

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

State of Illinois, Department of Central	)	
Management Services (Department of	)	
Revenue),	)	
	)	
Employer	)	
	)	
and	)	Case No. S-DE-14-103
	)	
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) (Act) *added by* Public Act 97-1172 (effective 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 (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 properly qualify for designation, the employment position must meet one or more of the following five requirements:

- (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.<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. 14,066 (September 6, 2013). These rules are contained in Part

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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.

1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On October 1, 2013, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designation petition pursuant to Section 6.1(b)(2) of the Act and Section 1300.50 of the Board's Rules. On October 11, 2013, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules.

The following two positions at the Illinois Department of Revenue are at issue in this designation petition:

40070-25-07-000-10-01	Vacant	Assistant General Counsel
40070-25-07-310-00-01	Charlton, Terry	Senior Counsel

In support of its petition, CMS filed position descriptions (CMS-104s) for each petition, which indicate that the designated positions hold the title of Senior Public Service Administrator (SPSA) Option 8L, and a summary spreadsheet which reflects that the positions were first certified into a bargaining unit on October 25, 2012.

I have reviewed and considered the designation petition, the documents accompanying the designation petition, the objections raised by AFSCME, and the documents submitted in support of those objections. I find that the objections fail to raise an issue of law or fact that might overcome the presumption that the designation is proper such that a hearing would be necessary. Moreover, after consideration of the information before me, I find that the designation was properly submitted and that it is consistent with the requirements of Section 6.1 of the Act. Accordingly, I recommend that the Executive Director certify the designation of the positions at issue in this matter and, to the extent necessary, amend any applicable certifications of exclusive representatives to eliminate any existing inclusion of these positions within any collective bargaining unit.

#### **I. AFSCME'S OBJECTIONS**

AFSCME objects to the designation in a number of ways. In support of its objections, AFSCME provided the Board with the following documents: stipulations in Case No. S-RC-10-222, wherein CMS stipulated that position number 40070-25-07-000-10-01 (the designated vacant position) was "properly included in the RC-10 bargaining unit" and Terry Charlton's

position<sup>2</sup> was “not supervisory within the meaning of the Act,” an organizational chart depicting the Office of Legal Services as of February 2010; the first page of a position description for position number 40070-25-07-000-10-01 that appears to be labeled as “Chipman;” and emails between James Chipman and Illinois Department of Revenue employee Brenda Teater from April 26, 2007. In the email, Mr. Chipman asks Ms. Teater whether his new position was exempt from “certified status” as “wholly professional.” In response, Ms. Teater writes, “You (Mr. Chipman) are moving into a certified position. You will be in a 6-months probationary status. The Wholly Professional status is new to us and Connie may be confused. I will talk with her about it.”

Through its written objections and documents, AFSCME makes the following arguments.

#### **A. Procedural Issues**

AFSCME contends that because the “employees<sup>3</sup> holding the position identified by this petition are covered by a collective bargaining agreement which CMS entered into subsequent to the enactment of [Section] 6.1,” the designation of these positions “violates due process and is arbitrary and capricious.” AFSCME specifically alleges that failing to hold a hearing on the issue of “whether there is any legal basis for the exclusion of these positions and the effect of such exclusion” is a “denial of due process.”

AFSCME also argues that Section 6.1 violates provisions of the United States and Illinois Constitutions in a number of ways. First, the designation is an improper delegation of legislative authority to the executive branch. Second, selective designation results in employees being treated unequally based on whether an individual’s position was subject to a designation petition. Third, the designation unlawfully impairs the contractual rights of individuals whose positions were subject to the provision of a collective bargaining agreement prior to the position being designated for exclusion.

#### **B. Substantive Issues**

AFSCME argues that the positions should not be excluded because they are professional positions improperly classified as SPSAs. AFSCME notes that the class specification for an SPSA position requires a position to be managerial, not simply professional, and specifically

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<sup>2</sup> The stipulations reference position number 40070-25-07-120-12-01 as Terry Charlton’s position. Documentation provided by CMS reflects that position number 40070-25-07-120-12-01 was renumbered to 40070-25-07-310-00-01, the position at issue in the present designation petition.

<sup>3</sup> AFSCME mistakenly references “employees.” However, only one employee, Terry Charlton, is presently affected by the designation petition, as the other position is vacant.

excludes positions subject to the provisions of a collective bargaining agreement.<sup>4</sup> AFSCME generally objects to the designation of both positions on the basis that the positions are inappropriately classified “due to their professional status as well as their inclusion in a bargaining unit.”

AFSCME provides additional support for each position. With respect to the contention that Mr. Charlton’s position is inappropriately classified, AFSCME argues that in 2010, CMS stipulated that Mr. Charlton’s position was “neither supervisory or managerial.”<sup>5</sup> AFSCME states that the Board rejected CMS’s argument that a position subject to a term appointment should not be included in the bargaining unit and certified Mr. Charlton’s position as included in the bargaining unit.

