STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

State of Illinois, Department of Central Management Services (Illinois Gaming Board),	)	
Petitioner	)	
	)	Case No. S-DE-14-121
and	)	
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, allows the Governor of the State of Illinois to designate certain public employment positions with the State as excluded from the collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. Section 6.1 and Public Act 97-1172 became effective on April 5, 2013 and allow the Governor 365 days from that date to make such designations. The Illinois Labor Relations Board (Board) promulgated rules to effectuate Section 6.1 that became effective on August 23, 2013, 37 Ill. Reg. 14070 (Sept. 6, 2013). Those rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On November 14, 2013, the State of Illinois, Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designation petition pursuant to Section 6.1 of the Illinois Public Labor Relations Act and Section 1300.50 of the Board's rules. All of the positions at issue in this case are affiliated with the Illinois Gaming

Board (IGB).[1] On November 25, 2013, the American Federations of State, County and Municipal Employees, Council 31 (AFSCME) filed an objection to CMS' petition pursuant Section 1300.60(a)(3) of the Board's rules. Subsequently, a hearing was held on December 23, 2013 before the undersigned. At that time, the parties appeared and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. After full consideration of the record, I, the undersigned Administrative Law Judge, recommend the following.

I. DISCUSSION AND ANALYSIS

Centrally, the instant analysis must determine whether the petitioned-for positions may lawfully be selected for designation under Section 6.1 of the Illinois Public Labor Relations Act. Under Section 6.1, 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 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. Moreover, to be properly designated, the position must also fit one or more of the five categories provided by Section 6.1(b).[2] Here, CMS contends that the positions at issue qualify for designation under Section 6.1(b)(5).

Section 6.1(b)(5) requires a petitioned-for position to authorize an employee in that position to have "significant and independent discretionary authority as an employee." That

[1] In support of and along with its petition, CMS provided a position description for each of the positions at issue. In addition, CMS provided affidavits that contend, inter alia, that the included position descriptions fairly and accurately represent the duties and responsibilities of those positions.

[2] 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. I also note that Public Act 98-100, which became effective July 19, 2013, added subsections (e) and (f) to Section 6.1. Those subsections shield certain specified positions from such designations, but none of those positions are at issue in this case.

authority is defined in Section 6.1(c), which requires the employee to either be (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 represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency or (ii) qualify 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 (NLRB) interpreting that provision or decisions of courts reviewing decisions of the NLRB.

General Objections

In its objection, AFSCME asserts that AFSCME's submissions merely demonstrate that the positions at issue are "authorized" to complete the job duties alleged therein. According to AFSCME, in order to properly designate a position for exclusion, CMS needed to demonstrate that the employees at issue have "actual authority" to complete the job duties listed in their position descriptions or that they have actually exercised all of the powers authorized by their positions. Strictly speaking, those positions do not seem to reflect the standard provided by Section 6.1. Indeed, the plain language of Section 6.1(b)(5) fairly clearly encompasses positions that simply authorize employees in those positions to have "significant and independent discretionary authority."

Separately, I suggest that the mere possibility that the extent of the petitioned-for employees' duties may be influenced by their supervisors is not necessarily dispositive. See State of Illinois, Department of Central Management Services (Emergency Management Agency), 30 PERI ¶105 (IL LRB-SP 2013). I also note that the language of Section 6.1 does not overtly require that the petitioned-for employees be fully aware or informed of the extent of their

authorized duties and responsibilities. Moreover, it does not appear to distinguish between "professional" and "managerial" work to the extent that AFSCME seems to contend. See State of Illinois, Department of Central Management Services (Department of Natural Resources), 30 PERI ¶112 (IL LRB-SP 2013); State of Illinois, Department of Central Management Services (Department of Agriculture), 30 PERI ¶84 (IL LRB-SP 2013).

I am also unmoved by the fact that the petitioned-for positions have previously been included in bargaining units or by the fact that, subsequent to the enactment of Section 6.1, AFSCME and CMS agreed to a collective bargaining agreement that covers the positions at issue. In general, it appears that an employer should be allowed to purse an exclusion at any time if, at any point, it determines an exclusion is appropriate. Department of Central Management Services v. Illinois Labor Relations Board, State Panel, 364 Ill. App. 3d 1028, 1036, 848 N.E.2d 118, 124 (4th Dist. 2006); see State of Illinois, Department of Central Management Services, 30 PERI ¶80 (IL LRB-SP 2013).

