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

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| State of Illinois, Department of Central Management Services (Department of Employment Security), | ) | |
| Petitioner | ) | |
| | ) | Case No. S-DE-14-256 |
| and | ) | |
| American Federation of State, County and Municipal Employees, Council 31, | ) | |
| Labor Organization-Objector | ) | |

## ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315/6.1 (2012) *added by* Public Act 97-1172 (eff. April 5, 2013), allows the Governor of the State of Illinois to designate certain public employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act (Act). 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 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 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 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 August 23, 2013, 37 Ill.

[1] Public Act 98-100, which became effective July 19, 2013, added subsections (e) and (f) to Section 6.1 which shield certain specified positions from such Gubernatorial designations, but none of those positions are at issue in this case.

Reg. 14,070 (September 6, 2013). These rules are contained in Part 1300 of the Board's Rules and Regulations, 80 Ill. Admin. Code Part 1300 (Rules).

On April 4, 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. The designation pertains to a position within the Department of Employment Security. On April 14, 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 the designation to have been properly submitted and consistent with the requirements of Section 6.1 of the Act and consequently I recommend that the Executive Director certify the designation of the position 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 the following position within any collective bargaining unit:

**Assistant Manager** Position no. 37015-44-21-100-10-01(vacant)

## I. AFSCME's Objections

AFSCME makes several general objections regarding the Act, along with several general objections regarding this designation. Generally, the Objector claims Section 6.1 of the Act violates the separation of powers doctrine established by the Illinois Constitution. AFSCME alleges that the legislature has improperly delegated its power to exclude or include employees from the Act to the Governor by giving the Governor the power to make changes to a law without any standards. AFSCME also claims that Section 6.1 of the Act violates the promise of equal protection under Article I, Section 2 of the Illinois Constitution. The Objector alleges the Act denies employees equal protection because the Governor can remove some positions from the Act while leaving identical positions without giving any rational basis for the decision. Finally, AFSCME claims that Section 6.1 of the Act violates Article I of the Illinois Constitution prohibiting the impairment of contracts because the employee designated is the beneficiary of a collective bargaining agreement.

AFSCME claims that this designation does not fully comply with the requirements of Section 6.1 of the Act. AFSCME alleges that Section 6.1(b)(5) requires CMS to provide a list of job duties for each designated position but the designation only includes a position description and affidavit regarding the position's job duties. It claims that this is insufficient to show that the designated position has actual authority to perform the duties listed in the position description because those duties are only potential responsibilities while the employee's actual duties are assigned at the supervisor's discretion. AFSCME alleges that if individuals hold the same position title but have different duties, the Petitioner should bear the burden to show why those different duties should not apply to all individuals holding that job title. The Objector claims that if a position description does not specifically state the policy that an employee effectuates, that position can not be designated as managerial as defined by Section 6.1(c)(i).

AFSCME claims that the designated position is not supervisory or managerial under the NLRA, as required by Section 6.1(b)(5). AFSCME alleges that CMS presented no evidence that an employee in the designated position exercised any of the job duties in the position description or that an employee was told or authorized to use discretion to alter the adoption of management policies with independent discretionary authority. AFSCME claims that NLRA case law requires the party raising the exclusion, here CMS, to bear the burden of proof on two matters. First, it alleges that the definition of "significant independent authority" in Section 6.1 of the Act is similar to the manager and supervisor definitions under the NLRA. Therefore, AFSCME claims that NLRA case law requires CMS to bear the burden of proof. Also, AFSCME alleges that the supervisory exclusion under the NLRA is dependent on facts, so therefore, CMS must demonstrate that the designated position has actual authority to act or effectively recommend one of the 11 supervisory functions with independent judgment. Finally, AFSCME claims that there is a distinction between professional and managerial employees under both the Act and the NLRA. AFSCME asserts that the position at issue here exercises professional discretion rather than managerial discretion and a fact-intensive inquiry is necessary to determine what type of discretion the employee in the position would exercise.

