

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

State of Illinois, Department of Central	)	
Management Services, (Department of	)	
Veterans' Affairs),	)	
	)	
Petitioner,	)	Case No. S-DE-14-178
	)	
and	)	
	)	
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.<sup>1</sup>

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

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<sup>1</sup> 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 16, 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. On January 27, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to the designation pursuant to Section 1300.60(a)(3) of the Board's Rules. Based on my review of the designation, the documents submitted as part of the designation, the objections, and the documents and arguments submitted in support of those objections, I find that the designation was properly submitted, that it is consistent with the requirements of Section 6.1 of the Act, and that the objections fail to raise an issue of law or fact that might overcome the presumption that the designation is proper. Consequently, 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.

The following two Dietary Manager I positions within the Department of Veterans' Affairs are at issue in this designation:

12501-34-30-210-80-01  
12501-34-40-110-20-01

Huner, Devin  
Meuser, Marsha

CMS's petition indicates the positions at issue qualify for designation under Section 6.1(b)(5) of the Act which permits designation if the position authorizes an employee in that position to have "significant and independent discretionary authority."<sup>2</sup> AFSCME objects to the designation of all listed positions.

### **I. Objections**

First, AFSCME states that Section 6.1 of the Act is unconstitutional, on its face and as applied, both under the Illinois Constitution and the Constitution of the United States of America because it deprives AFSCME of due process and violates the equal protection clauses, the

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<sup>2</sup> CMS filed position descriptions (CMS-104s) for the positions and affidavits in support of its assertion. These positions are currently represented by AFSCME.

prohibition against impairment of contracts, and the separation of powers clause of the Illinois Constitution.

Further, AFSCME generally objects to the use of position descriptions to support the petition and to the allocation of the burden of proof. AFSCME also argues that there can be no showing of managerial authority based solely on an affidavit, which states that the position at issue is authorized to effectuate departmental policy, where the position description does not reference any specific policy. Similarly, AFSCME states that the position descriptions set forth only potential responsibilities, not actual ones. In the same vein, AFSCME asserts that CMS has presented no evidence that the employees at issue ever exercised their referenced supervisory or quasi-managerial authority. Likewise, AFSCME asserts that CMS has not shown that it told the employees they possessed such authority. In addition, AFSCME argues that the positions at issue are professional and not managerial.

Finally, AFSCME advances specific objections with respect to the position held by Devin Huner and requests that Huner be retained in the unit for “the reasons stated in his questionnaire and because of the information contained therein.” AFSCME asserts that there is a high likelihood that all the position descriptions are inaccurate because specific individuals identified inaccuracies in their own position descriptions. On this basis, AFSCME asserts that the Board should order a hearing on all positions at issue because to decline to do so would compel speech in violation of the First Amendment.

## **II. Material Facts**

### **a. Devin Huner**

Devin Huner is a Dietary Manager I at the Illinois Veterans Home at Quincy. He reports to Dietary Manager II Chuck Eckhoff.

Huner’s position description states that he is a supervisor of 68 subordinates. It provides that he prepares and discusses annual performance evaluations with staff, initiates recommendations for commendatory or disciplinary measures based upon observed work performance, assists in the preparation of work schedules, and approves or denies employees’ use of benefit time. Huner admits that he “directs employees if [he] notices something being done improperly.” Yet, he denies that any employees report directly to him and asserts that all his purported subordinates report directly to Dietary Manager II Chuck Eckhoff, his own

supervisor.<sup>3</sup> Huner’s position description also provides that he spends 10% of his time acting as supervisor of dietary operation in the absence of the Dietary Manager II and assisting the Dietary Manager II in the planning and direction of all phases of a comprehensive food services program.

### **III. Discussion and Analysis**

#### **a. Constitutional Arguments**

It is beyond the Board’s capacity to rule that the Illinois Public Labor Relations Act, as amended by Public Act 97-1172, either on its face or as applied, violates provisions of the United States and Illinois constitutions. State of Ill., Dep’t of Cent. Mgmt. Serv., 30 PERI ¶ 80 (IL LRB-SP 2013) (citing Goodman v. Ward, 241 Ill. 2d 398, 411 (2011) (“Administrative agencies ... have no authority to declare statutes unconstitutional or even to question their validity. [citations omitted] When they do so, their actions are a nullity and cannot be upheld.”)). Accordingly, these issues are not addressed in this decision.

