STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

State of Illinois, Department of Central Management Services,	)	
Petitioner	)	
and	)	Case No. S-DE-14-137
American Federation of State, County and Municipal Employees, Council 31,	)	
Labor Organization-Objector	)	
Mary Petersen & Michael Teer,	)	
Employees-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 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 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 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 Department of Insurance based on Section 6.1(b)(5) of the Act:

Public Service Administrator, Option 2
Employed at Department of Insurance

Position Number	Working Title	Incumbent
37015-14-15-100-00-01	Department State Purchasing Officer	Carolyn March
37015-14-11-300-00-01	Public Service Administrator	Kevin Fry
37015-14-17-110-00-01	Producer Regulatory Supervisor	Mike Teer
37015-14-19-100-00-01	Assistant Deputy Director of Health Products	Mary Petersen
37015-14-13-100-01-01	Audit Manager	Chris Heisler

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, certification's 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-62 bargaining unit pursuant to the actions of the Board in Case. Nos. S-RC-07-048 and S-RC-08-074 on November 18, 2009.

Based on my review of the designations, the documents submitted as part of the designations, the objections, and the documents and arguments submitted in support of those objections, here are my findings:

I. OBJECTIONS

On November 27, 2013, and December 2, 2013, Mary Petersen and Michael Teer, respectively, filed objections to the designation of their positions. Peterson and Teer included personal statements with attachments. On December 9, 2013, the Board received AFSCME's

objections to the petition. In support for its objections AFSCME provided an affidavit from Tracy Abman and information forms completed by Kevin Frye, Petersen, and Teer, with attachments. All objections were filed pursuant to Section 1300.60(a)(3) of the Board's Rules.

AFSCME makes several objections 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.

AFSCME generally 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.

AFSCME raised specific objections to the designation of the positions held by Kevin Frye, Mike Teer, and Mary Petersen. AFCME provided written statements as evidence in support of the conclusion that the positions at issue are not managerial or supervisory in accordance with the Act.[2] The petitioned-for positions are properly designated as supervisory and therefore I will not discuss whether they are also properly designated as managerial employees.

[2] As noted above, Michael Teer and Mary Petersen filed individual objections. AFSCME's objections to these positions include the same exact statements already submitted by the individuals.

II. FINDINGS OF FACT

CMS provided the job description of the Department of State Purchasing Officer position held by Carolyn March. According to the job description, this position serves as a working supervisor who assigns and reviews work, provides guidance and training to staff, counsels staff regarding work performance, reassigns staff to meet day-to-day operating needs, establishes annual goals and objectives; approves time off; and prepares and signs performance evaluations.

The Deputy Director of Finance and Administration Bureau, Jan Bachman, submitted an affidavit attesting that the job duties and responsibilities of the State Purchasing Officer, detailed in the job description, including those above, fairly and accurately represent the duties which Carolyn March is authorized to perform. Bachman maintains that the position is authorized to have significant and independent discretionary authority in accordance with Sections 6.1(c)(i) and (ii) of the Act

According to the job description submitted by CMS regarding the position of Audit Manager filled by Chris Heisler, this position also serves as supervisor by assigning and reviewing work, providing guidance and training to assigned staff, counseling staff regarding work performance, establishing annual goals and objectives, approving time off, and preparing and signing performance evaluations.

The Deputy Director of Public Pension, Travis March, submitted an affidavit attesting that the job duties and responsibilities of the Audit Manager, detailed in the job description, including those above, fairly and accurately represent the duties which the position held by Chris Heisler is authorized to perform.

CMS provided an affidavit from Douglas Harrell, Deputy Director of Financial Corporate Regulatory Bureau for the Department of Insurance, who attested to the job description for Kevin Frye. Harrell maintains that the position is authorized to have significant and independent discretionary authority in accordance with Sections 6.1(c)(i) and (ii) of the Act. Harrell testified that Frye's job description fairly and accurately represents the duties and responsibilities the position is authorized to perform. These duties and responsibilities include the position's authority to assign, review work and responsibly direct subordinates with independent judgment, counsel staff regarding work performance, take corrective action, monitor work flow and reassign staff to meet day-to-day operating needs.

In response to the designation petition, Frye maintains that he does not hire, transfer, suspend, layoff, recall, promote, discharge, reward or discipline employees. However, Frye does not dispute his authority to direct, approve time off, adjust grievances at the first level, prepare and sign performance evaluations and determine and recommend staffing needs, as listed in his job description. Frye states that since he began this position in April 2013, two employees have been disciplined and both times the discipline was administered by his supervisor. Frye admits that he does assign special projects to the analysts and he passes down directives to his subordinates that he receives from the executive staff.

