STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

State of Illinois, Department of Central Management Services (Guardianship & Advocacy Commission),	)	
Petitioner	)	
and	)	Consolidated Case Nos. S-DE-14-150 & S-DE-14-151
American Federation of State, County and Municipal Employees, Council 31,	)	
Labor Organization-Objector	)	
John Burnet, Krista Butler & Susan Creighton,	)	
Employee-Objectors	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Section 6.1 of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012), allows the Governor to designate certain employment positions with the State of Illinois as excluded from collective bargaining rights which might otherwise be available under Section 6 of the Act. This case involves such designations made on the Governor's behalf by the Illinois Department of Central Management Services (CMS) in two petitions filed in Case Nos. S-DE-14-150 and S-DE-14-151. Administrative Law Judge (ALJ) Heather R. Sidwell consolidated these cases for decision, and on February 10, 2014, issued a Recommended Decision and Order (RDO), finding the designations comport with the requirements of Section 6.1. We agree with her assessment.

Both petitions designated for exclusion positions at the Illinois Guardianship and Advocacy Commission. The petition filed in Case No. S-DE-14-150 designated three Public

Service Administrator (PSA) Option 6 positions, one with the working title of Rights Coordinator Administrator, and two with the working title of Guardianship Managing Administrator. The petition filed in Case No. S-DE-14-151 designated one PSA Option 8L position with the working title of Managing Attorney. All four positions were designated for exclusion pursuant to Section 6.1(b)(5) of the Act. Section 6.1(b)(5) allows designations of positions with "significant and independent discretionary authority."[1]

All three employees occupying positions designated in Case No. S-DE-14-150 filed objections pursuant to Section 1300.60 of the Board's rules for implementing Section 6.1 of the Act, 80 Ill. Admin. Code §1300.60, and the American Federation of State, County and Municipal Employees, Council 31 (AFSCME) filed objections to both petitions. The ALJ consolidated the cases and held a hearing on January 29, 2014. Based on the evidence and arguments presented, she determined that the petitions were proper and recommended that the Board find they comport with the requirements of Section 6.1 and that the positions should be excluded from collective bargaining. After a detailed discussion of the nature of the positions, and of the tests for "significant and independent discretionary authority" set out in Section 6.1(c), she concluded that all four positions have significant and independent discretionary authority as defined in Section 6.1(c)(i). She rejected AFSCME's general objections, and declined to rule on whether Section 6.1 was constitutional.

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[1] Section 6.1(c) defines that term:

> For the purposes of this Section, a person has significant and independent discretionary authority as an employee if he or she (i) is engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency or (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act or any orders of the National Labor Relations Board interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

AFSCME filed timely exceptions to the ALJ's RDO pursuant to Section 1300.130 of the Board's rules, 80 Ill. Admin. Code §1300.130. Based on our review of the exceptions, the record, and the RDO, we reject the exceptions and adopt the RDO. We find the designations comport with the requirements of Section 6.1, and direct the Executive Director to issue a certification consistent with that finding.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ John J. Hartnett
John J. Hartnett, Chairman

/s/ Paul S. Besson
Paul S. Besson, Member

/s/ James Q. Brennwald
James Q. Brennwald, Member

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting held by videoconference in Chicago, Illinois, and Springfield Illinois, on February 28, 2014; written decision issued at Springfield, Illinois, March 10, 2014.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

State of Illinois, Department of Central, Management Services (Guardianship and Advocacy Commission),	)	
Employer	)	
and	)	
American Federation of State, County and Municipal Employees, Council 31,	)	Case No. S-DE-14-150
Labor Organization-Objector	)	
and	)	
Jon Burnet, Krista Butler, and Susan Creighton,	)	
Employee-Objectors	)	

State of Illinois, Department of Central, Management Services (Guardianship and Advocacy Commission),	)	
Employer	)	
and	)	Case No. S-DE-14-151
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). Three broad categories of positions may be so designated: (1) positions that were first

certified to be in a bargaining unit by the Illinois Labor Relations Board (Board) on or after December 2, 2008; (2) positions that 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 that have never been certified to have been in a collective bargaining unit. Only 3,580 such positions may be so designated by the Governor, and of those, only 1,900 may be positions that have already been certified to be in a collective bargaining unit.

