**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| **MICHAEL L. SHAKMAN and** | ) | |
| **PAUL M. LURIE, *et al.,*** | ) | **Case No. 69 C 2145** |
| **Plaintiffs,** | ) | |
| | ) | **Wayne R. Andersen** |
| **v.** | ) | **United States District Court Judge** |
| | ) | |
| **DEMOCRATIC ORGANIZATION OF** | ) | **Sidney I. Schenkier** |
| **COOK COUNTY, *et al.,*** | ) | **United States Magistrate Judge** |
| **Defendants.** | ) | |

## MARCH 5, 2009 REPORT OF THE MONITOR

The Monitor, Noelle C. Brennan ("Monitor"), by and through her counsel, Beth A. Davis and Sarah M. Brown of the law firm Noelle Brennan & Associates, Ltd., submits this Report of the Monitor pursuant to the Order of the Court entered on August 2, 2005 and pursuant to the *Agreed Settlement Order and Accord* entered on May 31, 2007. This Report is not intended to be a comprehensive account of the Monitor's activities. Rather, it addresses specific obstacles to the City's movement toward substantial compliance with this Court's Orders and the Hire Plan.

Over the past six to nine months, the City's willingness to work collaboratively with the Monitor's office has notably decreased, as have its efforts to comply with the *Agreed Settlement Order and Accord (*the "*Accord*"). Rather than working with the Monitor to further the goal of substantial compliance, the City has adopted a "litigation" approach that places less emphasis on establishing actual compliance and more emphasis on framing its legal arguments in its forthcoming motion for substantial compliance. A recent direction from a Deputy Commissioner of Human Resources illustrates this approach. After a DHR staff member reported a problem to the Monitor and the Office of Compliance (regarding a joint project) the Deputy Commissioner directed the following statement to his staff:

> This is somewhat of a technical issue. It does not necessarily need to be reported to the monitor. While it is good to keep them informed, certain details should be sent out only if necessary. Sometimes it causes more problems that it's worth.
>
> Going forward, I want all communications to the Monitor and Compliance sent to me FIRST. (emphasis in original).

Another email from a Managing Deputy Commission of Human Resources instructed:

> [The] Commissioner wants a tag line that will go **on all memos** responding to matters that are not political in nature. Something like … DHR is committed to balancing the critical need for improved recruiting effectiveness with stringent compliance requirements. We will continue to work with departments to avoid these **technical** errors in the future but submit that they are in no way connected to political and patronage hiring in the City, which DHR is committed to eliminate. (emphasis added)

Thus, the message from DHR is that many violations or problems with hiring are just "technical" and either do not warrant a report to the Monitor or can be explained away as innocuous "technical" violations. Also, DHR is so confident that these "technical" issues are not political, it is willing to insert a standard tag-line on memorandums affirmatively stating that the issues are in no way connected to patronage hiring. As detailed below, DHR's quickness to summarily designate a growing number of hiring problems as "non-political," without any input from the Monitor or the City's own Office of Compliance, and absent any meaningful internal investigation, raises questions as to whether the individuals in DHR who are trusted to recognize and address *Shakman* violations are truly accomplishing that task.

This problem is illustrated by recent events wherein the Commissioner of DHR failed to tell the Monitor that he was contacted by an Alderman about a specific individual's job assignment because the DHR Commissioner thought it fell into a "grey" area. Instead, he gave the request to DHR's Intergovernmental Affairs Liaison *and* the request was honored. Thus, not only was the contact not reported (which is explicitly required by this Court's Orders), but the requested action was taken in apparent violation of the *Accord*.

The City's Department of Law is taking a similar approach. In response to questions posed to Law's Chief Assistant Corporation Counsel about why he failed to report a hiring violation to the Monitor, he explained that he was not sure the hires at issue "directly violated" the City's Hire Plan or other internal policies. This attorney, who is the City's primary attorney responsible for all internal *Shakman* matters (aside from Corporation Counsel), did not know a violation existed despite the fact that 1) there were two Monitor office memos on the same issue; 2) there was a Mayor's Chief of Staff memo prohibiting the practice; 3) the exact violation was extensively discussed in the Monitor's 2007 report; and 4) there is an existing Court injunction which likely prohibits the hires at issue.

