

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

State of Illinois, Department of Central Management Services, (Department on Aging),)	
)	
Petitioner)	
)	
and)	Case Nos. S-DE-14-198
)	and S-DE-14-199
)	
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 (Act). Three broad categories of positions may be so designated: (1) positions that were first certified to be in a bargaining unit by the Illinois Labor Relations Board (Board) on or after December 2, 2008; (2) positions that 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 that have never been certified to have been in a collective bargaining unit. Only 3,580 such positions may be so designated by the Governor, and of those, only 1,900 may be positions that have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, a position must fall into 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, an Agency General Counsel, Agency Chief of Staff, Agency Executive Director, Agency Deputy Director, Agency Fiscal

Officer, Agency Human Resources Director, Senior Public Service Administrator, Public Information Officer, or Chief Information Officer;

- 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 either:
 - (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, 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 (September 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations (Rules), 80 Ill. Admin. Code Part 1300.

On January 24, 2014, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designations pursuant to Section 6.1 of the Act and Section 1300.50 of the Board's Rules. On February 3, 2014, the American Federation of State, County and Municipal Employees (AFSCME) filed timely objections to both designations.

Based on my review of the designations, the documents submitted therewith, the objections filed by AFSCME, and the documents and arguments submitted in support of those objections, I have determined that AFSCME has failed to raise an issue that would require a hearing in these matters. Therefore, I find the designations 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 these matters 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 CONTENTIONS

The instant petitions designate two positions at the Department on Aging (DOA) for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act. CMS states that these positions qualify for designation under Section 6.1(b)(5). CMS also states that these positions are currently represented by AFSCME for the purposes of collective bargaining. In support of its contentions, CMS has filed CMS-104s containing the position descriptions for the designated positions along with affidavits from the Manager of the DOA's Division of Home and Community Services stating, among other things, that the CMS-104s fairly and accurately represent the duties that employees in the designated positions are authorized to perform.

AFSCME objects to the designations on the grounds that CMS has failed to demonstrate that employees in the designated positions are authorized to have significant and independent discretionary authority as that term is used in Section 6.1(b)(5) and defined in Section 6.1(c). AFSCME raises several arguments in support of its contention that the designated positions are neither supervisory nor managerial under the relevant definitions. AFSCME next argues that the designations violate due process and are arbitrary and capricious. Finally, AFSCME alleges that

P.A. 97-1172 is unconstitutional under several provisions of the Illinois and United States Constitutions.

II. FINDINGS OF FACT

The position designated in Case No. S-DE-14-198 is a Public Service Administrator (PSA) Option 1 employed by the DOA in the working title of Training Administrator/Supervisor. At the time the designation was filed, this position was held by Jody Martin. The position was first certified to be in a collective bargaining unit on January 20, 2010, in Case Nos. S-RC-08-036.

The position designated in Case No. S-DE-14-199 is a PSA Option 6 employed by the DOA in the working title of Community Care Program (CCP) Administrator/Supervisor. At the time the designation was filed, this position was held by Mary Gilman. The position was first certified to be in a collective bargaining unit on December 2, 2008, in Case No. S-RC-07-078 and S-RC-07-150.

III. POSITION DESCRIPTIONS

The CMS-104 submitted along with the designation in Case No. S-DE-14-198 lists the following relevant responsibilities that the Training Administrator/Supervisor is authorized to complete “[u]nder administrative direction”: organize, plan, execute, control, and evaluate the operation of the DOA’s training program for both Federal and State mandated programs for DOA staff, provider agencies, and agencies in the Aging Network; exercise discretion in controlling the Agency training program and determining the judicious use of means to accomplish an end; supervise staff, including assigning work, approving time of, providing guidance and training, giving oral reprimands, effectively recommending the resolution of grievances, completing and signing performance evaluations, establishing goals and objectives, counseling staff on problems with productivity, quality of work, and conduct, and determining staffing needs to achieve program objectives. By affidavit Joseph Mason, Manager of the DOA’s division of Home and Community Services and Martin’s immediate supervisor, asserts that these duties fairly and accurately describe the duties that Martin is authorized to perform. The CMS-104 lists five funded positions that report to the Training Administrator/Supervisor.

