

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

State of Illinois, Department of Central Management Services,	)	
	)	
Employer	)	
	)	
and	)	Case No. S-DE-14-074
	)	
American Federation of State, County and Municipal Employees, Council 31,	)	
	)	
Labor Organization-Objector	)	
	)	

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

**I. BACKGROUND**

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

- 1) the position must authorize an employee in the position to act as a legislative liaison;
- 2) the position 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) the position 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) the position 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) the position 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.<sup>1</sup>

As noted, Public Act 97-1172 and Section 6.1 of the Illinois Public Labor Relations Act became effective on April 5, 2013, and allow the Governor 365 days from that date to make such designations. The Board promulgated emergency rules to effectuate Section 6.1, which became effective on April 22, 2013, 37 Ill. Reg. 5901 (May 3, 2013), and the Board promulgated permanent rules for the same purpose which became effective on August 23, 2013, 37 Ill. Reg. 14,070 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board’s Rules and Regulations, 80 Ill. Admin. Code Part 1300.

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<sup>1</sup> 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 here.

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 6, 2013, 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. Based on my review of the designations, the documents submitted as part of the designation, and the objections, I find that 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 any existing inclusion of these positions within any collective bargaining unit.

The following position at issue is classified as a Public Service Administrator (PSA) Option 2, at the Illinois State Police:

37015-21-00-93-10-01          Geist, Carol          Budget Analyst

AFSCME objects to the designation of the sole position at issue.

CMS's designation petition indicates that the positions at issue qualify for designation under Section 6.1(b)(5) of the Act. CMS also filed two sets of supporting documents, CMS-104 position description forms and a summary spreadsheet for each position. The position description form states that it is a "complete, current and accurate statement of position[']s essential functions." The summary spreadsheet identifies the following information for the designated position: position number, name of incumbent, position title, whether the position is a term appointment, whether the position is Rutan exempt, the e-mail address of the incumbent in the position, the statutory category that serves as the basis of the exemption, whether the position is subject to an active representation petition with the petition number, and the job duties as identified in the attached position description.

**Case No. S-RC-07-048**

The position at issue was subject to the representation petition filed in Case No. S-RC-07-048. I am taking judicial notice of the following information, any documents referenced are

listed in the footnotes and Appendix of this RDO, and physical copies are included in the record of this case, S-DE-14-074:

In October 2006, AFSCME filed a majority interest representation petition seeking to include all PSA, Option 2s into existing bargaining unit RC-62. Ill. Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., State Panel, 2011 IL App (4th) 090966.<sup>2</sup> CMS objected to this representation petition, and argued that over 130 of the PSA Option 2s, working at over 10 state agencies should be excluded from the bargaining unit because their status was supervisory, managerial, or confidential employees as defined by Section 3 of the Act. Id. ¶ 6. Relevant to the instant case, CMS argued that Budget Analyst for the Illinois State Police, Lee Wright, was confidential as defined by Section 3(c) of the Act, and should be excluded from the bargaining unit. Id. ¶ 11. In November 2009, the Board issued a decision holding that CMS had failed to raise a question of fact or law with regard to the status of 92 of the employees, including Wright. Id. ¶ 13. Since the Board held that there was no issue of fact or law, a hearing was not required and the 92 employees were included in the bargaining unit. Id. ¶ 13<sup>3</sup>

CMS appealed the Board's decision, arguing that the Board erred in denying it an oral hearing, and specific to this matter, erred in concluding that Wright was not confidential. Id. ¶ 19. The Appellate Court reversed the Board's ruling regarding 37 of the 92 employees, and remanded the case for a hearing before the Board. Id. ¶ 226. The Court ruled that a sufficient question of law existed as to whether Wright was confidential as defined by Section 3(c) of the Act.<sup>4</sup> Id. ¶ 221. The Court noted that it was CMS's burden to provide sufficient information to require an oral hearing, and that the Board erred in determining that CMS had not met this burden regarding Wright's status as a confidential employee. Id. ¶ 121.<sup>5</sup>

A hearing was scheduled for the fall of 2012, by which time Carol Geist held the position of Budget Analyst for the Illinois State Police. On December 14, 2012, Carol Rakers, the Chief Budget Officer of the Illinois State Police testified regarding Geist's status as a confidential employee. To date there have been five days of testimony, regarding the 37 positions at issue in

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<sup>2</sup> See Appendix.

