is not a category for exclusion under Section 6.1, and thus the positions should not be excluded.

II. DISCUSSION

The designation comports with the requirements of Section 6.1 and AFSCME's objections do not overcome the presumption that the Governor's designation was properly made.

Section 6.1 states that a position is properly designable for exclusion if: (1) it has never been certified into a collective bargaining unit, and (2) it authorizes an employee in that position to have significant and independent discretionary authority as an employee. 5 ILCS 315/6.1 (2012). The Act presumes that any designation made by the Governor under Section 6.1 is properly made. 5 ILCS 315/6.1(d) (2012). Rule 1300.60(d)(2)(A) of the Board's Rules permits an administrative law judge to find that a designation is proper based solely on the information submitted to the Board in cases in which no objections sufficient to overcome this presumption are filed. 80 Ill. Admin. Code 1300.60(d)(2)(A).

Here, the petition indicates, and AFSCME does not contest, that the designated positions have never been certified into a bargaining unit, and are not subject to any pending petition for certification in a bargaining unit. AFSCME does contest however that CMS has failed to meet its burden of demonstrating that the positions authorize the employees to have "significant and independent discretionary authority."

As noted, Section 6.1(d) of the Act provides a presumption that governs designation petitions and clearly states that designations made under Section 6.1 shall be presumed to have been properly made. Thus, AFSCME, as the party objecting to the designation, has the burden of demonstrating that the designated position is not authorized to have significant and independent discretionary authority.

AFSCME contends that CMS has not indicated the specific basis for exclusion under Section 6.1(b)(5), and therefore excluding the positions would violate the notice requirement of due process. Section 6.1 requires that CMS submit the following information to the Board: (1) the job title and job duties of the employment position; (2) the name of the State employee currently in the employment position, if any; (3) the name of the State agency employing the public employee; and (4) the category under which the position qualifies for designation. As noted, CMS provided all of this information to the Board. CMS indicated that the positions qualify for designation under Section 6.1(b)(5). Thus, CMS provided a category under which the positions qualify for designation. The Act does not require CMS to indicate whether the position

is authorized to engage in executive and management functions, represents management interests, or qualifies as a supervisor. CMS indicated that the positions qualify for designation under Section 6.1(b)(5), and thus provided AFSCME with notice of the basis for exclusion.

A position is properly designable under Section 6.1(b)(5) if it authorizes an employee in that position to have “significant and independent discretionary authority as an employee.” AFSCME incorrectly asserts that the Board should apply the NLRB manager standard when examining whether the position engages in “executive and management functions” or “represents management interests.” Section 6.1 does not require the Board to apply the NLRB manager standard. Section 6.1 does in fact direct the Board to apply the NLRB standard when examining supervisory status under Section 6.1(b)(5)(ii). However, the Act does not direct the Board to apply the NLRB standard when examining managerial status under Section 6.1(b)(5)(i).

Section 6(c)(i) provides that an employee has “significant and independent discretionary authority” if he or she “is engaged in executive and management functions of a State agency and 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.” This definition sets forth two tests for determining if an employee is a “manager.” Thus, an employee is a manager if he or she (1) engages in executive and management functions and is charged with the effectuation of management policies and practices or (2) represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.

Section 6(c)(ii) provides that an employee has “significant and independent discretionary authority” if he or she “qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.” This definition sets forth one test for determining if an employee is a “supervisor.” The NLRA defines a supervisor as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such

authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. Section 152(11). Thus, employees are 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 Cmty. Care, Inc., 532 U.S. 706, 713 (2001), quoting NLRB v. Health Care & Ret. Corp. of America, 511 U.S. 571, 573-74 (1994); see also Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006).

In order to meet the burden to raise an issue that might overcome the presumption that the designation is proper, AFSCME must provide specific examples to negate all three tests, because even if one of the three tests is met, then AFSCME has not sufficiently raised an issue, and the designation is proper. In order to raise an issue that the positions at issue do not qualify as managerial, AFSCME must negate both managerial tests for the positions at issue. In order to raise an issue that the positions at issue do not qualify as supervisory, AFSCME must negate at least one of the three prongs of the supervisor test for the positions at issue.

AFSCME fails to raise an issue that might overcome the presumption that the designation is proper because AFSCME has not negated both managerial tests for each position at issue and has not negated at least one of three prongs of the supervisor test for each position at issue. AFSCME did not provide specific examples that demonstrate that the positions at issue do not qualify for exclusion under the managerial tests or the supervisory test. Thus, AFSCME has failed to raise an issue that overcomes the presumption that the designation of the positions is proper under Section 6.1.

Nonetheless, AFSCME correctly notes that Section 6.1 does not provide a specific exclusion for “professional” employees. However, this argument fails specifically because Section 6.1 does not include any language distinguishing “managerial” employees from “professional” employees.

AFSCME does not contest that the position descriptions accurately describe the job duties and responsibilities of the positions, or that the incumbent employees actually perform the duties described in the position descriptions. Since AFSCME did not provide evidence that contradicts the positions’ job duties and responsibilities, AFSCME has not overcome the

presumption that the designation is proper. As such, there is no evidence that the positions do not have significant independent and discretionary authority when performing the tasks set forth in the position descriptions. Therefore, I recommend the Board find the designation proper.

III. CONCLUSION OF LAW

The Governor's designation in this case was properly made.

IV. RECOMMENDED ORDER

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

Office of Legal Counsel, General Counsel (vacant)	37015-44-07-110-10-01
Office of Legal Counsel, Legal Opinions (vacant)	37015-44-07-120-10-01
Office of Legal Counsel, Legal Opinions (Natalie Stegall)	37015-44-07-130-10-01
Office of Legal Counsel, Legal Opinions (vacant)	37015-44-07-140-10-01
Office of Legal Counsel, Legal Opinions (Jennifer Cohen)	37015-44-07-210-00-01
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V. EXCEPTIONS

Pursuant to Section 1300.90 and Section 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300,³ parties may file exceptions to the Administration Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than three days after service of the recommended decision and order. All exceptions shall be filed and served in accordance with Section 1300.90 of the Board's Rules. Exceptions must be filed by electronic mail sent to ILRB.Filing@Illinois.gov. Each party shall serve its exception on the other parties. If the original exceptions are withdrawn, then all subsequent exceptions are moot.

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

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 30th day of September, 2013

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

/s/ Michelle Owen

**Michelle Owen
Administrative Law Judge**