

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

State of Illinois, Department of Central)	
Management Services (Department of)	
Healthcare and Family Services),)	
)	
Petitioner)	
)	
and)	Case No. S-DE-14-171
)	
American Federation of State, County)	
and Municipal Employees, Council 31,)	
)	
Labor Organization-Objector)	
)	
Ron Wiggins,)	
)	
Employee-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 on August

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.

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 January 15, 2014, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designation pursuant to Section 6.1 of the Act and Section 1300.50 of the Board's Rules. CMS' petition designates the exclusion of the following Public Service Administrators employed at the Department of Healthcare and Family Services based on Section 6.1(b)(5) of the Act:

**Public Service Administrator, Option 2
Employed at Department of Healthcare and Family Services**

<u>Position No.</u>	<u>Working Title</u>	<u>Incumbent</u>
37015-33-15-223-00-61	MANAGER FISCAL OPERATIONS OIG	DEPPE DIANE M
37015-33-17-415-50-61	SUPV AUDIT TEAM	RODGERS LEONA B
37015-33-53-700-00-91	ACCOUNTING MANGER	VACANT
37015-33-53-800-00-91	ACCOUNTING MANGER	FERGUSON MARK A
37015-33-61-600-00-61	BUDGET SUPERVISOR	WIGGINS RON G
37015-33-73-310-00-61	SUPERVISOR	SCHISLER LORI J

In support of its petition, CMS submitted job descriptions (CMS-104s) for each position, affidavits and a summary spreadsheet. The spreadsheet identifies position numbers, titles, name of the incumbents, bargaining unit, certifications date and case number, statutory category of designation and a list of job duties that support the presumptions that the positions are supervisory or managerial. On November 8, 2009, the positions at issue were certified into the RC-62 bargaining unit pursuant to the actions of the Board in Case No. S-RC-07-048. On January 27, 2014, the American Federation of State, County and Municipal Employees (AFSCME) filed timely objections to the designation.

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 OBJECTIONS

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

AFSCME specifically objects to the designation of positions held by Mark Ferguson, Ron Wiggins and Lori Schisler. Wiggins also filed individual objections. The objecting parties argue that these designated positions do not possess significant and independent discretionary authority as required by Section 6.1 to exclude as either supervisory or managerial employees from bargaining. Moreover, the objections maintain that the designated positions are professional positions and not supervisory or managerial, which requires a fact-intensive inquiry into the specific responsibilities of the employees. Lastly, the objections argue that failure to hold a hearing on the issues is a denial of due process.

II. FINDINGS OF FACT

Mark Ferguson serves as the Account Adjustment Manager – North. In his affidavit, Deputy Administrator for Field Operations for the Illinois Department of Healthcare and Family Services, Division of Child Support Services, Norris Stevens, attests to being familiar with this position's duties, maintaining that the CMS-104 submitted by CMS fairly and accurately represents the duties it is authorized to perform. Ron Wiggins serves as the Budget Supervisor for the department. In her affidavit, Chief of the Bureau of Operations within the Division of Information Services for Illinois Department of Healthcare and Family Services, Eppie Dietz, asserts that she is familiar with this position's duties and maintains that the CMS-104 submitted by CMS fairly and accurately represents the duties it is authorized to perform. Lastly, Lori Schisler serves as the Supervisor of the Medial Liability Unit and her superior, Michael Casey, Administrator in the Division of Finance for the Department of Healthcare and Family Services maintains that he is familiar with this position's duties stating that the CMS-104 submitted by CMS fairly and accurately represents the duties it is authorized to perform.

Mark Ferguson, position number 37015-33-53-800-00-91, states that he has 17 subordinates who report directly to him. Although Ferguson maintains that he does not have the

authority to perform supervisory functions, he states that he uses existing policies and guidelines to supervise the overall work product completed by his subordinates. He also works directly with and, trains several of his subordinates to perform their “lead worker” duties. Ferguson states that he does not engage in the implementation of policy making with independent judgment and he points out that there are other employees who perform similar duties who have not been selected for designation.