<sup>3</sup> See Appendix, Certification of Representative.

<sup>4</sup> Section 3(c) defines confidential employees, as employees who "in the regular course of his or her duties, assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations or who, in the regular course of his or her duties, has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies."

<sup>5</sup> Consequently the Board revoked the certification of the 37 employees pending the outcome of the hearing. See Appendix, Correct Revocation of Certification of Representative.

Case No. S-RC-07-048, but the record remains open. On March 22, 2013, the Board's General Counsel granted a joint motion to hold this case in abeyance.<sup>6</sup> Since, the Board has not issued a decision in this matter, no legal or factual determinations have been made. I will only take notice of the contents of the hearing as referenced by AFSCME if necessary to address any objections.

## **II. ISSUES AND CONTENTIONS**

In generally objecting to the designation of Geist's employment position, AFSCME argues that it has been denied due process because the Governor filed designations for over 1,000 employment positions within one week, because CMS provided a lack of information in support of this designation petition, because the Board failed to provide pre-objection discovery, because there was a time lapse between AFSCME filing a representation petition and CMS filing this designation petition, and because the Board denied AFSCME sufficient additional time to file objections. Also, in generally objecting to this designation, AFSCME argues that CMS-104 position descriptions alone are insufficient to determine whether this designation is proper because CMS has not demonstrated that the CMS-104's are accurate, that the duties listed are only "possible" duties, and that CMS has previously testified to the inaccuracy of the position descriptions.

AFSCME specifically argues that Geist is neither a manager nor a supervisor because in the representation hearing for Case No. S-RC-07-048 the only issue was whether Geist was a confidential employee. AFSCME further argues that Geist is not a manager because there is no evidence that she has been authorized to exercise independent discretion, and that she is not a supervisor because the definition requires that she exercise her supervisory authority, and she has no subordinates.

## **III. DISCUSSION AND ANALYSIS**

AFSCME's arguments that it was denied due process, that the CMS-104 position descriptions alone are insufficient to determine whether designations are proper, that CMS is barred from arguing that Geist is a supervisor or a manager because it did not raise these issues at the representation hearing for Case No. S-RC-07-048, that Geist is not a manager because there

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<sup>6</sup> See Appendix.

is no evidence that she been authorized to exercise independent judgment, and that that Geist is not a supervisor because she does not exercise her authority, all fail to raise an issue that might overcome the presumption that Geist's employment position is designated properly under Section 6.1 of the Act.

#### **A. Due Process**

AFSCME was not denied due process: when the Governor filed designations for over 1,000 employment positions within one week, when CMS allegedly provided a lack of information in support of this designation petition, when the Board failed to provide pre-objection discovery, when there was a time lapse between AFSCME filing a representation petition and CMS filing this designation petition, or when the Board's General Counsel denied AFSCME's request to extend the due date to file objections to September 17, 2013.

As an administrative agency, the Board was created to carry out the Act's purpose, and the Board is bound by the provisions of the Act. See 5 ILCS 315/5 (2012). The Act states that the Board's procedures for determining whether these designations are proper must be consistent with due process. 5 ILCS 315/6.1 (2012). The purpose of procedural due process is to minimize error. See East St. Louis Fed'n of Teachers, Local 1220 v. East St Louis School Dist. No. 189 Financial Oversight Panel, 178 Ill. 2d 399, 419-20 (1997). Notice and an opportunity to be heard are necessary principles of procedural due process. Id.; Segal v. Dep't of Ins., 404 Ill. App. 3d 998, 1002 (1st Dist. 2010) citing People ex rel. Ill. Commerce Comm'n v. Operator Commun., Inc., 281 Ill. App. 3d 297, 302 (1st Dist. 1996). Notice must be reasonably calculated "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Segal, 404 Ill. App. 3d at 1002, citing Hwang v. Dep't of Public Aid, 333 Ill. App. 3d 698, 707 (1st Dist. 2002).

