

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

State of Illinois, Department of Central	)	
Management Services, (Department of	)	
Revenue),	)	
	)	
Petitioner	)	Case No. S-DE-14-206
	)	
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 February 3, 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 February 13, 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 9B position within the Illinois Department of Revenue is at issue in this designation:

37015-25-06-000-40-01      Stephen Gehlbach

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 position to have "significant and independent discretionary authority."<sup>2</sup> AFSCME objects to 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

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<sup>2</sup> CMS filed a position description (CMS-104) for the position and an affidavit in support of its assertion. This position is currently represented by AFSCME.

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 his referenced supervisory or quasi-managerial authority. Similarly, AFSCME asserts that CMS has not shown that it told the employee he 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 Stephen Gehlbach. It requests that Gehlbach "be retained in the bargaining unit for reasons stated in his questionnaire and because of the information contained therein." More specifically, AFSCME asserts that Gehlbach is a professional employee with no subordinates who does not have significant and independent discretionary authority.

## **II. Material Facts**

### **a. 37015-25-06-000-40-01 - Stephen Gehlbach**

Stephen Gehlbach asserts that he has authority to evaluate Department processes and operations and to provide guidance on improvements. However, he asserts that he has no authority to implement changes or to require the Department to adopt policies. Gehlbach asserts that all work performed by his position "is under the established rules of the International Standards for the Professional Practice of Internal Auditing promulgated by the Institute of Internal Auditors and required for the State of Illinois under the Fiscal Control and Internal Auditing."

Gehlbach asserts that he has no authority to decide how policies are implemented. However, he admits that he implements policies and legislation. Further, he notes that he provides feedback and opinions concerning the interpretation of legislation so that management may determine the course of action that the Department should adopt. Gehlbach states that he

provides guidance on internal controls to decrease the Department's risk exposure. However, he notes that it is within management's discretion to incorporate his guidance and feedback.

Gehlbach's job description states that he assists in the preparation of audit procedures and manuals. It further provides that he works independently of the technical staff by auditing and reviewing all processes to assure the accuracy of business records, to uncover internal control problems, and to identify operational difficulties. Further, he conducts research and tests of data maintained by the agency to ensure the confidentiality, integrity, and availability of the data in accordance with the standards outlined in the Control Objectives and Audit Guidelines for Information and Related Technology, the Federal Information Systems Controls Audit Manual, IRS Publication 1075, federal and state statutes, and agency policies and procedures. Gehlbach also performs audits of the security of infrastructure, network application, and internet. He documents the agency control structure for efficiency and effectiveness through the development of business process maps. He provides evaluations of operational efficiencies and makes reports to the Chief Internal Auditor and/or the Director on how to improve the overall IT structure and practices of the Department.

### **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. Servs., 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 employee at issue has...authority to complete the job duties...[in his]...position description." 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.

a. 37015-25-06-000-40-01 - Stephen Gehlbach

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 Gehlbach 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 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, Gehlbach represents management's interests because he ensures the security of the Department through his audits of the Department's infrastructure, network application, and internet. He recommends discretionary action in the course of this work by providing evaluations of operational efficiency to the Chief Internal Auditor and/or the Director wherein he outlines the manner in which the Department may improve its overall IT structure and practices. As such, Gehlbach makes recommendations that control or implement the policies of the Department because his suggestions concerning potential improvements to the Department's IT structure and practices ensure that the Department properly processes taxpayer information in adherence with statutory and regulatory mandates.

Notably, there is no evidence or argument that the Director or the Chief Internal Auditor has ever rejected Gehlbach's recommendations to improve the Department's IT structure and practices. Moreover, contrary to the objector's anticipated contention, there is no evidence or

argument that the International Standards for the Professional Practice of Internal Auditing limit the position holder's use of independent authority or discretion in recommending such improvements.

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 Illinois Department of Revenue is excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-25-06-000-40-01      Stephen Gehlbach

**VI. Exceptions**

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1300,<sup>3</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.

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

**Issued at Chicago, Illinois this 5th day of March, 2014**

**STATE OF ILLINOIS  
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*/s/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**