

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

State of Illinois, Department of Central Management Services,)	
)	
)	
Petitioner)	
)	
and)	Case No. S-DE-14-094
)	
American Federation of State, County and Municipal Employees, Council 31,)	
)	
)	
Labor Organization)	

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

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) *added by* Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. There are three broad categories of positions which may be so designated: 1) positions which were first certified to be in a bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008, 2) positions which were the subject of a petition for such certification pending on April 5, 2013 (the effective date of Public Act 97-1172), or 3) positions which have never been certified to have been in a collective bargaining unit. Only 3,580 of such positions may be so designated by the Governor, and, of those, only 1,900 positions which have already been certified to be in a collective bargaining unit.

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

- 1) it must authorize an employee in the position to act as a legislative liaison;
- 2) it must have a title of or authorize a person who holds the position to exercise substantially similar duties as a Senior Public Service Administrator, Public Information Officer, or Chief Information Officer, or as an agency General

Counsel, Chief of Staff, Executive Director, Deputy Director, Chief Fiscal Officer, or Human Resources Director;

- 3) it must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), see 20 ILCS 415/4 through 4d (2012);
- 4) it must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
- 5) it must authorize an employee in that position to have “significant and independent discretionary authority as an employee” by which the Act means the employee is either
 - (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
 - (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. It also requires the Illinois Labor Relations Board to determine, in a manner consistent with due process, whether the designation comports with the requirements of Section 6.1, and to do so within 60 days.¹

As noted, Public Act 97-1172 and Section 6.1 of the Illinois Public Labor Relations Act became effective on April 5, 2013, and allow the Governor 365 days from that date to make such designations. The Board promulgated rules to effectuate Section 6.1, which became effective on

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.

August 23, 2013, 37 Ill. Reg. 14070 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On September 16, 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. No objections have been filed to this designation.

The petition designates the following two Private Secretary II positions within the Pollution Control Board for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act:

34202-50-80-000-00-01	Pollution Control Board	Vacant established	Private Secretary II
34202-50-80-000-00-02	Pollution Control Board	Vacant established	Private Secretary II

The petition indicates that both positions qualify for designation under Section 6.1(b)(3) of the Act by asserting that the positions are completely exempt from jurisdiction B of the Personnel Code and all are Rutan-exempt. In support of its contentions, CMS filed position descriptions (CMS-104s) for each position and a spreadsheet in support of its petition which confirm its assertion. Both positions are subject to the pending petition for certification, filed by American Federation of State, County and Municipal Employees, Council 31 (AFSCME), in Case No. S-RC-11-110.

On September 16, 2013, CMS filed a similar designation in Case No. S-DE-14-092 (CMS and AFSCME), which sought to exclude two private secretary positions, among others, within the Pollution Control Board. That same day, CMS also filed a designation in Case No. S-DE-14-093 (CMS and AFSCME), which sought to exclude three private secretary positions within the Pollution Control Board. On October 9, 2013, I consolidated Case Nos. S-DE-14-092 and S-DE-14-093 for hearing to determine whether the positions were properly designatable based on the language in Section 6.1(a) of the Act. A hearing was held on October 16, 2013, by the undersigned, at which time all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally and to file written briefs.²

² At the hearing, Robb Craddock, the Deputy Director of Labor Relations for CMS, and Stephanie Barton (Shallenberger), the Deputy General Counsel of CMS Labor Relations from November 2009 through June 2012, testified on behalf of CMS. Michael Newman, the Associate Director of AFSCME, testified on behalf of AFSCME.

On October 23, 2013, I issued an Order to Show Cause, if there be any, why a separate hearing was needed in this case. I informed CMS that since, the designation at issue here, Case No. S-DE-14-093, also involves private secretary positions within the Pollution Control Board, I planned to take administrative notice of the hearing in Case Nos. S-DE-14-092 and S-DE-14-093 for purposes of the proceeding in this case.³ I informed CMS that its response to the Order to Show Cause was due by electronic email by 10:00am on Monday, October 28, 2013. CMS has not filed a response to the Order to Show Cause. Accordingly, I take administrative notice of the hearing in Case Nos. S-DE-14-092 and S-DE-14-093 for purposes of this proceeding.

