

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

State of Illinois, Department of Central Management Services, )  
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    Petitioner )  
)  
    and )  
)  
American Federation of State, County and Municipal Employees, Council 31, )  
)  
    Labor Organization-Objector )  
)  
    and )  
)  
Ken Broady, )  
)  
Ralph Caro, )  
)  
William Haddad, )  
)  
Theodore Penesis, )  
)  
Laura Perna, )  
)  
    and )  
)  
Martin Sutherland, )  
)  
    Employees-Objectors )

Case No. S-DE-14-099

**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 may be positions which have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, the position must fall into 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, an Agency General Counsel, Agency Chief of Staff, Agency Executive Director, Agency Deputy Director, Agency Fiscal Officer, Agency Human Resources Director, Senior Public Service Administrator, Public Information Officer, or Chief Information Officer;
- 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 either:
  - (i) is engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
  - (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 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 rules to effectuate Section 6.1, which became effective on August 23, 2013. 37 Ill. Reg. 14,070 (September 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations (Rules), 80 Ill. Admin. Code Part 1300.

On September 18, 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 30, 2013, the Board's General Counsel granted a motion filed by the American Federation of State, County and Municipal Employees, Council 31, (AFSCME) seeking an extension of time in which to file objections in this matter. The time to file objections was extended up to and including October 3, 2013. On October 3, 2013, AFSCME filed timely objections. Ken Broady, Ralph Caro, William Haddad, Theodore Penesis, Laura Perna, and Martin Sutherland, all employees in positions designated in this matter, filed separate timely objections. On October 11, 2013, after its time in which to file objections had ended, AFSCME filed supplemental objections. CMS states that it does not object to the Board's consideration of AFSCME's supplemental objections.<sup>2</sup>

Based on my review of the designation, 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 and the Employees-Objectors have failed to raise an issue that would require a hearing. Therefore, I find the designation to have been properly submitted and consistent with the requirements of Section 6.1 of the Act and 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

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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 in this case.

<sup>2</sup> In light of CMS's consent, I will consider the issues raised in AFSCME's supplemental objections. However, because CMS does not object, I have considered no timeliness issues raised by this filing.

representatives to eliminate any existing inclusion of these positions within any collective bargaining unit.

## **I. ISSUES AND CONTENTIONS**

The instant petition designates 19 positions at various State agencies for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act. CMS states that these positions qualify for designation under Section 6(b)(3) because each is both Rutan-exempt, as designated by CMS, and completely exempt from Jurisdiction B of the Personnel Code. CMS also states that these positions are currently represented for the purposes of collective bargaining. In support of its contentions, CMS has provided a spreadsheet containing information on the agency, classification, position number, working title, bargaining unit certification, and Personnel Code exempt status of the designated positions. Additionally, CMS has filed CMS-104 documents containing the position description for the designated positions and Position Action Notices with additional information on the positions. These documents indicate the Rutan- and Jurisdiction B-exempt status of the position to which they pertain.

Employees-Objectors Broady, Haddad, Penesis, Perna, and Sutherland each assert that the CMS-104 document for their position does not accurately describe their job duties; Broady, Penesis, and Sutherland claim that these inaccuracies extend to misidentifying their positions' classification or working title. Penesis also states that he does not qualify for designation under any category of Section 6.1(b) of the Act. Perna likewise states that she does is not a legislative liaison under Section 6.1(b)(1), does not have the title of or duties substantial similar to any of the titles listed in Section 6.1(b)(2), is not a term appointed employee so as to qualify for designation under Section 6.1(b)(4), and has no significant and independent discretionary authority as is required for designation under Section 6.1(b)(5). Broady and Penesis each further allege that they are not confidential, managerial, or supervisory employees as those are defined in Section 3 of the Act. Finally, both Caro and Sutherland state that they have no supervisory authority and are not managerial employees, with Caro alleging that he does not make, influence or affect policy and Sutherland arguing that he engages in no independent decision-making.

