

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

State of Illinois, Department of Central	)	
Management Services, (Guardianship and	)	
Advocacy Commission),	)	
	)	
Petitioner	)	
	)	
and	)	Case No. S-DE-14-129
	)	
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.<sup>1</sup>

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<sup>1</sup> 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.

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 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 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 (AFSCME) filed timely objections to the designation.<sup>2</sup>

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 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.

#### **I. ISSUES AND CONTENTIONS**

The instant petition designates two positions at the Guardianship and Advocacy Commission (GAC) for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act. CMS states that these positions qualify for designation under Section 6.1(b)(5). CMS also states that these positions are currently represented by AFSCME for the purposes of collective bargaining. In support of its contentions, CMS has filed position

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<sup>2</sup> As filed, this designation identified six positions to be excluded from the self-organization and collective bargaining provisions of Section 6. AFSCME objected generally to the designation of all six positions, but filed specific objections sufficient to require a hearing with respect to only four positions. Though I ordered a hearing to determine whether those positions are properly designable, the necessary witnesses were not available within the time frame for hearing specified in Rule 1300.70(d). On December 9, 2013, CMS voluntarily withdrew the designation as to those four positions, with the understanding that it would be permitted to re-file at a later date. Thus, only positions 37015-50-70-051-10-01 (Fiduciary Manager) and 37015-50-70-130-00-06 (Managing Attorney) remain at issue.

descriptions (CMS-104s) containing the position description for the designated positions and affidavits from the Director of GAC's Financial and Fiscal Operations Division and from the Director of The Office of the State Guardian (OSG) stating, among other things, that the CMS-104s fairly and accurately represent the duties that the designated positions are authorized to perform.

AFSCME objects to this designation on the grounds that CMS has failed demonstrate that the positions at issue qualify for designation under Section 6.1(b)(5). AFSCME next argues that the designation violates due process and is arbitrary and capricious. Finally, AFSCME alleges that Section 6.1 is unconstitutional under several provisions of the Illinois and United States Constitutions.

## II. **FINDINGS OF FACT**

The first position designated by CMS is a GAC employee in the working title of Fiduciary Manager in the agency's Division of Finance and Fiscal Operations. The position is classified as a Public Service Administrator (PSA) Option 2 by the employer and is currently represented by AFSCME for purposes of collective bargaining, as certified by the Board on November 18, 2009, Case Nos. S-RC-07-048 and S-RC-08-074. At the time this designation was filed, the position was held by Jeff Derrick. Derrick reports to the Director of the Division of Finance and Fiscal Operations, Gloria Lasley. By affidavit, Lasley asserts that she is familiar with Derrick's duties and that the CMS-104 submitted by CMS fairly and accurately represents the duties Derrick is authorized to perform.<sup>3</sup>

The second position designated by CMS is a GAC employee in the working title of Managing Attorney. The position is classified as a PSA Option 8L by the employer and is currently represented by AFSCME for purposes of collective bargaining, as certified by the Board on May 20, 2010, Case No. S-RC-10-158. At the time this designation was filed, the position was held by William Scheidemantel. Scheidemantel reports to the Director of OSG, Helen Godlewki Brownfield. Godlewski Brownfield asserts that she is familiar with

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<sup>3</sup> In response to AFSCME's objection that its initial filing included CMS-104s with no signatures from CMS or GAC employees and/or no stated effective dates, CMS submitted updated CMS-104s for the positions at issue. I have compared these documents to ensure the duties listed therein correspond to the duties enumerated in initial CMS-104s, the accuracy of which was asserted by affidavit.

Scheidemantel's duties and that the CMS-104 submitted by CMS fairly and accurately represents the duties Scheidemantel is authorized to perform.

### III. POSITION DESCRIPTION

A CMS-104 effective December 1, 2009, describes the following relevant responsibilities of the Fiduciary Manager:

1. Responsible for planning, executing, managing, controlling and evaluating the entire financial fiduciary operation and all fiduciary activities;
2. Develops program goals, objectives and outcome measurements for specialized fiduciary system;
3. Drafts new and revised policies and procedures relating to the fiduciary activities for OSG;
4. Directs studies to evaluate the efficiency of existing policies and procedures, analyzes results to determine continuation and/or revision, and writes reports on evaluation results and drafts recommendations for program improvement to the Director of Financial Operations;
5. Manages, controls, monitors and evaluates all fiduciary activities for GAC;
6. Develops new procedures and reports utilizing the on-line CompuTrust Pacific Western Computer System in planning the effective and efficient utilization of resources; organizes the goals and objectives of the support program.

A CMS-104 effective December 1, 2004, describes the following relevant responsibilities of the Managing Attorney:

1. Serves as the Managing Attorney of OSG Division, responsible for supervising and coordinating the legal, guardianship, and paralegal staff of the Division;
2. Supervises Staff Attorneys and guardianship representatives in the assignment of duties, allocation of resources, and supervision of performance; assigns staff duties to ensure effective and efficient operation of program; evaluates staff performance; completes and signs off on performance evaluations; ensures the professional development of staff; recommends and imposes staff discipline; administers provision of application union contract or personnel rules; counsels, gives oral and written reprimands, and hears grievances as required.