Administrative agencies do not have the authority to question the validity of the statutes under which they were created. See Goodman v. Ward, 241 Ill. 2d 398, 411 (2011); see also Metropolitan Alliance of Police, Coal City Police Chapter No. 186, No. 6 v. Ill. State Labor Rel. Bd., 299 Ill. App. 3d 377, 379 (3rd Dist. 1998). In order to process these designations the Board added Part 1300 to its Rules and Regulations, which details the regulations the Governor, the Board and any objectors must abide by when the Governor files such designation petitions. See 80 Ill. Admin. Code Part 1300. When an administrative agency has adopted rules and regulations under its statutory authority for carrying out its duties, the agency is bound by those

rules and regulations and cannot arbitrarily disregard them. Springwood Assoc. v. Health Facilities Planning Bd. 269 Ill. App. 3d 944, 948 (4th Dist. 1995) citing Union Electric Co. v. Dep't of Revenue, 136 Ill. 2d 385, 391 (1990). Administrative rules have the force and effect of law and are presumed valid. People v. Molnar, 222 Ill. 2d 495, 508, (2006); Dep't of Cent. Mgmt. Servs., 406 Ill. App. 3d 766, 771 (4th Dist. 2011).

As an administrative agency the Board is bound to follow the Act and the Board's Rules and Regulations. The only issue is whether these objections raise an issue of fact or law that might overcome the presumption that the designations of the employment positions are consistent with Section 6.1 of the Act. Whether the Board's rules comply with due process is not within my limited scope of authority. With this in mind, I will now address the basis for AFSCME's objection that it has been denied due process.

**i. Governor filed petitions designating over 1,000 employees within one week**

AFSCME was not denied due process when the Governor designated over 1,000 employee positions as exempt from the collective bargaining provisions of Section 6 of the Act within one week.

Section 6.1 of the Act limits the number of designations and the time in which the Governor has to file them. The Act allows the Governor to designate up to 3,580 employee positions as exempt from the collective bargaining provisions of Section 6 of the Act between April 5, 2013 and April 5, 2014. The Act limits the Governor in the number of positions he can designate and the amount of time he has to make those designations, but the Act does not set a limit on the amount of positions in each designation petition, or require the Governor to spread out the designation petitions over the course of the one-year period. Thus the Act does not prohibit the Governor from filing designation petitions containing over 1,000 employment positions within one week. Therefore, AFSCME was not denied due process when the Governor designated over 1,000 employees as exempt for the collective bargaining provisions of Section 6 of the Act in less than one week.

**ii. lack of information**

AFSCME was not denied due process based on the designation petition's alleged lack of information.

The Act states that in order to properly designate employment positions under Section 6.1 of the Act, the State must provide 1) the employment position's job title, 2) the employment

position's job duties, 3) the name of the incumbent employee, 4) the name of State agency employing the public employee, and 5) the category under which the position qualifies for designation. 5 ILCS 315/6.1(b) (2012).

CMS provided the information required to properly designate a position under Section 6.1 of the Act. CMS submitted the CMS-104 position descriptions for Geist's employment position, which meet the first requirement that CMS identify the employment positions' job title because the position description identifies the position title as Public Service Administrator. The position description also meets the second requirement, that CMS identify the position's job duties, because the position description is the "complete, current and accurate statement of position[']s essential functions." The summary spreadsheet CMS filed with the designation petition provides the information necessary to meet the third, fourth, and fifth requirements of Section 6.1, in that it identifies Geist as the incumbent of the position at issue, the agency employing the public employee is identified as the State Police, and the category under which the position qualifies for designation is identified as 6.1(b)(5). Since CMS provided the required information, the designation is presumed proper per Section 6.1(d) of the Act.

Under Section 6.1(b)(5) a position qualifies as exempt when it possesses "significant and independent discretionary authority." The CMS-104 position description is the "complete, current and accurate statement of position[']s essential functions." The requisite authority would be granted in the position descriptions listed job duties. Here, the relevant information is the job duties, and the CMS-104 position description states the job duties of Geist's employment position, thus the State did not provide a lack of information. Therefore AFSCME was not denied due process.

### **iii. lack of procedure to obtain additional information**

AFSCME was not denied due process by the application of the Board's administrative rules which are silent as to pre-objection discovery.

AFSCME's objection that the Act and the Board's Rules lack any procedure to obtain additional information is beyond my authority to review. As stated above, the Board's function is to interpret and implement the Act. The Act and the Rules are both silent as to a procedure to obtain additional information prior to filing objections to the gubernatorial designation, therefore the Board is not required to provide a method.

As noted above, the provided position descriptions are the “complete, current and accurate statement of position[’s] essential functions.” Since the Rules and the Act are silent to pre-objection discovery, and AFSCME has not demonstrated how a procedure for additional discovery prior to filing objections in this case would lead to other relevant information, the Board is not required to provide a method for such discovery. Therefore, AFSCME was not denied due process by the application of the Board’s administrative rules which do not specify a method to obtain additional information prior to filing objections.