The City's approach impedes the Monitor's ability to accurately assess the City's movement towards or away from substantial compliance. In order to have a meaningful opinion regarding the City's compliance with the *Accord*, the Hire Plan and the overall *Shakman* principles the Monitor's office must have unfiltered access to information. Over the past several months, an increasing amount of information provided to the Monitor appears to first go through several levels of review in an effort to downplay any implication of possible wrongdoing.

In addition, based on several recent interviews with senior level and other employees, it is clear that this approach deters some individuals from reporting any information to the Monitor's office. Moreover, when individuals do report information to the Monitor's office, they express serious concerns that such reports will lead to retaliation. In fact, a recent complainant asked to withdraw his complaint against his supervisor (who is well-known to be a senior member of HDO) because of his fear that she would lay him off in retaliation for making a complaint. As explained further below, the City's recent actions have substantially slowed its movement toward substantial compliance with this Court's Orders.

## I. FAILURE TO REPORT VIOLATIONS AND/OR ENGAGE IN MEANINGFUL INVESTIGATIONS

Outside of reports submitted by the Office of Compliance (which regularly reports any violations of which it is aware), the City has failed to proactively report potential violations. Furthermore, when the Monitor's office reports potential violations that it has discovered, the City's response often fails to adequately address the problem or prevent it from recurring in the future. The examples detailed below represent the City's continuing resistance to engage in meaningful self assessment.

### A. Hiring Violations in the Department of Environment

Recently, the Monitor's office discovered that the Department of Environment violated the Hire Plan by directing a City funded 501(c)(3) to hire two pre-selected candidates that DOE had sought, and failed, to hire directly. Specifically, DOE had selected the two candidates for hire in October of 2008, but both of those hires were stopped—one because of improprieties in the selection and the other because of budget constraints. The Law Department's Chief Assistant Corporation Counsel for *Shakman* issues was involved in the decision to stop the improper hire.

After DOE was informed that it could not hire the selected candidates, it directed the candidates to Global Philanthropy Partnership ("GPP"), which formally hired them and then sent them to work for DOE, on DOE's premises, with City of Chicago phone numbers, City of Chicago email addresses, and at the apparent direction of DOE managers. When a laid-off DOE employee complained that these hires violated the Hire Plan, a Managing Deputy Commissioner of DHR and the Chief Assistant Corporation Counsel for *Shakman* issues decided to conduct their own investigation into the matter, rather than reporting it to the Monitor and the Office of Compliance, as required.

During the purported investigation, the Chief Assistant Corporation Counsel and DHR's Deputy Commissioner learned that after DOE had failed to hire those candidates through the regular hiring process, DOE had given the candidates' names to GPP and the candidates had been placed in DOE. When the Chief Assistant Corporation Counsel and DHR's Deputy Commissioner met with the Commissioner of DOE and her staff, the Commissioner of DOE admitted that someone from her department had supplied the names to GPP. Despite having this

information, the Chief Assistant Corporation Counsel later told the Monitor he was not sure if DOE's actions "directly violated" the Hire Plan and thus continued to further "investigate" the matter without reporting the matter to the Monitor's office. Moreover, both he and the DHR Deputy Commissioner reported keeping their respective Commissioners informed on this matter and neither Commissioner reported the matter to the Monitor's office.

First, the Chief Assistant Corporation Counsel's failure to recognize the violation is extremely problematic, in light of the history of this issue. In July and September of 2007, the Monitor reported violations of this ***precise*** nature to the Corporation Counsel, the Mayor's then-Chief of Staff and the then-DHR Commissioner. See July and September 2007 Memos, attached as Exs. A and B. In response, the Chief of Staff sent a memo to all department heads stating:

> First, no City employee may direct an individual to apply for a position with a City contractor, either as an employee or as a subcontractor. **Second and in addition, no City employee may direct a City contractor to hire an individual as an employee or as a subcontractor.**
>
> August 14, 2007 memo to Department Heads re: City Contractors, attached as Ex. C.

