

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

State of Illinois, Department of Central)	
Management Services (Department of)	
Agriculture),)	
)	
Employer)	
)	
and)	Case No. S-DE-14-224
)	
American Federation of State, County)	
and Municipal Employees, Council 31,)	
)	
Labor Organization-Objector)	
)	
Robert Dowson and Kimberly Hamilton,)	
)	
Employee-Objectors)	

**ADMINISTRATIVE LAW JUDGE’S
RECOMMENDED DECISION AND ORDER**

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) (Act) *added by* Public Act 97-1172 (effective 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 (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 properly qualify for designation, the employment position must meet one or more of the following five requirements:

- (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, 479 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

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 here.

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. 14,066 (September 6, 2013). These rules are contained in Part 1300 of the Board’s Rules and Regulations, 80 Ill. Admin. Code Part 1300.

On February 19, 2014, the Illinois Department of Central Management Services (“CMS”), on behalf of the Governor, filed the above-captioned designation petition² pursuant to Section 6.1(b)(5) of the Act and Section 1300.50 of the Board’s Rules. The following PSA-Option 1 positions at the Illinois Department of Agriculture (“Department” or “Ag”) are identified for designation in this case:

<u>Position No.</u>	<u>Incumbent</u>	<u>Working Title</u>
37015-11-03-300-00-01	Kimberly Hamilton	International Marketing Representative II
37015-11-03-300-00-02	Robert Dowson	International Marketing Representative II

In support of its petition, CMS filed position descriptions for each position and affidavits from Department Labor Relations Manager Linda Rhodes. The PSA-Option 1 positions were certified on January 10, 2010.

On February 21, 2014, Kimberly Hamilton and Robert Dowson each submitted objections to the Board pursuant to Section 1300.60(a)(3) of the Board’s Rules.³ The objections included their AFSCME Information Forms, copies of their job descriptions with comments, copies of the affidavit submitted by CMS in case number S-DE-14-207 with handwritten comments, a performance evaluation, and a copy of their business card. On March 3, 2014, American Federation of State, County and Municipal Employees, Council 31 (“AFSCME”) filed objections to the designation, which also included the materials submitted by Hamilton and Dowson.

I reviewed the designation petition, position descriptions, supporting affidavits, the objections raised by AFSCME and the individual employees, and the supporting documents provided by the Objectors. My review indicates that the Objectors have failed to raise an issue of law or fact that might overcome the presumption that the designation is proper such that a hearing is necessary as to the propriety of the designation.

² These positions have been previously designated in Case Nos. S-DE-14-132 and S-DE-14-207. Each time, the designation of these positions was withdrawn prior to a Recommended Order and Decision being completed.

³ Hamilton and Dowson indicated their intent to incorporate the objections they filed in Case No. S-DE-14-207 as their objection to the present case.

After consideration of the information before me, I find that the designation is properly submitted and consistent with the requirements of Section 6.1 of the Act. Accordingly, I recommend that the Executive Director certify the designation of the positions at issue in this matter and, to the extent necessary, amend any applicable certification of exclusive representatives to eliminate any existing inclusion of this position within any collective bargaining unit.

I. AFSCME OBJECTIONS

AFSCME objects to the designation petitions in a number of ways. Through its written objections and documents, AFSCME makes the following arguments.

A. General Objections

AFSCME argues that Section 6.1 violates provisions of the United States and Illinois constitutions in a number of ways. First, the designation is an improper delegation of legislative authority to the executive branch. Second, selective designation results in employees being treated unequally based on whether an individual's position was subject to a designation petition. Third, the designation unlawfully impairs the contractual rights of individuals whose positions were subject to the provision of a collective bargaining agreement prior to the position being designated for exclusion.

AFSCME also contends that because the "employees holding the position identified by this petition are covered by a collective bargaining agreement which CMS entered into subsequent to the enactment of [Section] 6.1," the designation of these positions "violates due process and is arbitrary and capricious."

More substantively, AFSCME contends that under the National Labor Relations Board ("NLRB") precedent and case law interpreting the same, "any claim of supervisory or managerial status requires that *the party raising the exclusion bear the burden of proof.*"⁴ AFSCME argues that CMS seeks the exclusion of employees who are not "supervisors" or "managers" as defined by the National Labor Relations Act ("NLRA"), 29 U.S.C. 152 *et seq.*, or the NLRB. AFSCME contends that CMS has presented evidence only of the "*potential* responsibilities that can be given to the employee within the position" and has not demonstrated that the employees have actual authority to complete the duties. Accordingly, AFSCME argues that CMS should bear the burden of proving that the designated employees exercise duties that

⁴ Emphasis in original.

would make them supervisory or managerial, that the position exercises managerial discretion rather than just professional discretion, and that the designated position has different duties than a position with the same title that performs “wholly professional” duties.

