

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

State of Illinois, Department of Central Management Services,)	
)	
Employer,)	
)	
and)	Case No. S-DE-14-132
)	
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) (Act) *added by* Public Act 97-1172 (effective 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 (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 properly qualify for designation, the employment position must meet one or more of the following five requirements:

- (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, 479 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 August 23, 2013, 37 Ill. Reg. 14,066 (September 6, 2013). These rules are contained in Part 1300 of the Board’s Rules and Regulations, 80 Ill. Admin. Code Part 1300.

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 here.

On November 21, 2013, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designation petition pursuant to Section 6.1(b)(5) of the Act and Section 1300.50 of the Board’s Rules. The following ten Public Service Administrator (“PSA”) – Option 1 positions at the Illinois Department of Agriculture are at issue in this designation petition:

<u>Position Number</u>	<u>Incumbent</u>
37015-11-12-000-00-01	Kevin Gordon
37015-11-12-100-00-01	Dennis Morris
37015-11-13-100-00-01	Joe McGlaughlin
37015-11-32-000-00-01	Scott Frank
37015-11-60-400-00-02	Leann Fitzgerald
37015-11-01-000-00-01	Vacant
37015-11-03-300-00-01	Kimberly Hamilton
37015-11-03-300-00-02	Robert Dowson
37015-11-32-000-10-01	Juliann Heminghous
37015-11-01-000-00-02	Vacant

In support of its petition, CMS filed position descriptions (CMS-104s) for each position, affidavits from individuals who supervise the listed positions, and a summary spreadsheet. The spreadsheet indicates that the positions at issue were certified on January 20, 2010.

After having sought and received two extensions of time, on December 5, 2013, American Federation of State, County and Municipal Employees, Council 31 (“AFSCME”) filed its Objections to the designation pursuant to Section 1300.60(a)(3) of the Board’s Rules. AFSCME’s position-specific objections related to the positions held by Kimberly Hamilton and Robert Dowson. On November 25 and 27, 2013, respectively, Ms. Hamilton and Mr. Dowson objected on their own behalf.

On December 12, 2013, CMS sought leave to withdraw the petition as it related to the designation of the positions held by Ms. Hamilton and Mr. Dowson. The request was granted the same day. Therefore, this recommended decision and order will address only the remaining eight positions, none of which are the subject of position-specific objections.

I have reviewed and considered the designation petition, the documents accompanying the designation petition, and AFSCME’s Objections. I find that the Objections fail to raise an issue of law or fact that might overcome the presumption that the designation is proper such that a hearing would be necessary. Moreover, after consideration of the information before me, I find that the designation was properly submitted and that it is consistent with the requirements of

Section 6.1 of the Act. Accordingly, I recommend that the Executive Director certify the designation of the eight positions at issue in this matter 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. AFSCME'S OBJECTIONS

AFSCME objects to the designation in a number of ways, and makes the following arguments.

A. Constitutional Claims

AFSCME argues that Section 6.1 violates provisions of the United States and Illinois Constitutions in a number of ways. First, the designation is an improper delegation of legislative authority to the executive branch. Second, selective designation results in employees being treated unequally based on whether an individual's position was subject to a designation petition. Third, the designation unlawfully impairs the contractual rights of individuals whose positions were subject to the provision of a collective bargaining agreement prior to the position being designated for exclusion.

AFSCME also contends that because the employees holding the position identified by this petition are "covered by a collective bargaining agreement which CMS entered into subsequent to the enactment of [Section] 6.1," the designation of these positions "violates due process and is arbitrary and capricious."

B. Substantive Claims

AFSCME contends that under the National Labor Relations Board (NLRB) precedent and case law interpreting the same, "any claim of supervisory or managerial status requires that *the party raising the exclusion bear the burden of proof.*"² AFSCME argues that CMS seeks the exclusion of employees who are not "supervisors" or "managers" as defined by the NLRA or NLRB. AFSCME contends that CMS has presented evidence only that the "at-issue positions are *authorized* to complete such job duties,"³ not that the employees actually exercise that authority. AFSCME further contends that CMS cannot prove that a position is managerial where the position description identifies that the position effectuates policies but does not identify specific policies the position effectuates.

² Emphasis in original.

³ Emphasis in original.

Accordingly, AFSCME argues that CMS should bear the burden of proving that the designated employees exercise duties that would make them supervisory or managerial. AFSCME also argues that CMS should bear the burden of showing that the designated positions have different duties than other positions with the same position title that may be “wholly professional.”

Finally, AFSCME argues that because Ms. Hamilton and Mr. Dowson raised issues with their position descriptions, “there exists a high likelihood” that position descriptions of the other positions are “inaccurate and/or they are not authorized to perform the alleged job duties.”

II. DISCUSSION AND ANALYSIS

The law creates a presumption that designations made by the Governor are properly made. 5 ILCS 315/6.1(d). In order to overcome the presumption of a properly submitted designation made pursuant to Section 6.1(b)(5), the objectors would need to raise an issue of law or fact that the position does not meet either of the managerial tests set out in Section 6.1(c)(i) or the supervisory test set out in Section 6.1(c)(ii).

AFSCME’s Objections do not overcome that presumption or raise a question of law or fact that requires a hearing. For the reasons stated more fully below, I find the designations are proper.