AFSCME further asserts that "[t]he NLRB and the courts have systematically held that any claim of supervisory or managerial status requires that the party raising the exclusion bear the burden of proof." (According to AFSCME, CMS has failed to carry that burden.) It also contends that, to the extent that one of CMS' affidavits states that an employee effectuates policies or is authorized to effectuate departmental policy and the position description does not define a policy, there can be no showing that the employee is "managerial." In sum, I suggest that the foregoing positions overlook the presumption of appropriateness provided by Section 6.1(d) and the unique requirements of Section 6.1. See State of Illinois, Department of Central Management Services (Department of Natural Resources), 30 PERI ¶112.

Generally speaking, in order to properly designate a State employment position under Section 6.1, CMS must simply provide the Board with (1) the job title and job duties of the employment position; (2) the name of the State employee currently in the employment position, if any; (3) the name of the State agency employing the public employee; and (4) the category under which the position qualifies for designation. CMS provided that basic information. By doing so, CMS provided a basis for the designation and the minimum notice and showing required by Section 6.1. I also note that, for this particular type of case, absolute precision has not been required by the Board in the past. See State of Illinois, Department of Central Management Services (Emergency Management Agency), 30 PERI ¶105; State of Illinois, Department of Central Management Services, 30 PERI ¶80.

AFSCME's objection also alleges that Section 6.1 violates the Illinois Constitution and the United States Constitution. However, significantly, the Board is largely unable to address those kinds of allegations, as administrative agencies have no authority to declare statutes unconstitutional or question their validity. Goodman v. Ward, 241 Ill. 2d 398, 411, 948 N.E.2d 580, 588 (2011); State of Illinois, Department of Central Management Services, 30 PERI ¶80. Accordingly, I find that, though AFSCME's concerns are quite notable, this Recommended Decision and Order need not analyze the gravity of the rights affected by the Governor's designation or otherwise address AFSCME's constitutional concerns in detail.

Position-Specific Objections

Trudy Curtis

Curtis is the IGB's Internal Control Unit (ICU) Manager. Generally, the ICU receives and evaluates proposed changes to riverboat casinos' internal operating and accounting procedures. Those procedures are the casinos' "internal controls." The ICU determines whether

the casinos' proposed changes comply with the IGB's minimum internal control standards. As Manager of the ICU, Curtis presently oversees four subordinates. Those include two Internal Auditor I positions and two Public Service Administrator positions.

Curtis assigns her subordinates their work. When she does that, she considers the nature of the work being assigned. She also considers each subordinate's workload. In general, it appears that the Public Service Administrators are assigned the more complex cases and some specialized work. A more experienced Internal Auditor I could also be assigned more complicated cases than the less experienced Internal Auditor I.

All of Curtis' subordinates review the proposed internal control changes assigned to them. In each instance, the subordinate is expected to come up with questions and comments and share those concerns with the casino's compliance officer. The subordinate is also expected to contact the appropriate dockside supervisor and enforcement officer. Once the subordinate completes his or her review, he or she submits the review to Curtis for her review. If Curtis has comments or determines that something is incorrect, she contacts the subordinate and goes over the issue with him or her. At that stage, Curtis and/or the subordinate may contact the casino if there any remaining issues. Once Curtis, her subordinate, the dockside supervisor, and the enforcement officer are in agreement, the review is submitted to the IGB's Administrator in memo form. The Administrator can then either approve or deny the proposed change.

Curtis assigns other types of work as well. Sometimes, Curtis and her subordinates are also responsible for reviewing proposed changes to the IGB's minimum internal control standards. Those proposed changes follow a similar review and submission procedure. (Curtis cannot change the IGB's minimum standards on her own.) Curtis has also sought and been

granted approval to have two of her subordinates attend an internal audit compliance meeting with her.