Moreover, to be properly designated, a position must fall into 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, an Agency General Counsel, Agency Chief of Staff, Agency Executive Director, Agency Deputy Director, Agency Fiscal Officer, Agency Human Resources Director, Senior Public Service Administrator, Public Information Officer, or Chief Information Officer;
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 either:
    (i) is engaged in executive and management functions of a State agency and charged with the effectuation of management policies and practices of a State agency or represents management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or
    (ii) qualifies as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act, 29 U.S.C. 152(11), or any orders of the National Labor Relations Board

interpreting that provision or decisions of courts reviewing decisions of the National Labor Relations Board.

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

On January 9, 2014, the Illinois Department of Central Management Services (CMS), on behalf of the Governor, filed the designation in Case No. S-DE-14-150 pursuant to Section 6.1 of the Act and Section 1300.50 of the Board's Rules. This petition designates three positions at the Guardianship and Advocacy Commission (GAC) for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act. The employees that currently hold these positions (collectively, Employee-Objectors) each filed timely objections to the designation of his or her position: Jon Burnet on January 13, 2014, and Krista Butler and Susan Creighton on January 16, 2014. On January 17, 2014, the American Federation of State, County and Municipal Employees (AFSCME) filed timely objections to the entire designation.

On January 9, 2014, CMS, on behalf of the Governor, filed the designation in Case No. S-DE-14-151 pursuant to Section 6.1 of the Act and Section 1300.50 of the Board's Rules. This petition designates one position at the GAC for exclusion from the self-organization and collective bargaining provision of Section 6 of the Act. On January 17, 2014, AFSCME filed timely objections to this designation.

Based on my review of the designations, the documents submitted therewith, the objections, and the arguments and documentation submitted in support of those objections, I determined that in both designations AFSCME and the Employee-Objectors raised an issue for hearing as to whether employees in the designated positions are authorized to have significant

[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.

and independent discretionary authority. At the request of the parties and based on the fact that these cases involve common witnesses, I determined that consolidating these matters would result in an efficient resolution of the instant designations. A consolidated hearing was held on January 29, 2014. Based on the evidence adduced and the arguments presented at that hearing, I find the designations to have been properly submitted and consistent with the requirements of Section 6.1 of the Act and I recommend that the Executive Director certify the designation of the positions at issue in these matters as set out below and, to the extent necessary, amend any applicable certifications of exclusive representatives to eliminate any existing inclusion of these positions within any collective bargaining unit.

I. ISSUES AND CONTENTIONS

The instant petitions designate four positions at the GAC for exclusion from the self-organization and collective bargaining provisions of Section 6 of the Act. CMS states that these positions qualify for designation under Section 6.1(b)(5) because employees in these positions are authorized to have significant and independent discretionary authority as defined by both 6.1(c)(i) and (ii).[2]

The Objectors deny that employees in the designated positions are authorized to have significant and independent discretionary authority. AFSCME further states that CMS has not carried its burden in demonstrating that the positions at issue are properly designable. Additionally, AFSCME argues that the petitions designate positions that are not managerial under the decisions of the National Labor Relations Board. Finally, AFSCME alleges that the designations violate due process and are arbitrary and capricious and that Section 6.1 is unconstitutional under several provisions of the Illinois and United States Constitutions.

II. FINDINGS OF FACT

The GAC is statutorily divided into three divisions: Legal Advocacy Service, Human Rights Authority, and Office of the State Guardian.[3] The Guardianship and Advocacy Act, 20 ILCS 3955, provides that the GAC shall monitor issues concerning the rights and the care and treatment of eligible persons—persons who have received, are receiving, or have requested

[2] I ultimately conclude that the employees in the designated positions are authorized to have significant and independent discretionary managerial authority as defined in Section 6.1(c)(i). Because this conclusion is sufficient to support the designability of the positions at issue, I will not address the issue of whether employees in these positions are also authorized to have significant and independent discretionary authority as defined in Section 6.1(c)(ii).

[3] 20 ILCS 3955/3 (2012).

mental health services, persons with a developmental disability as defined by federal law, and persons disabled as defined by the Disabled Persons Rehabilitation Act, 20 ILCS 2405.[4] The GAC is statutorily permitted to recommend regulations and policies to State agencies and service providers, and legislation to the General Assembly, for the purpose of safeguarding the rights of these persons.[5]

Jon Burnet

Jon Burnet is employed as a Public Service Administrator (PSA) Option 6 by the Human Rights Authority (HRA) division of the GAC. His working title is Rights Coordinator Administrator. Burnet has three subordinates, each of whom serves as Rights Coordinator for another region.[6] He reports to HRA Director Teresa Parks. Burnet's position is currently represented by AFSCME for the purposes of collective bargaining, as first certified by the Board on December 2, 2008, Case Nos. S-RC-07-078 and S-RC-07-150.

