STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

State of Illinois, Department of Central Management Services, (Workers' Compensation Commission),	)	
Petitioner,	)	Case No. S-DE-14-128
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 (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 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 (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 18, 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 27, 2013, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules.

The following five Public Service Administrator, Option 1 positions within the Workers' Compensation Commission (WCC) are at issue in this designation:

37015-50-37-700-00-01	Maxey, Alma
37015-50-37-500-20-03	Vacant
37015-50-37-500-10-01	Shabazz, Theodora
37015-50-37-200-10-02	Castronova, Yvonna
37015-50-37-200-40-01	Freeman, Linda

CMS's petition indicates the positions at issue qualify for designation under Section 6.1(b)(5) of the Act which permits designation if the position authorizes an employee in that position to have "significant and independent discretionary authority."[2] AFSCME objects to designation of all listed positions.

On December 16, 2013, a hearing on the matter was conducted concerning the significant and independent discretionary authority of the position held by Alma Maxey. Based on my review of the designations, the documents submitted as part of the designation, the objections, the documents and arguments submitted in support of those objections and evidence presented at hearing, I find that the designation was properly submitted and that it is consistent with the requirements of Section 6.1 of the Act. 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.

[2] CMS filed position descriptions (CMS-104s) for the positions and affidavits in support of its assertion. These positions are currently represented by AFSCME.

I. Stipulations

1. CMS is a public employer within the meaning of Section 3(o) of the Illinois Public Labor Relations Act and the Board has jurisdiction over this matter pursuant to Section 5(a) and 20(b) of the Act.
2. AFSCME is a labor organization within the meaning of Section 3(i) of the Illinois Public Labor Relations Act.
3. The sole issue at hearing was whether Alma Maxey's position authorizes her with "significant and independent discretionary authority" within the meaning of Section 6.1(c)(i) of the Act.
4. There is a collective bargaining agreement in place between AFSCME and CMS.
5. Alma Maxey is in a bargaining unit represented by AFSCME.
6. The emails in Petitioner's exhibit #3 are unaltered.

II. Objections

First, AFSCME states that Section 6.1 of the Act is unconstitutional, on its face and as applied, both under the Illinois Constitution and the Constitution of the United States of America because it deprives AFSCME of due process and violates the equal protection clauses, the prohibition against impairment of contracts, and the separation of powers clause of the Illinois Constitution.

Next, AFSCME argues that the petition must be dismissed because the WCC is not a state agency that is directly responsible to the governor.

Further, AFSCME generally objects to the use of position descriptions to support the petition and to the allocation of the burden of proof. AFSCME also argues that there can be no showing of managerial authority based solely on an affidavit, which states that the position at issue is authorized to effectuate departmental policy, where the position description does not reference any specific policy. Further, AFSCME states that CMS has presented no evidence that the employees at issue ever exercised their referenced supervisory or quasi-managerial authority. Similarly, AFSCME asserts that CMS has not shown that it told the employees they possessed such authority. In addition, AFSCME argues that the positions at issue are professional and not managerial. Finally, AFSCME urges the Board not to rely on the Petitioner's affidavits because

the affidavits do not explain how the affiant is familiar with the job duties of the positions at issue.

AFSCME also filed position-specific exceptions with respect to the positions held by Alma Maxey, Theodora Shabazz, and Linda Freeman. First, AFSCME asserts that Alma Maxey has no discretionary ability to recommend, effectuate, or formulate agency policy and that she instead executes agency policies that are mandated by the CMS Transactions manual and by the WCC Human Resources (HR) Director.

Second, AFSCME asserts that aspects of Theodora Shabazz's position description are inaccurate. Further, AFSCME states that Shabazz does not engage in any of the enumerated supervisory functions with independent judgment. In addition, AFSCME asserts that the WCC's Executive Director has ignored Shabazz's recommendation on employee discipline. Finally, AFSCME notes that Shabazz assigns and directs work only in special circumstances and at the WCC chairman's direction.

Third, AFSCME asserts that Linda Freeman has no discretion in implementing policies and has no authority to discipline or to recommend discipline. Further, AFSCME contends that she exercises no independent judgment in assigning work because she assigns work to evenly distribute the work load and to meet strict statutory guidelines.