Curtis regularly gives her subordinates direction, guidance, and training. She is expected to monitor her staff and make sure they are performing their work properly. Notably, the IGB's Administrator, Curtis' immediate superior, evaluates Curtis' ability to perform those functions.

Curtis completes annual performance evaluations for all of her subordinates. That function requires her to determine her subordinates' objectives and decide whether prior objectives have been met. Curtis appears to provide extensive, thoughtful comments in her evaluations. She also discusses her subordinates' objectives with them.

Curtis' performance evaluations can be used to support disciplinary actions. Indeed, her negative evaluations have caused two probationary employees to not be certified or retained. Although it does not appear that Curtis can promote on her own, her evaluations can also be considered when a subordinate is seeking a promotion.

Simply put, I recommend that the circumstances outlined above satisfy the standard of Section 6.1(c)(ii). The possibility that Curtis may not be able to unilaterally hire, transfer, suspend, lay off, or recall is not dispositive in this instance. Accordingly, I also recommend that Curtis' position satisfies the standard of Section 6.1(b)(5). To the extent that the Board agrees with those recommendations, I propose that it need not determine whether she also satisfies the standard of Section 6.1(c)(i).

To the extent that the Board does wish to explore whether Curtis' position satisfies the standard of Section 6.1(c)(i), I note that Curtis asserts that she does not write policies or recommend the adoption of polices. She also claims that she does not have any authority over how policies or legislation will be implemented. However, in a sense, it appears that that is

precisely what she does via her work with the ICU. That being said, I would not find that she is engaged in traditional executive and management functions and, to some extent, it is also not clear whether she meaningfully takes or recommends discretionary actions. Yet, given the presumption of appropriateness provided by Section 6.1(d), I would recommend that she does.

Eugene O'Shea

O'Shea is the director of the IGB's Self-Exclusion Program (SEP). Participants enroll themselves in that program by filling out the required paperwork. Theoretically, if a participant subsequently enters a casino, he or she will be arrested. Further, if the participant earns winnings at a casino, the winnings will be taken and donated to a charity. Currently, there are over 10,000 participants on the list of self-excluded participants.

O'Shea is alerted by agents when a self-excluded individual is found and money is seized. When that occurs, O'Shea sends a letter to the casino's general manager. That letter tells the general manager where the money is supposed to go. If O'Shea discovers that an agent reported an incorrect amount, O'Shea is expected to contact the agent's supervisor.

When a self-excluded individual asks the IGB to be removed from the list of participants, O'Shea drafts a response letter. O'Shea may also be required to create an internal memorandum that summarizes the request and indicates whether the individual has ever violated the terms of his or her self-exclusion agreement. In that memorandum, O'Shea can make a recommendation regarding whether the individual's name should or should not be removed, but he has only done so once.

Whether a participant can be removed from the list is determined by a well-defined agency policy. To explain, in order for a participant to be removed from the list, the participant must have been on the list for at least five years and must have obtained an affidavit from a

licensed, certified gambling addiction counselor. The Administrator, who ultimately decides whether an individual should be removed, may also require that a second affidavit be obtained.

O'Shea is responsible for periodically creating and submitting a report to the IGB. That report indicates how many people have signed up for the SEP and how many participants have been found or arrested. It also details how much money has been seized and how that money has been distributed.

O'Shea may be contacted by a representative from a casino or a dockside agent and asked for guidance that relates to the SEP. In that situation, O'Shea can work with the Administrator to formulate a response. To be clear, O'Shea does not have the authority to direct an onsite agent.

O'Shea may be asked to discuss issues related to the SEP while attending the IGB's closed session meetings. During those meetings, O'Shea has made recommendations to the IGB. (Not all of his recommendations regarding the SEP have been accepted.) He has also provided general comments and observations.

In addition to the foregoing responsibilities, O'Shea sometimes performs the work of a public information officer and is expected to interact with the media as needed and respond to calls and inquiries. That work is often a "collaborative effort" between O'Shea, the Administrator, the IGB's General Counsel, and the chairman of the IGB. In practice, if a question comes in from the press, O'Shea discusses it with the Administrator and, together, they formulate a response.