The CMS-104 position description for Burnet's position states that, as Rights Coordinator Administrator, Burnet is authorized to: plan, administer, and evaluate procedures relating to the HRA; identify and provide recommendations for the HRA program; assist the HRA Director in the development of regional policy; train and monitor agency staff in order to implement agency policy; and assist the HRA Director in the handling of confidential and sensitive investigations. Parks testified that these portions of the description accurately describe Burnet's authority as Rights Coordinator Administrator. Burnet nonetheless testified that his position has no duties relating to agency policy.

The HRA investigates complaints alleging the violation of rights of eligible persons. When the HRA receives a complaint regarding a service provider, the Rights Coordinator for the region in which the complained-of activity occurred investigates the complaint. The HRA policy manual provides that Rights Coordinators are primarily responsible for processing these complaints and ensuring that all appropriate complaints are presented for review by the HRA regional authority panel of volunteers at the next scheduled meeting. If a complaint is inappropriate for HRA review, the manual instructs Rights Coordinators to assist by referring the complaint to an appropriate resource.

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[4] 20 ILCS 3955/5(l) and (2012) 20 ILCS 3955/2(g) (2012).
[5] 20 ICLS 3955/6 (2012).
[6] Though the parties presented evidence regarding Burnet's authority to have significant and independent discretionary authority as defined by Section 6.1(c)(ii), I will not make factual findings relating to these issues as they are unnecessary to my analysis and ultimate determination in this matter.

Rights Coordinators are responsible for gathering and disseminating information to ensure a timely investigation of complaints. The policy manual states that this information may include a provider's policy and procedures, case records, and interviews conducted and research completed by the Rights Coordinator. The investigation is complete when all pertinent information has been received and reviewed. The Rights Coordinator then drafts a report detailing the results of the investigation. This report contains a description of the complained-of conduct and relevant authority, such as statutes, regulations, and provider policy and procedure, governing the conduct. Complaints, investigations, and the resulting reports are reviewed by a panel of HRA volunteers for the regional authority at its regularly scheduled meetings. Based on recommendations contained in these reports, the regional authority determines whether to pursue a complaint. HRA Director Teresa Parks testified that the Rights Coordinators facilitate regional authority meetings and ensure that the volunteers on the panel carry out the agency's mandates and programs. Burnet spends 75 to 90% of his work hours in the role of Rights Coordinator for the HRA's Northwest Regional Authority based in Rockford, Illinois.

In his role as Administrator, Burnet edits reports drafted by his subordinates, correcting typos and grammar before they are sent to Parks for approval. These subordinates also call Burnet for guidance on cases approximately once every few weeks. Emails submitted by CMS show Burnet discussing strategy and providing guidance to his subordinates regarding complaints brought to the HRA. These emails also demonstrate that Burnet suggests substantive changes to the reports drafted by his subordinates, though he testified that his subordinates are not required to adopt his suggestions. Burnet also receives the meeting agendas and minutes and new complaint forms from the regions he supervises; he reviews these documents to ensure the Rights Coordinators are properly managing the volunteers. Parks stated that Burnet would contact the Rights Coordinator responsible for a regional authority if this review disclosed an issue. Parks testified that Burnet is responsible for ensuring agency mandates are followed, providing guidance on complex cases, and training new staff. He is evaluated on these criteria in his annual review.

Burnet has been involved in drafting an outline of goals and objectives for the Community HRA designed to engage newly recruited volunteers and "set the first stage of the HRA function in place." The HRA is in the process of adopting this outline, which was drafted by Burnet following conversations with Parks and HRA staff. Parks testified that, though she

has added to the draft throughout the adoption process, she has not changed Burnet's contributions.

Burnet was also involved with P.A. 96-692, legislation that was introduced after Burnet brought gaps in service to eligible persons to Parks's attention. Parks testified that Burnet developed a proposal to address these service gaps, gathered data, met with stakeholders, worked with legislative sponsors to develop the bill, and testified at legislative committee hearings.

