

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

State of Illinois, Department of Central)	
Management Services (Illinois Commerce)	
Commission),)	
)	
Petitioner)	
)	
and)	Case No. S-DE-14-209
)	
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 February 2, 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.² CMS' petition designates the exclusion of the following Administrative Law Judge Vs employed at the Illinois Commerce Commission based on Section 6.1(b)(3) of the Act:

**Administrative Law Judge V
Employed at the Illinois Commerce Commission**

<u>Position No.</u>	<u>Classification</u>		<u>Incumbent</u>
50524-31-60-200-40-01	ADMINISTRATIVE JUDGE	LAW	Haynes, Leslie D
50524-31-60-200-40-01	ADMINISTRATIVE JUDGE	LAW	Hilliard, Terrence A.
50524-31-60-200-40-01	ADMINISTRATIVE JUDGE	LAW	Sainsot, Claudia E.
50524-31-60-100-40-01	ADMINISTRATIVE JUDGE	LAW	Albers, John D.
50524-31-60-100-40-01	ADMINISTRATIVE JUDGE	LAW	Jones, Larry M.

In support of its petition, CMS submitted job descriptions (CMS-104s) for each position, affidavits and a summary spreadsheet. The spreadsheet identifies position numbers, titles, names of the incumbents, bargaining units, certification dates and case numbers, statutory categories³ of designation and a list of job duties that support the presumptions that the positions are supervisory or managerial. The positions at issue were certified into the RC-10 bargaining unit on May 7, 2010, in Case No. S-RC-10-046. On January 30, 2014, the American Federation of State, County and Municipal Employees (AFSCME) filed timely objections to the designation.

² A petition had previously been filed for the same positions in Case No. S-DE-14-139, where objections were filed and a hearing was scheduled. That petition was withdrawn by CMS. CMS submitted a second petition in Case No. S-DE-14-148, in which it changed its reason for exclusion from solely 6.1(b)(5) and added the exclusion of 6.1(b)(3). Objections were filed and a hearing was scheduled, however, that petition was also withdrawn.

³ The petition submitted limited the reason for exclusion to 6.1(b)(3). On its spreadsheet, CMS designates the employees at issue as statutorily excluded under 6.1(b)(3) and 6.1(b)(5) of the Act. CMS' other supporting documents also address both exclusions. Because I am able to resolve this case based on applicability of Section 6.1(b)(3), I find I need not address whether the designation is appropriate under Section 6.1(b)(5).

Based on my review of the designation, the documents submitted as part of the designation, the objections, and the arguments submitted in support of those objections, I have determined that the objections have failed to raise an issue that would require a hearing.

I find the designation to have been properly submitted and consistent with the requirements of Section 6.1 of the Act. Therefore, 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.

I. ISSUES AND OBJECTIONS

This petition designates five ALJ positions at the Illinois Commerce Commission (ICC) for exclusion from the collective bargaining provisions of Section 6.1 of the Act. CMS states that this position qualifies for designation under Section 6.1(b)(3) because it is both Rutan-exempt and completely exempt from Jurisdiction B of the Personnel Code. As evidence, CMS has provided the ICC's official job descriptions for these positions that indicate that the positions at issue are Rutan-exempt and a "non-CMS" positions.

AFSCME makes several general objections to the petition. AFSCME argues that Section 6.1 of the Act violates due process, the separation of powers doctrine in the Illinois Constitution, equal protection under Article I, Section 2 of the Illinois Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution, and impairs the contractual right of the employees prohibited by the impairment of contract clause in the Illinois Constitution.

AFSCME specifically objects to this petition arguing that the Governor does not the authority to designate the ICC positions under Section 6.1(b) of the Act as the ICC is an agency independent of the Governor.

AFSCME also maintains that CMS submitted no evidence to support its contention that the positions are exempt from Jurisdiction B of the personnel Code. As such, AFCME states that the ALJs are neither engineers nor technical employees and argues that the Personnel Code provides that only the technical and engineering staffs of the ICC shall be exempt from jurisdictions A, B and C of the Personnel Code, 20 ILCS 415/4c, unless said jurisdiction is extended pursuant to Section 4b of the Personnel Code. AFSCME states that the ALJs are not engineers or technical employees as the term "technical" is generally used to describe job duties.

AFSCME does admit that the job description states that the positions are “exempt from Rutan” and “exempt (non CMS position(s).”

