

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

State of Illinois, Department of Central)	
Management Services, (Department of)	
Corrections),)	
)	
Petitioner)	
)	Case No. S-DE-14-217
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 (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 February 5, 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 18, 2014, the American Federation of State, County and Municipal Employees (AFSCME) filed timely objections to the designation.

Based on my review of the designation, 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 this matter. Therefore, I find the designation 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 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 CONTENTIONS

The instant petition designates two positions at the Department of Corrections (DOC) 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 Wardens of the facilities to which the employees in the designated positions are assigned stating, among other things, that the CMS-104s fairly and accurately represent the duties that those employees are authorized to perform.

AFSCME objects to the designation on the grounds that it does not comport with the requirements of Section 6.1. In support thereof, AFSCME alleges that CMS has failed to provide the job duties of the designated positions as required by Section 6.1 and that the designated positions do not qualify for designation under Section 6.1(b)(5). AFSCME next argues that the designation violates due process and is 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 designated positions are both classified as Public Service Administrators (PSAs) Option 8N. These positions were first certified to be in a collective bargaining unit on October 28, 2009, in Case Nos. S-RC-04-130. Each has the working title of Director of Nursing. At the time the instant designation was filed, these positions were held by Rebecca Thielen and Lisa Marcum.

III. POSITION DESCRIPTIONS

The CMS-104 submitted by CMS lists the following relevant responsibilities that Thielen, as Director of Nursing at the Dixon Correctional Center, is authorized to complete “[u]nder administrative direction”: direct, coordinate, and provide guidelines to staff in all phases of the health care delivery unit, laboratory, and radiology programs; and implement policies and procedures. By affidavit Nedra Chandler, the Director of DOC’s Dixon Correctional Center, asserts that she is familiar with the duties that the Thielen is authorized to perform as Director of Nursing for the facility, and that those duties are fairly and accurately described by the CMS-104 for the position.

The CMS-104 submitted by CMS lists the following relevant responsibilities that Marcum, as Director of Nursing at the Vandalia Correctional Center, is authorized to complete “[u]nder administrative direction”: supervise the delivery of nursing services for patient care through immediate supervision of all Registered Nurses and one Corrections Medical Technician; assign work, ensuring 24-hour coverage on daily assignments; approve time off; provide guidance and training; give oral reprimands and refer employees for more severe discipline; complete and sign performance evaluations; establish annual goals and objectives; counsel staff on problems with productivity, quality of work, and conduct; determine staffing needs to achieve program objectives; and review activity reports. By affidavit Jim Luth, the Director of DOC’s Vandalia Correctional Center, asserts that he is familiar with the duties that Marcum is authorized to perform as Director of Nursing for the facility, and that those duties are fairly and accurately described by the CMS-104 for the position. The CMS-104 lists the following funded positions that report to Marcum: nine positions in the title of Corrections Nurse I, two in the title of Corrections Nurse II, and one in the title of Corrections Medical Technician.

IV. DISCUSSION AND ANALYSIS

As stated above, a position is properly designatable, 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 designation.

CMS's initial filing clearly indicates, and AFSCME concedes, that the positions at issue were first certified to be in a bargaining unit on October 28, 2009. 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).

An employee is authorized to have significant and independent discretionary authority as defined in Section 6.1(c) if he or she: (1) is authorized to 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; (2) is authorized to represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or (3) has authority such that he or she qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act (NLRA), 29 U.S.C. 152(11), or any orders of the National Labor Relations Board (NLRB) interpreting that provision or decisions of courts reviewing decisions of the NLRB.

The Board has held the managerial component of Section 6.1(c) 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.). CMS's submission is consistent with its contention that Thielen, as Director of Nursing, is authorized to have significant and independent discretionary authority under this component of the definition.² The CMS-104 for her position states that Thielen implements and establishes correctional health care policies and procedures at her facility. In fulfilling this responsibility, she by definition takes or recommends actions that effectively implement DOC policy; nothing on the face of CMS's submission indicates that she is not authorized to exercise discretion in doing so.

The NLRA defines a supervisor as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, responsibly to direct them, to adjust their grievances, or effectively to recommend such actions, 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. § 152 (11). The Board has upheld the designation of a position under this test where: (1) the designated employees have the authority to engage in any of the enumerated 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. State of Illinois, Department of Central Management Services, (Department of Public Health), Case No. S-DE-14-111 (IL LRB-SP November 27, 2013) (citing NLRB v. Kentucky River Comm. Care, Inc., 532 U.S. 706, 713 (2001) and Oakwood Healthcare Inc., 348 NLRB 686,687 (2006)).

CMS's submission is also consistent with its contention that Marcum, as Director of Nursing, is authorized to have significant and independent discretionary authority as defined in

² Because I find that Thielen, as Director of Nursing, is authorized to have 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 designation of her position is proper, I will not address the assertion that she is also authorized to have significant and independent discretionary authority as that term is defined in Section 6.1(c)(ii).

the supervisory component of the definition.³ The CMS-104 for Marcum's position indicates that, as Director of Nursing, she has the authority to schedule, assign work to, and direct and evaluate the performance of Registered Nurses at her facility. Nothing on the face of CMS's submission suggests that Marcum does not have the authority to use independent judgment or to act in the interests of the employer in completing these tasks.