**iv. time lapse between AFSCME filing a representation petition and CMS filing this designation petition**

The time lapse between AFSCME filing a representation petition and CMS filing this designation petition does not support AFSCME’s contention that it has been denied due process.

Section 6.1 of the Act establishes three categories of positions that can be designated based on the status of the representation petition. These categories are: 1) positions that were certified into bargaining units on or after December 2, 2008, 2) positions that were subject to pending representation petitions when Section 6.1 was added to the Act on April 5, 2013, and 3) positions that have never been certified into a collective bargaining unit. The Act requires that the Governor make any designations within 365 days from April 5, 2013, thus the Governor can make designations through April 4, 2014. Under the first category, a position that was certified into a bargaining unit up to approximately five years before the effective date of the Act is eligible to be designated under Section 6.1. In order to be certified the union must first have filed a representation petition. Given this time frame, it is evident the legislature contemplated extensive periods of time between a union filing a representation petition and the Governor filing a designation petition involving the same group of employment positions.

Under the second category, a position within any pending petition is eligible for designation. Given that the legislature contemplated a time frame of over five years between when a certified representation petition was first filed and when the gubernatorial designation was filed, it can be inferred that the absence of a time frame between when a representation petition that remains pending was filed, and when a gubernatorial designation is filed is an intentional omission. Also, because AFSCME has not explained how such a time lapse denies it due process, I find this argument unpersuasive. Therefore, AFSCME was not denied due process because of the time lapse between AFSCME’s last filed representation petition and CMS’s filing of this designation petition.

**v. General Counsel's denial of "sufficient" additional time**

AFSCME was not denied due process when the Board's General Counsel denied AFSCME's request to extend the due date to submit objections to September 17, 2013.

Section 6.1(b)(5) provides "within 60 days after the Governor make a designation under this Section, the Board shall determine, in a manner that is consistent with the requirements of due process, whether the designation comports with the requirements of this Section." Section 1300.60(a)(3) of the Board Rules and Procedures provides that "the collective bargaining representative or incumbent employee shall have 10 days from the date of service of the designation to object." See 80 Ill. Admin. Code 1300.60. As an administrative rule, the Board's time limit in which to object to the designation petition is presumed valid.

Here AFSCME filed motions requesting extensions of time to file objections. AFSCME requested that the due date to file objections be extended from September 3, 2013 to September 17, 2013. The Board's General Counsel issued an Order granting the request by extending the due date to September 6, 2013, but denied any further extension, because that would jeopardize the Board's ability to provide due process and still meet its statutory requirement to make a decision at its October 8, 2013 Board meeting and issue a written decision within 60 days.

The General Counsel's refusal to allow AFSCME additional time beyond September 6, 2013, was in light of the Act's requirement that the Board issue a decision in this case within 60 days. Further, while I have no authority to question the validity of the Act or the Rules under which the Board administers the Act, it is of note that the time limits imposed by the Rules are reasonable given the statutory time frame the Board has to process each designation petition. The Act requires that the Board determine the lawfulness of the designation within 60 days from the date of filing. CMS filed this designation petition on August 21, 2013, and the Act requires the Board to determine whether these designations comport with Section 6.1 of the Act by October 20, 2013. As the General Counsel explained in his Order, the last Board meeting before the decision is required to be issued will be held on October 8, 2013. In order for the Board to issue a decision, the Board must allow: (1) time for the parties to file objections; (2) time for the Administrative Law Judge (ALJ) to review the petition, any objections, and hold a hearing, if necessary, in order to draft, issue, and serve its Recommended Decision and Order (RDO); (3)

time for the parties to file exceptions to the ALJ's RDO; (4) time for the Board and its staff to review the RDO and any exceptions; (5) time for the Board to set an agenda for the Board meeting, pursuant to the Open Meetings Act;<sup>7</sup> and (6) time for the Board to rule on the ALJ's recommendation before it can issue a written decision. Granting AFSCME's request to extend the objection due date to September 17, 2013, would likely leave insufficient time for the procedural protections contemplated by Part 1300 of the Board's Rules, and for the Board to issue its decision by the required deadline. Therefore, AFSCME was not denied due process when the Board's General Counsel denied AFSCME's request to extend the due date to submit objections to September 17, 2013.