AFSCME has raised specific objections to the designation of three positions.<sup>3</sup> In its initial objection, AFSCME argues that the documentation filed by CMS does not indicate

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<sup>3</sup> AFSCME also raised objections to the designation of Perna's position, stating that that the CMS-104 for that position does not clearly indicate the basis for the position's exemption from Jurisdiction B of the Personnel Code, and to the designation of Haddad's position, on the grounds that the CMS-104 does not indicate whether the position

whether position number 37015-42-80-200-10-12 (vacant) is Rutan-exempt. In its supplemental objections, AFSCME argues that the documents filed by Broady along with his objections indicate that his position and the position held by Patricia Diamantopolous do not qualify for exemption from Jurisdiction B under Section 4d(3) of the Personnel Code.

AFSCME's initial objections also include general objections to P.A. 97-1172 and the Gubernatorial designation process. First, AFSCME argues that the designation of these positions is arbitrary and capricious because the designated positions have previously been certified into a bargaining unit by the Board, there is no showing that the duties of these positions have significantly changed, and positions in the same classification with similar working titles and duties remain in various collective bargaining units. Second, AFSCME alleges that P.A. 97-1172 is unconstitutional as an unlawful delegation of legislative power under the Illinois Constitution, as a violation of the equal protection guarantees found in Article I, Section 2 of the Illinois Constitution and in the 5th and 14th Amendments of the United States Constitution, and, because the designated positions are currently covered by a collective bargaining agreement to which the State is a party, under Article I, Section 16 of the Illinois Constitution and Article I, Section 10 of the United States Constitution. Finally, AFSCME states that the Board must hold a hearing to determine whether there is a legal basis for the instant designations in order to comport with the requirements of due process.

## **II. FINDINGS OF FACT**

Eighteen of the positions designated by CMS are classified as Public Service Administrator (PSA) Option 1s by the employer. Seventeen of these positions are in the RC-63 bargaining unit represented by AFSCME and one is in the RC-62 bargaining unit, as certified by the Board on January 20, 2010, in Case. No. S-RC-08-036. The remaining position is classified as a PSA Option 2 and is currently in the RC-62 bargaining unit represented by AFSCME, as certified by the Board on November 18, 2009, in Case. Nos. S-RC-07-048 and S-RC-08-074. The documents provided by CMS, including the documents submitted in CMS's initial filing and the supplemental information provided on the positions held by Haddad and Perna, indicate that all 19 positions are Rutan-exempt. These documents also show that 18 of the positions are

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is Rutan-exempt. After I issued a Notice of Hearing on these questions, CMS provided additional documentation indicating that Perna's position is exempt from Jurisdiction B under Section 4d(3) of the Personnel Code and that Haddad's position is Rutan-exempt. AFSCME withdrew its objections on these points.

exempt from Jurisdiction B of the Personnel Code pursuant to Section 4d(3), and one is exempt from Jurisdiction B pursuant to Section 4d(6).

### **III. DISCUSSION AND ANALYSIS**

As stated above, a position is properly designable, among other circumstances, if: (1) it was first certified to be in a bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008; and (2) it is both a Rutan-exempt position, as designated by the employer, and completely exempt from Jurisdiction B of the Personnel Code. 5 ILCS 315/6.1 (2012). Additionally, it is presumed that any designation made by the Governor under Section 6.1 of the Act is properly made. 5 ILCS 315/6.1(d) (2012). Rule 1300.60(d)(2)(A) permits an Administrative Law Judge (ALJ) 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).

CMS's initial filing clearly indicates, and AFSCME and the Employees-Objectors do not contest, that the designated positions were first certified to be in a bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008. The substantive objections allege that the instant designation is nonetheless improper because the positions at issue do not meet the requirements of Section 6.1(b)(3) of the Act. AFSCME has also raised several general objections to P.A. 97-1172 and the Gubernatorial designation process. I will examine the substantive and general objections in turn.

#### **SUBSTANTIVE OBJECTIONS**

A position is properly designable under Section 6.1(b)(3) if it is both a Rutan-exempt position, as designated by the employer, and completely exempt from Jurisdiction B of the Personnel Code. 5 ILCS 315/6.1(b)(3) (2012). Based on the plain language of Section 6.1(b)(3), the Board's sole inquiry is whether CMS has properly identified the positions at issue as having been designated by CMS as Rutan-exempt and as completely exempt from Jurisdiction B of the Personnel Code.

