

# LEGISLATIVE AUDIT COMMISSION



Management Audit  
Management Positions  
In The Executive Branch

April 2013

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## Management Audit

### Management Positions In The Executive Branch

April 2013

#### RECOMMENDATIONS - 5

##### Background

The Personnel Code was created to establish for the government of the State of Illinois a system of personnel administration under the Governor, based on merit principles and scientific methods (20 ILCS 415/2). The Code allows for exemptions to established requirements.

Legislative Audit Commission Resolution Number 141 directed the Auditor General to conduct an audit of management positions in the Executive Branch of State government. The resolution asked that auditors accumulate information from agencies on their management positions along with information about managers' organizational unit, job title, and function. It also requested information on whether these managers supervise, are exempt from the Personnel Code (Code), and are covered by a collective bargaining agreement.

According to the Department of Central Management Services' website, the Personnel Code is the law that provides the basis for the civil service merit system in Illinois. It includes all positions of employment in the service of the State unless specifically excluded by legislation. It empowers the Director of Central Management Services to promulgate rules and carry out this law, and creates the Civil Service Commission to monitor its proper administration and to conduct hearings. The Code consists of three jurisdictions:

- **Jurisdiction A, Classification & Pay**, which provides for a system of pay administration and position reporting and classification to assure that the work of employees is fairly compensated, consistent with the level and kind of job they perform;
- **Jurisdiction B, Merit & Fitness**, which covers candidate testing and selection, certification, performance appraisal and discipline, and other merit practices for employees; and
- **Jurisdiction C, Conditions of Employment**, which deals with such things as vacation, holidays, sick time, plans for resolving employee grievances, and other provisions that establish a body of uniform personnel practices across agencies.

The Personnel Code became law in 1955 and was implemented two years later in 1957. It replaced a loose system of inconsistent personnel practices and statutes. Previously, job classifications and salary range rates were itemized in law, and could only be changed every two years, when the legislature was in session. The Personnel Code was written to provide

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broad administrative powers to the Director of Central Management Services to carry out a personnel program and the law has continued with little change over the years.

**General Exemptions**

The Personnel Code establishes exemptions of two major types. The first type is exempt employees who are exempt from all jurisdictions of the Code. These are referred to as general exemptions and are covered under 4C of the Personnel Code (20 ILCS 415/4c). The Code contains a long list of general exemptions but among the most significant for this audit are:

- Directors of Departments, the Adjutant General, all other positions appointed by the Governor by and with the consent of the Senate.
- The State Police subject to the merit provisions of the State Police Act.
- The technical and engineering staffs of the Department of Transportation, the Department of Nuclear Safety (now part of the Emergency Management Agency), the Pollution Control Board, and the Illinois Commerce Commission, and the technical and engineering staff providing architectural and engineering services in the Department of Central Management Services.
- All investment officers employed by the Illinois State Board of Investment.
- All hearing officers of the Human Rights Commission.

**Partial Exemptions**

The second major type of exemptions is partial exemptions established under section 4D of the Personnel Code (20 ILCS 415/4d). The eight partial exemptions are for:

1. In each department up to two private secretaries for the director and one confidential assistant (4D1).
2. The resident administrative head of each State charitable, penal, and correctional institution (4D2).
3. Employees recommended by the Director of Central Management Services and approved by the Civil Service Commission. These are referred to as 4D3 exemptions and involve positions that have principal administrative responsibility for the determination of policy or have principal administrative responsibility for the way policies are carried out (4D3).
4. Certain employees subject to prevailing wage laws (4D4).
5. Certain licensed attorneys or other professionals including professional engineers, physicians, and nurses (4D5).
6. Positions established outside the geographical limits of the State of Illinois (4D6).
7. Staff attorneys reporting directly to individual Workers' Compensation Commissioners (4D7).

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8. Certain number of senior public service administrator positions within the Department of Healthcare and Family Services (4D8).

Of these partial exemptions, there are two categories that should be managers or supervisors based on the 4D description. Those are the 4D2 because of the positions as administrative heads and 4D3 positions because of the involvement in policy as noted in the definition. Employees in other categories may be managers or supervisors depending upon their job duties and responsibilities.

**Rutan Exemptions**

The audit resolution also requested that auditors collect information on Rutan exemptions. Rutan exemptions result from a court case decided in 1990 which established restrictions on political hiring practices (United States Supreme Court decision in *Rutan, et al. v. Republican Party of Illinois, et al.*, 497 U.S. 62 (1990)). Positions which are exempt from Rutan can consider political factors in employment decisions while positions where Rutan applies must follow established personnel practices to assure compliance with provisions of the court case.

The Department of Central Management Services has internal documents which outline the process by which it determines whether a position can be considered exempt from Rutan requirements. CMS maintains these documents as highly confidential in an effort to protect the integrity of the Rutan determination process. The documents specify three general areas which can permit a position to be exempt from the Rutan process. Positions can involve policy issues, confidentiality, or spokesperson responsibilities.

**Report Conclusions**

Legislative Audit Commission Resolution Number 141 directed the Auditor General to conduct an audit of management positions in the Executive Branch of State government. The resolution asked that auditors accumulate information from agencies on their management positions along with information about managers' organizational unit, job title, and function. It also requested information on whether these managers supervise, are exempt from the Personnel Code (Code), and are covered by a collective bargaining agreement.

Auditors interviewed representatives of the Department of Central Management Services. They reviewed information from CMS and identified position titles that were potentially managers or supervisors. Based on those identified titles, auditors requested electronic data from CMS for those employees. CMS was able to provide many of the elements required by the audit resolution for employees who are subject to the Illinois Personnel Code (Code employees). Data provided by CMS included 50 agencies in 212 position classifications or titles and a total of 13,474 employees as potential Code managers or supervisors. One agency, the Medical District Commission, had one potential manager but responded and indicated that they had no applicable employees. Auditors accepted the

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Commission's conclusion. That change left 49 agencies and 13,473 potential managers. The potential managers included only managers subject to the Personnel Code. Information on non-Code managers was provided directly by agencies. Agencies identified a total of 811 non-Code managers.

Because manager and supervisor are closely linked, auditors included both in the definition of a management position provided to State agencies. The survey's instructions noted that for the purposes of the survey, whether an employee is a manager or supervisor may not correspond to determinations that have been made to allow a position into a union. If an employee carries out the functions in the definitions, then he/she should be considered a manager or supervisor for the survey.

In addition, auditors noted to surveyed agencies that consideration should also be given to whether the employee has a 4D partial exemption from the Personnel Code or has a Rutan exemption, which suggests that they may be managers. Because of the additional items auditors asked agencies to consider in determining whether employees are managers for the surveys, the designations may not correspond to decisions of the Public Labor Relations Board or the courts.

