

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

State of Illinois, Department of Central Management Services,)	
)	
Petitioner)	
)	
and)	Case No. S-DE-14-125
)	
American Federation of State, County and Municipal Employees, Council 31,)	
)	
Labor Organization-Objector)	
)	
Margaret Harkness & Jennifer Harrison,)	
)	
Employee-Objectors)	

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

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) added by Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. There are three broad categories of positions which may be so designated: 1) positions which were first certified to be in a bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008, 2) positions which were the subject of a petition for such certification pending on April 5, 2013 (the effective date of Public Act 97-1172), or 3) positions which have never been certified to have been in a collective bargaining unit. Only 3,580 of such positions may be so designated by the Governor, and, of those, only 1,900 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 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 emergency rules to effectuate Section 6.1, which became

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.

effective on April 22, 2013, 37 Ill. Reg. 5901 (May 3, 2013), and the Board promulgated permanent rules for the same purpose which became effective on August 23, 2013, 37 Ill. Reg. 14,070 (Sept. 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On November 14, 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. CMS' petition designates the exclusion of the following Public Service Administrators in the Illinois Council on Developmental Disabilities based on Section 6.1(b)(5) of the Act:

**Public Service Administrator, Option 6
Employed at Illinois Council on Developmental Disabilities**

<u>Position Number</u>	<u>Working Title</u>	<u>Incumbent</u>
37015-50-41-200-02-03	Program Specialist	Margaret Harkness
37015-50-41-100-30-01	Investment Coordinator	Jennifer Harrison
37015-50-41-200-02-01	Program Specialist	Vacant
37015-50-41-200-02-02	Program Specialist	Vacant

In support of its petition, CMS submitted job descriptions (CMS-104s) for each position, affidavits and a summary spreadsheet. The spreadsheet identifies position numbers, titles, name of the incumbents, bargaining unit, certifications date and case number, statutory category of designation and a list of job duties that support the presumptions that the positions are supervisory or managerial. The positions at issue were certified into the RC-150 bargaining unit pursuant to the actions of the Board in Case Nos. S-RC-07-078 and S-RC-07-150 on December 5, 2008.

On November 22, 2013, Margaret Harkness and Jennifer Harrison filed objections to the designation of their positions. On November 26, 2013, the Board received AFSCME's objections to the petition. All objections were filed pursuant to Section 1300.60(a)(3) of the Board's Rules.

A hearing in this case was held on December 5, 2013, via video conference in the Chicago and Springfield offices of the Illinois Labor Relations Board. At that time the parties were given an opportunity to participate, adduce relevant evidence, examine witnesses and argue

orally. After full consideration of the parties' stipulations, evidence, and arguments, and upon the entire record of the case, I recommend the following:

I. ISSUES AND OBJECTIONS

I find and the parties stipulate that the only issue for hearing is whether the petitioned-for positions currently filled by Jennifer Harrison and Margaret Harkness were managerial in accordance with Section 6.1(c)(i) of the Act.

AFSCME makes several general objections to the petition arguing that Section 6.1 of the Act violates due process, the separation of powers doctrine in the Illinois Constitution, equal protection under Article I, Section 2 of the Illinois Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution, and impairs the contractual right of the employees prohibited by the impairment of contract clause in the Illinois Constitution.

Moreover, AFSCME objects to the designation of the petitioned-for positions claiming that the position descriptions merely acknowledge the employee's potential responsibilities and CMS failed to provide specific evidence that the employees at issue have actual authority to perform the job duties listed. As such, AFSCME argues that the employees in the petitioned-for positions were never informed of their significant and independent discretionary authority to perform supervisory or managerial functions and CMS has not met its burden of proving the positions possess the necessary significant and independent discretionary authority. Moreover, AFSCME maintains that to the extent the affidavits state an employee at issue effectuates policies and the position description does not define a policy, there can be no showing that the employee is in fact managerial and the burden is on CMS to show why different duties should not apply to those holding the same title. Therefore, AFSCME maintains that the positions at issue are neither supervisory nor managerial in accordance with Section 6.1 of the Act.

Specifically, AFSCME maintains that the designation of the Program Specialist position (occupied by Margaret Harkness) and Investment Coordinator position is improper. AFSCME and the individual objectors provided written statements and testimony as evidence in support of the conclusion that these positions are not managerial.

II. FINDINGS OF FACT

The Illinois Council on Developmental Disabilities (Council) is formed under the Federal Development Disabilities Act. The federal government fully funds the Council even though it is a state agency. Every state has a Council and, consistent with the federal act, their mission is to

advocate for change in the individual states. There are 26 individuals on the Illinois Council which is comprised of representatives from state agencies and individuals in the community, and they are all appointed by the Governor's office. Within the Council there is an executive committee that is elected by its members.