The first objection relevant to the designability of the instant positions has been raised by both the Employees-Objectors and AFSCME. Employees-Objectors Broady, Haddad, Penesis, Perna, and Sutherland each detail the alleged inaccuracies in their job duties described by the CMS-104 for their position and ask the Board to consider their actual job duties in ruling on the instant designation. In its supplemental objections, AFSCME likewise states that the Board

should hold a hearing to determine whether the job descriptions are accurate. Specifically, AFSCME states that documentation submitted by Broady indicates that his position and the position held by Diamantopolous, though apparently designated as exempt from Jurisdiction B pursuant to Section 4d(3) of the Personnel Code, do not actually qualify for that exemption.

The Board's inquiry into whether a designated position meets the requirements of Section 6.1(b)(3) is limited. The plain language of the Act indicates that the first relevant question is whether the employer, CMS, has designated a position as Rutan-exempt. A Rutan-exempt position is one for which political affiliation can be considered in making a hiring decision. The Supreme Court's decision in Rutan v. Republican Party of Illinois has been interpreted to allow the hiring of policymakers and "inner-circle" employees based on political affiliation. Rutan, 497 U.S. 62, 90 (1990) (Stevens, J., concurring) (political affiliation can be "relevant to [an] employee's ability to function effectively as part of a given administration."). Though a position's duties may be relevant to determining whether that position is exempt from the requirements of Rutan, making that determination is not the task before the Board. Section 6.1(b)(3) expressly limits the Board's inquiry to whether that determination has already been made in the affirmative. The first requirement of Section 6.1(b)(3) is met so long as the employer has designated a position as Rutan-exempt. Thus it is the outcome of CMS's determination of whether a position may be designated as Rutan-exempt, and not the job duties on which the determination may be based, that is relevant to the instant matter.

Furthermore, the discretion to determine whether 18<sup>4</sup> of the positions at issue qualify for an exemption from Jurisdiction B of the Personnel Code lies with another entity. Section 4d(3) provides that the Civil Service Commission, upon recommendation from the Director of CMS, shall exempt from Jurisdiction B positions which involve either principal administrative responsibility for the determination of policy or principal administrative responsibility for the way in which policies are carried out. 20 ILCS 415/4d(3) (2012). The authority to make this determination is expressly committed to the judgment of the Civil Service Commission. Id. Section 6.1 delegates no authority to the Board to grant or deny this exemption or to review the determinations of the Civil Service Commission. Instead, in cases in which a position is alleged

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<sup>4</sup> The remaining position, position number 37015-42-80-200-10-02 (Vacant), is exempt from Jurisdiction B pursuant to Section 4d(6) of the Personnel Code. Section 4d(6) provides that all positions established outside of the geographical limits of the State to which appointments of persons other than Illinois citizens may be made are exempt from Jurisdiction B. 20 ILCS 415/4d(6) (2012). No party has alleged that this position is not completely exempt from Jurisdiction B under this provision.

to be exempt from Jurisdiction B pursuant to Section 4d(3), the Board's inquiry is limited to determining whether the Civil Service Commission has determined that a position is exempt. Thus, as with a position's Rutan-exempt status, it the outcome of the Civil Service Commission's determination, and not the job duties on which the determination may be based, that is relevant to the instant matter.

CMS's initial filing indicates that each designated position is both Rutan-exempt, as designated by CMS, and completely exempt from Jurisdiction B of the Personnel Code. No party has filed an objection sufficient to overcome the presumption that the designation is proper. Though AFSCME and the Employees-Objectors ask the Board to consider alleged inaccuracies in the CMS-104s, as discussed above, the job duties described therein are not relevant to the Board's inquiry in this matter. The classification and working titles are likewise not relevant to this matter, despite the alleged inaccuracies.

Furthermore, though AFSCME alleges that CMS's initial filing does not identify position number 37015-42-80-200-10-12 (vacant) as having been designated by CMS as Rutan-exempt, there is no factual basis for this contention. Page 10 of the 58 pages of supporting documentation submitted by CMS with its initial filing is a Position Action Notice for this position with a run date of January 26, 2010. This document indicates that position number 37015-42-80-200-10-12 has been designated by CMS as Rutan-exempt.

