# STATE OF ILLINOIS
# ILLINOIS LABOR RELATIONS BOARD
# STATE PANEL

| | | |
|---|---|---|
| State of Illinois, Department of Central Management Services (Department on Aging), | ) | |
| Petitioner | ) | |
| and | ) | Case No. S-DE-14-243 |
| American Federation of State, County and Municipal Employees, Council 31, | ) | |
| Labor Organization-Objector | ) | |

## ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

## I. BACKGROUND

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). In order for a designation to be proper the position must be *eligible for designation* based upon its bargaining unit status, the position must *qualify for designation* based upon its job title and/or job duties, and the Governor must provide the Illinois Labor Relations Board (Board) with *specific information* as identified in the Act.

Section 6.1 identifies three broad categories of employment positions that may be *eligible* for designation based upon the position's status in a certified bargaining unit. 1) positions which were first certified to be in a bargaining unit by the 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.

To *qualify* for designation, the employment position must meet one or more of five requirements identified in Sections 6.1(b) of the Act. Relevant to this case, Section 6.1(b)(5) of the Act allows the designation of an employment position if the position authorizes an employee in that position to have "significant and independent discretionary authority as an employee," which under section 6.1(c) of the Act means that 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 [(NLRB)].

Section 6.1(b) also provides that in order for a position to be properly designated, the Governor or his agent shall provide in writing to the Board the *following information*: the job title of the designated employment position, the job duties of the employment position, the name of the employee currently in the employment position, the name of the State agency employing the incumbent employee, and the category under which the position qualifies for designation.

Section 6.1(d) creates a presumption that any such designation made by the Governor was properly made. It also requires the 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. This subsection also specifies that the qualifying categories identified in subsection 6.1(b) "are operative and function solely within this Section and do not expand or restrict the scope of any other provision contained in this Act." The Board promulgated rules to effectuate Section 6.1, which became effective on August 23, 2013, 37 Ill. Reg. 14,070 (Sept. 6, 2013). See 80 Ill. Admin. Code Part 1300.

On March 21, 2014, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the above-captioned designation petition pursuant to Section 6.1 of the Act and Section 1300.50 of the Board's Rules. The petition seeks to exclude the following Option 1 Public Service Administrator, at the Illinois Department on Aging (IDOA):

| **Position No.** | **Working Title** | **Incumbent** |
|---|---|---|
| 37015-47-10-200-12-02 | Agency Procurement Officer/Supervisor | Kathleen Michals |

CMS filed the designation petition with an attached summary spreadsheet, a CMS-104 position description, an organizational chart, and an affidavit completed by Dennis Miner, the Division Manager at the IDOA's Division of Finance and Administration.

On April 1, 2014, the American Federation of State, County and Municipal Employees, Council 31 (AFSCME), pursuant to Section 1300.60(a)(3) of the Board's Rules, filed objections to the designation petition. AFSCME objects to the designation of the position within the designation petition.

Based on my review of the designation petition, the documents submitted in support of the designation petition, the objections, and the arguments and documents submitted in support of those objections, I find the designation to have been properly submitted and is consistent with the requirements of Section 6.1 of the Act. Consequently, I recommend that the Executive Director certify the designation of the position at issue as set out below, and, to the extent necessary, amend the applicable certification of the exclusive representative to eliminate the existing inclusion of this position within the collective bargaining unit.

## II. ISSUES AND CONTENTIONS

The issue is whether the designation of the position as identified in the petition and supporting documentation comport with Section 6.1 of the Act. CMS contends that the designation is proper, and through its objections AFSCME contends that the designation is improper.

### A. Designation Petition

CMS's designation petition and the attached documentation indicate that the position at issue qualifies for designation under Section 6.1(b)(5) of the Act, and that the Board certified the positions into bargaining unit RC-63 on January 20, 2010.

