

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

State of Illinois, Department of Central)	
Management Services (Capital)	
Development Board),)	
)	
Petitioner,)	
)	
and)	Case No. S-DE-14-114
)	
American Federation of State, County)	
and Municipal Employees, Council 31,)	
)	
Labor Organization-Objector.)	

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

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

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.

Reg. 14,070 (September 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On October 31, 2013, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designation pursuant to Section 6.1(b)(3) and (5) of the Act and Section 1300.50 of the Board's Rules. The designation pertains to six positions within the Capital Development Board. All six positions were certified into the RC-62 bargaining unit pursuant to the actions of the Board in Case No. S-RC-10-112. On November 13, 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. Based on my review of the designations, the documents submitted as part of the designation, the objections, and the documents and arguments submitted in support of those objections, I find the designation to have been properly submitted and consistent with the requirements of Section 6.1 of the Act and consequently I recommend that the Executive Director certify the designation of the positions at issue in this matter as set out below and, to the extent necessary, amend any applicable certifications of exclusive representatives to eliminate any existing inclusion of these positions within any collective bargaining unit:

Administrator (position nos. 50555-50-44-200-50-01; 50555-50-44-200-95-01; 50555-50-44-200-90-01; 50555-50-44-200-40-01; 50555-50-44-200-01-01; 50555-50-44-310-00-01).

I. AFSCME's Objections

AFSCME makes several general objections regarding the Act, along with several general objections regarding this designation. AFSCME also specifically objects to the designation of all six positions. Generally, AFSCME claims Section 6.1 of the Act violates the separation of powers doctrine established by the Illinois Constitution. AFSCME alleges that the legislature has improperly delegated its power to exclude or include employees from the Act to the Governor, by giving the Governor the power to make changes to a law without any standards. AFSCME also claims that Section 6.1 of the Act violates the promise of equal protection under Article I, Section 2 of the Illinois Constitution. AFSCME alleges the Act denies employees equal protection because the Governor can remove some positions from the Act while leaving identical positions without giving any rational basis for the decision. Finally, AFSCME claims that Section 6.1 of the Act violates Article I of the Illinois Constitution prohibiting the impairment of

contracts because the employees designated are beneficiaries of collective bargaining agreements.

AFSCME claims that this designation does not fully comply with the requirements of Section 6.1 of the Act. AFSCME alleges that Section 6.1(b)(5) requires CMS to provide a list of job duties for each designated employee but the designation only includes position descriptions and some affidavits regarding the employees' job duties. AFSCME claims that CMS has not demonstrated that the designated employees have actual authority to complete the job duties listed in their position descriptions. AFSCME alleges that the position descriptions are also insufficient because they only list potential responsibilities while the employees' actual duties are assigned at their supervisors' discretion. Finally, AFSCME notes that the position descriptions give no indication how much time the employee spends on each job duty. AFSCME claims that the designated employees are not supervisory or managerial under the National Labor Relations Act (NLRA), as required by Section 6.1(b)(5). AFSCME alleges that CMS presented no evidence that the designated employees exercise any of the job duties in the position descriptions or that they act with independent discretionary authority. AFSCME claims that the NLRA standard requires the party raising the exclusion, here CMS, to bear the burden of proof. AFSCME alleges that the supervisory exclusion under the NLRA is dependent on facts, so therefore, CMS must demonstrate that the designated employees have actual authority to act or effectively recommend one of the 11 supervisory functions with independent judgment.

AFSCME claims that Section 6.1(b)(3) requires a designated employee to be both Rutan-exempt and exempt from Jurisdiction B of the Personnel Code. AFSCME alleges that CMS did not provide an affidavit or any other verification that the designated employees are both Rutan-exempt and exempt from Jurisdiction B of the Personnel Code. Finally, AFSCME notes that all six of the designated positions were certified in Case No. S-RC-10-112 and CMS agreed to their certification. AFSCME claims that CMS has not shown that the designated employees' job duties have changed. AFSCME alleges that designating these positions violates due process and is arbitrary and capricious because it would eliminate the employees' right to associate with a labor organization. AFSCME claims that the risk of error is high in this case because of the strong presumption favoring CMS and the designation.

AFSCME specifically objects to the designation of all six positions. AFSCME claims that Donald Broughton's position is not properly designated under Section 6.1(b)(3) or (5). AFSCME alleges that Broughton's position description states his work is subject to administrative approval so he does not act with independent authority. AFSCME also claims that Broughton's position description is not accurate and does not reflect his actual duties. Finally, AFSCME alleges that CMS did not produce evidence to specifically show that Broughton is exempt from Jurisdiction B of the Personnel Code.