Yvonne Clearwater, Acting Deputy Director of the Health Products Bureau for the Department of Insurance, submitted an affidavit testifying to the job duties of the petitioned-for position held by Mary Petersen. Clearwater maintains that the position is authorized to have significant and independent discretionary authority in accordance with Sections 6.1(c)(i) and (ii) of the Act. Clearwater states that Peterson's job description fairly and accurately represents the duties and responsibilities the position is authorized to perform. Clearwater states that Petersen is authorized to assign and review work and responsibly direct her subordinates with independent judgment. Lastly, Clearwater maintains that Petersen is authorized to counsel staff regarding work performance, take corrective action, monitor work flow and reassign staff to meet day-to-day operating needs.

In Mary Peterson's objections, she disputes and explains statements in the job description that describe the essential functions of her position. Specifically, Petersen notes that she manages and supervises the Office of Consumer Health Insurance (OCHI) which is a call center consisting of eight insurance analysts, along with managing the Life, Accident and Health Complaint Unit that consists of seven analysts. Additionally, Petersen states that she manages two clerical staff and one contract analyst. Contrary to the job description, Petersen argues that she does not routinely handle complaints. Instead, she insists that she assists analysts with difficult, technical complaints and only on occasion will she take over a complaint due to an issue between a consumer and an analyst, or due to an issue that requires her involvement because of the time constraints involved or the need to contact managers as carriers.

Moreover, Petersen denies having independent discretionary authority to hire, fire, transfer, suspend, lay-off, recall, promote or reward her subordinates. She states that any discipline is done in conjunction with labor relations and her supervisor. Petersen also notes that

during a recent grievance the matter was "taken" from her and handled by labor relations. Petersen does not dispute her authority to approve time off and prepare and assign performance evaluations as listed in the job description.

Lastly, Petersen admits that she is responsible for ensuring the work for her area is completed timely and correctly, she assigns and re-assigns work to ensure goals are met, she provides training, answers questions, develops procedures to be followed by staff when performing their duties and conducts quality review.

James Stephens, Deputy Director of Producer Regulatory Services/P & C Products Bureau for the Department of Insurance, submitted an affidavit attesting to the job duties and responsibilities of the position of Producer Regulatory Supervisor currently held by Michael Teer. Stephens testified that the job description for this position accurately and fairly represents the duties and responsibilities that the position is authorized to perform. Stephens also states that the position is authorized to have significant and independent discretionary authority in accordance with Sections 6.1(c)(i) and (ii) of the Act. Lastly, Stephens states that the position is authorized to counsel staff regarding work performance, take corrective action, monitor work flow and reassign staff to meet day-to-day operating needs.

Michael Teer appealed the designation of this position. Teer explains that although he does supervise the Producer Regulatory Unit and its investigators and examiners, it is the Administrative Assistant who usually assigns them work based on the type of case and their workload, but at times he does assign them cases directly. Moreover, Teer states that he works with staff on their cases by going on the exams in the field or helping investigators with ideas and thoughts on what is needed to finalize cases. However, Teer notes that most cases are worked on individually and that his review occurs after his subordinate has drafted the report and a Director's Order with a recommendation for how the case should be routed to upper management. Teer states that he reviews all cases to ensure that the information cover all areas needed and he verifies that the case is accurate and complete prior to routing to upper management for their review and approval. When employees need help deciding what form of action to pursue, Teer reviews their cases and make recommendations on changes to any reports or orders so that they are factual and accurate. Teer maintains that the cases are routed through at least three additional levels of management where his superiors can, and do, make changes to the case recommendations that affect the final orders.

Teer denies having the authority to transfer, suspend, lay-off, recall, promote, discharge or reward employees. He also explains that he is usually involved in the interviewing process for Rutan-exempt employees but that he does not specifically offer positions to individuals as that is done by human resources. Teer states that any discipline is done at the direction of his supervisor. For examples, Teer was recently told that he had to discipline an employee for failing to provide information to the Director upon request. This discipline was done at the direction of his supervisor and he was told what to say and do by human resources.

III. DISCUSSION AND ANALYSIS

A. AFSCME's General 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, violated 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 the 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-62 in Case Nos. S-RC-07-048 and S-RC-08-074 on November 18, 2009. 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 supervisory employees.