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., 30 PERI ¶80, Case No. S-DE-14-005 etc. (IL LRB-SP Oct. 7, 2013) appeal pending, No. 1-13-3454 (Ill. App. Ct. 1st Dist.) (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. Sufficiency of Evidence Related to Effectuation of Policies

AFSCME objects to the designation by arguing that CMS has failed to provide sufficient information to prove that the designated positions are managerial. “To the extent an affidavit states that an employee at issue effectuates policies or is authorized to effectuate departmental

policy, and the position description for the at issue employee does not define a policy, there can be no showing that the employee is managerial.” However, nothing in the law or accompanying rules require the Governor to identify specific policies an employee is authorized to effectuate. Section 6.1(b) requires the Governor to provide only “the job title and job duties of the employment positions; the name of the State employee currently in the employment position, if any; the name of the State agency employing the public employee; and the category under which the position qualifies for designation under this Section.” 5 ILCS 315/6.1(b).

Moreover, the Board’s Rules, the Act, and relevant case law demonstrate that position descriptions provide an adequate basis on which to evaluate the propriety of a designation. First, the Act and the Rules contemplate that the Board may make such a determination based on a job description alone because they require CMS to provide information concerning a position’s job title and job duties and, at the same time, provide that CMS’s designation is presumed proper once it submits such information. If such information constituted an insufficient basis for considering a designation, the Act and the Rules would not specify that the designation, when completed by the submission of such information, is presumed to be properly made. Second, Illinois Appellate Courts have held that position descriptions alone constitute an adequate basis upon which to evaluate a proposed exclusion.⁴ See Vill. of Maryville v. Ill. Labor Rel. Bd., 402 Ill. App. 3d 369 (5th Dist. 2010); Ill. Dep’t of Cent. Mgmt. Servs. v. Ill. Labor Rel. Bd., 2011 IL App (4th) 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 (3rd Dist. 1988). Accordingly, the Board has sufficient evidence from which to establish the propriety of the designation.

C. AFSCME bears the burden of proving that a designation is improper.

AFSCME argues that CMS should bear the burden in at least two ways. First, it argues that because CMS is seeking an exclusion, under NLRA case law, CMS should bear the burden.

AFSCME fails to appreciate that Section 6.1 is a wholly new legislative creation. The Act’s provision that “any designation made by the Governor...shall be presumed to have been

⁴ While these cases address the Employer’s burden in the majority interest process, they are nevertheless relevant to address AFSCME’s general argument concerning the sufficiency of job descriptions to establish a position’s job duties.

properly made,” 5 ILCS 315/6.1(d), shifts the burden of proving that a designation is improper on the objector (here, AFSCME). Therefore, AFSCME has the burden to demonstrate that the designation is improper.

In this case, CMS designated this position under Section 6.1(b)(5) which provides that the position must “authorize an employee in that position to have significant and independent discretionary authority as an employee.” 5 ILCS 315/6.1(b)(5). The Act then outlines in Section 6.1(c) three tests to determine whether a position has “significant and independent discretionary authority as an employee,” as that term is used in Section 6.1(b)(5). 5 ILCS 315/6.1(c). Thus, the burden is on the objector to demonstrate that the designation is not proper in that the employer has not conferred significant discretionary authority upon that position, as that term is defined in the Act.

Second, AFSCME also argues that CMS should bear the burden of showing that the designated positions have different duties than other positions with the same position title that may be “wholly professional.” This argument does not require additional analysis. To the extent that AFSCME is concerned that the designations may be carried out in an arbitrary manner, that constitutional question is not for the Board to decide. To the extent that this argument is a repackaging of AFSCME’s contention that the designated positions are not managerial because they are “wholly professional,” AFSCME still bears the burden of proving that contention to be true. It has failed to do so here.

D. The Designations are Proper.

AFSCME’s final argument in its Objections is that because Ms. Hamilton and Mr. Dowson raised issues with their position descriptions, “there exists a high likelihood” that position descriptions of the other designated positions are “inaccurate and/or they are not authorized to perform the alleged job duties.” Even if some position descriptions were inaccurate, AFSCME has failed to raise any alleged inaccuracies to the Board’s attention or to provide any legal analysis of the impact that any alleged factual inaccuracies might have on the Board’s analysis of the propriety of the designations.

With respect to the eight positions at issue, AFSCME has failed to provide any position-specific information or evidence. Thus, they have failed to overcome the presumption that the designation is proper. For that reason, and the reasons stated more fully above, I find the designations to be proper.

III. CONCLUSIONS OF LAW

The Governor’s designations in this case are properly made.

IV. RECOMMENDED ORDER

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

<u>Position Number</u>	<u>Incumbent</u>
37015-11-12-000-00-01	Kevin Gordon
37015-11-12-100-00-01	Dennis Morris
37015-11-13-100-00-01	Joe McGlaughlin
37015-11-32-000-00-01	Scott Frank
37015-11-60-400-00-02	Leann Fitzgerald
37015-11-01-000-00-01	Vacant
37015-11-32-000-10-01	Juliann Heminghaus
37015-11-01-000-00-02	Vacant

V. EXCEPTIONS

Pursuant to Sections 1300.130 and 1300.90(d)(5) of the Board’s Rules and Regulations, 80 Ill. Admin. Code Parts 1300,⁵ parties may file exceptions to the Administrative Law Judge’s Recommended Decision and Order and briefs in support of those exceptions no later than three days after service of this recommended decision and order. Exceptions shall be filed with the Board by electronic mail at an electronic mail address designated by the Board for such purpose, ILRB.Filing@illinois.gov, and served on all other parties via electronic mail at its e-mail address as indicated on the designation form. Any exception to a ruling, finding conclusion or recommendation that is not specifically urged shall be considered waived. A party not filing timely exceptions waives its right to object to this recommended decision and order.

Issued at Springfield, Illinois, this 31st day of December, 2013.

**STATE OF ILLINOIS
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Sarah R. Kerley

**Sarah Kerley
Administrative Law Judge**

⁵ Available at www.state.il.us/ilrb/subsections/pdfs/Section1300IllinoisRegister.pdf