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-14-185
and	)	
American Federation of State, County and Municipal Employees, Council 31,	)	
Labor Organization-Objector,	)	
and	)	
Diane Schultz ,	)	
Employee-Objector	)	

ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED DECISION AND ORDER

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) *added by* Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. There are three broad categories of positions which may be so designated: 1) positions which were first certified to be in a bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008, 2) positions which were the subject of a petition for such certification pending on April 5, 2013 (the effective date of Public Act 97-1172), or 3) positions which have never been certified to have been in a collective bargaining unit. Only 3,580 of such positions may be so designated by the Governor, and, of those, only 1,900 positions which have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, the position must fit one of the following five categories:

1) it must authorize an employee in the position to act as a legislative liaison;
2) it must have a title of or authorize a person who holds the position to exercise substantially similar duties as a Senior Public Service Administrator, Public Information Officer, or Chief Information Officer, or as an agency General Counsel, Chief of Staff, Executive Director, Deputy Director, Chief Fiscal Officer, or Human Resources Director;
3) it must be designated by the employer as exempt from the requirements arising out of the settlement of Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), and be completely exempt from jurisdiction B of the Personnel Code, 20 ILCS 415/8b through 8b.20 (2012), see 20 ILCS 415/4 through 4d (2012);
4) it must be a term appointed position pursuant to Section 8b.18 or 8b.19 of the Personnel Code, 20 ILCS 415/8b.18, 8b.19 (2012); or
5) it must authorize an employee in that position to have "significant and independent discretionary authority as an employee" by which the Act means the employee is either
    (i) engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
    (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. It also requires the Illinois Labor Relations Board to determine, in a manner

consistent with due process, whether the designation comports with the requirements of Section 6.1, and to do so within 60 days.[1]

As noted, Public Act 97-1172 and Section 6.1 of the Illinois Public Labor Relations Act became effective on April 5, 2013, and allow the Governor 365 days from that date to make such designations. The Board promulgated rules to effectuate Section 6.1, which became effective on 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 21, 2014, Diane Schultz, an employee of the State of Illinois who occupies the position designated as excluded from collective bargaining rights, filed an objection to the designation. 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 position 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 this position within any collective bargaining unit.

The following Public Service Administrator, Option 8S position within the Department of Veterans' Affairs is at issue in this designation:

370418-34-30-000-00-01 Diane Schultz

CMS's petition indicates the position at issue qualifies for designation under Section 6.1(b)(5) of the Act which permits designation if the position authorizes an employee in that

[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.

position to have "significant and independent discretionary authority."[2] AFSCME and Schultz object to the designation of the listed position.

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 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 employee at issue ever exercised her referenced supervisory or quasi-managerial authority. Similarly, AFSCME asserts that CMS has not shown that it told the employee she possessed such authority. In addition, AFSCME argues that the position at issue is professional and not managerial. Finally, AFSCME urges the Board not to rely on the Petitioner's affidavit because the affidavit does not explain how the affiant is familiar with the job duties of the position at issue.

AFSCME also filed position-specific exceptions with respect to the position held by Diane Schulz. It "requests that Mr. Schultz be retained in the bargaining unit for reasons stated in his questionnaire and because of the information contained therein."

Shultz filed a separate objection to the designation of her petition. It includes the questionnaire solicited by AFSCME and a document that outlines the Department's policy-making process.

[2] CMS filed a position description (CMS-104s) for the position and an affidavit in support of its assertion. This position is currently represented by AFSCME.

II. Material Facts

Diane Schultz holds the title Director of Social Services in the Department of Veterans' Affairs. She oversees 11 employees including three Social Service Program Planners, six Social Worker IIs, one Registered Nurse II, and one Office Assistant.

In relevant part, Schultz's position description provides that she supervises subordinate staff in the assignment of duties; plans assigns, prioritizes, coordinates, evaluates, reviews, and maintains records of performance of subordinates; provides appropriate training, technical assistance and counseling for subordinates' development; provides feedback to subordinates concerning work performance; works with each subordinate to meet goals and objectives, establishes and revises goals as required; conducts and signs performance evaluations; counsels employees on problems with productivity, quality of work, conduct, etc; issues oral and written reprimands on her own initiatives and recommends disciplinary action including suspension and discharge.

Schultz asserts that she has no authority to transfer, suspend, layoff, recall, promote, discharge, or reward employees. She admits that she assigns work to staff in the Social Service Department. In addition, she states that she directs her subordinates. For example, she may provide suggestions for interventions regarding behavioral or mood issues of residents' care plans and for interventions related to crisis management, usually related to behavioral "discontrol" or discharge planning. She does not deny that she possesses the authority to discipline employees or to effectively recommend their suspension or discharge.

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 employee at issue ever exercised her purported authority or was told she 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 employee…at issue [`has]…authority to complete the job duties…[in her]…position description." Finally, AFSCME generally asserts that CMS's affidavit is unreliable because there is no indication that it is 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. 370418-34-30-000-00-01 - Diane Schultz

CMS's designation of this position is proper because the designation is presumed to be properly made and neither AFSCME nor Schultz introduced 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, Schultz possesses significant and independent discretionary authority

because she has authority to responsibly direct her subordinates. Schultz's position description states that her position holds the authority to direct employees. Position holder Schultz admits the same. Based on this evidence, the position holder exercises the use of independent judgment and is accountable for her 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, Schulz holds the authority to responsibly direct her subordinates.

Further, Schultz possesses significant and independent discretionary authority because she has authority to discipline and effectively recommend discipline of her subordinates. The position description provides that Schultz has authority to issue oral and written reprimands on her own initiative. Schultz does not deny possessing that authority. In addition, her position description provides that she has authority to recommend disciplinary action including suspension and discharge. Schultz's recommendations are presumed effective because Schultz does not identify any circumstances in which her superiors ever rejected her recommendations, despite the fact that AFSCME specifically solicited such information from her on the questionnaire. Based on this evidence, the position holder exercises the use of independent judgment in taking and recommending disciplinary action 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 or independent authority. Consequently, Schultz holds the authority to discipline her subordinates and to make effective recommendations on disciplinary action.

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 position in the Department of Veterans' Affairs is excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

VI. Exceptions

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,[3] 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. 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 31st day of January, 2014

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/s/ *Anna Hamburg-Gal*

Anna Hamburg-Gal
Administrative Law Judge

[3] Available at http://www.state.il.us/ilrb/subsections/pdfs/Section%201300%20Illinois%20Register.pdf.