CMS's designation of the positions at issue is proper. Section 6.1(c) explains that a position authorizes its holder with the requisite authority, when the position is a "supervisor" within the meaning of the National Labor Relations Act. CMS provided job descriptions, affidavits and listed the specified job duties as evidence of supervisory authority of the positions at issue. The petitioned-for positions are properly designated as supervisory employees.

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, responsibility 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.A. § 152 (11). Employees are supervisors if they (1) hold the authority to engage in any of the above 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); see also Oakwood Healthcare Inc., 348 NLRB 686, 687 (2006). Independent judgment is a key issue in determining whether an employee is a supervisory under the NLRA. See Id. at 689.

Additionally, the position holder must be accountable for his subordinates' work and must carry out such direction with independent judgment. Id. In other words, "it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary," and that "there is a prospect of adverse consequences for the putative supervisor," arising from his direction of other employees. Id. Unlike the definition of a supervisor in Section 3(r) of the Illinois Labor Relations Act, Section 6.1(c)(ii) does not have a preponderance of time component.

The positions held by Carolyn March and Chris Heisler are properly designated as supervisors within the meaning of Section 6.1 of the Act. Generally, AFSCME argues there is no demonstration that the employees at issue have actual authority and they were not informed of their significant and independent authority to perform the duties listed in their job descriptions. Section 6.1 authorizes the designation of an employee that is authorized or performs supervisory

or managerial duties. Per the job descriptions, the positions held by March and Heisler serve as supervisors by assigning and reviewing work, providing guidance and training to assigned staff, counseling staff regarding work performance, establishing annual goals and objectives, approving time off, and preparing and signing performance evaluations. AFSCME has not provided evidence to rebut the presumption that these positions perform or have the authority to perform these duties with the requisite independent authority.

AFSCME's objections and the contentions made by Kevin Frye, Mary Petersen and Mike Teer, fail to demonstrate that the designation of the petitioned-for positions is improper. The individual employees at issue described, in detail, specific examples of what their jobs entail. Kevin Frye acknowledges that he assigns special projects to his subordinates and does not dispute his authority to approve time off, adjust grievances at the first level, prepare and sign performance evaluations and determine and recommend staffing needs. Frye's assignment and responsibility to direct is not clerical in nature because he is assigning "special projects" instead of the everyday projects in which his team also performs. According to Frye's testimony and job description he can choose which employees to assign to particular jobs and reassign employees to different jobs depending on his assessment of overall staffing needs in the field.

Mary Petersen admits that in her position she is responsible for ensuring the work for the area is completed timely and correctly, she assigns and re-assigns work to ensure goals are met, she provides training, answers questions, develops procedures to be followed by staff when performing their duties and conducts quality review. Petersen does not dispute her authority to approve time off and prepare and assign performance evaluations.

Lastly, Mike Teer states that he reviews all cases completed by his subordinates to ensure that the information "covers all areas needed" and he verifies that the case is accurate and complete. When employees need help deciding what form of action to pursue, Teer notes that he reviews their cases once submitted and make recommendations on changes to any reports or orders so that they are factually accurate. Teer also acknowledges that he is usually involved in the interviewing process for Rutan-exempt employees although he does not specifically offer positions to individuals as that is done by human resources.

It is clear that the petitioned-for positions responsibly direct their subordinates. Both Petersen and Teer attest to being accountable for the work of their subordinates. They ensure their work is timely, complete and factually correct. They also assign or re-assign job duties to

ensure goals are met. Neither the individual objectors nor AFSCME refutes that the petitioned-for positions are accountable for their subordinates' performance and may suffer adverse consequences by failing to direct work or take necessary corrective action. Oakwood Healthcare, Inc., 348 NLRB 686, 692 (2006) (where accountability focuses on the supervisor's own conduct and judgment in exercising oversight and direction of employees in order to accomplish the work is supervisory under the Act).

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 2
Employed at Department of Insurance

Position Number	Working Title	Incumbent
37015-14-15-100-00-01	Department State Purchasing Officer	Carolyn March
37015-14-11-300-00-01	Public Service Administrator	Kevin Fry
37015-14-17-110-00-01	Producer Regulatory Supervisor	Mike Teer
37015-14-19-100-00-01	Assistant Deputy Director of Health Products	Mary Petersen
37015-14-13-100-01-01	Audit Manager	Chris Heisler

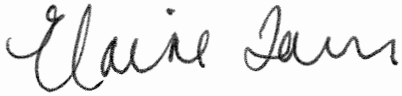
VI. EXCEPTIONS

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 18th day of December, 2013

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL



Elaine L. Tarver, Administrative Law Judge