With respect to the vacant position, AFSCME points out that in 2010, CMS stipulated that the inclusion of the position was “properly included in the unit. AFSCME argues that the vacant position is “wholly professional” and “by those terms alone is not properly classified as an SPSA position as described by the class specification.” AFSCME points to Ms. Teater’s email correspondence to support this contention.

AFSCME seeks a hearing on the duties of the positions to determine whether they are inappropriately classified as SPSAs, and, therefore, not subject to gubernatorial designation under Section 6.1(b)(2).

## **II. DISCUSSION AND ANALYSIS**

The law creates a presumption that designations made by the Governor are properly made. AFSCME’s objections do not overcome that presumption or raise a question of law or fact which requires a hearing. For the reasons stated more fully below, I find the designations are proper.

### **A. Procedural Issues**

#### **1. The designations do not violate due process.**

The Board does not deny AFSCME due process by determining that the designations are proper without an oral, evidentiary hearing.

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<sup>4</sup> In its Objections, AFSCME references that the position classification is attached to the brief. However, AFSCME’s filing did not include a copy of the position classification.

<sup>5</sup> According to the stipulations attached to AFSCME’s objections, CMS and AFSCME stipulated that Charlton’s position was “not supervisory within the meaning of the Act.”

AFSCME contends that designating these two SPSA positions to be excluded from collective bargaining violates due process. AFSCME argues that in order to comply with due process, the Board must require a hearing to determine whether there is any legal basis for the exclusion of these positions and the effect of such exclusion.

“Under the constitutions of the United States and Illinois, the State may not ‘deprive any person of life, liberty, or property, without due process of law.’ ‘The core of due process is the right to notice and a meaningful opportunity to be heard’; no person may be deprived of a protected interest by an administrative adjudication of rights unless these safeguards are provided.” World Painting Company v. Costigan, 2012 IL App (4th) 110869, ¶ 14 (internal citations omitted).

“[D]ue process is a flexible concept and requires only such procedural protections as fundamental principles of justice and the particular situation demand.” Abrahamson v. Illinois Department of Professional Regulation, 153 Ill. 2d 76, 92 (1992). In an administrative context, procedural due process does not necessarily require a proceeding that is in the nature of a judicial proceeding. Id., at 92–93. Further, “[d]ue process does not necessitate a hearing in every case of government impairment of a private interest.” Key Outdoor, Inc. v. Department of Transportation, 322 Ill. App. 3d 316, 321 (4th Dist. 2001) *citing* Roosevelt-Wabash Currency Exchange, Inc. v. Fornelli, 49 Ill. App. 3d 896, 899 (1st Dist. 1977); *see also* Department of Central Management Services/Illinois Commerce Commission v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 770 (4th Dist. 2010) (“a hearing could be ‘written’ in the sense that parties could be heard solely through their presentation of written arguments and documentary evidence to the agency.”).

Board Rule 1300.60(d)(2)(B) provides that where an Administrative Law Judge finds that objections raise an “issue of law or fact that might overcome the presumption that the designation is proper under Section 6.1 of the Act, the Administrative Law Judge will order a hearing to be held to determine whether the designation is proper.” However, the areas of inquiry AFSCME identifies do not require a hearing. The legal basis for the exclusion is the fact that the positions have the title of SPSA. AFSCME does not challenge this fact. The effect of the designation is that the positions are excluded from collective bargaining. This is set out in the statute. Inasmuch as AFSCME is seeking a hearing to challenge the constitutionality of Section 6.1, as discussed more fully below, that is beyond the purview of the Board.

In short, nothing in AFSCME's objections raise an issue of law or fact that might overcome the presumption that the designation was proper. Moreover, as evidenced by the record, AFSCME had an opportunity, which it exercised, to present its arguments and documentary evidence objecting to the designations. Furthermore, if it so chooses, AFSCME may also file exceptions to this Recommended Decision and Order for the Board's consideration. 80 Ill. Adm. Code 1300.130. These mechanisms provide sufficient process for AFSCME to challenge designations where there is no disputed fact or issue of law.

2. Designation based upon SPSA title is not arbitrary or capricious.

It is not arbitrary or capricious for the Board to permit the positions to be designated for exclusion from collective bargaining based on the title of SPSA, because, in doing so, the Board is adhering to the plain language of the statute. An action by an administrative agency is arbitrary and capricious if it "relies on factors that the statute does not intend, fails to consider an issue," Ellison v. Illinois Racing Board, 377 Ill. App. 3d 433, 441 (1st Dist. 2007), "or offers an explanation so implausible that it runs contrary to agency expertise." Cook County State's Attorney v. Illinois State Labor Relations Board, 292 Ill. App. 3d 1, 6 (1st Dist. 1997). An agency's decision is arbitrary and capricious when it does not comport with the relevant enabling statute. Bigelow Group, Inc. v. Rickert, 377 Ill. App. 3d 165, 175 (2nd Dist. 2007).

