

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

State of Illinois, Department of Central Management Services, (Department of Children and Family Services),	)	
	)	
Petitioner	)	Case No. S-DE-14-231
	)	
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 March 17, 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 March 26, 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 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.

The following two Public Service Administrator, Option 2 positions within the Department of Children and Family Services are at issue in this designation:

37015-16-20-320-00-01	Manager, Children's Acct Unit	Marlene Lindsey
37015-16-64-500-10-01	Contracts Administrator	Lily Ruan

CMS's petition indicates the positions at issue qualify 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 all listed positions.

### **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

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<sup>2</sup> CMS filed position descriptions (CMS-104s) for the positions and affidavits in support of its assertion. These positions are currently represented by AFSCME.

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 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 employees at issue ever exercised their referenced supervisory or quasi-managerial authority. Similarly, AFSCME asserts that CMS has not shown that it told the employees they possessed such authority. In addition, AFSCME argues that the positions at issue are professional and not managerial. Finally, AFSCME urges the Board not to rely on the Petitioner's affidavits because the affidavits do not explain how the affiant is familiar with the job duties of the positions at issue.

AFSCME also filed position-specific exceptions with respect to the positions held by Marlene Lindsey and Lily Ruan. AFSCME asserts that Lindsey's position description does not meet the notice requirements of due process because it does not list her duties and functions. For the same reason, AFSCME states that it is "void for vagueness." Further, AFSCME states that neither Lindsey nor Ruan exercise independent judgment with regard to the enumerated supervisory functions and that neither is held accountable, in any meaningful way, for the mistakes made by their subordinates. Further, AFSCME states that Lindsey exercises no discretion with respect to her implementation of policy. Likewise, AFSCME argues that Ruan plays no role in the legislative, budgetary, or policymaking processes of her department. AFSCME concludes that both position descriptions are inaccurate.

## **II. Material Facts**

### **a. 37015-16-20-320-00-01 Marlene Lindsey**

Marlene Lindsey's position description provides that she oversees six subordinates. It further states that she serves as a working supervisor. In that capacity, she assigns and reviews work, provides guidance and training to assigned staff, counsels staff regarding work performance, reassigns staff to meet day-to-day operating needs, establishes annual goals and

objectives, approves/disapproves time-off requests, and prepares and signs performance evaluations.

Lindsey admits that she directs her staff by training them when necessary, notifying them of new policy changes, and signing off on the work they complete.

b. 37015-16-64-500-10-01 Lily Ruan

Lily Ruan's position description provides that she oversees five subordinates. It further states that she serves as a working supervisor. In that capacity, she assigns and reviews work, provides guidance and training to assigned staff, counsels staff regarding work performance, reassigns staff to meet day-to-day operating needs, establishes annual goals and objectives, approves/disapproves time-off requests, and prepares and signs performance evaluations.

Ruan denies that she has authority to hire, transfer, suspend, layoff, recall, promote, reward or discharge employees. She admits that she has authority to make recommendations as to their work assignments. Further, she does not deny that she possesses the authority to direct her subordinates. Rather, she explains that she assists and trains them in their work. Finally, she does not deny that she prepares and signs her subordinates' performance evaluations.

### **III. Discussion and Analysis**

a. 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 provides three tests by which a person may 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. In its petition, CMS contends that the at-issue positions confers on the position holder "significant and independent discretionary authority" as further defined by either Section 6.1(c)(i) or both Section 6.1(c)(i) and (ii).

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

- i. The first test under 6.1(c)(i) — management and executive functions and effectuating management policies and practices

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).

However, the Section 6.1(c)(i) definition is broader than the traditional test because it does not include a predominance element and requires only that the employee be “charged with the effectuation” of policies, not that the employee be responsible for directing the effectuation. An employee directs the effectuation of management policy when he 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.

- b. The second test under 6.1(c)(i) — represents management interests by taking or recommending discretionary actions

The second test under Section 6.1(c)(i) also relates to the traditional test for managerial exclusion because it reflects the manner in which the courts have expanded that test. A designation is proper under this test 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). The Illinois Appellate Court has observed that the definition of a managerial employee in Section 3(j) is very similar to the definition of managerial employee in the Supreme Court’s decision in Nat’l Labor Rel. Bd. v. Yeshiva Univ. (“Yeshiva”), 444 U.S. 672 (1980). Dep’t of Cent. Mgmt. Serv./ Illinois Commerce Com’n v. Ill. Labor Rel. Bd. (“ICC”), 406 Ill. App. 766, 776 (4th Dist. 2010)(citing Yeshiva, 444 U.S. at 683). Further, the Court noted that the ILRB, like its federal counterpart, “incorporated ‘effective recommendations’ into its interpretation of the term ‘managerial employee.’ ” ICC, 406 Ill. App. at 776. Indeed, the Court emphasized that “the concept of effective recommendations...[set forth in Yeshiva] applies with equal force to the managerial exclusion under the Illinois statute.” Id.