Based on my review of the designations, the documents submitted as part of the designations, evidence presented at hearing, arguments and briefs, and upon the entire record of the case, I recommend that the Board find that the designation is not consistent with the requirements of Section 6.1 of the Act.

I. DISCUSSION AND ANALYSIS

The Governor's authority to designate positions under Section 6.1 does not extend to positions within the Pollution Control Board, and therefore the positions are not properly designable.

Section 6.1(a) of the Act authorizes the Governor to "designate . . . positions collectively within State agencies directly responsible to the Governor[.]" Section 3.1 of the Executive Reorganization Implementation Act (ERIA) indicates that certain agencies are *not* State agencies "directly responsible to the Governor," and then sets forth a list of those ten agencies.⁴ 15 ILCS 15/3.1 (2012).

³ On October 28, 2013, I issued a Recommended Decision and Order in Case Nos. S-DE-14-092 and S-DE-14-093.

⁴ Section 3.1 of ERIA states:

"Agency directly responsible to the Governor" or "agency" means any office, officer, division, or part thereof, and any other office, nonelective officer, department, division, bureau, board, or commission in the executive branch of State government, except that it does not apply to any agency whose primary function is service to the General Assembly or the Judicial Branch of State government, or to any agency administered by the Attorney General, Secretary of State, State Comptroller or State Treasurer. In addition the term does not apply to the following agencies created by law with the primary responsibility of exercising regulatory or adjudicatory functions independently of the Governor:

- (1) the State Board of Elections;
- (2) the State Board of Education;
- (3) the Illinois Commerce Commission;

In State of Illinois, Department of Central Management Services. _ PERI _ Cons. Case Nos. S-DE-14-047, 083, 086 (IL LRB-SP Oct. 15, 2013), the Board specifically examined whether Section 6.1 of the Act authorizes the Governor to designate positions within the Pollution Control Board. The Board stated: “the Governor’s authority to designate positions under Section 6.1 is limited to ‘State agencies directly responsible to the Governor,’ and finding that language to be unambiguous, we conclude that the attempt to designate positions within the Illinois Commerce Commission, the Illinois Workers’ Compensation Commission, and the Illinois Pollution Control Board, which under ERIA are not ‘directly responsible to the Governor,’ is contrary to the intent of the legislature, as expressed in the clear and unambiguous language of Section 6.1(a) of the Act.” Id. Thus, the Governor’s authority to designate positions does not extend to the two positions within the Pollution Control Board designated in this case.

As noted above, Section 6.1(d) does provide a presumption that any designation is presumed to have been properly made. However, in this case, the presumption of appropriateness is rebutted by the clear statutory language expressing the limits on the Governor’s authority to designate positions at the Pollution Control Board. Id. (“CMS’s position suggests that the presumption of appropriateness cannot be rebutted, even by clear statutory language expressing limits on the Governor’s authority. CMS’s position with respect to the presumption is extreme, cannot be reflective of legislative intent, and is rejected.”)

II. CONCLUSIONS OF LAW

The Governor’s designation is not consistent with the requirements of Section 6.1 of the Act.

III. RECOMMENDED ORDER

It is hereby recommended that the petition be dismissed.

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- (4) the Illinois Workers' Compensation Commission;
 - (5) the Civil Service Commission;
 - (6) the Fair Employment Practices Commission;
 - (7) the Pollution Control Board;
 - (8) the Department of State Police Merit Board;
 - (9) the Illinois Racing Board;
 - (10) the Illinois Power Agency.

IV. EXCEPTIONS

Pursuant to Section 1300.90 and Section 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300,⁵ parties may file exceptions to the Administration Law Judge's recommended decision and order, and briefs in support of those exceptions, not later than three days after service of the recommended decision and order. All exceptions shall be filed and served in accordance with Section 1300.90 of the Board's Rules. Exceptions must be filed by electronic mail sent to ILRB.Filing@Illinois.gov. Each party shall serve its exception on the other parties. If the original exceptions are withdrawn, then all subsequent exceptions are moot. A party not filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

Issued at Chicago, Illinois, this 28th day of October, 2013

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

/s/ Michelle Owen

**Michelle Owen
Administrative Law Judge**

⁵ Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>