II. FINDINGS OF FACT

The position designated by CMS covers five employees of the ICC in the working title of Administrative Law Judge. The position is currently represented by AFSCME for purposes of collective bargaining, as certified by the Board on May 7, 2010, Case No. S-RC-10-046. At the time this designation was filed, the position at issue was held by Leslie Haynes, Terrence Hilliard, Claudia Sainsot, John Albers and Larry Jones. The ALJs report to Michael Wallace, Bureau Chief of the Administrative Law Judges of the Illinois Commerce Commission. By affidavit, Wallace asserts that he is familiar with the ALJs’ duties and that the position descriptions submitted by CMS fairly and accurately represent the duties they are authorized to perform.

The position descriptions state that the position of Administrative Law Judge is exempt from the requirements of Rutan and is a “non-CMS” position. According to the descriptions, an employee in this position is,

“[s]ubject to administrative handles a variety of utility cases of major complexity assigned to the Administrative Law Judges Bureau; analyzes new legal and technical matters; deals with the public and public issues of the most sensitive and controversial nature; requires the highest commitment to assignments and duties in terms of time, energy and experience; processes assignments on legal issues of major complexity while recognizing the necessity of coordinating activities with the functions and policies of the Commission; processes cases in a fair, impartial, professional and expeditious manner; develops and demonstrates the highest qualities of integrity, judicial temperament, scholarly approach, thoroughness, industriousness, inquisitiveness, initiative and commitment in terms of time and energy.”

The position requires a law degree and license to practice in the State of Illinois, and five years of professional experience (including regulatory utility experience), extensive knowledge of the personal computer and its related software programs and applications; superior English oral and written communication skills; and two years of supervisory experience is preferred.

III. DISCUSSION AND ANALYSIS

a. Procedural Objections

First, the Board has held that it is beyond its capacity to rule on the constitutional allegations made by AFSCME. Specifically, it is beyond the Board’s purview to rule whether

the Illinois Public Labor Relations Act, as amended, violates provisions of the United States and Illinois constitutions. The Board noted that administrative agencies have no authority to declare statutes unconstitutional or even to question their validity and in doing so, their actions are null and void and cannot be upheld. State of Illinois, Department of Central Management Services, Case No. S-DE-14-005 (IL LRB-SP Oct. 7, 2013) (citing Goodman v. Ward, 241 Ill. 2d. 398, 411 (2011)). As such, I will not address the constitutional objections in this decision.

The Board has also expressed its concern with AFSCME's due process arguments but maintains that it has taken necessary measures to prevent such a violation. Therefore, the Board held that consistent with judicial precedent it has "insured that the individual employees as well as their representative and potential representative receive notice soon after designation petitions are filed, usually within hours, and have provided for redundant notice by means of posting at the worksite...we provided them an opportunity to file objections, and where they raise issues of fact or law that might overcome the statutory presumption of appropriateness, an opportunity for a hearing, [and]...require a written recommended decision by an administrative law judge in each case in which objections have been filed." State of Illinois, Department of Central Management Services, 30 PERI ¶ 80, Case No. S-DE-14-005 (IL LRB-SP Oct. 7, 2013) (citing Arvia v. Madigan, 209 Ill. 2d 520 (2004), and Gruwell v. Ill. Dep't of Financial and Professional Regulations, 406 Ill. App. 3d 283, 296-98 (4th Dist. 2010)). Additionally, the Board found that it has "allowed an opportunity to appeal those recommendations for consideration by the full Board by means of filing exceptions,...doubled the frequency of our scheduled public meetings in order to provide adequate review of any exceptions in advance of the 60-day deadline and... issu[e] written final agency decisions which may be judicially reviewed pursuant to the Administrative Review Law", in an effort to adhere to due process. State of Illinois, Department of Central Management Services, 30 PERI ¶ 80.

Moreover, in administrative hearings, failing to go to an oral hearing is not necessarily the denial of a hearing where submission of written documents could suffice as a hearing. Department of Central Management Services (Illinois Commerce Commission) v. Illinois Labor Relations Board, State Panel, 406 Ill. App. 3d 766, 769-70 (4th Dist. 2010). Therefore, AFSCME's due process rights have not been violated by the Board following the policies and procedures mandated by the legislature and I find there is no issue of law or fact warranting a hearing.

Regarding the burden of proof, AFSCME has the burden to demonstrate that the designation is not proper. The Act is clear in that “any designation made by the Governor...shall be presumed to have been properly made,” 5 ILCS 315/6.1 (2012). Therefore, the burden of proof shifts to the objector to prove that the designation is, in fact, improper.