Finally, Burnet was part of a work group authorized by H.R. 201 from the 96th General Assembly. This work group met between March and December of 2010 to produce recommendations on reporting mechanisms, gaps in the system for investigating allegations of abuse and neglect of people with disabilities, abuse and neglect registries in Illinois, and funding issues. The work group was chaired by the Office of the Inspector General and the Department of Human Services and included representatives from stakeholder agencie; professional, private, and advocacy organizations; and advocates. Burnet and Mary Milano, GAC Executive Director, participated as representatives of the GAC.

Burnet's position was initially designated in Case No. S-DE-14-129. This petition was filed by CMS on November 18, 2013, and withdrawn as to Burnet's position on December 9, 2013. Burnet testified that, following that initial designation, Milano called him to explain the reasons for his designation. According to Burnet, Milano stated that his position had been chosen from among positions with the same classification and/or working title for designation because Milano hoped to use Burnet's "talents" in Springfield.

Krista Butler

Krista Butler is employed as a PSA Option 6 by the Office of the State Guardian (OSG) division of the GAC. Her working title is Guardianship Managing Administrator. Butler works in the GAC's Northern Illinois West Suburban office. She reports directly to OSG Director Helen Godlewski-Brownfield. Butler has nine subordinates: two Guardianship Regional Administrators, one in the agency's West Suburban office, the other in the Rockford office; six Guardianship Representatives in the West Suburban office; and one clerical employee.[7] Butler's position is currently represented by AFSCME for the purposes of collective bargaining, as first certified by the Board on December 2, 2008, Case Nos. S-RC-07-078 and S-RC-07-150.

[7] Again, though the parties presented evidence regarding Butler's authority to have significant and independent discretionary authority as defined by Section 6.1(c)(ii), I will not make factual findings relating to these issues as they are unnecessary to my analysis and ultimate determination in this matter.

The CMS-104 position description for Butler's positions states that, as Guardianship Managing Administrator, Butler is authorized to: implement, interpret, and evaluate guardianship programs, policies, and procedures; participate in monitoring the activities of provider agencies to ensure that services are in compliance with the law and in the best interest of the clients; and serve as legally authorized designee for the Guardianship State Administrator. Godlewski-Brownfield testified that these portions of the description accurately describe Butler's authority as Guardianship Managing Administrator and that Butler "absolutely" has input in OSG policy. Butler nonetheless testified that her position has no duties relating to agency policy.

When appointed by a court under the Probate Act, 755 ILCS 5, the OSG serves as guardian of the person, estate, or both of a ward.[8] The OSG is the guardian for approximately 5,000 disabled persons with assets of less than $25,000. Guardianship Representatives employed by the OSG visit each ward four times per year and, in conjunction with Guardianship Attorneys and other staff employed by the OSG, are empowered to make medical, financial, and placement decisions for wards.

As Guardianship Managing Administrator, Butler is a Guardianship Manager under the terms of the OSG policy manual. Subject to the direction and approval of the OSG Director, this policy manual provides that Guardianship Managers are authorized to: act for and sign documents on behalf of the OSG with respect to decisions concerning the refusal of medical treatment or the administration of medical treatment against the express objections of a ward; consent to the entry of do-not-resuscitate orders and withholding or withdrawal of life-sustaining medical treatment (in strict compliance with the Health Care Surrogate Act, 755 ILCS 40); consent for experimental, unusual, or hazardous treatment or psychosurgery performed upon a ward; consent for electro-convulsive therapy (in strict compliance with policy); decisions regarding the use of aversive or restrictive procedures for OSG wards, including consents and refusals; consents for sterilization and abortion (as consistent with policy); decisions concerning the placement of OSG wards against the express objection of the ward or where OSG intends to refuse to place the ward as requested or demanded by others outside the OSG; and decisions regarding how to respond to litigation against an OSG ward. Guardianship Representatives and OSG attorneys do not have this authority.

[8] 20 ILCS 3955/30 (2012).

The manual also contains guidelines for each of these decisions. For example, when the manual states that consents for sterilization and abortion must be consistent with agency policy, the manual goes on to state that agency policy only permits consent following a court order. Guardianship Regional Administrators (and, per the manual, other Guardianship Managers such as Guardianship Managing Administrators and Managing Attorneys) are instructed to consider the information compiled by the Guardianship Representative assigned to a case and consult with an OSG attorney before petitioning for such a court order. The OSG must also request the appointment of a Guardian Ad Litem for the proceeding.