AFSCME concludes that there is a high likelihood that all the position descriptions are inaccurate because three individuals identified inaccuracies in their own position descriptions. On this basis, AFSCME asserts that the Board should order a hearing on all positions at issue because to decline to do so would compel speech in violation of the First Amendment.

III. <u>Material Facts</u>

a. Alma Maxey

Alma Maxey serves as Chief Human Resources Officer of the WCC. She prepares Human Resources transaction documents by typing CMS-2s for promotions, new hires, suspensions, terminations, and leaves of absences as mandated by the CMS transactions Manual and as directed by the HR Director. She maintains comprehensive personnel records to ensure that the State's mainframe is updated with employment changes. Further, she assists in tracking

and resolving CMS payroll discrepancies. She also drafted additional duties in a job description for a job clarification.

Maxey serves as Equal Employment Opportunity and Affirmative Action officer. In that capacity, she prepares the Affirmative Action Plan which establishes the percentages of the agency's minority, disabled, and female employees within the agency pursuant to the requirements of the Illinois Department of Human Rights and the Illinois Human Rights Act (IHRA).[3] Maxey uses the Illinois Department of Human Rights website to help formulate the reports. She inputs the WCC's hiring information into the website. The website uses census data to inform her whether the WCC is underutilizing certain demographic populations and whether the WCC is in compliance with the Act. In addition to containing the statistical report, the plan must also include "the goals and methods for increasing the percentage" of underutilized demographic populations within the agency. 775 ILCS 5/2-105(B) (2012). Maxey gives the plan to the WCC's chairman after she drafts it. The Chairman has authority to change the plan, but has not done so in the past several years in which Maxey has drafted one. The WCC uses the plan to make decisions concerning future hires.

In addition, she alerts the Chairman and HR Director John Lagattuta when she identifies specific hiring opportunities that the WCC could use to correct its non-compliance with affirmative action laws. In one case, she noted that Asians were underrepresented in an office clerk title. She recommended that the WCC interview Asians for that open position to correct the imbalance and to achieve compliance with the law. Lagattuta accepted Maxey's recommendation and chose Asian individuals to participate in the interview process.

Finally, Maxey track[s] and investigate[s] discrimination complaints that employees file against the WCC and keeps the Chairman apprised of these cases. In addition, she examines Rutan and other hiring packages and prepares Hiring and Promotion monitors as mandated by the DHR.

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[3] The Illinois Human Rights Act (IHRA) provides that "every State…commission shall establish, maintain, and carry out a continuing affirmative action plan consistent with" the HRA. Pursuant to the HRA, the "plan shall include a current detailed status report…indicating by each position in State service, the number percentage, and average salary of individuals employed by race, national origin, sex and disability….[,] identifying all positions in which the percentage of the people employed by race, national origin, sex and disability…is less than four-fifths of the percentage of each of those components in the state work force[,] specifying the goals and methods for increasing the percentage by race, national origin, sex and disability…[,] and indicating problems towards meeting equal employment opportunity goals."

b. Theodora Shabazz

AFSCME filed a questionnaire filled out by Shabazz, in which Shabazz contradicts statements made in her position description. Shabazz asserts that she has ten direct subordinates. Nine are administrative assistants and one is an office associate. Shabazz denies that she has authority to hire, transfer, suspend, layoff, discharge, and reward employees. While she has authority to recommend discipline to the Executive Director, the Executive Director gives her recommendations no weight and has rejected her recommendations each time she offered them. Shabazz admits that she directs employees. Specifically, she states that "sometimes, in special circumstances, with the direction of the Chairman, [I] may state to the [administrative assistants] to assign a lower case load for staff attorneys." Further she notes that, "in the absence of the office associate, [I] inform the [administrative assistants] to copy cases." She does not assert that those two sentences comprise the totality of her responsibility to direct her subordinates. Further, she does not refute the statements in her position description that states she provides guidance and training to assigned staff, establishes annual goals and objectives of the administrative support staff of the Commissioners, and prepares and signs her subordinates' performance evaluations.

c. Linda Freeman

AFSCME filed a questionnaire filled out by Freeman, in which Freeman contradicts statements made in her position description. Freeman admits that she directs her subordinates. She explains that she "randomly and evenly assigns transcripts to court reporters by their availability." Freeman does not assert that the quoted sentence comprises the totality of her responsibility to direct her subordinates. She denies she has authority to discipline; however she admits that she "make[s] recommendation[s] to [her] manager regarding misconduct of employees." Freeman's position description states that she "evaluates work performance of staff, establishes priorities among assignments, monitors records of transcript outputs in order to ensure adherence to statutory deadlines, investigates conduct or incidents prior to implementing disciplinary action, approves or denies time-off requests in accordance with the operating needs of the Commission, and responds to rules grievances."