Given the number of agencies surveyed, and the large volume of data compiled, it was not possible to independently verify all information provided. For example, agencies answered questions about whether employees were managers, how many people they supervised, and whether those employees were supervised by someone else. Auditors relied on the agencies' reporting of management status and reporting responsibility with verification to other sources when questions or conflicts arose. Auditors also followed up with agencies to better understand conflicts or complex information. Considering these data limitations, the evidence obtained provides a reasonable basis for findings and conclusions related to the management positions in State government as described in the audit's objectives.

Of a total of 50,498 employees reported by the 49 agencies surveyed, agencies indicated that 6,423 were management positions based on definitions. Overall these managers represented almost 13 percent of reported total employees for those agencies. For this report, employees who were identified as managers/supervisors by their agencies are referred to collectively as managers.

Of the 6,423 total management positions, two job titles accounted for 59 percent of all managers and supervisors. The two job titles were Public Service Administrator with 2,533 managers (39%) and Senior Public Service Administrator with 1,228 managers (19%). Other common titles were Executive II with 220, Human Services Casework Manager with 215, and Civil Engineer V with 206 managers.

Agencies reported that 1,858 managers were either completely or partially exempt from the Personnel Code.

- There were 811 managers who were completely **exempt from the Personnel Code** (for example, non-Code employees.) The largest group was from the Department of Transportation (IDOT). IDOT had 557 managers who were exempt from the Personnel Code accounting for 69 percent of the non-Code managers. Non-Code employees are exempt from all jurisdictions of the Code.

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- There were 1,047 managers who were **partially exempt from the Personnel Code**. The three agencies with the largest number of partial exemptions were Human Services, Corrections, and Central Management Services. All three agencies had over 100 partially exempt managers. Partially exempt employees are exempt from certain provisions of the Personnel Code.

Of the 6,423 managers, 1,735 (27 %) were Rutan exempt. Managers that are Rutan exempt were not required to have the Rutan interview process which uses pre-determined and uniform questions. Instead, positions with Rutan exemptions provide the director or chair of an agency more flexibility in making a hiring selection.

There were 4,613 managers (72%) who were covered by a collective bargaining agreement. Human Services had the largest number of managers in a union with 1,202, or 79%. Twenty-seven agencies had a majority of their managers covered by a collective bargaining agreement.

State agencies reported that there were 5,447 managers who supervised an average of 6.5 employees each based on surveys received. That average is based on the 85% of managers (5,447/6,423) who supervised employees. The remaining 976 managers had executive or management responsibilities but agencies reported that they did not supervise.

Survey responses showed that there were 1,206 managers who supervised employees who were also supervised by other managers. The most common reason for employees with multiple managers was that employees also reported to a higher ranking manager for issues like discipline or grievances.

### **Non-Managers**

There were several issues relating to employees who were classified by their agencies as non-managers but had characteristics that could indicate that they were managers.

- Auditors identified 43 positions which agencies identified as non-managers that had a 4D3 exemption from the merit and fitness requirements of the Personnel Code. These exemptions are for employees who have responsibilities which involve either principal administrative responsibility for the determination of policy or principal administrative responsibility for the way in which policies are carried out.
- There were 702 employees from the surveys that were in Rutan exempt positions that agencies identified as non-managers. Rutan exempt employees help agencies to carry out policies, to speak on their behalf, or to deal with confidential issues. Rutan exempt employees who carry out policy should be considered managers. Natural Resources had the most Rutan exempt non-managers with 109. Fifty-six of 109 of these employees functioned as Site Superintendents.
- Of employees who were identified by agencies as non-managers, there were 1,400 employees in 14 agencies who had direct supervisory authority. Supervisory responsibility is one characteristic that helps to define managers or supervisors. Corrections reported most of the non-managers who supervise with 1,088. These Corrections employees were mostly Lieutenants (537) or Sergeants (411).

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Corrections responded that the reason that these employees were not considered management was because they had “no managerial decision-making authority.”

- Auditors identified 84 employees who had a title, a working title, or a functional title that indicated that they were in a position of authority, but their agency said that they were not a manager. For example, Natural Resources had 61 employees whose function was Site Superintendent who were classified as non-managers because the supervision they exercised was “routine in nature.”
- There were 907 employees in the Public Service Administrator (PSA) title and 46 in the Senior Public Service Administrator (SPSA) title who were not considered managers by their agencies. Central Management Services (CMS) position classifications for both titles indicate that they are managers. Human Services had 128 PSAs who were non-managers and CMS had 117. CMS also had the most SPSA non-managers with 15.

Central Management Services should consider revising the State’s Personnel Code classification system so that issues identified in this audit can be addressed.

**Other Issues**

The Department of Central Management Services has not conducted research and planning regarding the total manpower needs of all offices as required by provisions in the Personnel Code (20 ILCS 415/9(11)).

Some employees who were classified as confidential employees were union members. These employees should either be non-union or should not be classified as confidential. The Public Labor Relations Act at 5 ILCS 315/3 (n) notes that confidential employees should be excluded from being union members. Confidential employees assist management with regard to labor relations or collective bargaining issues.

**Recommendations**

- 1. The Department of Central Management Services and the Civil Service Commission should assure 4D3 exemptions are approved appropriately in compliance with the Personnel Code (20 ILCS 415/4d(3)).**

**Findings:** Auditors identified two issues related to non-managers having Personnel Code partial exemptions. Auditors identified exemptions intended for private secretaries and confidential assistants which are union members. These exemptions are identified under section 4D1 of the Personnel Code. Second, 43 positions which agencies identified as non-managers who had a 4D3 exemption from the merit and fitness requirements of the Personnel Code.

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<b>CODE AND NON-CODE TOTAL AND MANAGEMENT EMPLOYEES - MARCH 2012</b>				
<u>Agency</u>	Total Code & Non-Code Employees <sup>1</sup>	OAG Identified Potential Code Managers <sup>2</sup>	Agency Identified Code & Non-Code Managers	Percent Managers
Aging	142	77	42	30%
Agriculture	354	112	78	22%
Arts Council	17	14	7	41%
Capital Development Board	122	10	18	15%
Central Management Services	1,420	633	258	18%
Children & Family Services	2,891	1184	613	21%
Civil Service Commission	4	3	3	75%
Commerce & Economic Opportunity	396	242	111	28%
Commerce Commission	253	17	79	31%
Corrections	11,408	2,565	621	5%
Criminal Justice Information Authority	64	25	15	23%
Deaf & Hard Of Hearing Commission	7	7	4	57%
Developmental Disabilities Council	8	6	3	38%
Emergency Management Agency	237	39	56	24%
Employment Security	1,778	476	314	18%
Environmental Protection	857	579	148	17%
Financial & Professional Regulation	472	228	90	19%
Gaming Board	123	41	26	21%
Guardianship & Advocacy	104	26	22	21%
Healthcare & Family Services	2,134	696	428	20%
Historic Preservation	172	63	31	18%
Human Rights Commission	21	4	4	19%
Human Rights Department	143	48	26	18%
Human Services	12,907	3,203	1,527	12%
IL Sentencing Policy Advisory Council	2	2	2	100%
IL Torture Inquiry Relief Commission	2	2	1	50%
Insurance	255	148	57	22%
Investment Board	10	1	4	40%
Juvenile Justice	1,229	262	174	14%
Labor	91	20	18	20%
Labor Relations Board, Educational	11	9	4	36%
Labor Relations Board, Illinois	17	11	2	12%
Law Enforcement Training & Stand Bd	17	11	5	29%
Lottery	158	36	25	16%
Military Affairs	224	13	32	14%
Natural Resources	1,253	590	125	10%
Pollution Control Board	25	16	4	16%
Prisoner Review Board	18	13	3	17%
Property Tax Appeal Board	30	6	6	20%
Public Health	1,090	432	252	23%
Racing Board	48	1	8	17%
Revenue	1,741	814	226	13%
State Fire Marshal	141	33	23	16%
State Police (excluding sworn officers)	1,220	276	182	15%
State Police Merit Board	5	4	5	100%
State Retirement Systems	95	44	21	22%
Transportation <sup>2</sup>	5,312	163	579	11%
Veterans' Affairs	1,296	234	104	8%
Workers' Compensation Commission	174	34	37	21%
<b>Totals</b>	<b>50,498<sup>1</sup></b>	<b>13,473</b>	<b>6,423</b>	<b>13%</b>