Section 6.1(b) of the Act requires the Board to determine whether the designations made by the Governor or his agents comport with Section 6.1 of the Act. 5 ILCS 315/6.1(b). The plain language of Section 6.1(b)(2) allows for designation of positions with the title of SPSA. Because a designation based solely on a position having the title of SPSA comports with the clear language of Section 6.1(b)(2), a Board determination that the designation is proper is not arbitrary or capricious.

3. The constitutionality of Section 6.1 of the Act is beyond the capacity of the Board.

AFSCME contends that the designation process created by Section 6.1 is unconstitutional in that it is an improper delegation of legislative authority to the executive branch, results in unequal treatment based on whether an individual's position was subject to a designation petition, and unlawfully impairs the contractual rights of individuals whose positions are covered by a collective bargaining agreement prior to designation.

The State Panel of the Board recently considered arguments that Section 6.1 is violative

of the United States and Illinois constitutions, as it ruled on 19 separate designation petitions designating multiple SPSA position to which AFSCME objected. State of Illinois, Department of Central Management Services v. American Federation of State, County and Municipal Employees, \_\_\_ PERI \_\_\_, Consolidated Case No. S-DE-14-005 etc. (IL LRB-SP October 7, 2013).<sup>6</sup> In that decision, the Board recognized that it was “beyond its capacity” to rule that the Act violated the United States or Illinois constitutions. *See 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.”). Accordingly, these objections are not relevant to any issue upon which the Board is called to act.

### **B. Substantive Issues**

AFSCME does not challenge the fact that the two positions at issue in this case do, indeed, “have the title of Senior Public Service Administrator,” thus making them appropriate for designation under Section 6.1(b)(2) of the Act. Instead, AFSCME argues that the positions are inappropriately classified as SPSAs, and should, therefore, not be subject to designation based on their classification.

AFSCME correctly points out that the class specification for the position of SPSA requires that a position be engaged in “managerial functions and not simply be professional” and excludes positions that are included in a bargaining unit and subject to a collective bargaining agreement. In support of its argument that the positions are inappropriately classified as SPSAs, AFSCME points to CMS’s stipulation that the positions were either appropriately within the bargaining unit or “not supervisory within the meaning of the Act.” However, these arguments ignore that Section 6.1 is a new creation of the legislature. Section 6.1 is a self-contained mechanism to allow positions to be excluded from collective bargaining, including, in some cases, position that have been subject to collective bargaining agreements for several years. Moreover, the authority to determine whether a position is appropriately classified<sup>7</sup> lies with the Illinois Civil Service Commission, not with the Board. 20 ILCS 415/10(5).

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<sup>6</sup> The Board’s October 7, 2013, decision applied to the following cases, which were consolidated for consideration and decision: S-DE-14-005, S-DE-14-008, S-DE-14-009, S-DE-14-010, S-DE-14-017, S-DE-14-021, S-DE-14-026, S-DE-14-028, S-DE-14-030, S-DE-14-031, S-DE-14-032, S-DE-14-034, S-DE-14-039, S-DE-14-040, S-DE-14-041, S-DE-14-042, S-DE-14-043, S-DE-14-044, and S-DE-14-045.

<sup>7</sup> The Illinois Civil Service Commission is authorized to “hear appeals of employees who do not accept the allocation of their positions under the position classification plan.” 20 ILCS 415/10(5). SPSA is a classification created by the classification plan under the Personnel Code. 80 Ill. Adm. Code 310.50.

Because the Act's clear language permits designation of the position based solely on classification, which AFSCME does not dispute, and without regard to job duties, I find that the designations are proper.

**III. CONCLUSIONS OF LAW**

The Governor's designation in this case is 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 Illinois Department of Revenue are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

40070-25-07-000-10-01	Vacant	Assistant General Counsel
40070-25-07-310-00-01	Charlton, Terry	Senior Counsel

**V. 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>8</sup> parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than three 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](mailto:ILRB.Filing@illinois.gov), and served on all other parties via electronic mail at its e-mail address 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 Springfield, Illinois, this 25th day of October, 2013.**

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

  
\_\_\_\_\_  
Sarah Kerley  
Administrative Law Judge

<sup>8</sup> Available at [www.state.il.us/ilrb/subsections/pdfs/Section1300IllinoisRegister.pdf](http://www.state.il.us/ilrb/subsections/pdfs/Section1300IllinoisRegister.pdf)