Therefore, AFSCME was not denied due process when the Board applied its rules here.

## **B. Substantive Objections**

CMS's designation of the position at issue is proper because it is presumed proper under the Act, and the objections do not raise an issue that might overcome that presumption.

### **i. burden**

In representation cases the burden of proof is on the employer seeking to exclude employees from bargaining units because this burden is "in accordance with the State's public policy, determined by the legislature, which is to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing." Chief Judge of the Circuit Court of Cook Cnty., 18 PERI ¶ 2016 (IL LRB-SP 2002). Section 6.1 of the Act, which was added to the Act in 2013, when the legislature passed Public Act 97-1172, allows the Governor to exclude certain public employment positions from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. Section 6.1(d) of the Act also provides that any designation made under Section 6.1 "shall be presumed" proper, and the categories eligible for designation "do not expand or restrict the scope of any other provision" of the Act. 5 ILCS 315/6.1(d) (2012)

Here, since it is clear that the legislature was aware that the policy of Section 6.1 is diametrically opposite from the rest of the Act, the purposes of each must be treated as separate and distinct policies. The Court has held that the party opposing the public policy as

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<sup>7</sup> The Open Meetings Act requires the Board to post an agenda for each regular meeting to be posted at the Board's principal office and at the location where the meeting is to be held at least 48 hours in advance of the meeting. See 5 ILCS 120/2.02 (2012).

demonstrated in the statutory language of the statute at issue has the burden to prove the party's position. See *Id.* Here, because the objector is opposing the State's public policy as stated in Section 6.1 of the Act, the objecting party bears the burden to demonstrate that the employment position at issue is not eligible for designation. Section 6.1(d) provides that "[a]ny designation made by the Governor under this Section shall be presumed to have been properly made." In order to overcome this presumption, or even raise an issue that might overcome the presumption, the objecting party must provide specific examples demonstrating that the employee does not properly qualify for designation under the submitted category. See State of Illinois, Department of Central Management Services, 24 PERI ¶ 112 (IL LRB SP 2008). If the objector fails to even raise an issue that might overcome the presumption that the designation is proper, then the State prevails absent a hearing. See Board Rules Section 1300.60(d)(2)(B).

CMS has filed this designation under Section 6.1(b)(5). To be properly designated under this Section, Geist must exercise "significant independent discretion" as a manager as defined by Section 6.1(c)(i) of the Act or as a supervisor as defined by Section 6.1(c)(ii) of the Act, incorporating Section 152 of the NLRA, 29 U.S.C § 152.

#### **a. Manager**

Section 6.1(c)(i) of the Act provides that an employee is a manager eligible of exclusion if the position authorizes the incumbent employee to be "engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency."

To qualify as a managerial employee under Section 6.1 of the Illinois Public Labor Relations Act, the employee must meet one of two tests. The first test requires the employee to 1) be engaged in executive and management functions; and 2) be responsible for the effectuation of management policies and practices of the Agency. The second test requires that the employee "represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of the Agency."

To the extent the management component of Section 6.1's definition of "significant independent discretion" uses terminology from the Act's Section 3(j)'s definition of a managerial employee, it is useful to look at the court's interpretation of those terms.

#### **1. first managerial test**

Regarding the first prong of the first managerial test, the Appellate Court has noted that executive and management functions generally, but not solely, consist of ensuring that the agency operates efficiently. Dep't of Cent. Mgmt. Serv. (Pollution Control Bd.), v. Ill. Labor Rel. Bd., State Panel, 2013 IL App (4<sup>th</sup>) 110877 ¶ 25; State of Ill. Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n) v. Ill. Labor Rel. Bd., State Panel, 406 Ill. App. 3d 766, 774, (4th Dist. 2010) (commonly referred to as ICC). The Board has defined executive and management functions as those functions which specifically relate to the running of an agency or department, including the following: establishment of policies and procedures, preparation of the budget, or the responsibility for assuring that the department or agency operates effectively. Cnty. of Cook (Oak Forest Hospital) v. Ill. Labor Rel. Bd., 351 Ill. App. 3d 379, 386, (1st Dist. 2004); State of Ill., Dep't of CMS (Healthcare and Family Serv.), 23 PERI ¶ 173 (IL LRB-SP 2007) (commonly referred to as INA). Executive functions require more than simply the exercise of professional discretion and technical expertise. Cnty. of Cook (Oak Forest Hospital) v. Ill. Labor Rel. Bd., 351 Ill. App. 3d 379, 386 (1st Dist. 2004); City of Evanston v. State Labor Rel. Bd., 227 Ill. App. 3d 955, 975 (1st Dist. 1992); INA, 23 PERI ¶ 173 (IL LRB-SP 2007); State of Ill. Dep't of Cent. Mgmt. Serv., 1 PERI ¶ 2014 (IL SLRB 1985).