Moreover, this issue was addressed extensively in the Monitor's 2007 Report.[1]

Second, if the Chief Assistant Corporation Counsel and DHR's Deputy Commissioner were really conducting an investigation or gathering facts to discern whether a violation had been committed and should be reported, then it would seem they would have asked some direct questions about why DOE did what it did after being forbidden from hiring the two candidates directly. Notably, they did ***not*** ask DOE's Commissioner: 1) the identity of the DOE employee who forwarded the names to GPP; 2) whether there was any relationship between that DOE employee and the candidates; 3) whether the candidates' placement was influenced by political considerations; 4) how GPP was funded (whether City funds were used to pay these individuals); or 5) what DOE's explanation was for sending the candidates to GPP after the candidates had been rejected by the City.

DOE's actions in this regard clearly violate the Hire Plan. This Court's Orders require that the City report these violations to the Monitor's office. Moreover, the Plan requires that the City report these violations to the Office of Compliance, and in some instances, the Inspector General. Notwithstanding these requirements, the City failed to report this matter to the Monitor or the Inspector General and only reported it to the Office of Compliance *after* it conducted its internal investigation. As discussed below, the Hire Plan is specifically designed to prevent this

[1] Notably, when the Monitor's office interviewed the Chief Assistant Corporation Counsel during its investigation, he could not recall having read this section of the Monitor's 2007 Report.

type of "pre-investigation" by Law or DHR before reporting these matters to the Office of Compliance.

### B. Hiring Violations in the Department of Public Health

On February 26, 2009, the day after the Monitor's office interviewed the Chief Assistant Corporation Counsel regarding his failure to report the DOE issue, the Corporation Counsel sent a Memo advising the Monitor's office for the first time that the Department of Public Health had used a contractor to hire an individual outside the Hire Plan. More specifically, the Memo explained that the department had "secured the services of an individual [in September 2008] to perform work under CDPH's direction and control, very much in the same manner it would direct and control the work of a City employee." The Memo further stated that "there is no indication whatsoever that political considerations had anything to do with CDPH's decision to enter into this contract" although it did not address what, if any, investigation into the matter was conducted. The City also stated that although this individual was "for all intents and purposes, working for the City as '[a] common law employee'" the use of the contractor did not **technically** violate any City policies that may address this issue. What was not addressed in the Memo, however, is the fact that an existing injunction entered by this Court on May 13, 2005 specifically prohibits the City from this conduct. After a 2001 ruling that the City had violated the *Shakman* Decree in hiring approximately **2000** individuals outside the *Shakman* notice and compliance provisions, the Court entered a permanent injunction prohibiting the City from either directly or indirectly:

> ***(1)*** Employing persons who meet the definition of ***common law employees*** (i) pursuant to personal service contract or ***similar mechanisms***, or (ii) by or through temporary personnel agencies ***or other organizations*** except in full compliance with the terms of the Consent Decree and the Plan of Compliance as amended from time to time.
>
> May 13, 2005 Order, attached as Ex. D (emphasis added); see also September 27, 2001 Order, attached as Ex. E.

The injunction mandates that employees who are essentially "common law" employees of the City, even when hired by an outside organization, must be hired through the Hire Plan. This injunction was issued after thirteen years of litigation regarding this issue (litigation on which the current Chief Assistant Corporation Counsel for *Shakman* issues worked), beginning in 1992 and eventually resolved with the May 2005 injunction. The fact that the Corporation Counsel's Memo omitted any mention of this injunction is inexplicable, especially in light of the prolonged history of this litigation.