The submitted CMS-104, in relevant part, identifies the information contained within as a "current and accurate statement of the position essential functions" of the position at issue.[1] In the affidavit completed and signed by Miner, he attests that Michals' position is authorized to have significant and independent discretionary authority as defined by Sections 6.1(c)(i) and 6.1(c)(ii) of the Act. Miner further attests that Michals' position is "authorized to be engaged in

[1] I find it unnecessary to include the specific information identified in the CMS-104 because AFSCME does not raise an objection to the accuracy of the CMS-104's content.

executive and management functions of [IDOA] and charged with the effectuation of management policies and practices of [IDOA] or represent management interests by taking or recommending discretionary actions that effectively control or implement the policy" of IDOA. Miner also attests that as the APO/Supervisor, Michals is authorized to oversee every IDOA vendor contract, to oversee the procurement process, and to supervise subordinate staff. In her capacity as a supervisor, Michals' position is "authorized to, in the interest of [IDOA], among other things, assign, responsibly direct, and review the work of [the positions'] subordinates with independent judgment. [Michals'] position is authorized to assign and review work, counsel staff regarding work performance, take corrective action, monitor work flow, and reassign staff to meet day to day operating needs."

### B. Objections

AFSCME argues that CMS should bear the burden of persuasion, and that the at-issue positions are not those of managers or supervisors within the meaning of the National Labor Relations Act (NLRA), that the CMS-104 and affidavit provide insufficient bases for designation, and that the designations are unconstitutional.

## III. DISCUSSION AND ANALYSIS

The objector bears the burden to demonstrate that the designation of the employment position at issue is improper because the objector's stance is contrary to the policy of Section 6.1 and because the presumption articulated in Section 6.1(d) requires that the objector overcomes the presumption that the designation is proper. The Illinois Appellate Court has held that the party opposing the public policy as demonstrated in the statutory language of the statute at issue has the burden to prove the party's position. See Ill. Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., State Panel, 2011 IL App (4th) 090966. Section 6.1 specifically allows the Governor to exclude certain public employment positions from collective bargaining rights which might otherwise be granted under the Act. Section 6.1 also allows the exclusion of 1,900 positions that are already certified into bargaining units. AFSCME is opposing the State's public policy to exclude certain positions from collective bargaining, as stated in Section 6.1 of the Act, thus the burden is on AFSCME to demonstrate that the employment at issue is not properly designated for such exclusion. Ill. Dep't Cent. Mgmt. Serv. (Ill. State Police) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶ 109 (IL LRB-SP 2013), No. 13-3600 (Ill. App. Ct. 1st

Dist.). Section 6.1(d) states that any designation for exclusion made by the Governor or his agents under Section 6.1 "shall be presumed to have been properly made." Like all presumptions, this presumption can be rebutted. Dep't of Cent. Mgmt. Serv. /Dep't of Healthcare & Fmly. Serv. v. Ill. Labor Rel. Bd. State Panel, 388 Ill. App. 3d 319, 335 (4th Dist. 2009). If contrary evidence is introduced that sufficiently rebuts the presumption, then it vanishes and the issue will be determined as if no presumption ever existed. Id. To rebut the presumption, the evidence must be sufficient to support a finding that the presumed fact does not exist. Id. at 335-336. The objector is burdened to present evidence that the position is ineligible for designation, does not qualify for designation, or that the designation is otherwise improper because the submission does not comport with the requirements of Section 6.1 of the Act. Here, AFSCME does not satisfy its burden because its objections include no contrary evidence, or factual allegations to rebut the presumption that Michals' position is properly designated. The remaining analysis will address AFSCME's legal arguments.

**A. Eligibility**

As stated above, positions which were first certified to be in a bargaining unit by the Board on or after December 2, 2008 are eligible for designation. The parties agree that the at-issue position has been certified into bargaining unit RC-63, and it is uncontested that the certification was on January 20, 2010. Thus, I find that the presumption that the at-issue position is eligible for designation as excluded from the collective bargaining provisions of the Act remains unrebutted.

**B. Information Provided by CMS**

In order to properly designate an employment position, CMS must submit in writing to the Board the job title of the designated employment position, the job duties of the employment position, the name of the State employee currently in the employment position, the name of the State agency employing the incumbent employee, and the category under which the position qualifies for designation under this Section of the Act. In the designation petition and the supporting documentation CMS identifies the official job title and the working job title of the position at issue. CMS submitted the CMS-104 position description in order to meet the requirement that it provide the position's job duties, and properly identified the name of the incumbent employee in the affidavits and organizational charts. Finally, in the petition and

supporting affidavits, CMS identified that it alleges that the at-issue position qualifies for designation under Section 6.1(b)(5) of the Act.