IV. Discussion and Analysis

a. Constitutional Arguments

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. State of Ill., Dep't of Cent. Mgmt. Serv., Case No. S-DE-14-005 etc. (IL LRB-SP Oct. 7, 2013) (citing Goodman v. Ward, 241 Ill. 2d 398, 411 (2011) ("Administrative agencies … have no authority to declare statutes unconstitutional or even to question their validity. [citations omitted] When they do so, their actions are a nullity and cannot be upheld.")). Accordingly, these issues are not addressed in this decision.

b. Non-Constitutional General Objections

AFSCME's general objections are without merit and do not raise issues of fact or law that might rebut the presumption that the designation is properly made.

First, the Board has previously rejected AFSCME's objections concerning the statutorily-mandated presumption, the burden of proof, and the manner in which ALJs have applied them. See State of Ill., Dep't of Cent. Mgmt. Serv., Case No. S-DE-14-005 etc. and all subsequent Board designation cases.

Here, most of AFSCME's objections may be restated as objections to this now well-established framework because they presuppose that CMS must initially prove that the designation is proper. For example, AFSCME argues that CMS "failed to carry its burden of proof" and "presented no evidence" that the employees at issue ever exercise their purported authority or were told they possessed it. Similarly, AFSCME asserts that "there can be no showing of managerial authority based solely on [an] affidavit," which is phrased in general terms. Likewise, AFSCME states that "there is no demonstration [by CMS] that the employees at issue have…authority to complete the job duties…[in their]…position descriptions." Finally, AFSCME generally asserts that CMS's affidavits are unreliable because there is no indication that they are accurate.

Contrary to AFSCME's general assertion, the burden is on AFSCME, not CMS. Accordingly, these objections must be rejected because they ignore the presumption and misallocate the burden.

Second, the Board has similarly rejected AFSCME's objections based on the bald statement that the designated positions do not have significant and independent discretionary authority because they are professional rather than managerial positions. State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Cent. Mgmt. Servs.), 30 PERI ¶ 85 (IL LRB-SP 2013). The terms managerial and professional are not mutually exclusive and there is no exception for professional employees in the language of Section 3(c)(i). State of Ill, Dep't of Cent. Mgmt. Servs. (Dep't of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing Dep't of Cent. Mgmt. Servs ./ Ill. Pollution Control Bd., 2013 IL App (4th) 110877). As such, "where a position meets one of the two alternative tests set out in Section 3(c)(i), it may appropriately be designated by the Governor for exclusion from collective bargaining rights regardless of whether it is also a professional position." Id.

In sum, AFSCME's general objections do not raise issues of fact or law that might rebut the presumption that CMS's designation is properly made.

c. Are WCC positions subject to designation? Yes.

Positions within the Workers' Compensation Commission are subject to designation pursuant to the Board's most recent interpretation of the Act.

The Board has issued two decisions which address the Governor's authority to designate employees in certain state agencies for exclusion from collective bargaining under Section 6.1 of the Act. In the first consolidated case, State of Illinois, Department of Central Management Services (Illinois Commerce Commission), a majority of the Board held that the Governor lacked authority to designate positions within the ICC, WCC, and PCB as excluded from collective bargaining. State of Ill., Dep't of Cent. Mgmt. Servs. (ICC, WCC, PCB), 30 PERI ¶ 83 (IL LRB-SP 2013). In the second consolidated case, State of Ill., Dep't of Cent. Mgmt. Servs. (Various Agencies, PCB), after a full hearing, a majority of the Board held that the Governor does have authority to "designate position[s] at the PCB ***and other agencies listed in Section 3(q-5),***" including the ICC and the WCC.[4, 5] State of Ill., Dep't of Cent. Mgmt. Servs.