AFSCME notes that the designated position was certified in Case No. S-RC-08-036 and CMS has not shown that the designated position's job duties have changed. The Objector alleges that designating this position violates due process and is arbitrary and capricious because it would eliminate the employee's right to associate with a labor organization. AFSCME claims

that the risk of error is high in this case because of the strong presumption favoring CMS and the designation.

## II. Discussion and Analysis

a. Procedural

AFSCME raises three general objections to this designation, claiming that Section 6.1 of the Act violates the Illinois Constitution. However, the Board has held that it is beyond its 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 Illinois, Department of Central Management Services, Cons. Case Nos. S-DE-14-005 etc. 30 PERI ¶ 80 (IL LRB-SP Oct. 7, 2013) citing Goodman v. Ward, 241 Ill. 2d 398, 411 (2011). In Case No. S-DE-14-005 the Board expressed its concern with AFSCME's due process arguments but maintained that it has taken necessary measures to prevent a violation of such.[2] Therefore, AFSCME's due process rights have not been violated by the Board following the policies and procedures mandated by the legislature.

b. Substantive

AFSCME makes several claims asserting that the burden of proof should be shifted from the Objector (AFSCME) to the Petitioner (CMS) in certain portions of this case. In representation cases the burden of proof is on the employer seeking to exclude employees from bargaining units because this burden is "in accordance with the State's public policy, determined by the legislature, which is to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing." Chief Judge of the Cir. Court of Cook Cnty., 18 PERI ¶ 2016 (IL LRB–SP 2002); see Ill. Dep't of Cent. Mgmt. Serv. v. Ill. Labor Rel. Bd., State Panel, 2011 IL App (4th) 090966. As indicated, Section 6.1 of the Act,

[2] The Board found in Case No. S-DE-14-005, issued October 7, 2013, that consistent with the judicial precedent, it has "insured that the individual employees as well as their representative and potential representative receive notice soon after designation petitions are filed, usually within hours, and have provided for redundant notice by means of posting at the worksite… we provided them an opportunity to file objections, and where they raise issues of fact or law that might overcome the statutory presumption of appropriateness, an opportunity for a hearing, [and]… require a written recommended decision by an administrative law judge in each case in which objections have been filed." See Arvia v. Madigan, 209 Ill. 2d 520 (2004); and Gruwell v. Ill. Dep't of Financial and Professional Regulations, 406 Ill. App. 3d 283, 296-8 (4th Dist. 2010). Additionally, the Board found that it has "allowed an opportunity to appeal those recommendations for consideration to the full Board by means of filing exceptions… doubled the frequency of our scheduled public meetings in order to provide adequate review of any exceptions in advance of the 60-day deadline and… issu[e] written final agency decisions which may be judicially reviewed pursuant to the Administrative Review Law" in an effort to adhere to due process. State of Illinois, Department of Central Management Services, 30 PERI ¶ 80 Cons. Case Nos. S-DE-14-005 etc. (IL LRB-SP Oct. 7, 2013).

which was added to the Act in 2013 when the legislature passed Public Act 97-1172, allows the Governor to exclude certain public employment positions from collective bargaining rights which might otherwise be granted under the Illinois Public Labor Relations Act. Section 6.1(d) of the Act provides that any designation made under Section 6.1 "shall be presumed" proper, and the categories eligible for designation "do not expand or restrict the scope of any other provision" of the Act.

Here, since it is clear that the legislature was aware that the policy of Section 6.1 is diametrically opposite from the rest of the Act, the purposes of each must be treated as separate and distinct policies. The 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 Cent. Mgmt. Serv. (Ill. State Police) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶ 109 (IL LRB-SP 2013) appeal pending, No. 13-3600 (Ill. App. Ct. 1st Dist.). Here, because the Objector is opposing the State's public policy as stated in Section 6.1 of the Act, the objecting party bears the burden to demonstrate that the employees at issue are not eligible for designation. Section 6.1(d) provides that "[a]ny designation made by the Governor under this Section shall be presumed to have been properly made." In order to overcome this presumption, or even raise an issue that might overcome the presumption, the objecting party must provide specific examples for every employee at issue, demonstrating that the employee does not properly qualify for designation under the submitted category. See Id. citing State of Ill. Dep't of Cent. Mgmt. Serv., 24 PERI ¶ 112 (IL LRB-SP 2008). If the objector fails to even raise an issue that might overcome the presumption that the designation is proper, then the State prevails absent a hearing. See Rules Section 1300.60(d)(2)(B).