AFSCME further contends that CMS cannot prove that a position is managerial where the position description identifies that the position effectuates policies but does not identify specific policies the position effectuates.⁵

B. Position-specific Objections

AFSCME argues that neither Hamilton nor Dowson are managers because their duties are “very far removed from those of a manager who is running a Department.” Neither Hamilton nor Dowson contest the duties outlined in their updated position description bearing an effective date of October 1, 2013. However, the employees state in the AFSCME Information Form, “Any action taken by me as an employee requires the approval of my immediate boss.”

II. DISCUSSION AND ANALYSIS

The law creates a presumption that designations made by the Governor are properly made. In order to overcome the presumption of a properly submitted designation under Section 6.1(b)(5), the Objectors would need to raise an issue of law or fact that the position does not meet either of the managerial tests set out in Section 6.1(c)(i).

A. AFSCME’S Procedural 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. Servs., 30 PERI ¶80, Case No. S-DE-14-005 etc. (IL LRB-SP 2013) appeal pending, No. 1-13-3454 (Ill. App. Ct. 1st Dist.)(*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 recommended decision and order.

AFSCME argues in its objections that CMS should bear the burden in at least two ways. First, it argues that because CMS is seeking an exclusion, under NLRA case law, CMS should bear the burden of proof, and should have had to present its case-in-chief first at the hearing. In

⁵ In several different areas, AFSCME argues about the appropriate supervisory standard, and the manner in which CMS should be required to prove that an employee is a supervisor. However, neither of the affected employees are identified by CMS as supervisory under Section 6.1(c)(i).

so arguing, AFSCME fails to appreciate that Section 6.1 is a wholly new legislative creation. The Act's provision that "any designation made by the Governor...shall be presumed to have been properly made," 5 ILCS 315/6.1(d), shifts the burden of proving that a designation is improper on the Objector. Therefore, AFSCME and the individual employees have the burden to demonstrate that the designation is improper.

B. Tests for Designations made under Section 6.1(b)(5)

Section 6.1(b)(5) allows the Governor to designate positions that authorize an employee to have "significant and independent discretionary authority." 5 ILCS 315/6.1(b)(5). The Act goes on to provide three tests by which a person can be found to have "significant and independent discretionary authority." Section 6.1(c)(i) sets forth the first two tests, while Section 6.1(c)(ii) sets forth a third.⁶ In its petition, CMS contends that the at-issue positions confer on the position holder "significant and independent discretionary authority" as further defined by Section 6.1(c)(i). Therefore, this recommended decision does not address Section 6.1(c)(ii).

In order to meet the burden to raise an issue that might overcome the presumption that the designation is proper, an Objector must provide specific examples to negate each of the tests set out in Section 6.1(c). If even one of the three tests is met, then an Objector has not sufficiently raised an issue, and the designation is proper. Ill. Dep't Cent. Mgmt. Serv., 30 PERI ¶ 85.

The first test under Section 6.1(c)(i) is substantively similar to the traditional test for managerial exclusion articulated in Section 3(j). To illustrate, Section 6.1(c)(i) provides that a position authorizes an employee in that position with significant and independent discretionary authority if "the employee 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." 5 ILCS 315/6.1(c)(i).

Though similar to the Act's general definition of managerial employee in Section 3(j), 5

⁶ Section 6.1(c) reads in full as follows:

For the purposes of this Section, a person has significant and independent discretionary authority as an employee if he or she (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 or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

5 ILCS 315/6.1(c).

ILCS 315/3(j), the Section 6.1(c)(i) definition is broader in that it does not include a predominance element and requires only that the employee is “charged with the effectuation” of policies not that the employee is responsible for **directing** the effectuation. An employee **directs** the effectuation of management policy when he/she oversees or coordinates policy implementation by developing the means and methods of reaching policy objectives, and by determining the extent to which the objectives will be achieved. Ill. Dep’t Cent. Mgmt. Serv. (Ill. State Police), 30 PERI ¶ 109 (IL LRB-SP 2013) (*citing* Cnty. of Cook (Oak Forest Hospital) v. Ill. Labor Rel. Bd., 351 Ill. App. 3d at 387); INA, 23 PERI ¶ 173 (IL LRB-SP 2007). However, in order to meet the first test set out in Section 6.1, a position holder need not develop the means and methods of reaching policy objections. It is sufficient that the position holder is charged with carrying out the policy in order to meet its objectives.