Though Butler testified that her authority to direct her subordinates is limited to relaying Godlewski-Brownfield's directives, Butler also stated that she is responsible for both relaying directives and ensuring they are followed. She reports non-compliance with directives to Godlewski-Brownfield. Emails submitted by CMS further demonstrate Butler's policy role with respect to directing her subordinates. In one email, for example, Butler notified her subordinates that she was suspending their regularly scheduled one-on-one meetings with her until further notice. She directed Guardianship Representatives to use that time to close inactive case files. Butler also relayed directives on the circumstances under which wards, family members, and service providers should be encouraged to contact her directly—only when there is a complaint about the Guardianship Representative or when the complainant has an unresolved issue and the Guardianship Representative provides a written explanation of why he or she was unable to resolve the issue.

Butler testified that many Guardianship Representatives work remotely since the introduction of netbooks to the GAC's West Suburban office, only coming to the office to do administrative tasks or for staff meetings. Since the netbooks were introduced, Butler has reported problems with the performance of her Guardianship Representative subordinates to Godlewski-Brownfield. Butler testified that she has received complaints from service providers, clients, and wards' family members. Butler also recommended terminating an employee whose performance was unsatisfactory; she testified that Godlewski-Brownfield instructed her to implement a corrective action plan instead as the agency had a moratorium on discipline. Emails show Butler met regularly with one subordinate on a corrective action plan and informed Godlewski-Brownfield of that employee's continued failure to perform satisfactorily as outlined

in the plan. This consisted largely of the employee's failure to complete duties related to his cases and document that completion in a timely manner per agency policy.

Though the CMS-104 for her position states that Butler is authorized to assign work, Butler testified that cases are assigned geographically. Emails, however, show that Butler began reassigning the geographical regions to which her subordinates were assigned after one Guardianship Representative in the region retired and another went on an extended leave of absence. When this reassignment was raised at labor-management meeting, Butler provided management with an explanation of her case assignment protocol. Therein, Butler explained that the historical practice has been to administratively assign Guardianship Representatives to cover cases until a vacant position is filled or an employee returns from a leave of absence. However, because she felt that these administratively assigned Guardianship Representatives never become invested in their temporarily assigned cases, resulting in an increase in complaints and failure to follow procedures relating to court-required paperwork, Butler opted to "clean up" case loads and approached the Guardianship Representatives she supervises about how best to do so. At the time Butler provided the explanation of her reassignment protocol, it does not appear that she had completed the process of reassigning cases. However, her evaluation for the period preceding the reassignment project provided that Butler would be reviewing caseload assignments over the next reporting period due to staff retirements.

Butler was a member of three work groups designed to review OSG policy and make recommendations. Butler testified that she did not know whether any of the recommendations made by her work groups had been adopted at the time of hearing. Emails demonstrate that Butler also recommended using students from the Adler School of Professional Psychology on OSG projects, though the agency never adopted this suggestion. Butler also provided commentary on draft legislation proposed by a non-agency stakeholder at Godlewski-Brownfield's request. Finally, she advised some OSG employees by email that she and another employee were creating a "drama list," which she explained would be a list of facilities that, though not officially banned by the OSG, were experiencing issues such that no wards should be placed there. She directed that this list was not to be shared outside of the agency and asked that employees share facilities that should be included on that list with their immediate supervisors.

Susan Creighton

Like Butler, Susan Creighton is employed as a PSA Option 6 by the OSG division of the GAC. Her working title is Guardianship Managing Administrator. Creighton works in the GAC's North Suburban office. Like Butler, Creighton reports to Godlewski-Brownfield. Godlewski-Brownfield stated that Butler and Creighton have the same working title and similar duties. Creighton supervises two Guardianship Regional Administrators, one in the agency's Egypt office, the other in the Peoria office; 11 Guardianship Representatives, four of whom are based in the Alton office and seven based in the North Suburban officer; one clerical employee; and various unpaid graduate students.[9] Creighton's position is currently represented by AFSCME for the purposes of collective bargaining, as first certified by the Board on December 2, 2008, Case Nos. S-RC-07-078 and S-RC-07-150.