The CMS-104 submitted along with the designation in Case No. S-DE-14-199 lists the following relevant responsibilities that the CCP Administrator/Supervisor is authorized to complete “[u]nder the general direction of the Chief of the Bureau of Community Operations”:

design and implement policy for the total administrative quality assurance process for all CCP contracts; plan and develop policies and procedures for implementation of new services and programs in long term care, including work plans, timetables, and assignments; supervises staff, including assigning work, providing guidance and training, completing and signing performance evaluations, establishing performance goals and objectives, counseling staff on problems with productivity, quality of work, and conduct, assisting in determining staffing needs to achieve the Department's objectives, and participating in the recruitment, selection, retention, and other employment dispositions of staff. The CMS-104 for her position and the DOA's organizational chart provide that Gilman reports to the Chief of the Bureau of Community Operations, a position that is currently listed as vacant on the organizational chart; the Bureau Chief in turn reports to Mason. By affidavit, Mason asserts that the duties listed in the CMS-104 for her position fairly and accurately describe the duties that Gilman is authorized to perform. The CMS-104 lists four funded positions that report to the CCP Administrator/Supervisor.

IV. DISCUSSION AND ANALYSIS

As stated above, a position is properly designable, among other circumstances, if: (1) it was first certified to be in a collective bargaining unit on or after December 2, 2008; and (2) it authorizes an employee in that position to have significant and independent discretionary authority as an employee. 5 ILCS 315/6.1 (2012). Additionally, it is presumed that any designation made by the Governor under Section 6.1 of the Act is properly made. 5 ILCS 315/6.1(d) (2012). Rule 1300.60(d)(2)(A) permits an Administrative Law Judge (ALJ) to find that a designation is proper based solely on the information submitted to the Board in cases in which no objections sufficient to overcome this presumption are filed. 80 Ill. Admin. Code 1300.60(d)(2)(A). Furthermore, the Board has held that the submission of position descriptions that are consistent with a designation, combined with the presumption under Section 6.1(d) and the absence of any evidence that the designation is inappropriate, leads to the conclusion that a designation comports with Section 6.1. State of Illinois, Department of Central Management Services (Department of Commerce and Economic Opportunity), 30 PERI ¶ 86 (IL LRB-SP 2013).

A. CMS's submission is consistent with the designations.

CMS's initial filing clearly indicates, and AFSCME does not contest, that the positions at issue in Case Nos. S-DE-14-198 and S-DE-14-199 were first certified to be in a bargaining unit

on January 20, 2010, and December 2, 2008, respectively. The first statutory requirement is thus satisfied. As to the second statutory requirement, the submission is consistent with the designation because the CMS-104s for the designated positions tend to show that employees in those positions are authorized to exercise significant and independent discretionary authority as that term is defined in Section 6.1(c)(i).²

An employee is authorized to have significant and independent discretionary authority as defined in Section 6.1(c)(i) if he or she is authorized to: (1) engage in executive and management functions of a State agency and be charged with the effectuation of management policies and practices of a State agency; or (2) represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency. The Board has held the second component of Section 6.1(c)(i) does not require that an employee engage in policy *making*, merely that an employee take or recommend discretionary action that effectively *implements* policy. State of Illinois, Department of Central Management Services (Department of Commerce and Economic Opportunity), Case No. S-DE-14-115 (IL LRB-SP January 7, 2014), appeal pending, No. 1-14-0276 (Ill. App. Ct., 1st Dist.). The CMS-104 for the position of Training Administrator/Supervisor is clearly consistent with CMS's assertion that an employee in this position is authorized to take or recommend discretionary action that effectively controls or implements DOA policy. As Training Administrator/Supervisor, the CMS-104 for Martin's positions expressly authorizes her to exercise discretion in organizing, planning, executing, and controlling the DOA's training program to ensure the judicious use of DOA resources to achieve the Agency's goals and objectives for the training program. This responsibility indicates, and nothing on the face of the submission or AFSCME's objections suggests otherwise, that Martin is authorized to take discretionary action that effectively implements DOA policy.

To the extent that the legislature employed phrases in Section 6.1(c)(i) that it had previously used when enacting Section 3(j), Board precedent interpreting Section 3(j) is instructive in determining whether an employee is authorized to have significant and independent discretionary authority as defined in the first component of Section 6.1(c)(i). State of Illinois,

² Because I find that employees in the designated positions are authorized to exercise significant and independent discretionary authority as that term is defined in Section 6.1(c)(i), and that finding alone is sufficient to support a conclusion that the instant designations are proper, I will not address the assertion that employees in the designated positions are also authorized to exercise significant and independent discretionary authority as that term is defined in Section 6.1(c)(ii).