B. AFSCME has raised no assertions that, if proven, might demonstrate that the designation is inappropriate.

AFSCME raises both general and specific objections to the designation of the positions at issue. Generally, AFSCME alleges that CMS has failed to provide the job duties of the designated positions and that there is no rational basis for treating the designated positions differently from other positions with the same title and/or similar duties that have not been designated. Specifically, AFSCME argues that the positions at issue do not meet the requirements for designation.

Section 6.1(b) provides that CMS must provide, among other information, the job duties of a designated position when filing a Gubernatorial designation petition. 5 ILCS 315/6.1(b) (2012). AFSCME argues that the affidavits and CMS-104s are insufficient for this purpose because: (1) the affidavits merely state legal conclusions; (2) the CMS-104s list only potential duties that are subject to the approval of a position's superior; and (3) the CMS-104s do not address the level of discretion an employee may exercise in performing the enumerated duties. However, AFSCME's allegation regarding the content of the affidavits is simply inaccurate. While they do contain the legal conclusions of the affiants as to the designability of the positions at issue, each affidavit also contains the affiant's statement that he or she is familiar with the duties of the designated positions and that the corresponding CMS-104s fairly and accurately describe those duties. I do not accept the affiants' conclusions as demonstrating any position's designability because that is the ultimate issue in this matter, and it is a question which the Board has been statutorily empowered to resolve. The affidavits do, however, have some value as foundation for the CMS-104s.

³ Because I find that Marcum, as Director of Nursing, is authorized to have significant and independent discretionary authority as that term is defined in Section 6.1(c)(ii), and that finding alone is sufficient to support a conclusion that the designation of her position is proper, I will not address the assertion that she is also authorized to have significant and independent discretionary authority as that term is defined in Section 6.1(c)(i).

AFSCME's objections to the use of the CMS-104s are also unpersuasive. Assuming, without so finding, that AFSCME's allegation that the CMS-104s list only potential duties is accurate, this assertion alone is too speculative to provide a basis for finding that an employee in a designated position is not authorized to perform any particular enumerated duty which may support its designability. Given the presumption in Section 6.1(d), AFSCME must counter each duty that may support a position's designability with a specific assertion that, contrary to the CMS-104, an employee in the designated position is not authorized to perform that duty. Likewise, where CMS's submission is not on its face inconsistent with a finding that an employee is authorized to exercise discretion or use independent judgement, it is incumbent on AFSCME to object with a specific assertion that no discretion or independent judgment is authorized.

AFSCME also alleges that there is no rational basis for treating the positions at issue differently from other positions with the same title and/or similar duties that have not been designated. AFSCME concludes that a hearing is necessary to determine whether there is a legal basis for such exclusion. This argument relates in part to AFSCME's contentions regarding the guarantee of equal protection, discussed below. To the extent AFSCME raises issues regarding the Board's basis for treating the designated positions differently, its objections must be rejected. The mere lawful exercise of the Governor's power to designate a position is itself a rational basis for the Board to treat a designated position differently from an arguably similar undesignated position. As to the need for a hearing, while a hearing may be necessary to determine whether there is a *factual* basis for a designation in the event an objector successfully undermines CMS's submission, the lawful exercise of the power granted in Section 6.1 is again a sufficient *legal* basis for the exclusion and no hearing is necessary.

As to its specific objections, AFSCME's conclusion that the positions at issue do not meet the requirements of Section 6.1 appear to be based on statements made by Directors of Nursing for DOC that work at other facilities whose positions were designated in Case Nos. S-DE-14-188 and S-DE-14-190.⁴ To the extent these statements are the basis of AFSCME's conclusion, both have already been rejected by the Board in those cases. State of Illinois, Department of Central Management Services (Department of Corrections), Case No. S-DE-14-

⁴ The positions at issue in the instant designation were also at issue in Case Nos. S-DE-14-188 and S-DE-14-190. That designation was withdrawn as to Thielen and Marcum's positions when it was discovered that CMS had failed to identify Thielen and Marcum as incumbents.

186 et al. (IL LRB-SP March 18, 2014). Beyond these statements, there is no discernible basis for AFSCME's conclusion as to Thielen and Marcum; neither filed a statement in this or the previous matter.

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

AFSCME generally argues that the instant designation violates due process and is arbitrary and capricious. 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 alleges that CMS's submission does not provide it with notice of the factual basis for the instant designation. However, I decline to find that notice is lacking where CMS's submission clearly indicates that the instant positions qualify for designation under Section 6.1(b)(5), the affidavits demonstrate CMS's contention that the positions have significant and independent discretionary authority as defined by both the managerial and supervisory portions of Section 6.1(c), and AFSCME has filed objections that are responsive to these contentions.

Beyond this assertion, AFSCME has not articulated how it has been deprived of either notice or an opportunity to be heard in this matter. Nonetheless, AFSCME's objections tout the

dangers of accepting CMS's petition without inquiry. Therefore, I must note that I have not accepted CMS's designation without inquiry. Though I have not granted AFSCME an oral hearing in this matter, I have considered the submissions of both CMS and AFSCME. Having determined that the objections, if proven, would not warrant dismissal of the instant petition, no oral hearing was necessary.

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 of Corrections are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-29-93-210-20-01	Director of Nursing
37015-29-87-210-10-01	Director of Nursing

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 Administrative 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 21st day of March, 2014

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

/s/ Heather R. Sidwell

**Heather R. Sidwell
Administrative Law Judge**