The CMS-104 lists 6 positions that report to Scheidemantel, all in the working title of Technical Advisor 2, Office Associate, or Office Occupations Trainee.

#### 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 positions were first certified in a bargaining unit after December 2, 2008. Therefore the first statutory requirement is satisfied. As to the second statutory requirement, the submission is consistent with the designation because the CMS-104s tend to show that employees in the designated positions are authorized to exercise significant and independent discretionary authority as that term is defined in Section 6.1(c).

An employee is authorized to have significant and independent discretionary managerial authority if he or she is: "[1] 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." 5 ILCS 315/6.1(c)(i) (2012). The

Board has held that executive and management functions amount to the running of an agency, such as by establishing policies and procedures, preparing a budget, or otherwise assuring that an agency or department runs effectively. State of Illinois, Department of Central Management Services/Illinois Commerce Commission (ICC) v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 778 (citing State of Illinois, Department of Central Management Services/Department of Human Services, 25 PERI ¶ 68 (IL LRB-SP 2009); City of Freeport, 2 PERI ¶ 2052 (IL SLRB 1986)).<sup>4</sup>

The CMS-104 for the position of Fiduciary Manager indicates that an employee in that position has the authority to draft new and revised policy and procedures relating to fiduciary activities of OSG. The Fiduciary Manager is charged with executing and managing financial fiduciary activities and for developing the goals, objectives, and outcome measurements of the program. Thus, on its face, the CMS-104 for this position is consistent with the assertion that an employee in the position has the authority to engage in executive and management functions and to be charged with the effectuation of management policies and practices in completing these tasks. Furthermore, nothing in CMS's submission is inconsistent with this assertion.

An employee is authorized to have significant and independent discretionary supervisory 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

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<sup>4</sup> In the cited cases, the interpretation of the phrase "executive and management functions" as used in Section 3(j) of the Act was at issue. The Board has held that, while the definition of significant and independent discretionary authority found in Section 6.1(c)(i) is not equivalent to the definition of managerial authority in Section 3(j) of the Act, past precedent is applicable to the extent it explains terms used in both sections. State of Illinois, Department of Central Management Services/Department of Commerce and Economic Opportunity, 30 PERI ¶ 86 (IL LRB-SP 2013).

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 position of Managing Attorney indicates that an employee in that position has the authority to complete and sign off on performance evaluations, recommend and impose staff discipline, give oral and written reprimands, and hear grievances. 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.

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

Despite the submission of CMS-104s and accompanying affidavits that are consistent with the designation, AFSCME argues that the positions at issue are nonetheless ineligible for designation under Section 6.1(b)(5). 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-104s are 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 incumbents have actually completed the enumerated duties or been instructed that they have the authority to do so; and (3) that the questions of whether a position is managerial or supervisory are fact-intensive issues, the resolution of which requires a hearing. Finally, AFSCME suggests that duties that may appear to authorize an employee to exercise managerial discretion may instead require only professional discretion.

AFSCME's first contention is that CMS should bear the burden of proving that the designated positions qualify as supervisory as defined by the NLRA or as a manager under NLRB precedent. This argument fails for several reasons. 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.<sup>5</sup> Likewise, the relevant inquiry under Section 6.1(c)(i) is an employee's authority to exercise significant and independent discretionary managerial authority;<sup>6</sup> NLRB precedent does not control this inquiry because, unlike Section 6.1(c)(ii), Section 6.1(c)(i) makes no specific reference to NLRB authority. State of Illinois, Department of Central Management Services (Department of Commerce and Economic Opportunity), 30 PERI ¶ 86 (IL LRB-SP 2013). 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. See Id. and 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 which 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 do so, but AFSCME which must produce evidence that he or she does not have such authority. It is likewise AFSCME which must produce evidence showing that the incumbent does not exercise independent judgment when completing supervisory functions, or does not do so in the interest of the employer. And finally, it is AFSCME which must show does not have the

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<sup>5</sup> A position is properly designatable 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 designatable, a position]... must authorize an employee in that position to... qualif[y] as a supervisor of a State agency."

<sup>6</sup> "[In order to be designatable, a position]... must authorize an employee in that position to..."[engage] in executive and management functions of a State agency and [be] 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."

authority enumerated in Section 6.1(c)(i).<sup>7</sup> 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 its remaining objections, 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 positions at issue have previously been certified into a bargaining unit by the Board, the positions' job duties and functions have not changed since their certification, and the positions are 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.

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<sup>7</sup> Neither AFSCME nor CMS, however, have the burden of demonstrating whether the discretionary authority evidenced by a position's duties is managerial or professional because this issue is not relevant the question before the Board in this matter. The Board has held that, "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." State of Illinois, Department of Central Management Services (Department of Commerce and Economic Opportunity), 30 PERI ¶ 86 (IL LRB-SP 2013). Therefore, I reject AFSCME's arguments related to the possibility that the instant positions are professional positions.

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 positions at the Illinois Guardianship and Advocacy Commission are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

- |                       |                   |
|-----------------------|-------------------|
| 37015-50-70-051-10-01 | Fiduciary Manager |
| 37015-50-70-130-00-06 | Managing Attorney |

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](mailto: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 7th day of January, 2014,**

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

*/s/ Heather R. Sidwell*

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**Heather R. Sidwell  
Administrative Law Judge**