Notes: 1: Total State employees in these 49 Code agencies according to CMS data and agencies' survey responses. 2: Potential managers do not include any non-Code employees.

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**4D1 Exemptions**

Auditors identified nine positions which had an exemption for private secretaries and confidential assistants that were union members. Most non-manager 4D1 exemptions reviewed were not union members (37 of 46), which is appropriate, but nine were union members.

**4D3 Exemptions**

Auditors identified 43 positions which agencies identified as non-managers that had a 4D3 exemption from the merit and fitness requirements of the Personnel Code. These exemptions are for employees who have responsibilities which involve either principal administrative responsibility for the determination of policy or principal administrative responsibility for the way in which policies are carried out. These responsibilities define managers.

These exemptions are recommended by the Department of Central Management Services and approved by the Civil Service Commission. Auditors asked an executive from the Civil Service Commission whether he thought employees with 4D3 exemptions were management positions and he said that they were. In spite of that, there were a total of 43 4D3 exemptions that were classified by agencies as non-managers.

This could be an issue of agencies defining managers too restrictively, or it could be an issue that too many titles are being approved as partial exemptions of the Personnel Code under section 4D3. Less than half (19 of these positions) are union members, so union status is not the primary issue here. When agencies indicated that employees were not managers, auditors asked them to provide a brief explanation of why they did not consider an employee a manager. Among the reasons given were they had no direct reports, were not managers, were administrative or staff, and their duties were routine in nature.

**CMS' Response:** The Personnel Code (20 ILCS 415/4d(3)) states that "The Civil Service Commission, upon written recommendation of the Director of Central Management Services, shall exempt from jurisdiction B other positions which, in the judgment of the Commission, involve either principal administrative responsibility for the determination of policy or principal administrative responsibility for the way in which policies are carried out, except positions in agencies which receive federal funds if such exemption is inconsistent with federal requirements, and except positions in agencies supported in whole by federal funds."

As the authority for granting 4d(3) exemptions lies with the Civil Service Commission (CSC), the Department of Central Management Services defers to the CSC for comment on ensuring compliance with this provision of the Personnel Code. Our response will discuss CMS' role in the submission of 4d(3) requests and the processing of subsequent approvals or denials.

The proper classification of a position must be determined prior to requesting 4d(3) exemption from the CSC. As such, an agency must submit a position establishment or

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clarification (on a CMS-104) to CMS for review by a CMS Classification Analyst. The agency must also submit a letter from its Agency Director to CMS outlining the reasons for the exemption request and all associated organizational charts. The CMS Classification Analyst ensures the position is properly classified and performs a preliminary analysis to determine if the position meets the 4d(3) criteria. If the position is determined to be properly classified and the preliminary analysis indicates the position is consistent with similar 4d(3) exempt positions, CMS prepares a request packet for submission to the Civil Service Commission. Once the packet is submitted to the CSC, it is placed on the monthly agenda for consideration. CMS, in conjunction with the requesting agency, answers any preliminary questions the CSC may have in preparation for the meeting as well as attends the CSC meeting to address questions from the Commission. Once the Commission has ruled on the appropriateness of 4d(3) exemption for a position, CMS officially recognizes the position as 4d(3) exempt and notifies the agency of such status. Conversely, if the exemption is denied, CMS notifies the agency, as well.

**Civil Service Commission's Response:** The audit was undertaken to review "management" positions. As provided to the Civil Service Commission, the audit proceeds to define what a "manager" is. "Manager is an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices.

The audit further notes that this definition was from the Illinois Public Labor Relations Act. The audit then references positions partially exempt from the Personnel Code pursuant to Section 4d(3). These are positions that "involve either principal administrative responsibility for determination of policy or principal administrative responsibility for the way in which policies are carried out." Such positions can only be exempted by judgment of the Civil Service Commission upon recommendation by the Director of Central Management Services. The audit goes on to note that such partially exempt positions "should be managers or supervisors" based on the statutory description and because of "the involvement in policy as noted in our definition."

The Civil Service Commission is mostly in agreement with this sentiment. However, the Commission believes that there can be positions exempt pursuant to Section 4d(3) of the Personnel Code that do not fall within the audit's definition of "manager." That is because the audit's definition of "manager" is limited to directing the "effectuation" of management policies. Referring to Section 4d(3), that is tantamount to positions that involve "principal administrative responsibility for the way in which polices are carried out." Section 4d(3) has additional exemption criteria, "determination of policy." The Commission has approved exemption requests for titles solely dedicated to this function, i.e. Senior Policy Advisor, Media Administrator, Strategic Planning Advisor, etc. Such positions may not have any management responsibilities as set forth in the audit definition since they participate in the *development* of policy but do not participate in the *effectuation* of policy.

This may also help explain why the audit identified 43 positions that the agencies indicated were not managers yet were exempt pursuant to section 4d(3) of the Personnel Code. To

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ensure compliance with the provisions of the Personnel Code, the Civil Service Commission has obtained a list of these positions and will follow up with the agencies to verify that they still qualify for a principal policy exemption.

The Civil Service Commission is in agreement that Section 4d(3) exemptions are to be approved appropriately in compliance with the Personnel Code. In fact, your June 2010 Management Audit of Exemptions Granted by the Civil Service Commission (HR140) found that for all 50 positions in your sample, the granting of the exemption was consistent with State law.

**2. The Department of Central Management Services should assure that Rutan exemptions are only used for positions responsible for implementing policies.**

**Findings:** There were 702 employees from the surveys that were in Rutan exempt positions that agencies identified as non-managers. Rutan exempt employees help agencies to carry out policies, to speak on their behalf, or to deal with confidential issues. Rutan exempt employees who carry out policy should be managers.