The Council develops a five-year plan, with specific goals and targets, within the parameters of the federal law that mandates how each state should be allocating its funding. The Council's staff has the task of supporting and assisting with the implementation of these plans over this five-year period. Of relevance, the Council's staff consists of the Director, Sheila Romano; the Fiscal and Operations Director, Janinna Hendricks; the Program and Policy Director, Sandra Ryan; Program Specialist, Margaret Harkness and Investment Coordinator Jennifer Harrison. The staff is split into three committees and they are each assigned a staff person. Harrison is assigned to the Community Inclusion and Housing Committee; Harkness is assigned to the Education and Employment Committee and their immediate supervisor Sandy Ryan, is assigned to Self-Determination and Health Committee. All assignments were made by Ryan.

The Education and Employment Committee is responsible for five of the current state plan goals in the areas of education, childcare and employment. Harkness' job is to support the activities in which her committee wants to partake in order to achieve its specified goals. This includes doing pilot demonstrations, research, and developing and writing reports. This process called is "call for investment" and is done to inform the public of what the Council is looking to fund and achieve so that it can submit proposals for grants.

Each committee also has a review committee and a facilitator. The facilitators draft "decision memoranda" for their committees. These memoranda comprise the information from the call of investment and includes which proposal the committee would like to fund and the amount of money the fund is willing to grant to meet its target. The memorandum goes to the director first for review. The director may make changes or have suggestions and the facilitator will make those changes and give it back to the review team for final confirmation. After final approvals, the memorandum is included in the packet that goes to the Council for vote.

After the Council votes to approve a specific proposal, Harkness or Harrison will be assigned as project monitor. This assignment is made by Ryan and can be based on availability, interest or expertise. Harkness and Harrison are generally assigned to projects within their

specific area of expertise but this is not always the case. As project monitor, Harkness and Harrison review quarterly reports to ensure the project is progressing according to the milestones listed in the proposals. Amongst other administrative checks, this also includes reviewing and signing off on requests for reimbursements from the project. Specifically, this review consists of making sure the project is requesting reimbursement for spending money in line with what the project should be doing. After signing off on the requests, they are sent to Springfield for payment. The project monitor also gives feedback on the reports through an online system where Ryan and the Director, Sheila Romano, can review the feedback before the reports are approved in the system. The monitors are not supposed to approve a report without approval from Ryan or Romano. Sometimes Ryan and Romano may have additional questions.

When there are issues with the budget regarding payment requests, the monitor may have to revise the budget so that funds from different line items can be used elsewhere. In doing so, the monitor will speak with the grantee and have them resubmit line item budget totals, including a rationale. If the rationale makes sense to the monitor, she will submit it to Ryan for approval. Ryan may ask for an explanation of the rationale in changing the budget line items so that she understands. The process is the same for projects that request an extension in time to finish its project.

Harkness and Harrison also sit on a number of task force committees that are assigned by Ryan. At these meetings, Harkness and Harrison are tasked with representing the Council and presenting its position based on policy statements approved by the Council. A task force may also request participation, funding or other support from the Council. Although Harrison and Harkness cannot commit the Council to any support, they do take those requests back to Ryan making recommendations on how they believe the Council should proceed. According to Harkness, her recommendations are implied in the inflection of her tone and are accepted 50% of the time.

Because of Harkness' expertise in the employment and economic realm, she is very involved with advocating for Illinois to become an "employment first" state. Her involvement includes speaking to different organizations on the employment laws for the state. Harkness has accepted several invitations to speak with organizations without prior approval by Ryan. More recently, Ryan directed Harkness to first clear the requests with her to ensure Harkness is not overextending herself.

Harkness may also draft “letters of support” from the Council to another grantor on behalf of a former grantee. This happens when a former grantee asks the Council for referrals. If Harkness worked closely with that grantee when they were funded by the Council on a project, she may draft a recommendation letter on the Council’s behalf. She gives her drafts to Ryan and she is not aware of whether the letters are submitted. Ryan may ask her opinion when she knows Harkness is more familiar with the grantee.

Harkness has also testified on behalf of the Council at a public hearing regarding the closure of Jacksonville Development Center. Harkness was asked to be present and testify based on her availability. It was important that the Council had a representative present because the Council advocates for community-based options opposed to institutionalization which would be the outcome if Jacksonville Development Center were to close. Moreover, it was a well attended public hearing and the Council felt the need to having a showing of support on its position. Although it was Harkness who testified at the hearing, her testimony was drafted by Harrison.