Regarding the Governor’s authority, the Board has ruled that the Governor does have authority to “designate position[s] at the PCB and other agencies listed in Section 3(q-5),” including the ICC and the WCC,⁴ as excluded from collective bargaining. State of Ill., Dep’t of Cent. Mgmt. Servs. (Various Agencies, PCB), 30 PERI ¶ 124, Cons. Case Nos. S-DE-14-092, S-DE-14-093, S-DE-14-094 (IL-LRB SP Nov. 15, 2013), appeal pending, No. 1-13-3866 (Ill. App. Ct., 1st Dist.), and State of Ill., Dep’t of Cent. Mgmt. Servs. (Workers’ Comp. Comm’n), 30 PERI ¶ 171, Case No. S-DE-14-128 (IL LRB-SP Jan. 13, 2014), appeal pending, No. 1-14-0388 (Ill. App. Ct., 1st. Dist.). Thus, based on the Board’s most recent decisions, the Governor is permitted to designate positions within the ICC as excluded from collective bargaining.

b. Designations under Section 6.1(b)(3)

As stated above, a position is properly designated if, amongst other reasons, it was first certified to the bargaining unit by the Illinois Labor Relations Board on or after December 2, 2008, and it is both a Rutan-exempt position, as designated by the employer, and completely exempt from Jurisdiction B of the Personnel Code. 5 ILCS 315/6.1 (2012). Moreover, designations made by the Governor are presumed proper under Section 6.1(d) of the Act.

It is undisputed that the positions at issue were certified into bargaining unit RC-10 on May 7, 2010, satisfying the first statutory requirement. At issue is whether the petitioned-for positions are both Rutan-exempt and exempt from Jurisdiction B of the Personnel Code.

The position description clearly indicates that the Administrative Law Judge positions at issue are Rutan-exempt. The position description also denotes the position as “non-CMS.” CMS is authorized by statute to administer the Personnel Code (20 ILCS 415), 20 ILCS 415/3 (2012) and 20 ILCS 405/405-100 (2012). All employment positions in the service of the State are subject to the provisions of the Personnel Code, as administered by CMS, unless the Personnel Code or another statute provides that a position is exempt. 20 ILCS 415/4 (2012). The notation

⁴ Section 3(q-5) lists the following agencies: the Illinois Commerce Commission, the Illinois Workers' Compensation Commission, the Civil Service Commission, the Pollution Control Board, the Illinois Racing Board, and the Department of State Police Merit Board.

on the descriptions that the positions at issue are “non-CMS” positions suggests that the position is not subject to CMS’s administration of the Personnel Code.

As AFSCME argues no alternative, I find that the use of the adjective “technical” in Section 4c(12) of the Personnel Code suggests that the exempt positions exhibit a degree of specialization or require special or practical knowledge. See “technical” Merriam-Webster.com. 2014. <http://www.merriam-webster.com/dictionary/technical> (March 13, 2014). The position description describes the roles of the Administrative Law Judges as analyzing new legal and technical matters involving rulemaking, rates, citations, complaints, granting of authority to operate as a public utility and telecommunications carrier and approval of financial agreements and securities issuances, which I find are duties consistent with this reading of “technical” within Section 4c(12).

Thus, CMS’s submission has provided sufficient evidence to satisfy the second statutory requirement and contrary to AFSCME’s contentions, it requires no further analysis. (State of Illinois, CMS, S-CA-14-152 (IL LRB-SP Mar. 10, 2014)) (the Board held that the nature of the test for designations made pursuant to Section 6.1(b)(3) is binary and should require little to no analysis). Because I find the designation appropriate under Section 6.1(b)(3) of the Act, I need not address whether the petitioned-for positions are also appropriately designated under Section 6.1(b)(5) of the Act.

IV. CONCLUSIONS OF LAW

The designations in this case are properly made under Section 6.1(b)(3) of the Act.

V. RECOMMENDED ORDER

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

**Administrative Law Judge V
Employed at the Illinois Commerce Commission**

<u>Position No.</u>	<u>Classification</u>		<u>Incumbent</u>
50524-31-60-200-40-01	ADMINISTRATIVE JUDGE	LAW	Haynes, Leslie D
50524-31-60-200-40-01	ADMINISTRATIVE	LAW	Hilliard, Terrence A.

	JUDGE		
	ADMINISTRATIVE	LAW	
50524-31-60-200-40-01	JUDGE		Sainsot, Claudia E.
	ADMINISTRATIVE	LAW	
50524-31-60-100-40-01	JUDGE		Albers, John D.
	ADMINISTRATIVE	LAW	
50524-31-60-100-40-01	JUDGE		Jones, Larry M.

VI. EXCEPTIONS

Pursuant to Section 1300.90 and 1300.130 of the Board’s Rules and Regulations, 80 Ill. Admin. Code Parts 1300, parties may file exceptions to the Administrative Law Judge’s recommended decision and order, and briefs in support of those exceptions, no 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 and Regulations. Exceptions must be filed by electronic mail sent 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 13th day of March, 2014

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

/s/ Elaine L. Tarver
Elaine L. Tarver, Administrative Law Judge