

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

State of Illinois, Department of Central)	
Management Services, (Illinois Department)	
of Transportation),)	
)	
Petitioner)	
)	
and)	Case No. S-DE-14-120
)	
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). Three broad categories of positions may be so designated: (1) positions that were first certified to be in a bargaining unit by the Illinois Labor Relations Board (Board) on or after December 2, 2008; (2) positions that 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 that have never been certified to have been in a collective bargaining unit. Only 3,580 such positions may be so designated by the Governor, and of those, only 1,900 may be positions that have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, a 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.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. 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 November 13, 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 November 25, 2013, the American Federation of State, County and Municipal Employees (AFSCME) filed timely objections to the designation.

Based on my review of the designation, the documents submitted as part of the designation, AFSCME's objections, and the arguments submitted in support of those objections, I have determined that AFSCME has 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 position 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 this position within any collective bargaining unit.

I. ISSUES AND CONTENTIONS

The instant petition designates one position at the Illinois Department of Transportation (IDOT) for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act. CMS states that this position qualifies for designation under Section 6.1(b)(5). CMS also states that this position is currently represented by AFSCME for the purposes of collective bargaining. In support of its contentions, CMS has filed a CMS-104 containing the position description for the designated position and an affidavit from the Director of IDOT's Division of Aeronautics stating, among other things, that the CMS-104 fairly and accurately represents the duties that the designated position is authorized to perform.

AFSCME objects to this designation on the grounds that CMS has failed demonstrate that the position at issue has significant and independent discretionary authority as that term is used in Section 6.1(b)(5) and defined in Section 6.1(c) of the Act because the CMS-104 does not show the requisite managerial authority as the term is defined by Section 6.1(c)(i). AFSCME further states that if CMS were to assert that the position authorizes the incumbent employee to have

significant and independent discretionary authority as a supervisor as defined by Section 6.1(c)(ii), a hearing would be necessary to determine whether that is the case.²

AFSCME next attempts to incorporate by reference arguments raised in other proceedings, stating that it “further asserts all the general objections it has set forth with respect to other DE petitions, such as Case No. S-DE-14-122.”³ In the general objections filed in Case No. S-DE-14-122, AFSCME raises several arguments in support of its contention that CMS designated positions that are not supervisors or managers under the relevant definitions. AFSCME further argues that the designation in that case violates due process and is arbitrary and capricious. Finally, AFSCME alleges that Section 6.1 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 position is currently covered by a collective bargaining agreement to which the State is a party, under

² In its objection, AFSCME states that CMS does not assert that the designated position is authorized to have significant and independent discretionary supervisory authority. This conclusion appears to be based on Paragraph 6 of the affidavit submitted by CMS, which provides that the position at issue qualifies for designation under Section 6.1(b)(5) and that an employee in that position is authorized to exercise significant and independent discretionary authority as defined by Section 6.1(c)(i) of the Act. Neither the Act nor the Board’s Rules require CMS to identify whether an employee’s alleged authority to exercise significant and independent discretionary authority is managerial (as defined in Section 6.1(c)(i)) or supervisory (as defined in Section 6.1(c)(ii)) when filing a designation. Furthermore, the statements in the affidavit are those of Susan Shea, Director of IDOT’s Division of Aeronautics; Paragraph 6 contains Shea’s broad conclusion on the ultimate question before the Board in this matter. I consider this statement neither as establishing the assertions contained in Paragraph 6 nor as limiting CMS’s broader assertion that the position is designable under Section 6.1(b)(5). This is particularly true where Paragraph 7 goes on to conclude that the position is authorized to exercise significant and independent discretionary authority as defined by Section 6.1(c)(i) but then enumerates duties that would support a finding under Section 6.1(c)(ii) to support that conclusion. Therefore, the authority of this position to exercise significant and independent discretionary authority as defined by both 6.1(c)(i) and (ii) is at issue in this matter.

³ The Board’s Rules require a party who wishes to object to a Gubernatorial designation to specifically set forth the grounds for its objection, including supporting documentation. 80 Ill. Adm. Code 1300.60(a)(3). Nothing in the Act or the Rules provides for incorporation by reference, and the Board has previously rejected a party’s attempts to incorporate by reference documents filed at another stage of the same proceeding. See State of Illinois, Department of Central Management Services, (Illinois Commerce Commission), 29 PERI ¶ 76 (IL LRB-SP 2012). However, in Illinois Commerce Commission, the Board was concerned that an employer’s attempt to incorporate into its response to the petitioner’s exceptions a document filed before the recommended decision and order (RDO) was issued would ensure that the response was not focused on the analysis used in the RDO or the exceptions. Id. Here, though the purportedly incorporated objections were filed in other cases, AFSCME correctly notes that these cases raise similar issues; thus the general objections may be applicable to the instant matter. Insofar as that is the case, the Board’s Rules provide me with the discretion necessary to consider the general objections filed by AFSCME in Case No. S-DE-14-122. I decline, however, to exercise that discretion to parse through the objections filed by AFSCME in the remaining 140 Gubernatorial designation cases before the Board in hopes of finding an argument on point.