AFSCME claims that James Cockrell's position is not properly designated under Section 6.1(b)(3) or (5). AFSCME alleges that Cockrell's position description is questionable because it was created after Section 6.1 of the Act became effective. AFSCME argues that CMS should submit Cockrell's previous position description or note the changes made. AFSCME claims that Cockrell's position description is not accurate and does not reflect his actual duties. Finally, AFSCME alleges that CMS did not produce evidence to specifically show that Cockrell is Rutan-exempt.

AFSCME claims that Marcy Joerger's position is not properly designated under Section 6.1(b)(3) or (5). AFSCME alleges that Joerger's position description was created in 2003, before her position was added to a bargaining unit and her job duties have not changed. Therefore, CMS should not be allowed to exclude her from the bargaining unit now. AFSCME claims that Joerger's work is subject to management approval and she does not develop policy. Finally, AFSCME alleges that CMS did not produce evidence to specifically show that Joerger is Rutan-exempt.

AFSCME claims that Jesus Martinez's position is not properly designated under Section 6.1(b)(3) or (5). AFSCME alleges that Martinez's position description is questionable because it was created after Section 6.1 of the Act became effective. AFSCME argues that CMS should submit Martinez's previous position description or note the changes made. AFSCME claims that Martinez exercises no independent authority because his work is subject to administrative approval. AFSCME alleges that Martinez exercises no supervisory functions with independent authority and in fact, his position description identifies him as a "lead worker" rather than a "supervisor." Finally, AFSCME claims that CMS did not produce evidence to specifically show that Martinez is exempt from Jurisdiction B of the Personnel Code.

AFSCME claims that Lisa Mattingly's position is not properly designated under Section 6.1(b)(3) or (5). AFSCME alleges that Mattingly's position description is questionable because it was created after Section 6.1 of the Act became effective. AFSCME argues that CMS should submit Mattingly's previous position description or note the changes made. AFSCME claims that Mattingly does not use independent judgment or make effective recommendations. AFSCME notes that Mattingly assigns work based on geography and without independent judgment. Finally, AFSCME alleges that CMS did not produce evidence to specifically show that Mattingly is Rutan-exempt.

AFSCME claims that Ron Wright's position is not properly designated under Section 6.1(b)(3) or (5). AFSCME alleges that Wright's position description is questionable because it was created after Section 6.1 of the Act became effective. AFSCME argues that CMS should submit Wright's previous position description or note the changes made. AFSCME claims that Wright's position description is not accurate and does not reflect his actual duties. AFSCME alleges that Wright does not have independent authority because his duties are subject to approval. Finally, AFSCME claims that CMS did not produce evidence to specifically show that Wright is exempt from Jurisdiction B of the Personnel Code.

II. Discussion and Analysis

a. Procedural Objections

AFSCME raises three general objections to this designation, claiming that Section 6.1 of the Act violates the Illinois Constitution. However, the Board has held that it is beyond its 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." State of Illinois, Department of Central Management Services, 30 PERI ¶ 80 Cons. Case Nos. S-DE-14-005 etc. (IL LRB-SP Oct. 7, 2013) citing Goodman v. Ward, 241 Ill. 2d 398, 411 (2011). In Case No. S-DE-14-005 the Board expressed its concern with AFSCME's due process arguments but maintained that it has taken necessary measures to prevent a violation of such.² Moreover, in

² The Board found in Case No. S-DE-14-005, issued October 7, 2013, that consistent with the Fourth District, it has, "insured that the individual employees as well as their representative and potential representative receive notice soon after designation petitions are filed, usually within hours, and have provided for redundant notice by means of posting at the worksite... we provided them an opportunity to file objections, and where they raise issues of fact or law that might overcome the statutory presumption of appropriateness, an opportunity for a hearing, [and]... require a written recommended decision by an administrative law judge in each case in which objections have been filed." See Arvia v. Madigan, 209 Ill. 2d 520 (2004), and Gruwell v. Ill. Dep't of Financial and Professional Regulations,

administrative hearings, failing to conduct an oral hearing is not necessarily the denial of a hearing where written documents could suffice as a hearing. Department of Central Management Services (Illinois Commerce Commission) v. Illinois Labor Relations Board, State Panel, 406 Ill. App. 3d 766, 769-70 (4th Dist. 2010). Therefore, AFSCME's due process rights have not been violated by the Board following the policies and procedures mandated by the legislature. Moreover, I find there is no issue of law or fact to warrant a hearing.