In light of this analysis, the second test under Section 6.1(c)(i) is similar to the expanded traditional managerial test because it is virtually identical to the statement of law in Yeshiva which the Illinois Appellate Court and the Illinois Supreme Court have incorporated into the traditional managerial test. Id. (quoting Chief Judge of the Sixteenth Judicial Circuit v. Ill. State Labor Rel. Bd., 178 Ill. 2d 333, 339-40 (1997)).

- c. The third test under 6.1(c)(ii) — qualifies as a supervisor as defined by the NLRA

Under the NLRA, a supervisor is an employee who has “authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, 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.A. § 152(11).

In other words, “employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed 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.’ ” NLRB v. Kentucky River Comm. Care, Inc. (“Kentucky River”), 532 U.S. 706, 713 (2001) (quoting NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-574 (1994); See also Oakwood Healthcare, Inc. v. United Auto Automobile, Aerospace and Agricultural Implement Workers of America (“Oakwood Healthcare”), 348 NLRB 686, 687 (2006). A decision that is “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement” is not independent. Oakwood Healthcare, 348 NLRB at 689.

#### d. 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.

#### e. 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. Serv., 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 employees at issue have...authority to complete the job duties...[in their]...position descriptions.” 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.

f. 37015-16-20-320-00-01 - Marlene Lindsey

CMS’s designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no evidence to suggest that CMS has limited the position holder’s discretion or independent authority within the meaning of Section 6.1(c)(ii).

Lindsey has significant and independent discretionary authority because he possesses authority to responsibly direct her subordinates. First, the position description states that the

position holds the authority to act as a working supervisor and that the position is responsible for reviewing subordinates' work, establishing annual goals and objectives, and preparing and signing performance evaluations. Lindsey confirms that she responsibly directs her subordinates because she admits that she trains them when necessary, notifies them of new policy changes, and signs off on the work they complete. Based on this evidence, the position holder, Lindsey, exercises the use of independent judgment and is responsible for her subordinates' work because the designation is presumed proper under Section 6.1(d) of the Act and the position description does not expressly limit the position holder's discretion, accountability, or independent authority.

Contrary to AFSCME's contention, CMS has provided AFSCME with adequate notice of the position holder's duties because the most recent position description, although mostly blank, incorporates the duties set forth in the prior position description. Here, the current position description does not contain a list of the positions' duties, but provides that the position's "duties and responsibilities remain the same." Further, CMS provided the position's prior description which thoroughly enumerates those required duties. Accordingly, CMS's submissions provide AFSCME with adequate notice of the position's duties, even though the most recent position description does not specifically describe them.

Thus, the designation of this position is properly made.

g. 37015-16-64-500-10-01 - Lily Ruan

CMS's designation of this position is proper because the designation is presumed to be properly made and AFSCME has introduced no evidence to suggest that CMS has limited the position holder's discretion or independent authority within the meaning of Section 6.1(c)(ii).

Ruan has significant and independent discretionary authority because she possesses authority to responsibly direct her subordinates. First, the position description states that the position holds the authority to act as a working supervisor and that the position is responsible for reviewing subordinates' work, establishing annual goals and objectives, and preparing and signing performance evaluations. Ruan confirms that she responsibly directs her subordinates because she admits that she assists and trains them in their work and does not deny that she prepares performance evaluations, establishes annual goals and objectives, and reviews her subordinates' work. Based on this evidence, the position holder, Ruan, exercises the use of independent judgment and is responsible for her subordinates' work because the designation is

presumed proper under Section 6.1(d) of the Act and the position description does not expressly limit the position holder's discretion, accountability, or independent authority.

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 positions in the Department of Children and Family Services are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-16-20-320-00-01	Manager, Children's Acct Unit	Marlene Lindsey
37015-16-64-500-10-01	Contracts Administrator	Lily Ruan

**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 3rd day of April, 2014**

**STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
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*/s/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**