Article I, Section 16 of the Illinois Constitution and Article I, Section 10 of the United States Constitution.

II. FINDINGS OF FACT

The position designated by CMS is an employee of IDOT in the working title of Executive Chief Pilot in the agency's Aeronautics Division. The position is classified as a Public Service Administrator (PSA) Option 8F by the employer and is currently represented by AFSCME for purposes of collective bargaining, as certified by the Board on July 16, 2010, Case No. S-RC-10-198.

At the time this designation was filed, the position at issue was held by Keith Spaniol. Spaniol reports to the Bureau Chief of Air Operations for the Division of Aeronautics. Susan Shea is the Director of the Division of Aeronautics. By affidavit, Shea asserts that she is familiar with Spaniol's duties and that the CMS-104 submitted by CMS fairly and accurately represents the duties Spaniol is authorized to perform.

III. POSITION DESCRIPTION

A CMS-104 effective September 16, 2003, describes the following relevant responsibilities of the position:

- 1) Under administrative direction, plans, coordinates, and manages, within designated fiscal limits, the activities of the Executive Flight Operation Section;
- 2) Performs pilot-in-command functions while on actual flight assignments;
- 3) Supervises Executive aircraft flight crews, coordinates with the Scheduling Section, and administers bureau policy as specified in the *Policy and Procedures* and *Flight Operations and Training Manuals*;
- 4) Ensures compliance with departmental safety rules;
- 5) Administers unit pilot work and duty schedules to include overtime, training, etc. Coordinates with Scheduling Section on a daily basis to ensure maximum utilization of assets. Assigns and evaluates staff work, prepares and signs performance evaluations, promotes good work performance, approves time off, recommends/imposes disciplinary action, and adjusts grievances at the first level;
- 6) Within designated fiscal limitations, and in accordance with departmental policy, plans, coordinates, and assists management of unit operations, including the

supervision of executive aircraft flight crews and compliance with the Bureau's Air Carrier Certificate; and

- 7) Schedules and administers a pilot standardization program which requires semi-annual review and flight checks in accordance with Federal Aviation Regulation and divisional policy of maintaining the highest possible standards for pilot proficiency, safety, and training.

The CMS-104 lists 13 positions that report to Spaniol, all in the working title of Aircraft Pilot I or Aircraft Pilot II.

IV. DISCUSSION AND ANALYSIS

As stated above, a position is properly designable, among other circumstances, if: (1) it was first certified to be in a collective bargaining unit on or after December 2, 2008; and (2) it authorizes an employee in that position to have significant and independent discretionary authority as an employee. 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). Furthermore, the Board has held that the submission of position descriptions that are consistent with a designation, combined with the presumption under Section 6.1(d) and the absence of any evidence that the designation is inappropriate, leads to the conclusion that the designation comports with Section 6.1. State of Illinois, Department of Central Management Services (Department of Commerce and Economic Opportunity), 30 PERI ¶ 86 (IL LRB-SP 2013).

A. CMS's submission is consistent with the designation.

CMS's initial filing clearly indicates, and AFSCME does not contest, that the designated position was first certified in a bargaining unit on July 16, 2010, thus satisfying the first statutory requirement. As to the second statutory requirement, the submission is consistent with the designation because the CMS-104 tends to show that an employee in the designated position is

authorized to exercise significant and independent discretionary authority as that term is defined in Section 6.1(c)(ii).⁴

An employee is authorized to have significant and independent discretionary authority if he or she has authority sufficient to qualify as a supervisor of a State agency as that term is defined in Section 152 of the National Labor Relations Act (NLRA) or any orders of the National Labor Relations Board (NLRB) interpreting that provision or decisions of courts reviewing decisions of the NLRB. 5 ILCS 315/6.1(c)(ii) (2012). 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, responsibly to direct them, to adjust their grievances, or effectively to recommend such actions, 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. § 152 (11). The Board has upheld the designation of a position under this test where: (1) the designated employees have the authority to engage in any of the enumerated 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. State of Illinois, Department of Central Management Services, (Department of Public Health), Case No. S-DE-14-111 (IL LRB-SP November 27, 2013) (citing NLRB v. Kentucky River Comm. Care, Inc., 532 U.S. 706, 713 (2001) and Oakwood Healthcare Inc., 348 NLRB 686,687 (2006)).

The CMS-104 for the designated position indicates that an employee in that position has the authority to assign work to and evaluate the performance of pilots in IDOT’s Executive Flight Operation Section; to approve requests for time off; to recommend and impose discipline; and to adjust grievances at the first level. Nothing on the face of CMS’s submission suggests that an employee in the designated position does not have the authority to use independent judgment or to act in the interests of the employer in completing these tasks.