b. Substantive Objections

AFSCME makes several objections to the designation of the positions under Section 6.1(b)(5) of the Act. However, because I find that the positions are properly designated under Section 6.1(b)(3) of the Act, I will not consider the Objector's arguments specifically related to Section 6.1(b)(5) of the Act. AFSCME claims that Section 6.1(b)(3) requires a designated employee to be both Rutan-exempt and exempt from Jurisdiction B of the Personnel Code. While they did not provide clear documentation showing that all six employees are both Rutan-exempt and exempt from Jurisdiction B of the Personnel Code with the petition, CMS subsequently supplemented its filing. CMS' supplementary filing shows that all six positions are both Rutan-exempt and exempt from Jurisdiction B of the Personnel Code as required by Section 6.1(b)(3) of the Act. AFSCME alleges that CMS did not provide an affidavit or any other verification that the designated employees are both Rutan-exempt and exempt from Jurisdiction B of the Personnel Code. However, given that the Petitioner presented evidence showing that all designated employees are Rutan-exempt and exempt from Jurisdiction B of the Personnel Code and the Objector presented no evidence to show this is not the case, a sworn statement is not necessary. In order to overcome the substantial presumption in Section 6.1(d), the Objector must show more than a mere absence of a sworn statement stating the positions are both Rutan-exempt and exempt from Jurisdiction B of the Personnel Code.

Finally, AFSCME notes that all six of the designated positions were certified in Case No. S-RC-10-112 and CMS agreed to their certification. AFSCME claims that CMS has not shown that

406 Ill. App. 3d 283, 296-8 (4th Dist. 2010). Additionally, the Board found that it has "allowed an opportunity to appeal those recommendations for consideration to the full Board by means of filing exceptions... doubled the frequency of our scheduled public meetings in order to provide adequate review of any exceptions in advance of the 60-day deadline and... issu[e] written final agency decisions which may be judicially reviewed pursuant to the Administrative Review Law", in an effort to adhere to due process. State of Illinois, Department of Central Management Services, 30 PERI ¶ 80 Cons. Case Nos. S-DE-14-005 etc. (IL LRB-SP Oct. 7, 2013).

the designated employees' job duties have changed. AFSCME alleges that designating these positions violates due process and is arbitrary and capricious because it would eliminate the employees' right to associate with a labor organization. AFSCME claims that the risk of error is high in this case because of the strong presumption favoring CMS and the designation. To qualify for designation under Section 6.1 of the Act, the position in question must fall into one of the three broad categories of designatable positions and must likewise fall into one of the five categories which describe its classification, title or characteristics. These positions fall into one of the three broad designatable categories because they were certified to be in a bargaining unit by the Board on or after December 2, 2008. Similarly, these positions fall within one of the five categories which describe the nature of the position because all six are Rutan-exempt and exempt from Jurisdiction B of the Personnel Code.

Here, AFSCME appears to argue that because these positions are included in a bargaining unit, they are inappropriate for designation. However, this does not address the Board's sole inquiry in this particular case. Here, the Board must determine whether the designated positions meet the criteria set forth in Section 6.1 of the Act. Section 6.1(b)(3) provides that for a position to be designatable, 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. In this case, it is clear that these positions fall into one of the three broad designatable categories. Similarly, it is undisputed that all six positions are Rutan-exempt and exempt from Jurisdiction B of the Personnel Code. Accordingly, the sole inquiry here is whether the designation comports with the requirements of the Act. CMS followed the requirements of the Act in designating these positions.

III. Conclusions of Law

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

IV. Recommended Order

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

Administrator (position nos. 50555-50-44-200-50-01; 50555-50-44-200-95-01; 50555-50-44-200-90-01; 50555-50-44-200-40-01; 50555-50-44-200-01-01; 50555-50-44-310-00-01).

V. Exceptions

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300³, parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, no later than 3 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 to ILRB.Filing@illinois.gov. Each party shall serve its exceptions 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 3rd day of December, 2013.

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

Thomas R. Allen

**Thomas R. Allen
Administrative Law Judge**

³ Available at www.state.il.us/ilrb/subsections/pdfs/Section 1300 Illinois Register.pdf