The CMS-104 position description for Creighton's positions states that, as Guardianship Managing Administrator, Creighton is authorized to: implement, interpret, and evaluate guardianship programs, policies, and procedures; participate in monitoring the activities of provider agencies to ensure that services are in compliance with the law and in the best interest of the clients; and serve as legally authorized designee for the Guardianship State Administrator. Godlewski-Brownfield testified that these portions of the description accurately describe Creighton's authority as Guardianship Managing Administrator and that Creighton "absolutely" has input in OSG policy. Creighton nonetheless testified that her position has no duties relating to agency policy.

Like Butler, as a Guardianship Managing Administrator, Creighton is a Guardianship Manager, with all of the authorities detailed above to act for and sign documents on behalf of the OSG.

Creighton testified that she does instruct her subordinates on their performance pursuant to the directives of Godlewski-Brownfield. For example, emails submitted by CMS demonstrate Creighton announcing a new directive to her subordinates regarding their early arrival on days they are assigned to answer consent calls for the agency. Finally, Creighton recommends hiring priorities for OSG vacancies in response to inquiries from Godlewski-Brownfield.

[9] Though the parties presented evidence regarding Creighton's authority to have significant and independent discretionary authority as defined by Section 6.1(c)(ii), I will not make factual findings relating to these issues as they are unnecessary to my analysis and ultimate determination in this matter.

Finally, Creighton was a member of a work group designed to review OSG policy and make recommendations. As of the date of hearing, none of the recommendations made by Creighton's work group had been adopted.

Laura Sakas

Laura Sakas is employed as a PSA Option 8L by the OSG division of the GAC. Her working title is Managing Attorney. Sakas works in the GAC's West Suburban office. Like Butler and Creighton, Sakas reports directly to Godlewski-Brownfield. Sakas supervises three Guardianship Representatives in the agency's Chicago office and four attorneys, two of whom are based in the Chicago office, one based in the North Suburban Office, and one based in the Rockford office.[10] Sakas's position is currently represented by AFSCME for the purposes of collective bargaining as certified by the Board on August 13, 2010, Case No. S-RC-10-158.

The CMS-104 position description for Sakas's positions states that, as Managing Attorney, Sakas is authorized to: offer guidance to OSG attorneys on matters of strategy and tactics; review requests for acceptance of cases and make recommendations for acceptance or denial; develop and coordinate policy and procedure manuals under supervision of the Director of OSG; ensure that specific plans are made for the payment of claims and the handling of property, and that inventories and accounts are filed within statutory time limits; develop comprehensive procedures for filing ward income tax returns; and ensure that OSG workers give due consideration to tax issues in all phases of estate administration. Godlewski-Brownfield testified that these portions of the description accurately describe Sakas's authority as Managing Attorney. Sakas nonetheless testified that his position has no duties relating to agency policy.

OSG attorneys represent the OSG and Guardianship Representatives in court. These attorneys do all of the legal work for OSG wards. As with Butler and Creighton, as a Managing Attorney, Sakas is a Guardianship Manager, with all of the authorities detailed above to act for and sign documents on behalf of the OSG.

III. DISCUSSION AND ANALYSIS

As stated above, a position is properly designable, among other circumstances, if: (1) it was first certified to be in a collective bargaining unit on or after December 2, 2008; and (2) it authorizes an employee in that position to have significant and independent discretionary

[10] Again, though the parties presented evidence regarding Sakas's authority to have significant and independent discretionary authority as defined by Section 6.1(c)(ii), I will not make factual findings relating to these issues as they are unnecessary to my analysis and ultimate determination in this matter.

authority as an employee. 5 ILCS 315/6.1 (2012). Additionally, it is presumed that any designation made by the Governor under Section 6.1 of the Act is properly made. 5 ILCS 315/6.1(d) (2012). Because it is undisputed that the positions at issue were first certified to be in a collective bargaining unit on or after December 2, 2008, the only remaining issue is whether employees in those positions are authorized to have significant and independent discretionary authority as employees, as that term is defined in Section 6.1(c).

a. Significant and Independent Discretionary Authority of Employees in the Designated Positions

An employee is authorized to have significant and independent discretionary authority if he or she is authorized to: (1) engage in executive and management functions of a State agency and be charged with the effectuation of management policies and practices of a State agency; (2) represent management interests by taking or recommending discretionary actions that effectively control or implement the policy of a State agency; or (3) qualify as a supervisor of a State agency as that term is defined under Section 152 of the National Labor Relations Act (NLRA), 29 U.S.C. 152(11), or any orders of the National Labor Relations Board (NLRB) interpreting that provision or decisions of courts reviewing decisions of the NLRB.

