STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

State of Illinois, Department of Central Management Services (Department of Insurance),	)	
Petitioner	)	
and	)	Case No. S-DE-14-250
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 27, 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. CMS filed the designation petition with an attached CMS-104 position description. The petition seeks to exclude the following Option 9B Public Service Administrator, at the Illinois Department of Insurance (IDOI):

Position No.	**Working Title**	**Incumbent**
37015-14-03-000-30-01	Information Technology Officer	Vacant

On April 4, 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 AFSCME contends that the designation is improper.

A. Designation Petition

CMS's designation petition and the attached documentation alleges that the position at issue qualifies for designation under Section 6.1(b)(5) of the Act, and that the Board certified the position into bargaining unit RC-62 on September 24, 2012.

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. Under general directions, an incumbent of the at-issue position serves as an Auditor in Charge on Information Technology (IT) security audit/review projects. An incumbent assigns audit segments to team members and explains the assignment's relationship to the overall audit objective. As an internal information systems auditor, an incumbent verifies the accuracy and completeness of the Department's Information Technology Systems and programs in the areas and application system controls etc, to ensure the accuracy of business records, uncover internal

control problems and identify operation difficulties. The position is not authorized to supervise any subordinate positions.

B. Objections

AFSCME argues that the CMS-104 provides insufficient basis for designation, that the at-issue employees are not managers or supervisors within the meaning of the National Labor Relations Act (NLRA), and that the designation is 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 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 the at-issue 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-62, and it is uncontested that the certification was on September 20, 2010. Thus, I find that the presumption that the at-issue position is eligible for designation 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, that the position is currently vacant, and that CMS 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 because the CMS-104 only identifies *potential* responsibilities that can be given to the employee within that position, and there is no evidence that the employee actually performs 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. 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). Also, as explained below, since the position is

currently vacant, there is no employee to exercise the duties identified within the CMS-104, and AFSCME does not propose that the lack of an incumbent is grounds to deny the designation. 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. There is a presumption that the designation is proper; accordingly, there is also a presumption that the requirements that qualify the position for designation 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 this position qualifies 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.

1. (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, provides 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,[1] 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)).

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, AFSCME argues that there is no evidence that the employees at issue were ever told that they had discretion, or were authorized to exercise such discretion to the extent that they

[1] 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.

could have significant and independent discretionary authority so as to alter the adoption of management policies or the effectiveness of such policies, as required for a Section 6.1(b)(5) exclusion. This argument is without merit for two reasons: first because AFSCME is again arguing that CMS bears the burden, second, because the position at issue is vacant there is currently no employee who can be informed of the position's authorized duties. 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.).

Based upon the information provided by CMS, I find that the at-issue employment positions is authorized to represent management interests by taking discretionary actions that effectively control or implement the policy of the Department of Insurance policy by auditing the Department's operations. Thus, there is a presumption that the at-issue position qualifies for designation under Section 61.(b)(5) of the Act because it satisfies the second test articulated n Section 6.1(c)(i). Since AFSCME presents no evidence to the contrary, the presumption is unrebutted.

2. (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).

There is a presumption that the at-issue position satisfies at least one of the tests articulated in Section 6.1(c) of the Act, but in this case, CMS does not allege which test or tests the at-issue position satisfies. While there is some evidence that the at-issue position performs some supervisory duties, but because the CMS-104 specifically fails to identify the position as supervisor with subordinates that report to it, I find that there is no presumption that the employment position at issue qualifies for designation because it satisfies the test as articulated in Section 6.1(c)(ii).

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 does not actually argue that the at-issue 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). 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 the at-issue 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**
37015-14-03-000-30-01	Information Technology Officer

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,[2] 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 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

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

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 11th day of April, 2014.

STATE OF ILLINOIS
ILLINIOIS LABOR RELATIONS BOARD
STATE PANEL

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