Ron Wiggins, position number 37015-33-61-600-00-61, does not have any subordinates and Wiggins has never had any in this position. As such, AFSCME argues that the position description is inaccurate. Wiggins maintains that he does not have any independent discretionary authority and his duties consist of compiling the IT budget for the department by acquiring information from other employees and inputting the information into a database. Wiggins maintains that he does not interpret or apply any policies or procedure; however, he does coordinate the approval of federal budgets with the Bureau of Federal Finance to ensure correct federal reporting.

Lori Schisler, position number 37015-33-73-310-00-61, describes her job duties as supervising four staff members by communicating assignments pertaining to preparation of liability estimates and appropriation requests and subsequent inquires after the budget is passed. She reads and responds to voluminous amounts of e-mail regarding upper management decisions pertaining to changes in policy that impact liability. Schisler reviews legislative proposals and works with staff to prepare independent fiscal analysis for different divisions, which require their approval before submitting the legislative affairs. Schisler maintains that she and her staff are responsible for tracking the budget approved by the general assembly throughout the year by monitoring appropriation balances and cash resources. As it relates to supervisory indicia, Schisler states that she is Rutan-certified to participate in the hiring process as a technical expert and has participated in the counseling of one employee once. She maintains that she does not perform any other supervisory indicia. Schisler does state that her responsibilities overseeing her subordinates include assigning and reviewing work, approving time off and preparing evaluations.

III. DISCUSSION AND ANALYSIS

a. Procedural Objections

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

The Board has also expressed its concern with AFSCME's due process arguments but maintains that it has taken necessary measures to prevent such a violation. Therefore, the Board held that, consistent with judicial precedent, it has "insured that the individual employees as well as their representative and potential representative receive notice soon after designation petitions are filed, usually within hours, and have provided for redundant notice by means of posting at the worksite....we provided them an opportunity to file objections, and where they raise issues of fact or law that might overcome the statutory presumption of appropriateness, an opportunity for a hearing, [and]...require a written recommended decision by an administrative law judge in each case in which objections have been filed." State of Illinois, Department of Central Management Services, Case No. S-DE-14-005 (IL LRB-SP Oct. 7, 2013) (citing Arvia v. Madigan, 209 Ill. 2d 520 (2004), and Gruwell v. Ill. Dep't of Financial and Professional Regulations, 406 Ill. App. 3d 283, 296-98 (4th Dist. 2010)). Additionally, the Board found that it has "allowed an opportunity to appeal those recommendations for consideration by the full Board by means of filing exceptions,...doubled the frequency of our scheduled public meetings in order to provide adequate review of any exceptions in advance of the 60-day deadline and... issu[e] written final agency decisions which may be judicially reviewed pursuant to the Administrative Review Law", in an effort to adhere to due process. State of Illinois, Department of Central Management Services, Case No. S-DE-14-005 (IL LRB-SP Oct. 7, 2013).

Moreover, in administrative hearings, failing to go to an oral hearing is not necessarily the denial of a hearing where submission of written documents could suffice as a hearing. Department of Central Management Services (Illinois Commerce Commission) v. Illinois Labor Relations Board, State Panel, 406 Ill. App. 3d 766, 769-70 (4th Dist. 2010). Therefore, AFSCME's due process rights have not been violated by the Board following the policies and

procedures mandated by the legislature and I find there is no issue of law or fact warranting a hearing.

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

Lastly, Illinois Appellate Courts have held that the Board’s consideration of job descriptions alone is an adequate basis upon which to evaluate 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 No. S-RC-07-048 on November 8, 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 or managerial under the Act.