At the outset, I note that several points raised in AFSCME's general objections are inconsistent with the plain language of Section 6.1 and Board precedent regarding the same. AFSCME broadly objects that the positions at issue are not managers within the definition used by the NLRB. However, the Board has specifically rejected AFSCME's contention that it should look first to NLRB precedent in interpreting Section 6.1(c)(i). State of Illinois, Department of Central Management Services (Department of Commerce and Economic Opportunity), 30 PERI ¶ 86 (IL LRB-SP 2013) ("To the extent precedent is relevant to interpretation of Section 6.1(c)(i), we look first to precedent established by Illinois courts, this Board, and where relevant the Illinois Educational Labor Relations Board, then to federal precedent interpreting similarly worded provisions of the NLRA."). The Board has likewise rejected AFSCME's allegation, based on its erroneous application of NLRB precedent, that CMS should have the burden of demonstrating that a designation meets the statutory standards enumerated in Section 6.1. Id. Finally, the Board rejected AFSCME's contention that Section 6.1(c)(i) requires the Board to distinguish between merely professional employees and employees with managerial authority. Id. ("Where a position meets one of the two alternative tests set out in Section 3(c)(i), it may

appropriately be designated by the Governor for exclusion from collective bargaining rights regardless of whether it is also a professional position…").

A position authorizes an employee to have significant and independent discretionary authority, and thus satisfies the statutory test under Section 6.1(b)(5), where an employee in the designated position is authorized to take or recommend discretionary action that effectively controls or implements policy. State of Illinois, Department of Central Management Services (Department of Commerce and Economic Opportunity), Case No. S-DE-14-115 (IL LRB-SP January 7, 2014). Thus, the Board has held that Section 6.1(c)(i) does not require that an employee engage in policy *making*, merely that an employee take or recommend discretionary action that effectively *implements* policy. Id. Moreover, the Board has determined that an employee's testimony that he or she lacks significant and independent discretionary authority is insufficient to rebut the presumption under Section 6.1(d) where that testimony conflicts with both the job description for that employee's position and the testimony of his or her superior. Id. Turning to the positions at issue, I conclude that employees in each position are authorized to represent agency interests by taking or recommending discretionary actions that effectively control or implement GAC policy.

Burnet is authorized to make recommendations on substantive matters in such a way that he both effectively controls and implements agency policy. Testimonial and documentary evidence demonstrated that the Director of the HRA and the Executive Director of the GAC seek out Burnet's advice on policy matters such as pending legislation and the need for legislation to address gaps in service. This is consistent with the CMS-104 position description for Burnet's position, which states that he is authorized to make recommendations for the HRA program and assist the Director in developing HRA policy. In this way, Burnet recommends discretionary actions that effectively control policy. Likewise, in drafting reports that include recommendations on complaints before the HRA, providing guidance to his subordinates on issues such as methods for conducting an investigation and relevant authority, and reviewing activities of the HRA panels in regions assigned to his subordinates, Burnet recommends discretionary action that effectively implements agency policy. These activities are again consistent with the CMS-104 for Burnet's position, which states that he is authorized to assist in the handling of HRA investigations and to monitor staff in order to implement HRA policy.

Likewise, both Butler and Creighton are authorized to make recommendations on substantive matters in such a way that they both effectively control and implement agency policy. Testimonial and documentary evidence demonstrate that the Director of the OSG seeks their input on policy matters such as in the OSG policy working groups. This is consistent with the CMS-104s for these positions, which state that Butler and Creighton are authorized to evaluate OSG policy. The CMS-104s also state that Butler and Creighton are authorized to implement OSG policy, which they do by both relaying directives and ensuring they are followed. Furthermore, Butler and Creighton are authorized to take discretionary actions that effectively implement agency policy by acting on behalf of the OSG with regard to medical and legal decisions affecting OSG wards. This is again consistent with their CMS-104s, which state that they are authorized to serve as the legally authorized designee of the Guardianship State Administrator.