AFSCME's only objection that CMS has not provided the Board with the information required to properly designate an employment position is that it argues that the submitted CMS-104 does not meet the job duties requirement. AFSCME argues that the CMS-104 and affidavit only identifies *potential* responsibilities that can be given to the employee within that position, and there is no evidence that the employee actually perform the duties identified within the CMS-104. This argument fails to meet AFSCME's burden because the Board has previously determined that CMS-104s are sufficient to meet the "job duties" requirement of Section 6.1 of the Act, and because, as explained further in the next section, whether the employee actually exercises all her authorized duties is not the issue as articulated in the language of the statute. See State of Ill. Dep't of Cent. Mgmt. Serv. and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶ 80 (IL LRB-SP 2013) appeal pending, No. 13-3454 (Ill. App. Ct. 1st Dist.); Ill. Dep't Cent. Mgmt. Serv. (Dep't of Commerce and Econ. Opp.) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶163 (IL LRB-SP 2014). Thus, AFSCME has not overcome the presumption that CMS has provided the statutorily required information.

### C. Qualifications

AFSCME does not overcome the presumption that the position at issue qualifies for designation under Section 6.1(b)(5) of the Act because its objections only contain arguments to support the manner in which it believes the Board should apply the tests articulated in Section 6.1(c), and the Board has previously rejected these arguments. See Ill. Dep't Cent. Mgmt. Serv. (Gaming Bd.) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, S-DE-14-121 (IL LRB-SP 2014) appeal pending, No. 14-0278 (Ill. App. Ct. 1st Dist.); Ill. Dep't Cent. Mgmt. Serv. (Dep't of Commerce and Econ. Opp.) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶163 (IL LRB-SP 2014) appeal pending, No. 14-0276 (Ill. App. Ct. 1st Dist.).

An employment position may be properly designated under Section 6.1(b)(5) only if the position authorizes an employee in that position to have significant and independent discretionary authority as articulated in the statutory tests provided in Section 6.1(c)(i) and Section 6.1(c)(ii) of the Act. 5 ILCS 315/6.1. CMS asserts that the position at issue holds significant and independent discretionary authority within the meaning of both Sections 6.1(c)(ii) and (c)(i). There is a presumption that the designation is proper; accordingly, there is also a

presumption that the requirements that make the designation proper are satisfied. In other words, there is a presumption that the position qualifies for designation under at least one of the categories identified in Section 6.1(b)(1) through (5). To qualify for designation under Section 6.1(b)(5) an employee must meet one of the statutory tests articulated in Section 6.1(c). Since there is a presumption that these positions qualify for designation under Section 6.1(b)(5), there is also a presumption that the positions satisfy at least one of the requisite tests articulated in Section 6.1(c). Section 6.1(c) identifies three statutory tests with 6.1(c)(i) establishing two of these tests, and 6.1(c)(ii) establishing the third test. The effect of CMS's allegation that Michals' position qualifies for designation under both Sections 6.1(c)(i) and 6.1(c)(ii), results in the presumption that this position meets the statutory test under Section 6.1(c)(ii) and at least one of the tests articulated in Section 6.1(c)(i).

1. (c)(ii)

Section 6.1(c)(ii) of the Act provides that an employee is a supervisor if the employment position authorizes the employee in that position to "qualif[y] as a supervisor of a State agency as that term is defined under Section 152 of the [(NLRA)], or any orders of the [(NLRB)] interpreting that provision or decisions of courts reviewing decisions of the [NLRB]."

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, 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 their interpretations, the NLRB and the Courts have held that employees are statutory supervisors under the NLRA if "1) they hold the authority to engage in any one 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., 532 U.S. 706, 713 (2001) (internal quotes omitted); see also Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006).

As stated above, there is a presumption that the positions at issue meet the test articulated in Section 6.1(c)(ii), thus, CMS is not required to prove every prong of the supervisory test articulated in this section of the Act. Rather, AFSCME has the burden to overcome the

presumption that the positions meet the supervisory test by providing specific evidence negating at least one prong of the test. Absent such contrary evidence the presumption that each position at issue qualifies for designation because they satisfy this test stands.