#### **b. Non-Constitutional General Objections**

AFSCME’s general objections are without merit and do not raise issues of fact or law that might rebut the presumption that the designation is properly made.

First, the Board has previously rejected AFSCME’s objections concerning the statutorily-mandated presumption, the burden of proof, and the manner in which ALJs have applied them. See State of Ill., Dep’t of Cent. Mgmt. Serv., 30 PERI ¶ 80 and all subsequent Board designation cases.

Here, most of AFSCME’s objections may be restated as objections to this now well-established framework because they presuppose that CMS must initially prove that the designation is proper. For example, AFSCME argues that CMS “failed to carry its burden of proof” and “presented no evidence” that the employees at issue ever exercise their purported authority or were told they possessed it. Similarly, AFSCME asserts that “there can be no showing of managerial authority based solely on [an] affidavit,” which is phrased in general terms. Likewise, AFSCME states that “there is no demonstration [by CMS] that the employees at issue have...authority to complete the job duties...[in their]...position descriptions.” Finally,

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<sup>3</sup> CMS designated Chuck Eckhoff’s position in Case No. S-DE-14-179. His position was properly designated as supervisory under Sections 6.1(b)(5) and (c)(ii) of the Act.

AFSCME generally asserts that CMS's affidavits are unreliable because there is no indication that they are accurate.

Contrary to AFSCME's general assertion, the burden is on AFSCME, not CMS. Accordingly, these objections must be rejected because they ignore the presumption and misallocate the burden.

Second, the Board has similarly rejected AFSCME's objections based on the bald statement that the designated position does not have significant and independent discretionary authority because it is professional rather than managerial. State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Cent. Mgmt. Servs.), 30 PERI ¶ 85 (IL LRB-SP 2013). The terms managerial and professional are not mutually exclusive and there is no exception for professional employees in the language of Section 6.1(c)(i). State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing Dep't of Cent. Mgmt. Servs. / Ill. Pollution Control Bd., 2013 IL App (4th) 110877). As such, where a position meets one of the two alternative tests set out in Section 6.1(c)(i), it may appropriately be designated by the Governor for exclusion from collective bargaining rights regardless of whether it is also a professional position. Id.

In sum, AFSCME's general objections do not raise issues of fact or law that might rebut the presumption that CMS's designation is properly made.

c. 12501-34-40-110-20-01 - Meuser, Marsha

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no specific evidence to suggest that CMS has limited the position holder's discretion or independent authority, within the meaning of Section 6.1(c)(i) or (ii). State of Ill. Dep't of Cent. Mgmt. Serv., 30 PERI ¶ 164 (IL LRB-SP 2014) (objectors must provide specific examples to negate each of the three tests in Section 6.1(c)); see also State of Ill. Dep't of Cent. Mgmt. Serv., 30 PERI ¶ 85 (IL LRB-SP 2013).

AFSCME has not raised issues of fact for hearing by asserting that there is a "high likelihood" that the position description is inaccurate because AFSCME has not specifically identified any such alleged inaccuracies. State of Ill., Dep't of Cent. Mgmt. Servs. (Dep't of

Revenue), 30 PERI ¶ 110 (IL LRB-SP 2013) (general statement that position description is inaccurate does not raise issues of fact for hearing).<sup>4</sup>

Thus, CMS properly designated this position.

d. 12501-34-30-210-80-01 - Huner, Devin

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority, within the meaning of Section 6.1(c)(ii) or (i).

First, Huner is properly designated within the meaning of Section 6.1(c)(ii) because he qualifies as supervisory.

Under Section 6.1(c)(ii) of the Act, a position authorizes its holder with the requisite authority if the position is supervisory within the meaning of the National Labor Relations Act and the National Labor Relations Board's case law. 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 1 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., 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., 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, Inc., 348 NLRB at 689.

An employee with the purported authority to responsibly direct must carry out such

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<sup>4</sup> The alleged constitutional implications of this ruling are not addressed here for reasons set forth in section IV.a. of this RDO.

direction with independent judgment. Further, “it must be shown that the employer delegated to the putative supervisor the authority...to take corrective action, if necessary.” In addition, there must be a “prospect of adverse consequences for the putative supervisor” arising from his direction of other employees. Id.