The Section 6.1(c)(i) test is unlike the traditional test where a position is deemed managerial only if it is charged with *directing* the effectuation of policies. Under the traditional test, for example, “where an individual merely performs duties essential to the employer's ability to accomplish its mission, that individual is not a managerial employee,” Ill. Dep’t of Cent. Mgmt. Serv. (Dep’t of Revenue), 21 PERI ¶ 205 (IL LRB SP 2005), because “he does not determine the how and to what extent policy objectives will be implemented and the authority to oversee and coordinate the same.” INA, 23 PERI ¶ 173 (*citing* City of Evanston v. Ill. Labor Rel. Bd., 227 Ill. App. 3d 955, 975 (1st Dist. 1992)). However, under Section 6.1(c)(i), a position need not determine the manner or method of implementation of management policies. Performing duties that carry out the agency or department’s mission is sufficient to satisfy the second prong of the first managerial test.

The second test under Section 6.1(c)(i) indicates that a designation is proper if the position holder “represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.” 5 ILCS 315/6.1(c)(i). This second test allows a position to be designated upon a showing that it either (a) takes discretionary actions that effectively control or implement agency policy or (b) effectively recommends such discretionary actions.

D. The designation of the PSA-Option 1/International Marketing Representative II position held by Kimberly Hamilton is proper.

Hamilton does not contest the duties of her position as described in the position

description bearing an October 1, 2013, effective date. As a PSA-Option 1/International Marketing Representative II, Hamilton's duties include:

- Organizes and promotes international and domestic trade shows, trade missions, and other events to promote the Illinois processed food industry internationally;
- Works with Illinois foreign office staff, Food Export Association of the Midwest, and Foreign Agricultural Service to utilize federal money and encourage and facilitate export trade;
- Recruits companies for marketing activities, makes necessary arrangements for their participation and follow-up upon completion;
- Identifies and consults with Illinois food companies to encourage international and domestic marketing;
- Develops relationships with experts and information sources for international trade;
- Facilitates contacts and interpersonal relations with foreign business and government contacts; and
- Hosts international visitors and delegations in Illinois and sets up commercial contacts for said visitors and official delegations.

In her response, Hamilton described her job as “consult[ing] with Illinois food companies to encourage domestic and international marketing” and indicated that upon request, she provides information related to expected expenditures for formulation of the agency's budget. Hamilton also attached a recent performance evaluation, wherein she was rated as having exceeded every objective of her duties.⁷ In that evaluation, her supervisor commented that she “always represents IDOA in a very professional manner and provides a wealth of knowledge to our Illinois food companies. She has developed very strong relationships with many of our Illinois companies and as her supervisor I have watched several of these companies succeed directly because of Kim Hamilton's efforts.” The supervisor concluded her comments by stating the Hamilton is a “huge asset to the industry.”

Based on the uncontested duties of her position, and information submitted by Hamilton, it is evident that in performing her duties, she represents management interests related to

⁷ Hamilton was evaluated as having met one other objective (“Performs other duties as required or assigned which are reasonably within the scope of the duties listed above.”).

promoting Illinois food business. Hamilton reviewed the affidavit submitted by CMS,⁸ which contained the statement that her position “represents management interests by taking or recommending discretionary actions that effectively control or implement Department policy,” and did not contest that her position is authorized to take discretionary action or recommend such action.⁹ Moreover, in order to perform the uncontested duties of consulting with Illinois businesses, developing relationships, and organizing international and domestic trade events, an employee in Hamilton’s position must either take discretionary actions or, at a minimum, recommend discretionary actions. Though Hamilton states that her “functions require the approval of a supervisor/manager,” the Illinois appellate court has held that where employees implement management policies and practices, the fact that they “do not do so ‘independently’ is unimportant, given that the Act does not require such independence in management functions.” *See e.g. Dep’t of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd.*, 2011 IL App (4th) 090966 at ¶ 186.

Accordingly, I find that Hamilton’s position is appropriately designated because it represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.

E. The designation of the PSA-Option 1/International Marketing Representative II position held by Robert Dowson is proper.

Dowson does not contest the duties of his position as described in the position description bearing an October 1, 2013, effective date. As a PSA Option 1/International Marketing Representative II, Dowson’s duties include:

- Coordinates and implements programs to enhance international domestic marketing for Illinois ag products;
- Plans and coordinates meetings with foreign business entities and agricultural delegations of Illinois industry firms and the overseas offices;
- Promotes, organizes, recruits, and implements foreign trade shows, missions, and other international and domestic trade activities;

⁸ Hamilton reviewed and identified disagreement with the affidavit filed in support of the petition in case number S-DE-14-207, but did not specifically address the affidavit filed with the current petition. Regardless, the statement that Hamilton’s position “represents management interests by taking or recommending discretionary actions that effectively control or implement Department policy” was in both affidavits.