AFSCME argues that the Michals is not a supervisor because CMS presents no evidence that she was ever authorized, told, or actually exercise any of the enumerated supervisor duties, and because CMS does not prove that all three prongs of the supervisory test are met. The first prong of the NLRA supervisor test only requires that the employee ***hold the authority*** to engage in one of the enumerated supervisory functions. The issue is whether Michals is authorized to perform such duties, the CMS-104 provides evidence of such authorization, and AFSCME supplies no evidence to the contrary. That an employment position may be properly designated without requiring an incumbent employee to actually exercise the duties the position authorizes it to perform is supported by the fact that the Board has certified designations that include vacant positions because without an incumbent such authorized duties cannot actually be exercised. See Ill. Dep't Cent. Mgmt. Serv. (Dep't of Emp. Sec.) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31 30 PERI ¶ 168 (IL LRB-SP 2014) appeal pending 1-14-0386 (Ill. App. Ct. 1st Dist.); Ill. Dep't Cent. Mgmt. Serv. and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31 30 PERI ¶ 164 (IL LRB-SP 2014) appeal pending 1-14-0348 (Ill. App. Ct. 1st Dist.); Ill. Dep't Cent. Mgmt. Serv.(Dep't of Veterans' Affairs) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 30 PERI ¶ 111 (IL LRB-SP 2013) appeal pending 1-13-3618 (Ill. App. Ct. 1st Dist.). The CMS-104 position descriptions authorize Michals to engage in all the duties listed within because, as stated above, the Board has already held that the functions identified in the CMS-104 are sufficient to constitute the positions' duties, and AFSCME does not contend that the duties identified within the submitted CMS-104 do not qualify as any of the enumerated supervisory functions, nor does AFSCME provide evidence that Michals is unaware of her authority as identified in the CMS-104. AFSCME argues that the second prong is not met because CMS has not provided a specific showing that Michals exercises independent judgment. Again, it is presumed that the supervisory test is met, which includes the use of independent judgment, and AFSCME must provide a specific showing that Michals is not authorized to exercise independent judgment. Accordingly, since AFSCME does not at all address whether the at-issue position meets the third prong because the supervisory duties are held in the interest of CMS, and because it does not

negate the first two prongs of the test, AFSCME has not overcome the presumption that the at-issue position meets the test articulated in Section 6.1(c)(ii) of the Act.

2. (c)(i)

Section 6.1(c)(i) of the Act provides that an employment position is eligible for exclusion if the position authorizes the incumbent employee to be "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."

Section 6.1(c)(i) of the Act, requires that the employee meet one of two tests. The first test requires the employee to a) be engaged in executive and management functions; and b) be charged with the effectuation of management policies and practices of the Agency. The second test requires that the employee "represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of the Agency."

AFSCME argues that the tests for independent discretionary authority articulated in Section 6.1(c) essentially follow the manager and supervisor definition as developed by the NLRB, and argues that the Board should apply the interpretation of those definitions. As noted above, Section 6.1(c)(ii) does specifically incorporate the NLRB's definition and interpretation of a supervisory employee. However, while Section 6.1(c)(i) does use the same language the Supreme Court used in interpreting a managerial employee as identified by the NLRB,[2] unlike subsection (c)(ii), subsection (c)(i) is silent as to whether it also incorporates the Court's interpretation of a managerial employee under the NLRB. Thus applying the NLRB's analysis of managerial employee is not supported by the statute, and the only inquiry is whether the petitioned-for employment position comports with any of the tests ***as written*** in Section 6.1(c)(i) of the Act. Ill. Dep't Cent. Mgmt. Serv. (Dep't of Commerce and Econ. Opp.) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶163 (IL LRB-SP 2014)(specifically rejecting AFSCME's application of the historical origins of Section 6.1(c)(i)).

[2] In Nat'l Labor Rel. Bd. v. Yeshiva Univ. the Supreme Court held that under the NLRA an employee may be excluded as managerial only if he "represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." 444 U.S. 672, 683 (1980). Section 6.1(c)(i) states, in relevant part, that an employment position authorizes an employee in that position to have independent discretionary authority as an employee if he or she "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.