The second prong of the first managerial test requires that the alleged managerial employee exercise responsibility for directing the effectuation of such management policies and practices. Cnty. of Cook (Oak Forest Hospital) v. Ill. Labor Rel. Bd., 351 Ill. App. 3d at 386; INA, 23 PERI ¶ 173 (IL LRB-SP 2007); Dep't of Cent. Mgmt. Serv., 2 PERI ¶ 2019 (IL SLRB 1986). An employee directs the effectuation of management policy when he/she oversees or coordinates policy implementation by developing the means and methods of reaching policy objectives, and by determining the extent to which the objectives will be achieved. Cnty. of Cook (Oak Forest Hospital) v. Ill. Labor Rel. Bd., 351 Ill. App. 3d at 387; INA, 23 PERI ¶ 173 (IL LRB-SP 2007); State of Ill. Dep't of Cent. Mgmt. Serv. (Public Aid), 2 PERI ¶ 2019 (IL SLRB 1986). Such individuals must be empowered with a substantial measure of discretion to determine how policies will be affected. Cnty. of Cook (Oak Forest Hospital) v. Ill. Labor Rel. Bd., 351 Ill. App. 3d at 387; INA, 23 PERI ¶ 1736 (IL LRB-SP 2007).

## **2. alternative managerial test**

The second, alternative managerial test requires that the employee’s “effective recommendations” direct the effectuation of management policies. Because superiors often make decisions based on a variety of factors, the “litmus test” of whether the employees’ recommendations are influential is whether the recommendations “almost always persuade the superiors.” ICC, 406 Ill. App. 3d at 777 citing Nat. Labor Rel. Bd. v Yeshiva Univ., 444 U.S. 672, 677 (1980).

**b. supervisor**

Section 6.1(c)(ii) of the Act provides that an employee is a supervisor eligible of exclusion if the employee position authorizes the employee in that position to “qualif[y] as a supervisor of a State agency as that term is defined under Section 152 of the 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.”

The NLRA defines a supervisor as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C.A § 152(11).

Employees are supervisors if (1) they hold the authority to engage in any of the above listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer. NLRB v. Kentucky River Comm. Care, Inc., 532 U.S. 706, 713 (2001); see also Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006). Independent judgment is a key issue in determining whether an employee is a supervisor under the NLRA. See Id. at 689. Judgment is not independent if it is controlled by a higher authority, such as verbal instructions, or detailed instructions or regulations. Id.

**c. objector’s burden**

In order to meet the burden to raise an issue that might overcome the presumption that the designation is proper, the objector must provide specific examples to negate each test, because if

even one of the three tests is met, then the objector has not sufficiently raised an issue, and the designation is proper.

In order to raise an issue that Geist is not a manager AFSCME must negate both managerial tests. To negate the first managerial test AFSCME must demonstrate, or effectively argue that Geist does not meet at least one of the elements of the test. It can do this by demonstrating that Geist is not engaged in executive and management functions, or that she is not responsible for the effectuation of management policies and practices of the Illinois State Police. In order to negate the second managerial test, AFSCME must demonstrate that Geist does not actually provide any recommendations regarding the effectuation of management policies, or that her recommendations are not “effective” because the recommendations do not almost always persuade the decision-maker.

In order to raise an issue that Geist is not a supervisor AFSCME must negate at least one of the three prongs of the supervisor test. Negating the first prong may prove to be the most tedious, because it only requires that Geist hold the authority to engage in *any one* of the listed supervisory functions. In order to negate this prong, the objector must provide specific examples where Geist was directed not to engage in the listed supervisory function. AFSCME must provide an example for every indicia listed. To negate the second prong, AFSCME must demonstrate that Geist does not use independent discretion in exercising supervisory duties. In order to negate the third prong of the supervisory test AFSCME must demonstrate or effectively argue that Geist’s authority to engage in supervisory functions is not held in the interest of the employer, that it is done for her personal interest or in the interest of some third party.