Where an employee substitutes for a supervisor, the substitute will be deemed supervisory if he spends a regular and substantial portion of his working time performing supervisory tasks. Hexacomb Corp. and Western Temporary Services, Inc., 313 NLRB No. 148 (1994); Aladdin Hotel, 270 NLRB No. 122, 4 (1984). If the substitution is merely sporadic and insignificant, the substitute is not held to be a statutory supervisor. Aladdin Hotel, 270 NLRB No. 122, 4 (1984). Employees who substitute as supervisors during vacations or other unscheduled occasions do not qualify as statutory supervisors under the NLRA. Hexacomb Corp. and Western Temporary Services, Inc., 313 NLRB at 3.

Here, Huner is properly designated as supervisory because his position description states he substitutes as a supervisor for 10% of his work time and there is no evidence to suggest that this substitution is merely sporadic, unscheduled, and insignificant. Aladdin Hotel, 270 NLRB No. 122, 4 (1984) (employees who regularly substituted for their superiors on average at least two times per month over a three-month period were supervisory); Sewell, Inc., 207 NLRB 325, 330-332 (1973) (finding two relief employees supervisory where they worked 1 day every two weeks, and two of out 8 working days as substitute supervisors); Swift & Co., 129 NLRB 1391 (1961) (excluding employee as supervisory where he exercised such authority for 15% of his work time in which he substituted for his superior); but see Hexacomb Corp. and Western Temporary Services, Inc., 313 NLRB at 3. In light of the presumption and in the absence of evidence that Huner only substitutes as a supervisor during vacations or other unscheduled occasions, rather than prescheduled ones, the designation is presumed properly made.<sup>5</sup>

Second, Huner is likewise properly designated within the meaning of Section 6.1(c)(i) of the Act because he represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.

Under Section 6.1(c)(i) “a person has significant and independent discretionary authority as an employee if he or she “[1] is engaged in executive and management functions of a State

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<sup>5</sup> As noted in Case No. S-DE-14-179, Huner’s superior, Charles Eckhoff, is properly designated as supervisory.

agency and charged with the effectuation of management policies and practices of a State agency or [2] represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.” When addressing the meaning of Section 6.1(b)(5), one must first look to the language of that section of the Act. The Board may consider case precedent pertaining to the traditional managerial exclusion under Section 3(j) to the extent that the precedent explains the meaning of terms commonly used in both Section 3(j) and section 6.1(b)(5). State of Ill., Dep’t of Cent. Mgmt. Servs. (Dep’t of Commerce & Economic Opportunity), 30 PERI ¶ 86 (citing City of Bloomington v. Ill. Labor Relations Bd., 373 Ill. App. 3d 599, 608 (4th Dist. 2007) (“When statutes are enacted after judicial opinions are published, it is presumed that the legislature acted with knowledge of the prevailing case law.”). Finally, the burden is on AFSCME to prove that the designation is improperly made. State of Ill., Dep’t of Cent. Mgmt. Servs. (Dep’t of Commerce & Economic Opportunity), 30 PERI ¶ 86.

Here, Huner has authority to represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency because he assists the Dietary Manager II in the planning and direction of all phases of a comprehensive food services program for the Department of Veterans’ Affairs. The policy of the Illinois Department of Veterans’ Affairs is to “empower veterans and their families to thrive” by providing critical programs that augment the benefits provided by the United States Department of Veterans’ Affairs <sup>6</sup> The food services program is integral to implementing that policy because it helps ensure that veterans receive adequate nutrition and care. Huner’s responsibility to assist in planning and directing the food services program shows that he has the authority to represent management interests in achieving that mission. Finally, Huner takes or recommends discretionary action when performing this task because the designation is presumed properly made and the position description does not limit the position holder’s discretion or independent authority.

Thus, the designation is properly made.

#### **IV. Conclusions of Law**

The Governor’s designation in this case is properly made.

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<sup>6</sup> <http://www2.illinois.gov/veterans/about-us/Pages/default.aspx>

**V. Recommended Order**

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

12501-34-30-210-80-01  
12501-34-40-110-20-01

Huner, Devin  
Meuser, Marsha

**VI. Exceptions**

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,<sup>7</sup> parties may file exceptions to the Administrative Law Judge's recommended decision and order, and briefs in support of those exceptions, not 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. Exceptions must be filed by electronic mail to [ILRB.Filing@illinois.gov](mailto: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 3rd day of February, 2014**

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

*/s/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**

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<sup>7</sup> Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>.