Exhibit 3-3 shows Rutan exempt non-managers. Natural Resources had the most Rutan exempt non-managers with 109. Fifty-six of 109 of these employees functioned as Site Superintendents. There were 532 of the 702 that were also union members.

The Rutan decision, from 1990, held that promotions, transfers, and recalls based on political affiliation or support are an impermissible infringement on public employees' First Amendment rights. Certain employees or positions may have an exemption to this rule for certain high-level employees.

It appears that either agencies may have misidentified some employees as non-managers or employees may have been exempted from requirements of the Rutan decision inappropriately. When agencies indicated that employees were not managers, their explanations were similar to employees with Personnel Code exemptions. Among the reasons given were duties were routine in nature, they did not supervise, or they had no managerial decision-making authority.

The Director of Central Management Services is responsible for setting forth a uniform set of rules that guide the process of personnel administration. Whether hiring decisions are exempt from Rutan is an important part of the process of personnel administration.

Central Management Services has internal documents which outline the process by which it determines whether a position can be considered exempt from Rutan requirements. Although a process exists, it does not seem to be a sufficient internal control to assure that exemptions to the Rutan decision are only used for certain high-level employees who will loyally implement the State's policies. There are over 700 employees who are Rutan exempt but are not considered by agencies as managers.

**CMS' Response:** The Department believes that there are sufficient internal controls in place to ensure that the Rutan decision is implemented in accordance with all provisions of the law. The audit cites that these exemptions should only be used for certain high-level employees who will loyally implement the State's policy. Utilizing established principles of management and accountability, the Rutan determination criteria was developed in 1990 by the external accounting firm of Ernst & Young and the law firm of Jenner and Block and were based on the then-recently released Rutan decision, the Elrod and Branti decisions. By law, the Rutan determinations are based on the type of duties and level of responsibilities in three critical areas: policy-making, spokesperson and confidentiality. While the spokesperson and/or confidentiality components were added into the draft audit report per our request, we are still of the opinion that the overall conclusion does not accurately take these two criteria into account. The threshold for all three criteria encompasses many more types and levels of duties and responsibilities than solely "implementing policies" and meeting the Illinois Public Labor Relations Act's definition of "managing" and/or "supervising."

The report further cites that "Rutan exempt employees who carry out policies should be considered managers." Policy-implementation is indeed one criterion used in determining the Rutan exempt status of a position though the level with which a position is charged with "carrying out" policy was likely interpreted in many ways by the agencies completing the surveys. Please note that positions, not employees, are determined to be Rutan Exempt; the determination is not based on the employee or work the employee is claimed to perform without regard to the officially assigned duties and responsibilities of the employee's position reflected in the official position description (CMS-104). Rutan determinations are based on the duties and responsibilities assigned and attested to by the Director of the agency via the CMS-104. As we discuss in greater detail in our response to Recommendation #3, we are uncertain of the extent to which the agencies utilized the official position description when completing the survey. Further, it does not appear that agencies were given the opportunity to address possible spokesperson and/or confidentiality aspects of the job in the survey but rather were limited to only addressing policy issues. Therefore, their conclusion would only address one aspect of potential Rutan

Exhibit 3-3 <b>AGENCIES WITH RUTAN EXEMPTIONS FOR NON-MANAGERS</b>	
<u>Agency</u>	<u>Rutan Exempt</u>
Natural Resources	109
Revenue	67
Corrections	57
Healthcare & Family Services	53
Human Services	52
Financial & Professional Reg	44
Central Management Services	37
Commerce & Econ Opportunity	36
Transportation	26
Employment Security	24
Children & Family Services	22
Insurance	21
Public Health	20
Pollution Control Board	14
Environmental Protection	10
State Police	10
25 Other Agencies*	<u>100</u>
Total Rutan Exempt Non- Managers	<u>702</u>
* Twenty-five agencies had between one and nine employees who were Rutan exempt and identified as non-managers.	

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exemption consideration, that being solely policy-making as defined by the “manager” and “supervisor” definitions in the Illinois Public Labor Relations Act.

***Auditors’ Comment 5: The purpose of the audit was to collect information from agencies on managers. One element auditors were required to collect was whether the employee was Rutan exempt. It was not an audit of purposes for Rutan exemptions. However, when audit results showed such a large number of Rutan exempt employees with management or supervisory responsibilities in their formal CMS position descriptions were being reported as non-managers by agencies, auditors simply recommended that CMS look into this matter.***

There were 702 Rutan exempt positions identified by the agencies as non-managers, and a statement at the bottom of page 35 concludes that “It appears that either agencies may have misidentified some employees as non-managers or employees may have been exempted from requirements of the Rutan decision inappropriately.” A review by CMS of a sampling of the 702 Rutan exempt positions provided as the source data revealed that, while some of the positions were excluded based on policy-making, those same positions were also generally exempted based on the level of spokesperson and/or confidentiality responsibilities as well. Further, a majority of the positions reviewed were Rutan exempt based only on their confidential and/or spokesperson responsibilities and did not rise to the level of Rutan exemption with respect to policy-making.

***Auditors’ Comment 6: Although auditors shared their survey results regarding the 702 Rutan exempt positions with CMS, CMS did not provide auditors with the results of their review. However, it appears that the CMS review consisted of reviewing the employees’ duties delineated in the CMS-104 for the position– what the employees should be doing – rather than determining what the employees were actually doing at the agency. It is the auditors’ position that the strength of the audit was to determine how employees were actually functioning in their position, rather than simply relying on a CMS position description which may or may not accurately depict the employees’ actual duties.***

As there have been several position number changes and employee movements since the data was provided and our record-keeping with respect to position history is only partially automated, verification for several of the 702 Rutan exempt positions requires a lengthy and manual process before a thorough analysis can be performed. Again, however, once completed, the results would only yield the exemption(s) based on the CMS-104, not necessarily the information used by the agencies to complete the survey. We believe the underlying reason is because of the definitional problems and that the agencies self-reported assessment of an employee’s duties may or may not be accurately or thoroughly reflected in the CMS-104. There are several factors that may have been considered by the agencies including, but not limited to, agencies may not be considering some policy-exempted positions to be policy-implementers and/or fit the definition of “manager” used in the survey; agencies may not be working the employee to the level described on the position description with respect to policy-making; the person completing the survey may not have consulted the

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CMS-104 but rather based the comments on the duties known to be performed by the incumbent; and/or the incumbent is currently temporarily assigned to other duties or otherwise assigned duties not reflected in the job description which may have resulted in the survey being completed reflecting those duties. These factors are discussed in greater detail in Recommendation #3. CMS will remind agencies that the official record of a position's duties is the CMS-104, and the document must be updated to reflect any changes in duties and/or authorities.