AFSCME also argues that the Board must distinguish between professional employees and managerial employees in reviewing these designations. This argument is unpersuasive because unlike the NLRA, Section 6.1 of the Act does not distinguish between managerial and professional employees. See Ill. Dep't Cent. Mgmt. Serv. (Dep't of Agric.) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶ 84 (IL LRB-SP 2013) appeal pending, No. 13-3598 (Ill. App. Ct. 1st Dist.).

Finally, without specifically applying this to the at-issue position, AFSCME argues that there can be no showing that an employee is managerial if an affidavit states that the employee is authorized to effectuate department policy if the CMS-104 does not define a policy. This argument is unpersuasive because nothing in Section 6.1(c) requires that effectuating the overall policy of IDOA is insufficient to meet the meaning of the term policy as written in the text. As such there is also no requirement that the employee effectuate a specific policy. Accordingly, AFSCME's objections do not overcome the presumption that Michals' position meets at least one of the tests articulated in Section 6.1(c)(i) of the Act.

In sum, AFSCME only protests that CMS has not met its burden of proof. In fact AFSCME has the burden, which it fails to meet because it provides absolutely no evidence to demonstrate that the designated employment position is not supervisory under Section 6.1(c)(ii) of the Act, and it does not actually argue that Michals' position is not authorized to exercise independent discretionary authority ***as written*** in the text of Section 6.1(c)(i) of the Act. CMS asserts that this position qualifies for designation under Section 6.1(b)(5) because it meets at least one of the tests articulated in Section 6.1(c)(i) and because it also meets the test articulated in Section 6.1(c)(ii). AFSCME is required to provide specific facts to rebut the presumption that the position qualifies for designation, but it provides no facts here. Accordingly, AFSCME's objections fail to overcome the presumption that Michals' position qualifies for designation.

**D. Constitutionality**

AFSCME's remaining arguments go to whether Section 6.1 is constitutional. Section 6.1(d) of the Act grants the Board the authority to determine whether the designation of the employment positions at issue comport with Section 6.1 of the Act. As an administrative agency, the Board has no authority to rule that the Illinois Public Labor Relations Act, as amended by Public Act 97-1172, is unconstitutional, either on its face or as applied. Ill. Dep't Cent. Mgmt. Serv. (Gaming Bd.) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, S-

DE-14-121 (IL LRB-SP 2014); State of Ill. Dep't of Cent. Mgmt. Serv. and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶ 80 (IL LRB-SP 2013) appeal pending, No. 13-3454 (Ill. App. Ct. 1st Dist.), (*citing* Goodman v. Ward, 241 Ill. 2d 398, 411 (2011)); see also Metro. Alliance of Police, Coal City Police Chapter No. 186, No. 6 v. Ill. State Labor Rel. Bd., 299 Ill. App. 3d 377, 379 (3rd Dist. 1998) (noting that administrative agencies lack the authority to invalidate a statute on constitutional grounds or even to question its validity). It is beyond my limited scope of authority as an administrative law judge for the Board to analyze the Act's constitutionality on its face or as applied to the at-issue designation petition. Thus, I find that it is unnecessary to include AFSCME's constitutional arguments in my analysis of whether the designations of the position at issue comports with Section 6.1 of the Act.

## IV. CONCLUSION

Pursuant to Section 1300.60 of the Board's Rules, I find that the designations are proper based solely on the information submitted to the Board because the at-issue positions are eligible and qualify for designation, the designations comport with Section 6.1 because CMS has submitted the required information, and AFSCME's objections do not overcome the presumption that the designations are proper under Section 6.1 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 at the Illinois Department of Human Services are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

| **Position No.** | **Working Title** |
|---|---|
| 37015-47-10-200-12-02 | Agency Procurement Officer/Supervisor |

## VI. EXCEPTIONS

Pursuant to Sections 1300.130 and 1300.90(d)(5) of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300,[3] 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 this recommended decision and order. Exceptions shall be filed with the Board

[3] Available at www.state.il.us/ilrb/subsections/pdfs/Section1300IllinoisRegister.pdf

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 their e-mail addresses as indicated on the designation form. Any exception to a ruling, finding, conclusion, or recommendation that is not specifically argued shall be considered waived. A party not filing timely exceptions waives its right to object to this recommended decision and order.

**Issued at Chicago, Illinois this 3rd day of April, 2014.**

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

**/s/** *Deena Sanceda*
**Deena Sanceda**
**Administrative Law Judge**