

**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-14-175
)	
American Federation of State, County)	
and Municipal Employees, Council 31,)	
)	
Labor Organization-Objector)	
)	

**ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED DECISION AND ORDER**

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) added by Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. 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 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 8N
Employed at Department of Healthcare and Family Services**

<u>Position No.</u>	<u>Working Title</u>	<u>CARE</u>	<u>Incumbent</u>
37015-33-23-112-00-61	LONG TERM SUPERVISOR	CARE	CARLISLE BARBARA B
37015-33-23-113-00-61	LONG TERM SUPERVISOR	CARE	PRZADA SUSAN D
37015-33-23-114-00-61	LONG TERM SUPERVISOR	CARE	COONROD ROBERTA S
37015-33-23-121-00-21	LONG TERM SUPERVISOR	CARE	OTTAVIANO ROXANE M
37015-33-23-123-00-61	LONG TERM SUPERVISOR	CARE	WOJCIECHOWSKI LORI J
37015-33-23-124-00-21	LONG TERM SUPERVISOR	CARE	PULPHUS GLORIA J
37015-33-23-125-00-61	LONG TERM SUPERVISOR	CARE	SCHMECK JODY S

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 October 28, 2009, the positions at issue were certified into the RC-63 bargaining unit pursuant to the actions of the Board in Case No. S-RC-04-130. On January 27, 2014, the American Federation of State, County and Municipal Employees (AFSCME) filed timely objections to the designation.²

² On January 28, 2014, the Board received Susan Przada's individual objections to this petition. Subsequently, Przada submitted a revision of her objection to the Board January 29, 2014. Objections in this case were due January 27, 2014, and Przada has shown or argued any reason why the Board should grant a variance to allow the submission of this filing. However, Przada's objections are almost verbatim

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 the positions arguing that the positions do not possess significant and independent discretionary authority as required by Section 6.1. The individual employees submitted statements that state that their main job function is to complete field surveys pursuant to the direction of the central office, they do not perform most of the duties as described in the position description, particularly any planning, directing, implementing development, or recommendation regarding policies and goals of the department. AFSCME contends that the designated positions are merely professional where the employee uses professional skills to understand and follow the guidelines established by the Department, negating the claim that the positions are managerial in nature.

As it relates to the employees' supervisory authority, AFSCME maintains that the employees do not have authority to engage in any supervisory function with independent judgment. Instead, the employees state that the assignment of work is done either by geography or equalization and approval of time is routine given that they can grant it but cannot deny it. Moreover, although they prepare performance evaluations, the evaluations are without reward or consequence.

to the objections timely submitted by AFSCME on her behalf. As such, those issues will be addressed in this decision.

Lastly, AFSCME argues that these positions have been certified into the bargaining unit pursuant to the actions of the Board for over four years and there is no rational basis for treating them differently than the many other positions which hold the same title or have similar duties. AFSCME requests a hearing be held to determine whether there is a legal basis for the exclusion of this position and the effect of such exclusion. AFSCME maintains that failure to hold a hearing on the issues raised is also a denial of due process.

II. FINDINGS OF FACT

The position designated by this petition has the working title of Long Term Care Supervisor or Region Field Office Supervisor. Kelly Cunningham is the Chief of the Bureau Long Term Care in the Department of Healthcare and Family Services. Cunningham, by affidavit, asserts that she is familiar with the designated employees' duties and that the CMS-104 submitted by CMS fairly and accurately represents the duties they are authorized to perform.

As it relates to their supervisory duties, the job description states that the designated employees serve as full line supervisors who assign and review work; provide guidance and training to assigned staff; counsel staff regarding work performance; reassign staff to meet day-to-day operating needs; establish annual goals and objectives; approve time off; adjust first level grievances; effectively recommend and impose discipline, up to and including discharge; prepare and sign performance evaluations and determine and recommend staffing needs.

The statements by the designated employees specifically address their supervisor duties. These employees state that they do not serve as full line supervisors. They maintain that they do not have the authority to adjust first level grievances, effectively recommend discipline, or determine/recommend staffing needs. Although they approve time off, it is argued that they have no authority to deny time off or counsel an employee absent direction from management. Work assignments are done based on either geography or equalization and although they prepare performance evaluations, these evaluations are based on objective criteria and reviewed by their supervisors prior to going to the individual employee. Lastly, the employees state that they do not responsibly direct their subordinates.

Regarding presumably managerial duties, the designated employees maintain that they are not engaged in executive or management functions or charged with the effectuation of management policy and practices, nor do they represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of the

department. Specifically, the employees contend, contrary to their job descriptions, that they do not develop, recommend and implement policies and procedures, develop and implement program goals and objectives, confer with management on integration of program function activities, resolve administrative problems or recommend program function improvements.

Instead, the designated employees state that they are responsible for the completion of surveys (MDS and SLF surveys) as required by the central office, which reflect data compiled by the long term care facility or supportive living facility detailing the services provided to the recipient. MDS surveys are used to insure that the services reported as provided to a recipient and charged to Medicaid were provided. The SLF surveys are completed to determine care and services are provided within the scope of the regulation. The designated employees' subordinates, field staff nurses, are assigned to complete these surveys and the designated employees review all completed surveys and make the necessary changes as required by their manual of instruction, prior to forwarding them to central office.

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 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-63 in Case No. S-RC-04-130 on October 28, 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.³

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 be “charged with the effectuation” of policies and not that the employee direct 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

³ 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 be charged with carrying 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) (2012). 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.

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 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.

I find the designated employees are authorized to have significant and independent discretionary authority meeting the managerial and supervisory component in Section 6.1 of the Act. Section 6.1(d) requires us to presume the Governor's designation is proper, and the

evidence as a whole fails to overcome that presumption. Although the designated employees state that they do not responsibly direct their subordinates, they explain that they gather the surveys submitted by their subordinates and make necessary changes to ensure they reflect and follow guidelines. When doing so, the designated employees use some discretion by deciding to what extent the surveys correctly reflect the services reported and provided for by the recipients, within the scope of the regulations. Moreover, as liaison between their subordinates and the central office, the designated employees state that they ensure their staff is following any changes in policy implemented by central office. Therefore, the designated employees use discretionary action to effectively implement agency policy, and are properly designated as managerial.

The designated employees also deny responsibly directing their subordinates but do not refute actively reviewing and correcting the surveys submitted by their subordinates, prior to turning them over to the central office. Although the dates and time lines for the surveys are set by central office, the designated employees ensure these surveys are submitted to central office on time and that they meet the scope and subject as set out by upper management. It is not refuted that this type of review is performed with independent judgment and that the designated employees are responsible for the work of their subordinates. Moreover, the designated employees do not refute the contention that they also use independent and discretionary authority when providing guidance and training assigned staff. Thus, the designated employees' responsibly direct their subordinates and review and monitor of their subordinates' work.

Therefore, the positions at issue are managerial and 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 8N

Employed at Department of Healthcare and Family Services

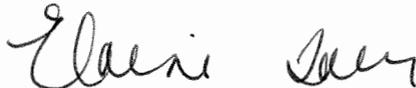
<u>Position No.</u>	<u>Working Title</u>	<u>Incumbent</u>
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37015-33-23-125-00-61	LONG TERM SUPERVISOR	CARE SCHMECK JODY S

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**



Elaine L. Tarver, Administrative Law Judge