Department of Central Management Services (Department of Commerce and Economic Opportunity), 30 PERI ¶ 86 (IL LRB-SP 2013). The phrase “engaged in executive and management functions” is an example of language used in both Sections.³ The Board has held that “executive and management functions” amount to the running of an agency, such as establishing policies and procedures, preparing a budget, or otherwise assuring that an agency or department runs effectively. Department of Central Management Services/Illinois Commerce Commission (ICC) v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 774 (4th Dist. 2010) (citing, American Federation of State, County and Municipal Employees, Council 31, 25 PERI ¶ 68 (IL LRB-SP 2009); City of Freeport, 2 PERI ¶ 2052 (IL SLRB 1986)). The requirement in the first component of Section 6.1(c)(i) that an employee be charged with the effectuation of management policies and practices diverges from similar language used in Section 3(j) in that Section 3(j) requires that an employee *direct*, rather than merely be charged with, the effectuation of management policies and practices. An employee *directs* the effectuation of management policies and practices if he or she oversees or coordinates policy implementation through development of means and methods of achieving policy objectives, determines the extent to which policy objectives will be achieved, and is empowered with a substantial amount of discretion to determine how policies will be effected. ICC at 775. However, for a position to be designable under Section 6.1(b), an employee in that position need only be *charged* with carrying out agency policy.

The CMS-104 for Gilman’s position expressly provides that, as CCP Administrator/Supervisor, Gilman is authorized to design both DOA policy and procedure relating to the quality assurance process for CCP contracts and the implementation of new long term care programs. This responsibility is consistent with CMS’s assertion that Gilman is authorized to engage in executive and management functions by establishing policy and procedure. The CMS-104 also provides that Gilman is authorized to implement policy and procedure relating to the quality assurance process for CCP contracts. This responsibility indicates that Gilman is authorized to be charged with the effectuation of DOA policy and practices. Therefore, the responsibilities enumerated in the CMS-104 for her position are consistent with CMS’s assertion that Gilman is authorized to engage in executive and

³ Though, as the Board has noted, Section 3(j) requires an employee to be engaged *predominantly* in executive and management functions; Section 6.1(c)(i) contains no predominance requirement. Id.

management functions of the DOA and to be charged with the effectuation of DOA policy and practices.

B. AFSCME has raised no assertions that, if proven, might demonstrate that the designations are inappropriate.

AFSCME alleges that the positions at issue are not managerial. In support of this contention, AFSCME states: (1) the burden of demonstrating that a position is properly designable should be allocated to CMS; (2) even if this burden is shifted by the presumption in Section 6.1(d), a CMS-104 is insufficient to demonstrate that the job duties of a designated position are consistent with the designation because there is no demonstration of “actual authority” to perform the enumerated functions, CMS-104s list only potential duties, and there is no evidence that the employees in the designated positions have either actually completed the enumerated duties or been instructed that they are authorized to do so; and (3) the Board must distinguish between professional and managerial discretion in determining whether an employee in a designated position is authorized to have significant and independent discretionary authority of a managerial nature.

First, AFSCME misconstrues the relevant issue in these matters. The pertinent question is not whether the positions at issue are managerial, but whether employees in those positions are authorized to have significant and independent discretionary authority of a managerial nature. The Board has already determined that a position that meets the requirements of Section 6.1 is properly designable even if it is not a managerial position as defined in Section 3(j) of the Act. State of Illinois, Department of Central Management Services (Department of Commerce and Economic Opportunity), 30 PERI ¶ 86 (IL LRB-SP 2013).

In addition to misconstruing the relevant issue, AFSCME misconstrues the relevant precedent, alleging not only that the designated positions are not managerial, but specifically that they are not managerial as that term is defined by precedent of the National Labor Relations Board (NLRB). The Board has specifically rejected AFSCME’s contention that it should look first to NLRB precedent in interpreting Section 6.1(c)(i). Id. (“To the extent precedent is relevant to interpretation of Section 6.1(c)(i), we look first to precedent established by Illinois courts, this Board, and where relevant the Illinois Educational Labor Relations Board, then to federal precedent interpreting similarly worded provisions of the NLRA.”).

AFSCME's contention that CMS should be allocated the burden of proving that the positions at issue are properly designable is rooted in its insistence that the Board apply NLRB precedent relating to managerial positions in making its determination. In doing so, AFSCME not only continues to insist on the misapplication of precedent, but also ignores the plain language of the statute and the Board's own precedent regarding the issue. In Section 6.1(d), the General Assembly clearly allocated the burden of proving that a designation is improper to the objecting party and the Board has consistently rejected AFSCME's argument that CMS should nonetheless bear the burden of proof on this issue. Id.