⁹ Hamilton’s handwritten note on the materials she submitted says only that her position description “says nothing about this.”

- Represents the Department in various associations, councils, and meetings including U.S. Livestock Genetics Export, Inc., IL Milk Products Association, IL Milk Promotion Board, American Dairy Association of Illinois and IL Dairy Issue Management Team;
- Identifies and consults with Illinois agribusinesses to encourage international and domestic marketing;
- Develops relationships with experts and information sources for international trade;
- Assists the bureau manager in planning, development and implementation of the annual international marketing plan and program operations;
- Facilitates contacts and interpersonal relations with foreign business and government contacts; and
- Hosts international visitors and agricultural delegations in Illinois and sets up commercial contacts for said visitors and official delegations.

In his response, Dowson describes his responsibilities as “work[ing] with the agribusiness industry to export livestock, genetics, machinery, and equipment internationally” and stated that upon request, he provides information related to expected expenditures for formulation of the agency’s budget. Dowson was evaluated by his immediate supervisor to have exceeded in his objectives related to (1) promoting, organizing, recruiting, and implementing foreign trade shows, missions, and other international and domestic trade activities and (2) representing the Department in various associations, councils, and meetings.

Based on the duties in his position description and the statements contained in the affidavit which Dowson does not contest, I find that the designation of his position is proper under Section 6.1(c)(i). I find that Dowson represents management interests by taking or recommending discretionary actions that effectively controls or implements Department policy of a State agency.

Based on the uncontested duties of his position, and information submitted by Dowson, it is evident that in performing his duties, he represents management interests related to promoting Illinois agribusiness. Dowson reviewed and did not contest the statement contained in the

affidavit submitted by CMS¹⁰ that his position “represents management interests by taking or recommending discretionary actions that effectively control or implement Department policy,” and did not contest that his position is authorized to take discretionary action or recommend such actions. Moreover, in order to perform the uncontested duties of consulting with Illinois agribusinesses, developing relationships, hosting international visitors and agricultural delegations, and organizing and implementing foreign trade events, an employee in Dowson’s position must either take discretionary actions or, at a minimum, recommend discretionary actions.

Dowson’s duties also control and implement management policies and practices. He participates in the planning and development of the Department’s annual international marketing plan and program operations. Dowson’s position is also charged with implementing programs to enhance international and domestic marketing for Illinois ag products.

Though Dowson states that his “functions require the approval of a supervisor/manager,” the Illinois appellate court has held that where employees implement management policies and practices, the fact that they “do not do so ‘independently’ is unimportant, given that the Act does not require such independence in management functions.” *See e.g. Dep’t of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd.*, 2011 IL App (4th) 090966 at ¶ 186.

Accordingly, I find that Dowson’s position is appropriately designated because it represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency.

III. CONCLUSIONS OF LAW

The Governor’s designation in this case is properly made.

IV. RECOMMENDED ORDER

Unless this Recommended Decision and Order is rejected or modified by the Board, the following position with the Illinois Department of Human Services is excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

¹⁰ Dowson reviewed and identified disagreement with the affidavit filed in support of the petition in case number S-DE-14-207, but did not specifically address the affidavit filed with the current petition. Regardless, the statement that Dowson’s position represents management interests by taking or recommending discretionary actions that effectively control or implement Department policy was in both affidavits.

<u>Position No.</u>	<u>Incumbent</u>	<u>Working Title</u>
37015-11-03-300-00-01	Kimberly Hamilton	International Marketing Representative
37015-11-03-300-00-02	Robert Dowson	International Marketing Representative

V. EXCEPTIONS

Pursuant to Sections 1300.130 and 1300.90(d)(5) of the Board’s Rules and Regulations, 80 Ill. Admin. Code Parts 1300,¹¹ parties may file exceptions to the Administrative Law Judge’s Recommended Decision and Order and briefs in support of those exceptions no later than three days after service of this recommended decision and order. Exceptions shall be filed with the Board by electronic mail at an electronic mail address designated by the Board for such purpose, ILRB.Filing@illinois.gov, and served on all other parties via electronic mail at its e-mail address as indicated on the designation form. Any exception to a ruling, finding, conclusion or recommendation that is not specifically urged shall be considered waived. A party not filing timely exceptions waives its right to object to this recommended decision and order.

Issued at Springfield, Illinois, this 14th day of March, 2014.

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

Sarah R. Kerley

**Sarah Kerley
Administrative Law Judge**

¹¹ Available at www.state.il.us/ilrb/subsections/pdfs/Section1300IllinoisRegister.pdf