

**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-14-172
)	
American Federation of State, County)	
and Municipal Employees, Council 31,)	
)	
Labor Organization-Objector)	
)	
Sara Barger and Terry Rogers,)	
)	
Employee-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 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 6
Employed at Department of Healthcare and Family Services**

<u>Position No.</u>	<u>Working Title</u>	<u>Incumbent</u>
37015-33-29-320-00-61	MANAGER	ROGERS TERRY L
37015-33-29-320-00-61	MANAGER	SARA BARGER
37015-33-46-241-60-21	GENERAL COUNSEL - SUPERVISOR	VACANT
37015-33-46-241-70-21	General Counsel - SUPERVISOR	VACANT

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 December 2, 2008, the positions at issue were certified into the RC-63 bargaining unit. 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 Sara Barger and Terry Rogers. Barger and Rogers 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

Sara Barger and Terry Rogers serve in the position of Supervisor in the Non-Institutional Provider Services Section of the Department of Healthcare and Family Services. As the Chief of the Bureau of Pharmacy Services in the department, Lisa Arndt submitted an affidavit attesting to being familiar with this position's duties, maintaining that the CMS-104 submitted by CMS fairly and accurately represents the duties the above-mentioned positions have the authority to perform.

According to Sara Barger, position number 37015-33-29-320-00-61, her position reviews policy and procedure changes, participates in meetings and discussions concerning policy revisions and provider policy notices and handbooks and provides detail on billing that could impact policy changes. In this position, Barger also reviews mandated policy and procedure changes including state and federal regulations, HIPAA revisions, Affordable Care Act and National Correct Coding Initiatives and provide comments to management for approval. Barger also states she assists with changes associated with new, revised and discontinued "CPT" and "HCPCS" code annually and intermittently. As a supervisor, Barger explains that she only approves time off and makes rare assignments of work. Barger explains that this position is said

to be the “Additional Identical” to Terry Rogers’ position, as such she is considered back up when Rogers is absent.

Terry Rogers, position number 37015-33-29-320-00-31, maintains that this position does not formulate policy but directs the interpretation of medical policy and billing and payment policies and procedures. Rogers states that this position reviews and evaluates drafts of notifications of policies but does not evaluate the policy itself. When establishing new policies, Rogers, along with the subordinate staff, may suggest language to help document or explain policy to staff and providers, and these suggestions are given consideration but upper management makes the decisions. As a supervisor, Rogers has 12 direct subordinates and tasks are assigned based on the job’s description and through a rotation of those available personnel. As it relates to discipline, Rogers gathers the facts and forwards them to the SPSA who makes the final disciplinary decisions.

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, violate 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-63 on December 2, 2008. 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

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.

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.

Here, both Barger and Rogers are properly designated as managerial under Section 6.1 of the Act. Barger and Rogers both stated that their jobs consist of reviewing, interpreting and assisting with the drafting of policies and procedures that effect their department, in order to follow federal guidelines and meet their department's objectives. This is a clear example of managerial authority under Section 6.1(c)(i) because the position requires both Barger and Rogers 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 according to Section 6.1(c)(i) 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 6
Employed at Department of Healthcare and Family Services**

Position No.

Working Title

Incumbent

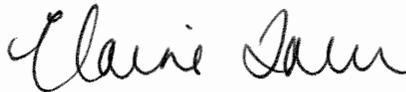
37015-33-29-320-00-61	MANAGER	ROGERS TERRY L
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VI. EXCEPTIONS

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
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Elaine L. Tarver, Administrative Law Judge