As discussed above, the Board has held that the submission of position descriptions that are consistent with a designation, combined with the presumption under Section 6.1(d) and the absence of any evidence that the designation is inappropriate, leads to the conclusion that the designation comports with Section 6.1. Id. Under this rubric, the Board has repeatedly upheld designations made under Section 6.1(b)(5) based on the submission of CMS-104s enumerating duties consistent with the designation, the statutory presumption that the designation is proper, and the failure of objectors to raise any allegations that, if proven, might demonstrate that the designation is inappropriate. Id. AFSCME cites no authority for its contention that CMS must nonetheless provide evidence that employees in the designated positions have "actual authority" to perform the enumerated functions, that they have performed the functions, or that they have been instructed that they are authorized to do so. To require CMS to do so would be contrary to the presumption of appropriateness contained in Section 6.1(d); it is instead AFSCME's responsibility to provide evidence that these employees are not authorized to have significant and independent discretionary authority. Moreover, the broad provisions that these employees perform their duties under general or administrative direction do not demonstrate that they lack the authority to perform the duties enumerated in the CMS-104 for their position. To say, based solely on these provisions, that an employee may not be authorized to perform the duties enumerated in the CMS-104 for his or her position is both speculative and contrary to the presumption of appropriateness provided in Section 6.1(d). Therefore, I conclude that the CMS-104 submitted by CMS is sufficient to demonstrate that the job duties of the positions at issue are consistent with the designations.

Finally, the Board has rejected AFSCME's contention that Section 6.1(c)(i) requires the Board to distinguish between merely professional employees and employees with managerial

authority. Id. (“Where a position meets one of the two alternative tests set out in Section 3(c)(i) [sic], it may appropriately be designated by the Governor for exclusion from collective bargaining rights regardless of whether it is also a professional position...”).

C. AFSCME’s remaining objections do not warrant dismissal of the instant designation.

AFSCME generally argues that the instant designations violate due process and are arbitrary and capricious because the positions at issue have previously been certified into a bargaining unit by the Board, the positions’ job duties and functions have not changed since this certification, and the positions are covered by a collective bargaining agreement which CMS entered into subsequent to the enactment of Section 6.1. Finally, AFSCME alleges that P.A. 97-1172 is unconstitutional under provisions of the Illinois and United States Constitutions.

An agency’s action is arbitrary and capricious only if the agency contravenes the legislature’s intent, fails to consider a crucial aspect of the problem, or offers an explanation which is so implausible that it runs contrary to agency expertise. Deen v. Lustig, 337 Ill. App. 3d 294, 302 (4th Dist. 2003). Furthermore, an agency is bound to follow its own rules. State of Illinois, Department of Central Management Services (Illinois Commerce Commission) v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 771 (4th Dist. 2010). As noted above, the plain language of the statute permits the designation of a position based solely on the criteria enumerated in Sections 6.1(a) and (b)(5). Furthermore, AFSCME has raised no claim that the Board has failed to follow its own Rules regarding the instant designations. Therefore, it is not arbitrary for the Board to permit designation of the positions at issue because it is adhering to its own rules and the plain language of the statute in doing so.

As to the requirements of due process, adequate notice of a proposed governmental action and a meaningful opportunity to be heard are the fundamental prerequisites of due process. Peacock v. Bd. of Tr. of the Police Pension Fund, 395 Ill. App. 3d 644, 654 (1st Dist. 2009) (citing Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970)). AFSCME has not articulated how it has been deprived of either in this matter.

AFSCME alleges that P.A. 97-1172 violates the separation of powers provisions of the Illinois Constitution, the guarantee of equal protection under the Illinois and United States Constitutions, and the impairment of contract prohibitions of both the Illinois and United States Constitutions. However, 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. 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.”).

V. CONCLUSION OF LAW

The Governor’s designations in these cases are properly made.

VI. RECOMMENDED ORDER

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

37015-47-30-200-00-01	Training Administrator/Supervisor
37015-47-30-300-10-01	Community Care Program Administrator/Supervisor

VII. EXCEPTIONS

Pursuant to Section 1300.90 and Section 1300.130 of the Board’s Rules and Regulations, 80 Ill. Admin. Code Part 1300, parties may file exceptions to the Administration Law Judge’s recommended decision and order, and briefs in support of those exceptions, not later than three 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 sent to ILRB.Filing@Illinois.gov. Each party shall serve its exception on the other parties. 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 26th day of February, 2014

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

/s/ Heather R. Sidwell

**Heather R. Sidwell
Administrative Law Judge**