### C. Hiring Violations in the Department of Streets and Sanitation

After the December 31, 2008 reduction in force, the Monitor's office discovered that eleven employees in Streets & Sanitation who were scheduled to "bump" into lower positions still occupied their original job titles and pay grades. In other words, employees who were

supposed to have been demoted into positions with less pay had not been demoted and were being overpaid. On February 2, 2009, the Monitor's office alerted the Department of Human Resources, the Department of Law and the Office of Compliance to the issue. On February 9, 2009, the Commissioner of DHR sent the Monitor's office a Memorandum explaining that the error was in the process of being corrected. In his Memo, the Commissioner stated "[w]hile this appears to be an administrative matter which will require a cooperative effort by all departments to resolve, political influence did not play a role in this matter." When asked to provide details regarding the investigation that led to the conclusion regarding political influence, the Commissioner replied that his office sent the wrong version of the Memorandum to the Monitor's office and the final version did not contain the language regarding political influence. The Commissioner did not explain why the language was included in the "wrong" version.

Subsequently, the Monitor obtained emails suggesting that the Commissioner specifically requested that the political influence language be added to the Memorandum. In addition, DHR's Managing Deputy Commissioner sent an email to DHR's Director of Public Affairs on February 6 stating:

> [The] Commissioner wants a tag line that will go **on all memos** responding to matters that are not political in nature. Something like … DHR is committed to balancing the critical need for improved recruiting effectiveness with stringent compliance requirements. We will continue to work with departments to avoid these **technical** errors in the future but submit that they are in no way connected to political and patronage hiring in the City, which DHR is committed to eliminate. (emphasis added)

Thus, it appears that the Commissioner not only intended for the language to be included in the February 9th memorandum, he also wanted similar language to be included in all memoranda addressing topics that he deemed non-political.

Had the Commissioner or his staff performed a meaningful investigation into the Streets & Sanitation issue, they would have discovered that six out of eleven of the individuals who were being overpaid were on the Clout List. One of the individuals who was supposed to be demoted was specifically identified as having received his job illegally during the Sorich trial. That individual retired on January 31, 2009 without ever being demoted. Although he was never demoted, the fact that he was <u>supposed</u> to have been demoted appears to have allowed Streets and Sanitation to manipulate who was ultimately laid off. Thus, there is some evidence that the actions reported on by DHR may have been "connected to political and patronage hiring in the City."

## II. FAILURE TO REPORT CONTACTS BY ELECTED OFFICIALS

Recently the Monitor's office discovered that DHR and/or Law have failed to notify the Monitor's office of contacts by elected officials and/or departments. The Hire Plan states that:

> *Hiring departments shall not contact the DHR to lobby for or advocate on behalf of actual or potential applicants or bidders for non-Exempt positions.* Hire Plan, II.8.
>
> *All contacts … from any elected or appointed office … attempting to affect any employment action for any position not exempt from the Accord shall be reported to the [Office of Compliance].*
>
> New Plan, II.10 (as modified by 1/18/08 Order).

The Court's January 18, 2008 Order made clear that all contacts by an elected office must be reported when the contact references particular job actions for particular employees:

> *All contacts by Aldermen, the Mayor's Office or other elected officials … regarding the employment of a particular job seeker or employee [must] be reported to [the Office of Compliance and the Monitor].*
>
> 1/18/08 Opinion, attached as Ex. F.

Despite these requirements, the Department of Human Resources and the Department of Law, who are directly involved in employment matters, have failed to report certain instances of contacts by elected officials and other potential violations in contravention of the Court's Orders and the Hire Plan.

### A. Aldermanic Contact Not Reported

On February 26, 2009 the Monitor's office learned that the Commissioner of DHR failed to report a written request from Alderman Zalewski requesting a more favorable job assignment/ location for one of his constituents (a City employee). First, the request was granted. Second, although DHR received that request on or about January 29, 2009, it was not reported to the Monitor's office until the Monitor's office began its investigation into the DOE matter. Rather, the DHR Commissioner forwarded the request to DHR's Intergovernmental Affairs Liaison who forwarded it to the Law Department's Chief Assistant Corporation Counsel for *Shakman* issues. When asked why he did not report the contact, the DHR Commissioner stated that he felt the contact fell into a "grey area" so it was not clear whether he was required to report it under any rule. The Commissioner stated that after he forwarded the contact to DHR's IGA Liaison he did not think about it until the Chief Assistant Corporation Counsel contacted him (after the DOE investigation in late February) and told him that he was going to report the contact to the Monitor's office out of "an abundance of caution." The above provisions of the Hire Plan and

this Court's January 18, 2008 Order make clear that this contact should have been reported. Moreover, the fact that the Alderman's request was granted constitutes an additional violation.