We would also like to provide a comment regarding the excerpt from the Rutan decision which appears on page 35 and states "A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views." This statement is, in the abstract, correct. However, when taken into context with the additional rights afforded employees under the Personnel Code, Personnel Rules, applicable union contract language, and any other source of rights an employee may enjoy, most employees may only be dismissed for work-related and/or performance reasons with due process. As we stated in our request to consider removal of this language, this statement is misleading.

***Auditors' Comment 7: The purpose of the quote from the Rutan decision was to provide the reader with perspective as to why it may be in the government's interest to have Rutan exempt employees. The audit has no discussion of dismissals of Rutan exempt employees. Rather, CMS, in its comments, raises dismissals as an issue.***

**3. The Department of Central Management Services should review and revise the State's classification plan to address the issues identified in this management audit.**

**Findings:** According to the Personnel Code, Central Management Services and its Director are responsible for the preparation, maintenance, and revision of a position classification plan for all covered positions, based upon similarity of duties performed, responsibilities assigned, and conditions of employment (20 ILCS 415/8a). This classification plan is subject to approval by the Civil Service Commission.

Of employees who are identified by agencies as non-managers, there were 1,400 employees in 14 agencies who have direct supervisory authority, but were not reported as managers by agencies. Most of these workers are bargaining unit covered supervisory positions. Auditors identified selected titles that indicated that employees were in a position of authority even though their agency said that they were not a manager.

There were 84 employees identified as non-managers who had a working title or functional title selected.

Central Management Services should consider revising the State's Personnel Code classification system so that issues identified in the audit can be addressed. Among the

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Problems that could be clarified with an improved plan are:

- Inconsistency of manager and supervisor positions that have partial exemptions to Section 4D of the Personnel Code.
- Inconsistency of manager and supervisor positions that have a Rutan exemption;
- Unclear responsibility for the supervision of employees, including responsibility for important functions like evaluations, discipline, and grievances;
- Issues with functional titles with significant authority within agencies that are classified as non-managers;

**CMS' Response:** Specifically cited:

- Inconsistency of manager and supervisor positions that have partial exemptions to Section 4d of the Personnel Code;
- Inconsistency of manager and supervisor positions that have a Rutan exemption;
- Unclear responsibility for the supervision of employees, including responsibility for important functions like evaluations, discipline, and grievances;
- Issues with functional titles with significant authority within agencies that are classified as non-managers.

Exhibit 3-4 <b>NON-MANAGERS WHO SUPERVISE BY AGENCY</b>		
<u>Agency</u>	<u># of Employees</u>	<u>Average # Supervised</u>
Central Management Services	79	6.8
Children & Family Services	2	4.0
Commerce & Econ Opportunity	7	1.9
Corrections	1,088	101.3
Criminal Justice Authority	1	1.0
Emergency Management Agency	4	1.8
Gaming Board	2	3.0
Military Affairs	1	1.0
Natural Resources	185	2.5
Pollution Control Board	1	6.0
Prisoner Review Board	2	2.0
Property Tax Appeal Board	2	2.0
Revenue	23	4.7
State Retirement Systems	<u>3</u>	<u>3.0</u>
Total	<u>1,400</u>	<u>79.5</u>
Source: CMS and agency survey data summarized by OAG.		

The Department believes the “inconsistency of manager and supervisor positions that have partial exemptions to Section 4d of the Personnel Code” and “inconsistency of manager and supervisor positions that have a Rutan exemption” recommendations have been addressed in our responses to Recommendations #1 and #2.

CMS will review the Classification Plan to remedy the issues as outlined below. The Department would like to comment on the recommendations to amend the Classification Plan to address “unclear responsibility for the supervision of employees, including responsibility for important functions like evaluations, discipline, and grievances” and “issues

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with functional titles with significant authority within agencies that are classified as non-managers.” As CMS cannot accurately discern the thought process behind individual agencies’ completion of the survey, our response focuses on the process CMS has in place and remedies that are underway or may be necessary to address the issues identified in the Management Audit. Our comments are broken down into several distinctly different issues: those related to the survey as completed by the agencies, the usage of working/functional titles, the official classification aspect and history of the broad-banded titles, the changes needed to the PSA and SPSA classifications, and the role of “managerial” for union-covered positions.

### Agency Survey

As discussed in the draft audit report, the survey tool was self-reported by the agencies. Many individuals completed the surveys which may have resulted in a more subjective analysis rather than a consistent application of definitions. The responses may or may not accurately reflect the scope and level of duties and responsibilities officially assigned to the incumbent’s position as designated on the Position Description (CMS-104), the official legal document of record outlining the responsibilities and authorities to be carried out by an incumbent.

Position Descriptions (CMS-104) serve as the cornerstone of the Classification Plan in assigning jobs to specific titles. CMS relies on the attestation by the Director of a given Department (signature line, bottom, far right, CMS-104) that those functions/authorities outlined in the document are, in fact, those to be carried out by the position’s incumbent. Delineating and separating the work that an incumbent may be performing from that for which is officially assigned to the position is essential, as an agency may not be using the incumbent assigned to a position to carry out the functions and authorities of said position. CMS must rely on the CMS-104 in its decision-making processes to maintain a consistent Classification Plan.

Again, we are uncertain the extent to which the position description was utilized in the review process, if at all. If the agencies completed the surveys based on the duties the incumbent was currently performing or as they perceive the incumbent to be performing rather than those officially assigned to the position of said incumbent, an inaccurate reporting could well result.

**Auditors’ Comment 8: CMS asserts that if agencies based their responses on what the employee was actually doing, rather than what was delineated in the position description, “inaccurate reporting could well result.” To the contrary, the auditors believe that agencies reporting survey results on what employees are actually doing results in accurate reporting.**

Further, with the large number of retirements, layoffs and other severe budgetary constraints placed on agencies, incumbents could be temporarily assigned or otherwise assuming duties not reflected in their official position description.

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CMS has controls in place to ensure job descriptions are kept up-to-date. For example, the annual performance evaluation due each Merit Compensation employee requires a box to be checked indicating that the duties being performed are accurately reflected on the CMS-104. We are presently pursuing the incorporation of the documentation of the same review process in the non-Merit Compensation performance evaluation form. Further, Personnel Rules, Section 301.20 requires that each agency head report to the Director of Central Management Services “any significant changes in the duties of every position within the agency.” As a result, BOP Technical Services requires the position descriptions be updated whenever there is a change in duties, authorities and/or reporting structure. However, there are no penalties or consequences associated with noncompliance; therefore, enforcement is met with varying degrees of success, especially as budgetary constraints force agencies to prioritize the work that must be done. But again, whether the agency was reflecting the officially assigned duties of the incumbent’s position or duties the incumbent may be performing at any given time is unknown. BOP does not perform a random audit of duties being performed by an incumbent versus the duties officially recorded to and attested on the CMS-104. To do so would challenge the honesty and integrity of the Director of the Agency attesting to officially assigned duties and responsibilities. Further, from a fiscal standpoint, we do not have the staffing or resources to complete such task, even if desired or recommended.