As noted, AFSCME generally claims that this designation does not fully comply with the requirements of Section 6.1 of the Act because CMS is required to provide more than the position description and affidavit to show the job duties of the designated position. AFSCME alleges that the position description only lists potential responsibilities and does not demonstrate that the designated position has actual authority to complete those job duties. However, this does not render the designation inappropriate 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 Ill. Dep't Cent. Mgmt. Serv. (Dep't of Revenue) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶ 110 (IL LRB-SP 2013), appeal pending, No. 13-3601 (Ill. App. Ct. 1st Dist.); 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.).

As indicated above, AFSCME also alleges that the position designated in this petition was certified in a bargaining unit in Case No. S-RC-08-036 and CMS has not shown that the position's job duties have changed. However, this objection does not recognize, as the Board has, that "Section 6.1 is a new creation. It does not modify pre-existing means of determining collective bargaining units, but is a self-contained and entirely new means of decreasing the number of State employees in collective bargaining units." 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). Thus, certification of positions into bargaining units under the Act prior to the addition of Section 6.1 does not prevent the legislature from subsequently amending the Act to provide for the removal of these employment positions from the bargaining unit. Id.

The objections that the position at issue is neither one of a supervisor or a manager under the NLRA fail to raise an issue that might overcome the presumption that the designation is proper because Section 6.1 of the Act does not incorporate the NLRA definition of manager, and AFSCME provides no evidence to negate the presumption that the designation is proper. Proper designation under Section 6.1(b)(5) requires the employees at issue to be authorized to exercise "significant independent discretion" as managers defined by Section 6.1(c)(i) of the Act, or as supervisors defined by Section 6.1(c)(ii) of the Act, incorporating Section 152 of the NLRA, 29 U.S.C § 152. Ill. Dep't Cent. Mgmt. Serv. (Dep't. of Revenue) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶ 110 (IL LRB-SP 2013).

AFSCME's argument that the position at issue is not managerial under the NLRA is not relevant, because the NLRA managerial definition is not controlling authority under Section 6.1 of the Act. Ill. Dep't Cent. Mgmt. Serv. (Dep't of Veterans Affairs) and Am. Fed'n of State, Cnty. & Mun. Emp., Council 31, 30 PERI ¶ 111 (IL LRB-SP 2013). AFSCME's arguments that the position lacks significant independent discretionary authority as a manager and supervisor under Section 6.1 also fails to overcome the presumption that it has such authority because AFSCME does not provide evidence to support this contention. Id.

AFSCME only submitted these general objections to this designation and did not object to CMS' assertions that the employee in this position is authorized to have significant and independent discretionary authority as defined by Section 6.1(c)(i). In a case like this where no

party objects to CMS' evidence regarding the position's job duties, I assume this evidence is correct. Therefore, because AFSCME's general objections are insufficient to raise any issue that might overcome the presumption that the designation of the position at issue is proper and it has not submitted specific objections to the designation of the position, the designation of this position is proper under Section 6.1(b)(5) of the Act.

## 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 in the Department of Employment Security is excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

**Assistant Manager** Position no. 37015-44-21-100-10-01(vacant)

## V. Exceptions

Pursuant to Section 1300.90 and 1300.130 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 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 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. Each party shall serve its exceptions on the other parties. A party not filing timely exceptions waives its right to object to the Administrative Law Judge's recommended decision and order.

**Issued at Chicago, Illinois, this 17th day of April, 2014.**

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

*Thomas R. Allen*

**Thomas R. Allen**
**Administrative Law Judge**

[3] Available at www.state.il.us/ilrb/subsections/pdfs/Section 1300 Illinois Register.pdf