Harkness and Harrison perform the same or similar duties regarding their role as facilitator and project monitor. As Investment Coordinator, Harrison also performs more administrative tasks regarding projects including drafting letters to those who did not receive a grant and to the Illinois Legislators and Congressional Delegates announcing new awards. Harrison will also review payment requests on projects requesting reimbursement to make sure the requests fit within the projects budgeted guidelines. She then inputs the information into a database and it is sent to the Fiscal and Operations Director, Janinna Hendricks for review.

As it relates to new legislation, Harrison monitors the Illinois General Assembly website to see if there are any bills that are introduced that have an effect on people with developmental disabilities. Per a template Harrison found online, she drafts a summary of the bill including a recommendation as to whether the Council should oppose, support or do nothing. Her summaries are given to Ryan and Romano. Although Harrison testified that her summaries are first submitted to Ryan where they are revised and resubmitted prior to going to Romano, the evidence presented suggests that the summaries with recommendations are provided to Ryan and Romano at the same time. At times, both have made comments or rebutted Harrison’s recommendations for different reasons; however, Harrison’s recommendations are accepted 50% of the time per her testimony.

Sandy Ryan and Sheila Romano testified that they rely heavily on the expertise and experience of Harkness and Harrison when accepting recommendations. Ryan testified that she does routinely review the work of both and she makes more administrative changes regarding grammar and spelling and is less likely to make substantive changes. Ryan testified to accepting Harrison and Harkness' recommendations 90% of the time.

III. DISCUSSION AND ANALYSIS

a. Procedural Objections

First, the Board has held that it is beyond its capacity to rule on the constitutional allegations made by AFSCME. Specifically, it is beyond the Board's purview to rule whether the Illinois Public Labor Relations Act, as amended, violate provisions of the United States and Illinois constitutions. The Board noted that administrative agencies have no authority to declare statutes unconstitutional or even to question their validity and in doing so, their actions are null and void and cannot be upheld. State of Illinois, Department of Central Management Services, Case No. S-DE-14-005 (IL LRB-SP Oct. 7, 2013) (citing Goodman v. Ward, 241 Ill. 2d. 398, 411 (2011)). As such, I will not address the constitutional objections in this decision.

The Board has also expressed its concern with AFSCME's due process arguments but maintains that it has taken necessary measures to prevent such a violation. Therefore, the Board held that consistent with judicial precedent 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." State of Illinois, Department of Central Management Services, Case No. S-DE-14-005 (IL LRB-SP Oct. 7, 2013) (citing Arvia v. Madigan, 209 Ill. 2d 520 (2004), and Gruwell v. Ill. Dep't of Financial and Professional Regulations, 406 Ill. App. 3d 283, 296-98 (4th Dist. 2010)). Additionally, the Board found that it has "allowed an opportunity to appeal those recommendations for consideration by 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, Case No. S-DE-14-005 (IL LRB-SP Oct. 7, 2013).

Moreover, in administrative hearings, failing to go to an oral hearing is not necessarily the denial of a hearing where submission of 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 and I find there is no issue of law or fact warranting a hearing.

Regarding the burden of proof, AFSCME has the burden to demonstrate that the designation is not proper. The Act is clear in that “any designation made by the Governor...shall be presumed to have been properly made,” 5 ILCS 315/6.1 (2012). Therefore, the burden of proof shifts to the objector to prove that the designation is, in fact, improper.

Lastly, Illinois Appellate Courts have held that the Board’s consideration of job descriptions alone, is an adequate basis upon which to evaluate an exclusion. See Village of Maryville v. Illinois Labor Relations Board, 402 Ill. App. 3d 369 (5th Dist. 2010); Ill. Dep’t of Cent. Mgmt. Servs. V. Ill. Labor Rel. Bd., 2011 Ill App. (4th Dist.) 090966; but see Vill. of Broadview v. Ill. Labor Rel. Bd., 402 Ill. App. 3d 503, 508 (1st Dist. 2010); see also Ill. Dep’t of Cent. Mgmt. Servs. v. Ill. Labor Rel. Bd., 382 Ill. App. 3d 208, 228-29 (4th Dist. 2008); City of Peru v. Ill. Labor Rel. Bd., 167 Ill. App. 3d 284, 291 (3d Dist. 1988). Accordingly, the Board has sufficient evidence from which to establish whether the designation is proper.

b. Designations under Section 6.1(b)(5)

As stated above, a position is properly designated if, amongst other reasons, it was first certified to the bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008, and it authorizes an employee in the position to have “significant and independent discretionary authority as an employee” as defined by Section 6(c) of the Act. Moreover, designations made by the Governor are presumed proper under Section 6.1 of the Act.

It is undisputed that the positions at issue were certified into bargaining unit RC-63 in Case Nos. S-RC-07-078 and S-RC-07-150 December 5, 2008. At issue is whether the petitioned-for positions have significant and independent discretionary authority as described in Section 6.1(c), to be designated as managerial under the Act.