Penesis's assertion that his position does not meet any of the categories for designation by the Governor under Section 6.1(b) is also insufficient to overcome the presumption that the designation is proper. Penesis does not further explain this allegation as it relates to Section 6.1(b)(3), thus it is unclear whether he claims that his position has not been designated by CMS as Rutan-exempt, is not completely exempt from Jurisdiction B of the Personnel Code, or both. However, CMS's initial filing indicates that Penesis's position has be designated as Rutan-exempt and is exempt from Jurisdiction B pursuant to Section 4d(3) of the Personnel Code. Penesis's assertion, unsupported by any factual allegations, that he nonetheless does not qualify for designation under Section 6.1(b)(3) is insufficient to overcome the presumption that the designation is proper. 5 ILCS 315/6.1(d) (2012).

Perna's objection that her position does not qualify for designation is also insufficient. While she claims that her position is not eligible for designation under Sections 6.1(b)(1), (2), (4), or (5), she fails to address her position's designability under Section 6.1(b)(3). A position

need qualify under only one of the enumerated categories in order to be properly designable. Therefore, even if Perna's position does not qualify under four of the five categories enumerated in Section 6.1(b), it is sufficient that her position is designable pursuant to Section 6.1(b)(3).

Finally, the remaining substantive objections filed by Broady, Caro, Penesis, and Sutherland appear to focus on the exemptions for managerial, supervisory, and confidential employees traditionally asserted by employers in response to representation petitions before the Board. Because these positions were certified in a bargaining unit on January 20, 2010, the Employees-Objectors likely gained familiarity with these exemptions through the proceedings in Case No. S-RC-08-036. However, these exemptions are not relevant to the instant designation because a position that does not meet the definition of a managerial, supervisory, or confidential employee may nonetheless qualify for designation under Section 6.1. Section 6.1(a) specifically states that the Governor may designate up to 1900 employees that were certified in a bargaining unit on or after December 2, 2008; these are by virtue of their prior certification necessarily positions that either the employer has stipulated or the Board has determined do not qualify for an exemption, but are nonetheless properly designable. Furthermore, the Board has long held that the applicability of these exemptions does not depend on the relevant 6.1(b)(3) factors—exemption from both the requirements of Rutan and from Jurisdiction B of the Personnel Code. See State of Illinois, Department of Central Management Services, 25 PERI ¶ 184 (IL LRB-SP 2009) and County of Cook, 24 PERI ¶ 36 (IL LRB-LP 2008).

Because the evidence submitted indicates that the designated positions meet the requirements of Section 6.1(b)(3) and no objections sufficient to overcome the presumption in favor of the designation have been raised, I conclude that the instant designation is proper.

#### AFSCME'S GENERAL OBJECTIONS

AFSCME argues that exclusion of the designated positions based solely on their designation by the Governor would be arbitrary. In support of this contention, AFSCME cites to the positions in the same classification with similar working titles and job duties that remain in bargaining units.

An agency's action is arbitrary and capricious only if the agency contravenes the legislature's intent, fails to consider a crucial aspect of the problem, or offers an explanation which is so implausible that it runs contrary to agency expertise. Deen v. Lustig, 337 Ill. App. 3d 294, 302 (4th Dist. 2003). Furthermore, an agency is bound to follow its own rules. State of

Illinois, Department of Central Management Services (Illinois Commerce Commission) v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 771 (4th Dist. 2010). As noted above, the plain language of the statute permits the designation of a position based solely on its Rutan- and Jurisdiction B-exempt status. Furthermore, AFSCME has raised no claim that the Board has failed to follow its own Rules regarding the instant designation. Therefore, it is not arbitrary for the Board to permit designation of the positions at issue because it is adhering to its own rules and the plain language of the statute in doing so. AFSCME's contentions on this issue must fail.