[4] Section 3(q-5) lists the following agencies: the Illinois Commerce Commission, the Illinois Workers' Compensation Commission, the Civil Service Commission, the Pollution Control Board, the Illinois Racing Board, and the Department of State Police Merit Board.

[5] Both cases concern positions at the PCB, but the second case did not involve positions at the ICC or the WCC.

(Various Agencies, PCB), S-DE-14-092, S-DE-14-093, S-DE-14-094 (IL-LRB SP Nov. 15, 2013) (emphasis added).

In light of these two contradictory decisions, this Recommended Decision and Order follows the Board's reasoning in consolidated Case No. S-DE-14-092, 093 & 094 because it is the most recent case that addresses the issue at hand. Where two cases resolve the same issue in opposing ways, the most recent decision overrules the older one. Reynolds v. Danz, 172 Ill. App. 3d 907, 913 (3rd Dist. 1988). Both consolidated cases above address the same issue, even though they apply to different state agencies, because they resolve the question of the legislature's intent in circumscribing the Governor's authority to designate positions in agencies "directly responsible to the Governor." The first case holds that the Act is unambiguous and that it bars the Governor from designating positions in agencies which are not "directly responsible to the Governor," as that phrase is defined by the Executive Reorganization Implementation Act (ERIA). State of Ill., Dep't of Cent. Mgmt. Servs. (ICC, WCC, PCB), 30 PERI ¶ 83. The second case holds that the Act is ambiguous, but that legislative intent—evidenced by testimony before the Board—compels the conclusion that the Act permits the Governor to designate positions in state agencies more broadly, regardless of the language set forth in the ERIA. State of Ill., Dep't of Cent. Mgmt. Servs. (Various Agencies, PCB), S-DE-14-092, S-DE-14-093, S-DE-14-094. Since these two cases are in direct opposition to each other, the most recent one controls.

Thus, based on the Board's most recent decision, the Governor is permitted to designate positions within the WCC as excluded from collective bargaining.

d. 37015-50-37-500-20-03 (Vacant); 37015-50-37-200-10-02 (Castronova, Yvonna)

CMS's designation of these positions is proper because the designations are presumed to be properly made and AFSCME has introduced no specific evidence to suggest that CMS has limited the position holders' discretion or independent authority, within the meaning of Section 6.1(c)(i) or (ii).

AFSCME has not raised issues of fact for hearing by asserting that there is a "high likelihood" that the position descriptions are inaccurate because AFSCME has not specifically identified any such alleged inaccuracies. State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of

Revenue), 30 PERI ¶ 110 (IL LRB-SP 2013) (general statement that position description is inaccurate does not raise issues of fact for hearing).[6]

Thus, CMS properly designated the two positions referenced above.

e. 37015-50-37-700-00-01 – (Maxey, Alma)

CMS's designation of this position is proper because the designation is presumed to be properly made and the evidence presented at hearing supports this conclusion because it shows that its holder, Maxey, is engaged in executive and management functions of a State agency and is charged with the effectuation of management policies and practices of a State agency. Further, it shows that Maxey represents management interests by taking or recommending discretionary actions that effectively control or implement the policies of a State agency.

Under Section 6.1(c)(i) "a person has significant and independent discretionary authority as an employee if he or she "[1] 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 [2] represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency." When addressing the meaning of Section 6.1(b)(5), one must first look to the language of that section of the Act. The Board may consider case precedent pertaining to the traditional managerial exclusion under Section 3(j) to the extent that the precedent explains the meaning of terms commonly used in both Section 3(j) and section 6.1(b)(5). State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing City of Bloomington v. Ill. Labor Relations Bd., 373 Ill. App. 3d 599, 608 (4th Dist. 2007) ("When statutes are enacted after judicial opinions are published, it is presumed that the legislature acted with knowledge of the prevailing case law."). Finally, the burden is on AFSCME to prove that the designation is improperly made. State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Commerce & Economic Opportunity), 30 PERI ¶ 86.

