

**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-14-179
)	
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.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 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. On January 30, 2014, AFSCME filed a supplemental objection. 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 three Dietary Manager II positions within the Illinois Department of Veterans' Affairs are at issue in this designation:

12502-34-30-210-80-01	Eckhoff, Charles
12502-34-40-110-20-01	Gebhardt, Diane
12502-34-60-210-00-01	Barnhart, Dixie

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."² 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

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

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 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. Further, AFSCME states that CMS has presented no evidence that the employees at issue ever exercised their referenced supervisory or quasi-managerial authority. Similarly, 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 urges the Board not to rely on the Petitioner's affidavits because the affidavits do not explain how the affiant is familiar with the job duties of the positions at issue.

AFSCME also filed position-specific exceptions with respect to the positions held by Charles Eckhoff and Dixie Barnhart. It requests that these employees be "retained in the bargaining unit for reasons stated in [their] questionnaire[s] and because of the information contained therein." In particular, AFSCME asserts that although CMS claims that Barnhart is a supervisor, the organizational chart CMS submitted with the Petition shows that she has no subordinates.

AFSCME concludes that there is a high likelihood that all the position descriptions are inaccurate because two 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. 12502-34-30-210-80-01 - Eckhoff, Charles

Charles Eckhoff directly oversees one subordinate, Dietary Manager I Devin Huner.³ Eckhoff's position description provides that he supervises the staff assigned to the dietary department by observing and evaluating their work performance, initiating commendatory or disciplinary action and other personnel actions, approving time off, providing guidance and training, and determining staffing needs to achieve program objectives. Eckhoff admits that he assigns work to his subordinate and that he has final say as to the tasks assigned to all employees in the department. Further, he notes that he works in conjunction with the Dietary Manager I, the Support Service Coordinator Is and the Cook II to develop job duties for each dietary position. He admits that he makes recommendations concerning employee discipline. He does not deny that his superiors accept his recommendations. Further, Eckhoff admits that he directs the Dietary Manager I and his subordinates "as needed to effectively complete all tasks and duties as required within the dietary department." Eckhoff explains that "one cannot be the manager of a department and not give direction to the employees.

Finally, Eckhoff asserts that he is responsible for writing and submitting for approval all policies pertaining to the dietary department. These policies include administrative policies, diet and diet therapy policies, menu and menu planning policies, and service policies. Eckhoff concludes that his superiors have approved all his recommended policies.

b. 12502-34-40-110-20-01 - Gebhardt, Diane

Diane Gebhardt serves as the Department Head of the Dietary Department and performs key administrative and managerial responsibilities by directing all phases of a complex and comprehensive clinical dietetic and food service program.

c. 12502-34-60-210-00-01 - Barnhart, Dixie

Barnhart works under "administrative direction" at the Anna Veterans Home. She admits that the Business Administrator directed her to review dietary policies for the Home. She further admits that she undertook such review and made changes to the policy. Finally, Barnhart admits that her superior approved her changes and updated the policies according to her revisions.

³ CMS designated Huner's position in Case No. S-DE-14-178. The designation was properly made.

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, 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 positions do not have significant and independent discretionary authority because they are professional rather than managerial positions. 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. 12502-34-40-110-20-01 - Gebhardt, Diane

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).⁴

Thus, CMS properly designated this position.

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

a. 12502-34-30-210-80-01 - Eckhoff, Charles

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME 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) of the Act.

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 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.

In this case, Eckhoff possesses significant and independent discretionary authority because he has authority to responsibly direct his subordinates. Eckhoff's position description states that his position supervises the staff assigned to the dietary department by evaluating his subordinates' work, providing guidance and training, and determining staffing needs to achieve

program objectives. Position holder Eckhoff admits that he directs the Dietary Manager I and his subordinates “as needed to effectively complete all tasks and duties as required within the dietary department.” Indeed, he notes that, “one cannot be the manager of a department and not give direction to the employees.” Based on this evidence, the position holder exercises the use of independent judgment and is accountable for his subordinates’ work because the designation is presumed proper under Section 6.1(d) of the Act and the position description does not expressly limit the position holder’s discretion, independent authority, or accountability.

Thus, the designation of this position is properly made.

b. 12502-34-60-210-00-01 - Barnhart, Dixie

CMS’s designation of this position is proper because the designation is presumed to be properly made and the evidence presented supports this conclusion because it shows that position holder Barnhart represents management interests by taking or recommending discretionary actions that effectively control or implement the policies 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 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, Barnhart represents management interests by taking or recommending discretionary actions that effectively control or implement the policies of a State agency because she makes effective recommendations concerning changes to dietary policies that govern the Veterans’

Home. Barnhart represents management interests by revising such policies because the policies impact the services provided at the Home. She exercises significant discretion when she recommends changes to those dietary policies because she must initially determine whether it is appropriate to change established policies and then must determine the manner in which they should be altered. Barnhart's tasks in this regard control or implement the policies of the Department of Veterans' Affairs because Barnhart's recommendations help maintain adequate care standards within the Veterans' system, a necessary component of the Department's mission, and Barnhart's superior changes the policies in line with Barnhart's recommendations. See State of Ill., Dep't of Cent. Mgmt. Servs. (Ill. Gaming Bd.), Case No. S-DE-14-121 (IL LRB-SP Jan. 3, 2014)(employee satisfied the second test under Section 6.1(c)(i) even where he merely implemented policies that related to the subject matter of the agency's regulatory authority and did not affect the policies of his agency more broadly).

Thus, the designation of this position is properly made.

IV. Conclusions of Law

The Governor's designation in this case is 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 in the Illinois Department of Veterans' Affairs are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

12502-34-30-210-80-01	Eckhoff, Charles
12502-34-40-110-20-01	Gebhardt, Diane
12502-34-60-210-00-01	Barnhart, Dixie

VI. Exceptions

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,⁵ 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

⁵ Available at <http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf>.

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. 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

**Anna Hamburg-Gal
Administrative Law Judge**