⁴ Because I find that an employee in the position at issue is authorized to exercise significant and independent discretionary authority as that term is defined in Section 6.1(c)(ii), and that finding alone is sufficient to support a conclusion that the designation is proper, I will not address the assertion that an employee in the designated position is authorized to exercise significant and independent discretionary authority as that term is defined in Section 6.1(c)(i).

B. AFSCME has raised no assertions that, if proven, might demonstrate that the designation is inappropriate.

In the objections filed in this case and in Case No. S-DE-14-122, AFSCME argues that the designated position is not a supervisory. In support thereof, AFSCME states: (1) that CMS should bear the burden of proof in this matter because NLRB precedent provides that the party asserting an exclusion bears the burden of proving that the exclusion applies; (2) that the CMS-104 is insufficient to demonstrate that the job duties of the designated position are consistent with the designation because there is no demonstration of “actual authority” to perform the enumerated functions, the CMS-104s list only potential duties, and there is no evidence that the incumbent has actually completed the enumerated duties; and (3) that the question of whether a position is supervisory is a fact-intensive issue, the resolution of which requires a hearing.

It is clear that AFSCME’s first contention—that CMS should bear the burden of proving that the designated position qualifies as that of a supervisor as defined by the NLRA—fails as a matter of law. First, the pertinent issue is not whether an employee is a supervisor under the NLRA, but whether he or she has the authority to be a supervisor under that definition.⁵ Therefore, AFSCME’s insistence on evidence of “actual authority” to perform the duties listed in the CMS-104 is not rooted in the statute. Moreover, in providing a presumption that any Gubernatorial designation is properly made, the General Assembly clearly allocated the burden of proving that a designation is improper to the party who objects.⁶ See 5 ILCS 315/6.1(d) (2012). It is because of this presumption that AFSCME’s remaining assertions are also insufficient. It is not CMS who must provide evidence that an incumbent has actually completed the duties enumerated in the CMS-104 in order to demonstrate that he or she has authority to complete those duties, but AFSCME who must produce evidence that he or she does not have such authority. It is likewise AFSCME who must produce evidence showing that the incumbent does not exercise independent judgment when completing the enumerated duties, or does not do

⁵ A position is properly designable if it authorizes an employee to have significant and independent discretionary authority as an employee. 5 ILCS 6.1(b)(5) (2012). An employee has significant and independent discretionary authority as an employee if he or she qualifies as a supervisor of a State agency as defined by the NLRA. 5 ILCS 6.1(c)(ii) (2012). Substituting the legislature’s definition of significant and independent discretionary authority, Section 6.1(b)(5) reads as follows: “[In order to be designable, a position]... must authorize an employee in that position to... qualify] as a supervisor of a State agency.”

⁶ AFSCME further argues that even if Section 6.1(d) shifts this burden—which it does—CMS has nonetheless failed to satisfy the burden of producing evidence to support the presumption that the designation is properly made. However, as previously discussed, CMS’s submission tends to support its assertion that an employee in the designated position is authorized to exercise significant and independent discretionary authority.

so in the interest of the employer. Where there is some question as to these issues, a hearing may be required. But where AFSCME has failed to refute these points with anything other than conclusory statements that are unsupported by any factual assertions, no hearing is warranted.

C. AFSCME's remaining objections do not warrant dismissal of the instant designation.

In the remaining objections filed in Case No. S-DE-14-122, AFSCME argues that Section 6.1 is unconstitutional under several provisions of the Illinois Constitution and the United States Constitution, and that the instant designation is arbitrary and capricious and violates due process.

AFSCME alleges that P.A. 97-1172 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 generally argues that the instant designation violates due process and is arbitrary and capricious because the position at issue has previously been certified into a bargaining unit by the Board, the position's job duties and functions have not changed since its certification, and the position is covered by a collective bargaining agreement which CMS entered into subsequent to the enactment of Section 6.1. Though AFSCME explains the legal standards related to the requirement of due process at length, it fails to relate these standards back to the facts of the instant designation or the Gubernatorial designation process as a whole. AFSCME relies instead on conclusory statements unsupported by reasoning. As such, the grounds for its objections on these issues are unclear. However, I note that 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 that authorizes an employee to have significant and independent discretionary authority. 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 Act in doing so. As to the requirements of due process, 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)). AFSCME has not articulated how it has been deprived of either in this case.

V. CONCLUSION OF LAW

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

VI. RECOMMENDED ORDER

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

37015-23-60-400-10-01 Executive Chief Pilot

VII. 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. 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 20th day of December, 2013

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/s/ Heather R. Sidwell

Heather R. Sidwell
Administrative Law Judge