## **ii. CMS-104 position descriptions**

CMS-104 position descriptions contain sufficient information from which to decide whether gubernatorial designations comport with Section 6.1 of the Act.

### **a. verification**

AFSCME’s objection that position descriptions are insufficient because CMS does not verify their accuracy is factually incorrect. The position descriptions submitted in gubernatorial designations, are submitted as attachments to the designation petitions. The petitions require that the individual filing on behalf of the Governor attest that “the statements contained [within the petition and its attachments] are true to the best of [his] knowledge and belief.” The objection that the position descriptions are insufficient because CMS does not verify their accuracy is

factually incorrect and therefore does not raise an issue that might overcome the presumption that this designation is proper.

**b. evidence of job duties**

Any general objection that there is “no evidence that employees could exercise all or any of the duties listed [in the position description] without being actually given the authority,” does not present an issue that might overcome the presumption that the designation is proper. To be properly designated under Section 6.1(b)(5) “the position must authorize an employee in that position to have ‘significant and independent discretionary authority’ as an employee,” with *authorize* being the operative word. Here, the position description is the authorization that grants Geist the ability to exercise the job functions stated therein. Whether Geist actually exercise the authority granted within the position description does not determine whether the position is properly designated under Section 6.1(b)(5). To prevail and demonstrate that Geist lacks authority, AFSCME must provide an example of her being prevented from exercising a duty in her position description. Simply stating that CMS provided no evidence that Geist actually exercised the duties she is authorized to perform is insufficient. Therefore, since AFSCME has not provided specific examples to support its contention that the Geist is not in fact authorized to exercise the duties as described in the position description, this argument does not raise an issue that might overcome the presumption that this designation is correct.

**c. testimony that CMS-104 position descriptions are inaccurate**

AFSCME’s argument that testimony taken during a previous representation hearing indicating that the position descriptions are not accurate, does not overcome the presumption that this designation is correct, because AFSCME references testimony regarding employment positions not at issue in this case, and does not provide evidence that Geist’s position description is inaccurate.

AFSCME’s argument that many of the CMS-104 position descriptions are 20 years old and that there has been “ample testimony” that such position descriptions are inaccurate, is not applicable to the facts as presented in this case because Geist’s position description was updated in 2011.

AFSCME next argues that even more recently updated position descriptions are also inaccurate, and as support cites to the testimony taken in Case No. S-RC-07-048 regarding the position of Field Auditor Supervisor at Illinois Department of Employment Security.<sup>8</sup> Geist is a Budget Analyst at the State Police. A general argument that testimony that a specific position description was inaccurate does not by extension mean that all position descriptions are inaccurate. AFSCME was served with the petition, the position descriptions, and a spreadsheet summary, and it has not submitted objections specifying that Geist's position description is inaccurate. Therefore, because AFSCME provides no evidence that Geist's position description is inaccurate, AFSCME has failed to raise an issue of fact or law that might overcome the presumption that this designation is proper.

### **iii. Geist**

AFSCME fails to raise an issue that might overcome the presumption that the Geist's position has been designated properly under Section 6.1 of the Act because in order to raise an issue that might overcome the presumption that the designation is proper, AFSCME must provide specific examples that demonstrate that Geist does not qualify for the exemption under the supervisory test or either of the managerial tests.

#### **a. previous hearing**

AFSCME's argument that CMS did not argue that Geist was either a managerial or supervisory employee in the hearing for Case No. S-RC-07-048, does not raise an issue that might overcome the presumption that the designation is proper.

Res judicata does not bar CMS from arguing that the Geist's position is supervisory and managerial under Section 6.1 of the Act. The doctrine of res judicata, which prevents parties from rearguing previously decided matters, only applies if the following three requirements are satisfied: 1) there is a final judgment on the merits rendered by a tribunal of competent jurisdiction, 2) there is an identity of parties, and 3) there is an identity of cause of action. Judge of the 12th Judicial Circuit (River Valley Juv. Detention Ctr.), 28 PERI ¶137 (IL LRB-SP 2012) citing Downing v. Chicago Transit Auth., 162 Ill. 2d 70, 73-74 (1994). The first prong of the res judicata test is not satisfied because the representation case is currently pending before the Board. Without the first prong of the res judicata test being met, analysis of the remaining two prongs is unnecessary. Since the Board has not issued a decision, the fact that CMS did not

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<sup>8</sup> See Appendix, tr. 338, 340, 344, 348, 355-359.