Section 6.1(b)(5) allows the Governor to designate positions that authorize an employee to have “significant and independent discretionary authority.” 5 ILCS 315/6.5(b)(5). The Act provides three tests by which a person can be found to have “significant and independent discretionary authority.” Section 6.1(c)(i) sets forth the first two tests, while Section 6.1(c)(ii)

sets forth the third.² The above-referenced positions are properly designated under Section 6.1(c)(i) of the Act and therefore, I will not address Section 6.1(c)(ii).

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

The second test under 6.1(c)(i) makes a designation proper if the position “represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of the agency.” 5 ILCS 315/6.1(c)(i). The Illinois Appellate Court has observed that the definition of a managerial employee in Section 3(j) is very similar to the definition of a managerial employee in the Supreme Court’s decision in National Labor Relations Board v. Yeshiva University, 444 U.S. 672 (1980). Dep’t of Cent. Mgmt. Serv. Ill. Commerce Com’n v. Ill. Labor Rel. Bd., 406 App. 766, 776 (4th Dist. 2010) (citing Yeshiva, 444 U.S. at 683). The Court noted that the ILRB, “incorporated effective recommendations into its interpretation of the term ‘managerial employee.’” ICC, 406 Ill. App. at 776.

² Section 6.1(c) provides that a person has significant and independent discretionary authority as an employee if he or she (i) is engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency or (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

The third test under Section 6.1(c)(ii) states that 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 one 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. (“Kentucky River”), 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. v. United Auto Automobile, Aerospace and Agricultural Implement Workers of America (“Oakwood Healthcare”), 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, 348 NLRB at 689.

Here, both Ferguson and Schisler are properly designated as supervisors under the Act. Ferguson states that he supervises the overall work product of his subordinates and directly works with, and trains several of them to perform their “lead worker” functions which include training, quality control and technical support. Schisler explains that her responsibilities include assigning and reviewing work, approving time off and preparing evaluations. The work Schisler assigns and reviews includes liability estimates and budget models, budget documents that determine appropriation requests and cash resources and monthly liability reports. She reviews these documents prior to submitting them to upper management. Ferguson and Schisler direct the work of their subordinates and their review, prior to submitting the their superiors, is evidence of responsible direction. Neither Ferguson nor Schisler deny using independent judgment when performing these duties.

Wiggins and Schisler are also properly designated as managerial under Section 6.1 of the Act. As part of his duties, Wiggins states that he coordinates the approval of federal budgets with other departments to ensure correct federal reporting. In doing so, Wiggins is carrying out

policy to ensure the Department is meeting its directives. Schisler also attested to, in pertinent part, being involved in the decision-making process pertaining to changes in policy that impact her department and reviewing legislative proposals. She also develops monthly cash spending scenarios related to monthly cash availability caps imposed by the Office of the Comptroller. These are clear examples of managerial authority under Section 6.1(c)(i) because the position requires Wiggins, Ferguson and Schisler to represent management's interest by taking or recommending discretionary actions that effectively control or implement the policies of the agency.

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

IV. CONCLUSIONS OF LAW

The designations in this case are properly made.

V. RECOMMENDED ORDER

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

**Public Service Administrator, Option 2
Employed at Department of Healthcare and Family Services**

<u>Position No.</u>	<u>Working Title</u>	<u>Incumbent</u>
37015-33-15-223-00-61	MANAGER FISCAL OPERATIONS OIG	DEPPE DIANE M
37015-33-17-415-50-61	SUPV AUDIT TEAM	RODGERS LEONA B
37015-33-53-700-00-91	ACCOUNTING MANGER	VACANT
37015-33-53-800-00-91	ACCOUNTING MANGER	FERGUSON MARK A
37015-33-61-600-00-61	BUDGET SUPERVISOR	WIGGINS RON G
37015-33-73-310-00-61	SUPERVISOR	SCHISLER LORI J

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 30th day of January, 2014

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

A handwritten signature in cursive script, appearing to read "Elaine Tarver".

Elaine L. Tarver, Administrative Law Judge