To the extent that AFSCME argues there is no rational basis for treating designated positions differently from the similar non-designated positions it cites, AFSCME's arguments speak to the constitutionality of P.A. 97-1172. As to the constitutionality of Section 6.1, AFSCME also argues that the amendment violates the separation of powers provisions of the Illinois Constitution, the guarantee of equal protection under the Illinois and United States Constitutions, and the impairment of contract prohibitions of both the Illinois and United States Constitutions. However, it is beyond the Board's capacity to rule that the Illinois Public Labor Relations Act, as amended by Public Act 97-1172, either on its face or as applied violates provisions of the United States and Illinois constitutions. Goodman v. Ward, 241 Ill. 2d 398, 411 (2011) ("Administrative agencies ... have no authority to declare statutes unconstitutional or even to question their validity. [citations omitted] When they do so, their actions are a nullity and cannot be upheld.").

Finally, AFSCME argues that the Board must hold a hearing to determine whether the job duties of the designated positions support their Rutan-exempt status and their exemption from Jurisdiction B of the Personnel Code under Section 4d(3). As discussed above, however, these duties are not relevant to the Board's inquiry in this matter. Furthermore, due process does not require the Board to hold an oral hearing in this matter. Adequate notice of a proposed governmental action and a meaningful opportunity to be heard are the fundamental prerequisites of due process. Peacock v. Bd. of Tr. of the Police Pension Fund, 395 Ill. App. 3d 644, 654 (1st Dist. 2009) (citing Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970)). To provide a party with the meaningful opportunity to be heard, the Board must provide a party affected by its proceedings with a meaningful procedure to assert his or her claim prior to the deprivation or impairment of a right. Peacock v. Bd. of Tr. of the Police Pension Fund, 395 Ill. App. 3d at 654 (citing Matthews v. Eldridge, 424 U.S. 319, 332 (1976) and Wendl v. Moline Police Pension Bd., 96 Ill. App. 3d

482, 486 (3rd Dist. 1981)). In support of its contention that the positions are designable, CMS has provided documentation indicating that the designated positions meet the requirements for designability under Section 6.1(b)(3). The parties have been given an opportunity to assert their opposition to the designation in their objections, and I have determined that AFSCME and the Employees-Objectors have not alleged any facts that, if proven, would be sufficient to support judgment in their favor. Due process does not require that the Board nonetheless provide an oral hearing at which AFSCME and the Employees-Objectors may adduce evidence and testimony to support objections that I have deemed to be insufficient.

**IV. CONCLUSION OF LAW**

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

**V. RECOMMENDED ORDER**

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

Department of Corrections

37015-29-00-000-15-01

Department of Commerce and Economic Opportunity

37015-42-00-000-01-01	Program Support
37015-42-00-020-00-01	Executive Assistant
37015-42-00-050-11-01	Assistant Managing Director
37015-42-80-200-10-02	Homeland Security Washington D.C. Office

Department of Children and Family Services

37015-16-00-000-30-99	Special Assistant to the Director
37015-16-00-100-00-01	Staff Assistant to the Director
37015-16-05-200-00-99	Chief of Latino Services
37015-16-05-300-00-01	Chief of African-American Services
37015-16-28-200-00-99	Associate Deputy Director of Communications
37015-16-28-300-00-01	Associate Deputy Director of Communications

Illinois Department of Employment Security

37015-44-00-000-11-03	Public Service Administrator
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Illinois Department of Financial and Professional Regulation

37015-13-40-500-00-01	Constituent Information Program Administrator
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Department of Natural Resources

37015-12-00-000-40-01      Manager of Chicago Operations  
37015-12-00-001-10-01      EEO/Ethics Officer

Department of Insurance

37015-14-00-000-00-02      Outreach Advisor

Office of the State Fire Marshall

37015-50-50-100-00-16      Fire Safety Compliance Manager

Department of Revenue

37015-25-71-130-00-01      Liquor Control Manager

Department of Veterans' Affairs

37015-34-00-000-02-01      Special Advisor on Veterans' Employment

**VI.    EXCEPTIONS**

Pursuant to Section 1300.90 and Section 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300, 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](mailto: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 24<sup>th</sup> day of October, 2013**

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



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**Heather R. Sidwell  
Administrative Law Judge**