Here, Maxey is engaged in executive and management functions because she drafts the affirmative action plan for the WCC which "specifi[es] the goals and methods for increasing the percentage" of demographic populations that are under-represented in the WCC's workforce. 775 ILCS 5/2-105(B) (2012). "Executive and management functions" are those which

[6] The alleged constitutional implications of this ruling are not addressed here for reasons set forth in section IV.a. of this RDO.

specifically relate to the running of an agency including the following: establishing policies and procedures, preparing a budget, or otherwise assuring that an agency or department runs effectively. Dep't of Cent. Mgmt. Serv. (Pollution Control Bd.), v. Ill. Labor Rel. Bd., State Panel, 2013 IL App (4th) 110877 ¶ 25; State of Ill. Dep't of Cent. Mgmt. Serv. (Ill. Commerce Comm'n) v. Ill. Labor Rel. Bd., State Panel, 406 Ill. App. 3d 766, 774, (4th Dist. 2010). Maxey helps run the agency when she drafts the plan since she develops procedures which broadly impact the manner in which the entire agency chooses its employees.[7] Further, Maxey exercises significant discretion and managerial initiative in doing so because she must necessarily develop such goals and methods before she may articulate them in the plan. Contrary to AFSCME's anticipated contention, it is immaterial that Maxey uses a formula to initially determine the WCC's compliance with affirmative action laws because her authority to develop the affirmative action plan is not limited to compiling facts and statistics that reflect the WCC's compliance. Rather, it extends to developing and specifying the means, methods, and procedures by which the agency should achieve such compliance and therefore demonstrates that she is engaged in executive and management functions sufficient to satisfy the first prong of the test.

Second, Maxey is charged with the effectuation of management policies and practices because she effectively recommends methods by which the WCC may attain compliance with affirmative action laws, both generally and on a case-by-case basis. First, Maxey effectively recommends that the WCC adopt her affirmative action plan which generally outlines the agency's future approach to achieving and maintaining compliance with affirmative action laws. Maxey testified that she gives the Chairman the plan after she drafts it and explained that the Chairman has not made changes to her plan in the past several years, even though he has the authority to do so. Second, and more specifically, Maxey effectively recommended that the WCC interview Asian applicants for an office clerk position to correct its non-compliance with the law. The WCC's HR Director John Lagattuta accepted her recommendation and proceeded to initiate the interview process with respect to the individuals of the demographic that Maxey identified. Dep't of Cent. Mgmt. Serv./ Ill. Commerce Com'n, 406 Ill. App. 3d at 775

[7] This finding adopts the non-precedential rationale set forth in State of Ill. (Dep't of Cent. Mgmt. Serv.). See State of Ill. (Dep't of Cent. Mgmt. Serv.), 28 PERI ¶ 26 (IL LRB-SP 2011) (Bureau chiefs who identified hiring needs engaged in executive and management functions).

(effective recommendations are those that are accepted almost all the time without modification). Thus, Maxey satisfies the second prong of the first test through her effective recommendations.

Moreover, the tasks described above show that Maxey likewise "represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency." As a preliminary matter, it is the WCC's policy to adhere to the IHRA and to apply affirmative action. Maxey represents management's interest in implementing that policy because she identifies the agency's non-compliance with the IHRA and creates a plan which recommends methods by which the agency can ameliorate its deficiencies. Finally, Maxey's recommendations qualify as discretionary, even though her recommendations may uniformly pertain to the hiring or recall of employees, because AFSCME failed to demonstrate that Maxey lacks the leeway to choose the particular positions to which the WCC applies its affirmative action policies.

Thus, the designation of this position is properly made.

f. 37015-50-37-500-10-01 - (Shabazz, Theodora)

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority, within the meaning of Section 6.1(c)(ii).

Under Section 6.1(c)(ii) of the Act, a position authorizes its holder with the requisite authority if the position is supervisory within the meaning of the National Labor Relations Act and the National Labor Relations Board's case law. Under the NLRA, a supervisor is an employee who has "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, 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.A. § 152(11).

In other words, "employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed 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.'" NLRB v. Kentucky River Comm. Care, Inc., 532 U.S. 706, 713 (2001) (quoting NLRB v. Health Care & Retirement Corp. of America, 511

U.S. 571, 573-574 (1994)); See also Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006). A decision that is "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement" is not independent. Oakwood Healthcare, Inc., 348 NLRB at 689.