### Functional Titles (aka Working Title)

The survey requested functional titles. It is important to note that working titles are not recognized by CMS as official titles, nor are they considered when determining a position’s assigned duties and responsibilities. They may be arbitrarily assigned within the agencies with no consistent application across agencies or even within them.

***Auditors’ Comment 9: Because the audit resolution specifically asked auditors to report on managers’ functions, auditors included “functional title” or function as an element in the survey instrument.***

The recommendation cited some examples of functional titles being inappropriately characterized as non-managers. Absent the source data, it is generally impossible to discern which classification and/or position is being referenced. Even after identifying the position, the methodology the agency used to complete the survey would still be unknown.

The one exception is in the Superintendent classification where an established classification of Site Superintendents is referenced. The agency indicated these incumbents are not managers (as defined in the survey’s instruction) due to the “routine nature” of their responsibilities.

As mentioned, the distinction that these positions are Rutan Exempt is due solely to their spokesperson responsibilities and not their policy-making authority or lack thereof. It is presumed the agency considered the lack of policy-making when indicating the Site Superintendents were not managers, though the agency would need to be consulted.

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Classification Plan and History of the PSA and SPSA Classifications

The Classification Plan addresses the duties and responsibilities associated with 960+ classifications and approximately 39,000 positions. A class specification defines a class encompassing the broad scope of duties and responsibilities of all positions assigned to it. A class specification is divided into 3 parts: Distinguishing Features of Work, the Illustrative Examples of Work and the Requirements section. The Distinguishing Features of Work define the work roles required to be allocated to the class. The Illustrative Examples of Work are simply that, a sample of work roles that may be included in the class. Illustrative Examples are not all-inclusive. Requirements define the minimal knowledge, skills and abilities necessary to successfully achieve the objectives of the position work roles assigned to the class. Examples of class specifications are available at [work.illinois.gov](http://work.illinois.gov).

The Classification Plan is a constantly changing work in progress. A class may be updated at the agency's request, due to technological advances or changes, as a result of collective bargaining, by the changing requirements within a particular field such as licensure and/or other educational/experience requirements, or by CMS' initiation. A Classification Study is a review of existent positions to determine and define groupings of jobs which have similar work roles, authorities and requirements, and the subsequent development of a class specification defining such grouping. The process is quite lengthy, and one study requirement is that agencies ensure all CMS-104s are up-to-date. Positions within a particular class study are then analyzed; draft specifications developed and subsequent discussions held with the user agencies and the union regarding study findings and proposals. When the study is complete, Civil Service Commission approval must be obtained as outlined in the Personnel Code. Subsequently, all potential positions affected by the study must be reviewed and allocated to the appropriate classification. Agencies and employees are then notified, and the Personnel Code and collective bargaining agreement's right to appeal provisions then go into effect. Again, note throughout the class study process and the allocating of individuals, sole reliance is given to the CMS-104. To do otherwise would not result in a consistent application of class study principles, would not necessarily describe the officially assigned duties and responsibilities of the position but rather the duties an incumbent is performing at a given period, the result of which would not provide the maximum legal defense.

Inasmuch as the Management Audit primarily focuses on the Public Service Administrator and Senior Public Service Administrator classifications, our response does as well. A brief background into the establishment of the PSA and SPSA classifications is provided to explain the complexity of the broad-banding process that occurred in the early 1990s. Based on recommendations from the Governor's Human Resources Advisory Council to provide more flexibility in the Classification Plan, the PSA and SPSA classifications were established. The PSA classification broad-banded almost all classifications previously in the MC 8 – MC 11 pay ranges: 219 classifications. The SPSA classification broad-banded almost all classifications previously in the MC 12 and above pay ranges: 221 classifications. As such, based solely on pay grades, a wide variety of professional classifications were merged into these two classes including titles related to general administration, personnel

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and labor relations, fiscal, accounting, auditing, communication and computer services, health and human services, environmental, conservation and agriculture, corrections and law enforcement, and positions requiring specific licensures which may be associated within any of the areas noted above, etc.

Examples of the classifications broad-banded into PSA are: Accountant IV, Administrative Assistant III, Assistant Real Estate Commissioner, Child Welfare Administrator I, II, III, Corrections Industry Superintendent, Corrections Parole Supervisor, Disability Claims Analyst Supervisor, Disability Claims Supervisor I, II, Executive III, Information Systems Executive I, II, III, IV V, Personnel Officer II, III, Rehabilitation Services Supervisor I, II, Sanitarian IV, V and Veterinarian Supervisor I, II.

Examples of the classifications broad-banded into SPSA are: Administrative Assistant IV, Architect V, Assistant Mental Health Program Executive, Chief Hearings Referee, Child Welfare Administrator IV, V, Conservation Police Captain, Corrections Superintendent I, II, III, Developmental Disabilities Council Program Supervisor, Environmental Engineer V, Fiscal Officer I, II, Forensic Science Administrator, II-V, Internal Auditor IV, V, Mental Health Program Executive, Nursing Services Administrator II, Public Information Executive, Rehabilitation Children's Facility Assistant Administrator, Substance Abuse Program Executive I, II, III, Substance Abuse Specialist IV, Superintendent of Boiler Safety, Technical Advisor IV, V, and Veterinary Pathologist.

As you will note above from the wide range of classifications that were broad-banded, the definition of who and what is being managed and the level to which "management" plays a significant role assigned to a given position varies just as greatly. Examples of work role options within the PSA and SPSA classifications were established to delineate the work roles and types of education and/or experience required. An all-encompassing and exhaustive list of the roles associated with broad-banded classifications is virtually impossible given the multitude of positions that were broad-banded. As previously noted, the appropriate consideration is of the Distinguishing Features of Work which are required to be met for a position to be allocated to the class.

While encompassing various occupational-specific titles and a vast number of disciplines, the PSA and SPSA classifications became generally characterized as "middle management" and "senior state management" positions, respectively. As we discussed throughout the preliminary phases of this audit and as is recognized throughout the draft Audit, the "management" component contained in both classifications is general terminology and not designed to be coextensive with the definition utilized by the Illinois Public Labor Relations Act and this Management Audit. Generally, the "management" of established programs and/or policies is not recognized in the Illinois Public Labor Relations Act definition which states "engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices." However, the SPSA class also recognizes those positions which supervise day-to-day operations of a program unit or serve in an assistant capacity to a Director or Deputy Director.

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We do recognize that there are positions within the classes that are not vested with managerial and/or administrative responsibilities and, instead, provide specialized support for administrators/managers to make decisions. As we discuss below, we are currently working on removing such roles from the classes. Based upon the Audit recommendation, we will also study the feasibility of amending the class specifications to remove the management and/or administrative support roles or amending the class specifications to better address the broad and varied legacy classes that the broad-banded classes encompass. Further, we continue to perform the same analysis on the other classifications as needed changes are identified.