previously argue that Geist's position was either managerial or supervisory does not prevent CMS from making this argument in this case,<sup>9</sup> and thus, does not raise an issue that might overcome the presumption that Geist's position is designated properly under Section 6.1 of

**b. manager**

AFSCME's argument that there is no evidence that the authority granted to Geist in her position description is exercised with independent discretion which would alter the adoption of management policies or the effectiveness of such policies does not raise an issue that might overcome the presumption that the designation is proper. The independent discretion that AFSCME's argues is lacking, is presumed, unless AFSCME can provide specific contradictory evidence. Sections 6.1(b) and 6.1(d) state that once the state has submitted the required information the designation is presumed proper. As noted above, in order to overcome the presumption that Geist's position has been properly designated under Section 6.1(b)(5), AFSCME must provide specific evidence that this position does not qualify as having significant independent discretionary authority as a manager by negating the managerial tests. A general argument against the very evidence that creates the presumption is not specific evidence to the contrary. Thus, AFSCME has not raised an issue that might overcome the presumption that Geist exercises independent discretionary authority as a manager.

**c. supervisor**

AFSCME's remaining argument, that Geist is not a supervisor because her position description does not identify that she has any subordinates to supervise, is not sufficient to raise an issue that might overcome the presumption that Geist is designated properly under Section 6.1, because AFSCME does not sufficiently raise an issue as to her managerial status. As noted above, in order to raise an issue that might overcome the presumption that Geist has been designated properly under Section 6.1(b)(5) of the Act, AFSCME must provide specific evidence that negates the supervisory test, and both managerial tests. If Geist's position qualifies under even one of those tests AFSCME does not meet its burden. Since AFSCME did not overcome the presumption that Geist is a manager, whether Geist is also a supervisor is moot. Therefore, AFSCME fails to raise an issue that might overcome the presumption that the designation of Geist's employment position is proper.

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<sup>9</sup> Also, the definitions of "managerial employee" and "supervisor" in representation "RC" cases differ from the definitions of "manager" and "supervisor" in gubernatorial designation "DE" cases. Compare 5 ILCS 315/3(j)(r) with 5 ILCS 315/6.1(c)(i)-(ii).

**IV. CONCLUSION**

Pursuant to Section 1300.60 of the Board’s Rules, I find that the designation is proper based solely on the information submitted to the Board and the objections fail to overcome the presumption that the designation is proper under Section 6.1 of the Act.

**V. RECOMMENDED ORDER**

Unless this Recommended Decision and Order Directing Certification of the Designation is rejected or modified by the Board, the following position of Illinois the Illinois State Police is excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-21-00-93-10-01                      Budget Analyst

**VI. EXCEPTIONS**

Pursuant to Sections 1300.130 and 1300.90(d)(5) of the Board’s Rules and Regulations, 80 Ill. Admin. Code Parts 1300,<sup>10</sup> parties may file exceptions to the Administrative Law Judge’s Recommended Decision and Order in briefs in support of those exceptions no later than 3 days after service of this recommended decision and order. Exceptions shall be filed with the Board by electronic mail at an electronic mail address designated by the Board for such purpose, ILRB.Filing@illinois.gov, and served on all other parties via electronic mail at their e-mail addresses as indicated on the designation form. Any exception to a ruling, finding conclusion or recommendation that is not specifically urged shall be considered waived. A party not filing timely exceptions waives its right to object to this recommended decision and order.

**Issued at Chicago, Illinois this 27<sup>th</sup> day of September, 2013.**

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

***/s/ Deena Sanceda***  
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**Deena Sanceda**  
**Administrative Law Judge**

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<sup>10</sup> Available at [www.state.il.us/ilrb/subsections/pdfs/Section1300IllinoisRegister.pdf](http://www.state.il.us/ilrb/subsections/pdfs/Section1300IllinoisRegister.pdf)

**APPENDIX**  
**Recommended Decision and Order Case No. S-DE-14-074**

1. Ill. Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., State Panel, 2011 IL App (4th) 090966.
2. Case No. S-RC-07-048, Certification of Representative
3. Case No. S-RC-07-048, e-mails between the Board's General Counsel and the parties, agreeing to an abeyance.
4. Case No. S-RC-07-048, tr. 338, 340, 344, 348, 355-359.
5. Case No. S-RC-07-048, Corrected Partial Revocation of Certification.