An employee with the purported authority to responsibly direct must carry out such direction with independent judgment. Further, "it must be shown that the employer delegated to the putative supervisor the authority…to take corrective action, if necessary." In addition, there must be a "prospect of adverse consequences for the putative supervisor" arising from his direction of other employees. Id.

In this case, the position description states that the position holds the authority to direct employees. Further, based on this evidence, the position holder, Shabazz, exercises the use of independent judgment and is accountable for her subordinates' work because the designation is presumed proper under Section 6.1(d) of the Act, the position description does not expressly limit the position holder's discretion, independent authority, or accountability.

Shabazz's questionnaire does not alter this conclusion because Shabazz never asserted that the examples of direction she admitted to performing constitute the sole means by which she directs her subordinates. In particular, the position description provides that Shabazz directs her subordinates by providing guidance and training to assigned staff, establishing annual goals and objectives of the administrative support staff of the Commissioners, and preparing and signing her subordinates' performance evaluations. Shabazz never refuted these methods of direction and never stated that the examples she provided of her authority to direct were exhaustive. Finally, there is no indication from the job description that Shabazz is not accountable for her subordinates' work or that her decisions concerning her methods of direction—establishing annual goals, training subordinates, preparing performance evaluations—are controlled by detailed instructions set forth by a higher authority or by the employer's rules and policies. But see Oakwood Healthcare, Inc., 348 NLRB at 689.[8]

Thus, the designation of this position is properly made.

[8] Notably, the mere fact that Shabazz requires "the direction of the Chairman" to tell the Administrative Assistants to assign staff attorneys fewer cases does not, by implication, suggest that Shabazz requires the Chairman's approval for all methods of direction described above. Rather, it merely suggests that Shabazz does not direct the WCC's attorneys.

g. 37015-50-37-200-40-01 – (Freeman, Linda)

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority, within the meaning of Section 6.1(c)(ii) of the Act.

As noted above, a position authorizes its holder with the requisite authority under Section 6.1(c)(ii) of the Act if the position is supervisory within the meaning of the National Labor Relations Act and the National Labor Relations Board's case law.

Here, Freeman has significant and independent discretionary authority because she possesses authority to adjust grievances. The position description states that the position holds the authority to "respond to … grievances" and Freeman never denied the authority to adjust them. Based on this evidence, the position holder exercises the use of independent judgment and adjusts grievances within the meaning of the NLRA because the designation is presumed proper under Section 6.1(d) of the Act and the position description does not expressly limit the position holder's discretion, independent authority, or accountability.

Further, Freeman has significant and independent discretionary authority because she effectively recommends discipline. Freeman concedes that she "make[s] recommendations to [her] manager regarding misconduct of employees." Further, these recommendations are presumed effective because Freeman does not identify any circumstances in which her superiors ever rejected her recommendations, despite the fact that AFSCME specifically solicited such information from her on the questionnaire. Notably, Freeman's broad denial of her authority to discipline does not warrant an alternate conclusion on this issue where Freeman made a more specific assertion concerning her authority to make recommendations on such matters.

Finally, Freeman has significant independent discretionary authority because she responsibly directs her subordinates. The position description states that Freeman has the authority to direct and Freeman never asserted that the examples of direction that she admitted to performing on the questionnaire constitute the sole means by which she directs her subordinates. In particular, the position description provides that Freeman directs her subordinates by evaluating staff's work performance. Freeman never refuted this method of direction and never stated that the example she provided of her authority to direct (assignment of work) was inclusive or exhaustive. Finally, there is no indication from the job description that Freeman is

not accountable for her subordinates' work or that her decisions concerning her methods of direction—preparing performance evaluations—are controlled by detailed instructions set forth by a higher authority or by the employer's rules and policies.

Thus, the designation of this position is properly made.

V. Conclusions 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 positions in the Workers' Compensation Commission are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-50-37-700-00-01	Maxey, Alma
37015-50-37-500-20-03	Vacant
37015-50-37-500-10-01	Shabazz, Theodora
37015-50-37-200-10-02	Castronova, Yvonna
37015-50-37-200-40-01	Freeman, Linda

VII. Exceptions

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,[9] parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, not 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.

[9] Available at http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf.

Issued at Chicago, Illinois this 19th day of December, 2013

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/s/ *Anna Hamburg-Gal*

Anna Hamburg-Gal
Administrative Law Judge