### Changes Needed to the PSA and SPSA Classifications

Initially, one of the appealing factors behind the broad-banded classifications was broadening of the pool of candidates from which hiring selections could be made. On April 24, 1997, veterans' preference became absolute via the Illinois Supreme Court's decision in *Denton v. Civil Service Commission of the State of Illinois*, 176 Ill.2d 144 (1997). This decision meant that absolutely no non-veterans could be hired from an open competitive eligible list when veterans (as defined in the Personnel Code and Rules) within the same grade category are eligible. With absolute veterans' preference, the need became evident to return to more occupational-specific titles to narrow the eligible lists to just those applicants possessing a requisite and more refined skill set. An example of the problems created by broad-banding and subsequent passage of absolute veterans' preference: A Fiscal Accountant and an Auditor are two distinctly different professions, requiring entirely different, though seemingly similar, skill sets. Yet, the candidate pools for both would utilize the same PSA, Option 2 eligible list. As a matter of fact, the PSA, Option 2 class encompasses many more fiscal and audit-related legacy classifications. A veteran candidate may receive an "A" grade on the broader, more general class specification requirements of PSA, Option 2 though not possess the desired position requirements of a particular vacancy. Absolute veterans' preference means that the agency may not bypass the veteran candidate in favor of the candidate possessing the requisite skill set. Establishing separate classifications to address the different occupations would yield eligible lists that contained veterans and non-veterans with the desired skill sets.

However, because of the extensive research and resources previously dedicated to establishing the broad-banding classifications, the need to return to more occupational-specific classifications has been slow to gain acceptance. It has only been in the past few years that efforts to split various disciplines and occupational-specific groups back out into their legacy classifications have been undertaken. Due to the increased unionization of these titles and the broad-banded salary ranges, these efforts are lengthy and quite involved, requiring extensive Classification Studies and complex union negotiations. The most notable and successful disbandment to date is that of the PSA, Option 5 (Conservation/Agriculture) classification which was split into 18 occupational-specific titles. CMS continues in this lengthy endeavor and recognizes changes to the Class Specifications for the PSA and SPSA will be necessary to properly characterize the type of work that will remain within these classifications.

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CMS recognizes the PSA and SPSA class specifications specifically exclude positions subject to collective bargaining contracts. The class specifications have not been updated since October 1, 2002, and the increased unionization efforts began in the mid-2000s. These efforts include the petitioning of a large number of PSAs and SPSAs, many of which were ultimately certified into the union by the Illinois Labor Relations Board. When determining the union inclusion of particular positions, the Illinois Labor Relations Board relies significantly on testimony provided by the incumbent(s) and supervisor which can differ greatly from the official position description. (Note: See our more complete discussion of this issue in our response to Recommendation #5.) This has led to some inconsistencies in union inclusions/exclusions for seemingly identical or comparable positions as reflected on the official position descriptions.

A policy decision needs to be made as to whether to proceed with the lengthy process of performing a Class Study to assign a different classification(s) to the current union positions. Discussions remain on-going, and a decision is pending the outcome of the initiative to remove numerous positions from the union pursuant to passage of the Management Bill (SB 1556).

### “Managerial” Role in Union-Covered Positions

As noted in the Audit, the Illinois Public Labor Relations Act definition of “Supervisor” is “an employee whose principal work is substantially different from that of his or her subordinate, and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances or to effectively recommend any of those actions, if the exercise of that authority is not merely routine or clerical nature, but requires the consistent use of independent judgment.”

Including many of these titles in the union has precluded the performance of a few of the key functions listed in the definition of “supervisor” that was used, specifically imposing discipline and hearing grievances. From the survey conclusions, it appears that agencies, and even units within the various agencies, applied the definition of “supervisor” differently, considering whether the incumbent functioned as a line supervisor or a working supervisor without the ability to impose discipline and hear grievances. Still others may have disregarded the discipline and grievance provisions when considering whether an incumbent is a supervisor. Additionally, whether union or non-union, most personnel actions such as to hire, transfer, suspend, layoff, recall, promote, etc., are performed within a centralized personnel entity and not within the role of the supervisor of the position, though they may consult in the process. Again, CMS is uncertain whether the official position description was referenced during completion of this survey.

We agree with the Management Audit’s findings related to the need for a consistent definition of functions that a union supervisor may perform. CMS’ Labor Relations continues to work with the applicable bargaining units regarding the definition for the role of a union-covered

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supervisor, and we are hopeful that there will be some consistent language and application of such in the near future.

Another issue is that, due to budgetary constraints, many vacancies have not been filled. Application of the definition needs to include consideration of the number of current filled incumbents the position had reporting to it at the time as this can significantly impact the “principal work being substantially different.” Additionally, the length of tenure and experience levels of the subordinates as well as complexity of duties can affect the amount of supervision that is required. Again, the information used to complete this survey may not necessarily correspond with the information provided on the official position description with respect to duties or number of subordinates.

**CMS’ Updated Response:** Partially Accepted.

- CMS maintains the Classification Plan under its statutory duty under the Personnel Code. It includes almost 1000 classes, each with Distinguishing Features of Work that include broad definitions of duties typically associated with “managerial” or “supervisory” duties. The audit applied only the Illinois Public Labor Relation Act’s definition of “manager” and “supervisor,” which is often inconsistent with the definitions used in Class Specifications.
- The survey tool used for the audit was self-reported. Actual job description may or may not have been reviewed when agency employees completed it. Moreover, other factors, such as temporary and interim assignments, may have affected the results. In contrast, CMS reviews and approves job descriptions based on the duties listed in the official job description. We rely on the agency Director to attest to the duties listed in that official description and to ensure that updates are made as needed.
- We continue to have controls in place through the performance evaluation process for Merit Compensation employees. This evaluation requires a box to be checked indicating that the duties being performed are accurately reflected on the CMS-104 (Position Description). We have since also added the same process to non-Merit Comp employees.
- Through the Management Act (Public Act 097-1172), the State has removed certain positions, including managerial and supervisory, from the union, allowing for more defined responsibilities with respect to abilities to perform evaluations, discipline and grievances.
- Additionally, in recent negotiations with the AFSCME, a definition of “working supervisor” was agreed upon for managerial and supervisory duties historically performed in the job classification prior to union inclusion. Now, “working supervisors” can complete performance evaluations with the next level supervisor signing off, begin discipline, and conduct a pre-disciplinary meeting with a non-union supervisor present.

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- 4. Central Management Services should conduct research and planning regarding the total manpower needs of all offices as required by the Personnel Code (20 ILCS 415/9 (11)) or should obtain legislative relief from this mandate.**

**Findings:** The Department of Central Management Services (CMS) had not conducted research and planning regarding the total manpower needs of all offices as required by provisions in the Personnel Code. This section of the Personnel Code states it is the duty of the Director of the Department of Central Management Services:

*To conduct research and planning regarding the total manpower needs of all offices, including the Lieutenant Governor, Secretary of State, State Treasurer, State Comptroller, State Superintendent of Education, and Attorney General, and of all departments, agencies, boards, and commissions of the executive branch, except state-supported colleges and universities, and for that purpose to prescribe forms for the reporting of such personnel information as the department may request both for positions covered by this Act and for those exempt in whole or in part.  
(20 ILCS 415/9(11))*

Although CMS does not fulfill requirements related to this manpower planning requirement, it does obtain some related information which is required by other statutory mandates.