Finally, Sakas is also authorized to take discretionary actions that effectively implement agency policy by acting on behalf of the OSG with regard to medical and legal decisions affecting OSG wards. Moreover, the Board has held that responsibilities that amount to serving as in-house counsel, though not enough to justify exclusion of a position under Section 3(j) of the Act, are sufficient to support a finding that an employee has significant and independent discretionary authority as defined in Section 6.1(c)(i). State of Illinois, Department of Central Management Services (Illinois Gaming Board), Case No. S-DE-14-121 (IL LRB-SP January 13, 2014).

b. Allegations that the Instant Designations are Arbitrary and Capricious and Violate Due Process

AFSCME generally argues that the instant designations violate due process and are arbitrary and capricious because the positions at issue have previously been certified into a bargaining unit by the Board, the positions' job duties and functions have not changed since their certification, and the positions are covered by a collective bargaining agreement which CMS entered into subsequent to the enactment of Section 6.1.

An agency's action is arbitrary and capricious only if the agency contravenes the legislature's intent, fails to consider a crucial aspect of the problem, or offers an explanation which is so implausible that it runs contrary to agency expertise. Deen v. Lustig, 337 Ill. App. 3d 294, 302 (4th Dist. 2003). Furthermore, an agency is bound to follow its own rules. State of

Illinois, Department of Central Management Services (Illinois Commerce Commission) v. Illinois Labor Relations Board, 406 Ill. App. 3d 766, 771 (4th Dist. 2010). As noted above, the plain language of the statute permits the designation of a position based solely on the criteria enumerated in Section 6.1(a) and (b)(5). Furthermore, AFSCME has raised no claim that the Board has failed to follow its own Rules regarding the instant designations. Therefore, it is not arbitrary for the Board to permit designation of the positions at issue because it is adhering to its own rules and the plain language of the statute in doing so.

As to the requirements of due process, adequate notice of a proposed governmental action and a meaningful opportunity to be heard are the fundamental prerequisites of due process. Peacock v. Bd. of Tr. of the Police Pension Fund, 395 Ill. App. 3d 644, 654 (1st Dist. 2009) (citing Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970)). AFSCME has not articulated how it has been deprived of either in these matters.

AFSCME and Burnet each allege that the designation of Burnet's position is arbitrary and capricious because it is based on a motive that does not satisfy the standards for designation enumerated in Section 6.1. The Objectors argue that Milano's explanation to Burnet that his position had been designated for exclusion because she wanted to use his talents in Springfield while other positions in the same classification and/or working title were not designated demonstrate that the designation of Burnet's position is improper. However, the plain language of the statute requires only that a position fit into one of the three categories of Section 6.1(a) and satisfy one of the five criteria enumerated in Section 6.1(b) in order to be properly designable. Where I have concluded that a position does both, neither the statute nor the Board's precedent permit me to determine that a designation is nonetheless improper based on the motives behind the designation.

c. Constitutionality of Section 6.1

Finally, AFSCME alleges that P.A. 97-1172 violates the separation of powers provisions of the Illinois Constitution, the guarantee of equal protection under the Illinois and United States Constitutions, and the impairment of contract prohibitions of both the Illinois and United States Constitutions. However, it is beyond the Board's capacity to rule that the Illinois Public Labor Relations Act, as amended by Public Act 97-1172, either on its face or as applied violates provisions of the United States and Illinois constitutions. Goodman v. Ward, 241 Ill. 2d 398, 411 (2011) ("Administrative agencies … have no authority to declare statutes unconstitutional or

even to question their validity. [citations omitted] When they do so, their actions are a nullity and cannot be upheld.”).

IV. CONCLUSION OF LAW

The Governor’s designations in these cases are properly made.

V. RECOMMENDED ORDER

Unless this Recommended Decision and Order Directing Certification of the Designation is rejected or modified by the Board, the following positions at the Guardianship and Advocacy Commission are excluded from the self-organization and collective bargaining provisions of Section 6 of the Illinois Public Labor Relations Act:

37015-50-70-310-10-08	Rights Coordinator Administrator
37015-50-70-120-00-03	Guardianship Managing Administrator
37015-50-70-110-00-10	Guardianship Managing Administrator
37015-50-70-140-00-02	Managing Attorney

VI. EXCEPTIONS

Pursuant to Section 1300.90 and Section 1300.130 of the Board’s Rules and Regulations, 80 Ill. Admin. Code Part 1300, parties may file exceptions to the Administration Law Judge’s recommended decision and order, and briefs in support of those exceptions, not later than three 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 sent to ILRB.Filing@Illinois.gov. Each party shall serve its exception 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 10th day of February, 2014

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

/s/ Heather R. Sidwell

Heather R. Sidwell
Administrative Law Judge