Section 6.1(b)(5) allows the Governor to designate positions that authorize an employee to have “significant and independent discretionary authority.” 5 ILCS 315/6.5(b)(5). The Act provides three tests by which a person can be found to have “significant and independent discretionary authority.” Section 6.1(c)(i) sets forth the first two tests, while Section 6.1(c)(ii) sets forth the third.² Because the managerial test is the only issue to resolve, I will not discuss the employees supervisory authority under Section 6.1(c)(ii) of the Act.

The first test is substantively similar to the traditional test for the managerial exclusion articulated in Section 3(j). Section 6.1(c)(i) provides that a position authorizes an employee with significant and independent discretionary authority if “the employee 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.” However, 6.1(c)(i) provides a broader definition than the traditional test found in Section 3(j), in that it does not include a preponderance element and only requires that an employee is “charged with the effectuation” of policies and not that the employee is directing the effectuation. According to the traditional test, an employee directs the effectuation of management policy when he or she oversees or coordinates policy implementation by developing the means and methods of reaching policy objectives, and by determining the extent to which the objectives will be achieved. Elk Grove Village, 245 Ill. App. 3d at 122, Evanston, 227 Ill. App. 3d at 975. Here, however, in order to meet the first test set out in Section 6.1, a position holder need only be charged with carrying out the policy in order to meet the Department’s objective.

The second test under 6.1(c)(i) makes a designation proper if the position “represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of the agency.” 5 ILCS 315/6.1(c)(i). The Illinois Appellate Court has observed that the definition of a managerial employee in Section 3(j) is very similar to the definition of managerial employee in the Supreme Court’s decision in National Labor Relations Board v. Yeshiva University, 444 U.S. 672 (1980). Dep’t of Cent. Mgmt. Serv. Ill. Commerce

² Section 6.1(c) provides that a person has significant and independent discretionary authority as an employee if he or she (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 or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

Com'n v. Ill. Labor Rel. Bd., 406 App. 766, 776 (4th Dist. 2010) (citing Yeshiva, 444 U.S. at 683). The Court noted that the ILRB, "incorporated effective recommendations into its interpretation of the term 'managerial employee.'" ICC, 406 Ill. App. at 776.

In this case, the exclusion of the three Program Specialist positions (one occupied by Maragret Harkness and two vacant), as well as the Investment Coordinator position held by Jennifer Harrison is properly designated under Section 6.1(c)(i) of the Act.

It is clear by virtue of the job descriptions and testimony given at hearing in this case that the positions above execute management functions. Both Harkness and Harrison possess and exercise authority and independent judgment that broadly affects the organization's purposes or its means of effectuating those purposes when they act as facilitators and project managers. In these roles, Harkness and Harrison are responsible for ensuring the Council's objectives are consistently being met by those in which they grant funds. There is also evidence of Harkness and Harrison having responsibility and independent authority when a grantee is requesting a change in the line item budget or extension of time. In the position of project manager, Harrison and Harkness review the rationale of the request and justify whether it meets the projects goals requirements as it relates to the overall objective of the Council, prior to making recommendations to their superior. Moreover, their recommendations are accepted at least 50% of the time, if not more.

Lastly, the position is empowered with a substantial measure of discretion when acting as a liaison on a task force and regarding potential legislation. When acting as a liaison, Harkness effectively recommends how the Council should act on a request made by a task force committee. Management relies heavily on her expertise and opinion when accepting these recommendations. Moreover, Harrison has independent discretion when alerting management of potential legislative problems and corrective actions. Harrison is the only person in the office that monitors potential legislation and in this role, based on her knowledge and expertise; she decides which points of legislation to flag and effectively recommends how the Council should respond. Again, these recommendations are accepted 50% or more of the time.

Thus, the positions at issue are managerial according to Section 6.1(c)(i) of the Act and are properly designated for exclusion.

IV. CONCLUSIONS OF LAW

The designations in this case are properly made.

V. RECOMMENDED ORDER

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

**Public Service Administrator, Option 6
Employed at Illinois Council on Developmental Disabilities**

<u>Position Number</u>	<u>Working Title</u>	<u>Incumbent</u>
37015-50-41-200-02-03	Program Specialist	Margaret Harkness
37015-50-41-100-30-01	Investment Coordinator	Jennifer Harrison
37015-50-41-200-02-01	Program Specialist	Vacant
37015-50-41-200-02-02	Program Specialist	Vacant

VI. EXCEPTIONS

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300, 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 and Regulations. 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 not filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

Issued at Chicago, Illinois this 23rd day of December, 2013

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



Elaine L. Tarver, Administrative Law Judge