I recommend that O'Shea's position does not meet the standard of Section 6.1(c)(i). I find that he is not meaningfully engaged in traditional executive and management functions. It is also not clear that O'Shea sufficiently takes or recommends discretionary actions that effectively control or implement agency policy. Instead, it appears that O'Shea largely collaborates with his

superiors and ultimately communicates their positions to others. Sometimes, his work resembles that of a clerk. Moreover, O'Shea has no subordinates. Accordingly, I further recommend that his position does not meet the standard of Section 6.1(c)(ii). See State of Illinois, Department of Central Management Services (Emergency Management Agency), 30 PERI ¶105 (IL LRB-SP 2013). Because neither of Section 6.1(c)'s standards have been met, I must also recommend that O'Shea's position does not meet the standard of Section 6.1(b)(5).

James Pellum and Paul Prezioso

Pellum and Prezioso similarly function as "legal counsel" for the IGB and perform the same work. Both report directly to the IGB's General Counsel and do whatever work she assigns them. That work appears to have included drafting "disciplinary complaints," motions for summary judgment, "surrender letters," notices to be posted on the IGB's website, and other documents. Additionally, either may be directed to consider a new administrative rule, help the General Counsel respond to Freedom of Information Act requests, or assist a representative of the Attorney General's office in some way. The two are also expected to receive calls from IGB field agents who have questions about the IGB's statute and its administrative rules. Sometimes, Pellum and Prezioso work together on assignments.

All of Pellum's and Prezioso's written work is submitted to the General Counsel for her review and approval. The General Counsel checks their work for spelling and grammatical errors and makes sure the work is accurate and complies with the IGB's statute, administrative rules, and precedent. The General Counsel can and has changed their work product, but generally accepts the work that has been given to her. Her changes can range from adding exhibits to changing a document's language or format. The work of a legal counsel can also be

reviewed by the Administrator. Moreover, evidently, some determinations can only be made by the members of the IGB.

I recommend that the IGB's legal counsel position does not satisfy the standard of Section 6.1(c)(i). The record does not demonstrate that either attorney is engaged in traditional executive and management functions. It is also not clear that either represents management interests by taking or recommending discretionary actions that effectively control or implement agency policy. In general, it appears that the two essentially perform routine legal work under supervision and in accordance with specific instructions. Presumably, not all of the State's lawyers are "managers" under Section 6.1(c)(i). See Department of Central Management Services/Department of Healthcare and Family Services, 388, Ill. App. 3d 319, 331, 902 N.E.2d 1122, 1131 (4th Dist. 2009); Chief Judge of the 18th Judicial Circuit, 14 PERI ¶2032 (IL SLRB 1998); General Dynamics Corporation, 213 NLRB 851, 857 (1974).

In addition, I note that Pellum and Prezioso have no subordinates. Therefore, I also recommend that their position does not satisfy the standard of Section 6.1(c)(ii). See State of Illinois, Department of Central Management Services (Emergency Management Agency), 30 PERI ¶105 (IL LRB-SP 2013). Because neither of Section 6.1(c)'s standards have been met, I ultimately recommend that IGB's legal counsel position does not meet the standard of Section 6.1(b)(5).

II. CONCLUSION OF LAW

Based on my review of the designation, the documents submitted as part of the designation, the objections, the testimony, and the documents and arguments submitted in support of those objections, I find the instant designation to have been properly submitted and

consistent with the requirements of Section 6.1 of the Illinois Public Labor Relations Act. However, I find that the designation is improper to the extent that it seeks to designate the positions currently occupied by O'Shea, Pellum, and Prezioso.

III. 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 Gaming Board are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

Position Number	Working Title
37015-50-69-010-10-01	Asst. Licensing Coordinator
37015-50-69-240-00-01	Internal Controls Supervisor

IV. EXCEPTIONS

Pursuant to Sections 1300.90 and 1300.130 of the Board's rules, 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 the Administrative Law Judge's Recommended Decision and Order. All exceptions shall be filed and served in accordance with Section 1300.90 of the rules. Notably, exceptions must be filed by electronic mail sent 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 that does not file timely exceptions waives its right to except to the Administrative Law Judge's Recommended Decision and Order.

Issued in Chicago, Illinois this 26th day of December 2013.

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Martin Kehoe
Administrative Law Judge