CMS also has concern about this mandate because it includes other constitutional offices which are not under the jurisdiction of the Personnel Code. CMS officials said they do not have the resources to perform a manpower study on all agencies, and they lack sufficient knowledge of mandates applicable to constitutional offices and personnel rules and, as such, cannot provide meaningful input into the manpower needs of the offices, nor do they see the importance of the findings from a study. The Department has sought legislative relief from the manpower requirements but proposed changes had not yet been made at the conclusion of audit work.

**CMS' Updated Response:** Accepted. This provision was repealed by Public Act 098-0692.

- 5. The identified State agencies should assure all confidential assistants are not included in a collective bargaining unit or their confidential responsibilities as defined by the Public Labor Relations Act (5 ILCS 315/3) are transferred to non-union employees.**

**Findings:** There were a total of four employees who were identified as confidential assistants who were in a union. Employees who meet the Public Labor Relations Act definition of confidential are to be excluded from collective bargaining. The Public Labor Relations Act notes that confidential employee:

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*. . . means an employee who, in the regular course of his or her duties, assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations or who, in the regular course of his or her duties, has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies. (5 ILCS 315/3)*

The Public Labor Relations Act at 5 ILCS 315/3 (n) notes that confidential employees are excluded from the definition of public employee and as a result would be excluded from being union members. Three agencies, Agriculture, IEMA, and DFPR have four confidential employees who are union members.

**Agriculture's Response:** Please be advised that the Agency concurs with your audit assessment. Any positions that are involved in confidential matters for the Director should be exempt from the bargaining unit.

**IEMA's Response:** IEMA agrees and disputed the inclusion of this position into the union. Unfortunately, the Labor Board did not find in our favor and certified the position. Additionally due to more than 90% of the agency's positions being included in the bargaining unit, as well as our difficult fiscal situation, there is no other position to transfer these confidential duties to that would not also be in the union.

**DFPR's Response:** We concur with your finding related to one employee who was classified as a confidential employee and also in a union. It is our hope that this position will be removed from the union as a result of the management bill.

**CMS' Response:** The Department of Central Management Services accepts the recommendation to "assure all confidential assistants are not included in a collective bargaining unit." It would not be in the incumbent's best interest to transfer the confidential responsibilities to non-union employees as it would require removing the very duties that necessitated the creation of the position, likely resulting in a layoff for the incumbent. Further, such action would do nothing to correct the Illinois Labor Relations Board's approval of extending bargaining unit inclusion to employees responsible for such confidential duties, which CMS disputed.

CMS' Labor Relations, in conjunction with the Governor's Office and members of the Legislature, have worked through the legislative process for the past two years to address the increased unionization in upper management positions, including 4d(1) and 4d(3) positions. As a result, Senate Bill 1556 passed the House of Representatives on May 31, 2012, and the Senate on January 8, 2013. The bill was sent to the Governor on February 6, 2013, and awaits his signature. It is anticipated that Governor Quinn will sign this legislation into law.

The unionization in the State's workforce has increased from 79.27% in 2003 to 95.59% currently, while workforce numbers have drastically declined due to retirements and

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budgetary constraints. These opposing trends have significantly hindered the State's ability to govern and fill key roles with the most qualified individual for the position rather than the most senior according to union contract provisions.

Senate Bill 1556 further provides that the Governor may designate up to 1,900 positions under the jurisdiction of the Governor that have been certified in a bargaining unit on or after December 2, 2008, to be excluded from collective bargaining provisions. In preparation for the expected passage of this legislation, CMS' Labor Relations has begun surveying the agencies to identify the priority order in which the agencies would like these positions excluded. The first priority are the Legislative Liaisons and 4d(1) and 4d(3) positions followed by higher-level personnel, budget, legal and other key managerial, supervisory, and/or programmatic positions as defined in the legislation. It is expected that the 4d(1) positions cited in the Management Audit will be excluded from collective bargaining through this exercise.

Central Management Services has been arguing the problem of increased unionization of managerial, supervisory and other key higher level positions in front of the Illinois Labor Relations Board ("ILRB") for the past several years. The ILRB previously applied a very narrow interpretation of the Public Labor Relations Act exemptions for positions with confidential, supervisory and managerial responsibilities without any consideration of how their interpretation conflicted with the Personnel Code and Rules and the classification system created pursuant to them. Additionally, when considering petitions for union inclusion of particular positions, the ILRB relies significantly on testimony of the incumbents and their supervisors as to the duties that may satisfy the confidential, supervisory or managerial exemptions. Perhaps not surprisingly, this testimony can differ greatly from the duties set forth in the official position description. This approach conflicts with the standard in use by federal courts for considering the legal effect of a position's duties. For example, in *Riley v. Blagojevich*, 425 F.3d 357 (7th Cir. 2005), the Court ruled in the State's favor prior to discovery based on the duties and responsibilities set forth for the positions at issue in their official position descriptions. In addressing the harms that could result from a contrary approach, the Court stated, "Nor would it be sensible to give employees who are assigned policy duties an incentive to try to protect their jobs simply by not performing those duties." *Id.*, at 361. These problematic rulings have caused several of our key management positions, including the 4d(1)s and 4d(3)s, to become covered by collective bargaining agreements. CMS continues to maintain that the threshold for these two exemptions established by the Personnel Code and monitored and enforced by the Civil Service Commission should preclude union inclusion from ever being found appropriate. In recent months, the ILRB and State Appellate Court have issued more favorable decisions regarding exclusion of key positions.

We were encouraged to see support for our position in this Management Audit with respect to the need to prevent 4d(1) positions from further union inclusion and remove the union inclusion provisions for those already included. We are hopeful that this Recommendation will assist in our on-going efforts to address these concerns with the Illinois Labor Relations Board.

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**CMS' Updated Response:** Accepted. The Illinois Labor Relations Board previously applied a narrow interpretation of exemptions from collective bargaining, resulting in key management positions, including the 4d(1)s and 4d(3)s, going into the union. Several court cases reviewing these decisions upheld the ILRB's decisions. The State argued and continues to maintain that the threshold for these two exemptions should preclude union inclusion from ever being found appropriate and have seen more favorable responses from ILRB and the State Appellate Court regarding exclusion of these two exemptions. Through the Management Act, all 4d(1) and 4d3 positions that were included in collective bargaining after December 2008 have been removed from the union. There remain a small number of lower level positions that were included in the union prior to the December 2008 date set forth in the Management Bill.