### B. City Clerk's Office Contacts Not Reported

Recently the DHR Commissioner failed to report several contacts between himself and the City Clerk regarding a group of employees that the Clerk's office sought to have promoted through the reclassification process. Those contacts fell squarely within the type of contact that should have been reported to the Office of Compliance and the Monitor.

The Monitor's investigation revealed that the DHR Reclassification Analyst wrote at least four memos to the DHR Commissioner rejecting the City Clerk's request and further recommending that the employees be downgraded to a lower class and title. After drafting her initial recommendation, the Reclassification Analyst explained in a November 17, 2008 memo to the DHR Commissioner that the individuals who the Clerk wished to promote were actually performing duties that were comparable to the duties performed by employees who worked in titles two grades lower. Despite her previous memos, the Reclassifications Analyst was again asked to explore the "pros and cons" of promoting the individuals. This time, she clearly stated,"[e]ssentially there are no pros." She noted in a later memo that adhering to the Clerk's request would raise potential conflicts with the union and that doing nothing (with respect to her recommendation to downgrade the position) is not a "viable option." Specifically, she noted: "No change [to the job class] or withdrawal is not a viable option. Positions do not perform administrative job functions. An issue that was brought to DHR's attention by the Fed. Monitor."[2] Despite the Analyst's unequivocal rejection of the Clerk's request, the DHR Commissioner decided that the Clerk could submit another request and have the new request reviewed by a different Reclassification Analyst.[3] No contacts between DHR and the City Clerk's office were reported to the Monitor or the Office of Compliance.

The above examples demonstrate why the City's Law Department and Department of Human Resources do not have primary responsibility for compliance with the Hire Plan. Without recounting the numerous meetings, discussions, and draft proposals of the compliance portion of the New Plan, and the court filings by the City, the Mayor, the City Council, the Plaintiffs and the Monitor regarding who would be responsible for future compliance with the Hire Plan after the sunset of the *Accord*, this issue was indisputably the most litigated portion of the Hire Plan. The Monitor and the Plaintiffs strenuously objected to the City's Law Department having primary compliance responsibility. In fact, the City never even made such a proposal to the Court. Rather, the Office of Compliance was created as an independent office and is

[2] Months earlier, the Federal Monitor questioned whether the individuals were in the proper title (Administrative Assistant III) after the Monitor's Office discovered that the individuals were not performing any administrative duties.

[3] The second Reclassification Analyst also rejected the Clerk's request.

responsible for "overseeing compliance with the governance system set up by the [Hire] Plan." To bolster the Office of Compliance's effectiveness, the Hire Plan requires that any concerns regarding a *potential* hiring violation identified by DHR be reported to the Office of Compliance. The Hire Plan describes in detail this reporting requirement, referred to as an "escalation" procedure. The Hire Plan specifically provides that "the [Office of Compliance] shall evaluate the circumstances surrounding the escalation." This escalation process was specifically intended to prohibit the types of "investigations" and failures to report described above.

## III. CITY'S INTERFERENCE WITH INDEPENDENT OFFICE OF COMPLIANCE

Not only is the City failing to follow the escalation process, it has demonstrated an ongoing resistance to the Office of Compliance's independence. For example, two of the first Hiring Reports issued by the Office of Compliance concluded that the Department of Law violated the Hire Plan in its selection of two Chief Assistant Corporation Counsels. Both times, the Department of Law refused to accept the Office of Compliance's conclusions. After receiving one of the Hiring Reports, a Deputy Corporation Counsel actually reported the Office of Compliance to the Inspector General and requested that the Inspector General investigate the Office of Compliance's investigation.

In addition to challenging the Office of Compliance's independence, the Department of Law has undercut the Office of Compliance's ability to fulfill its obligations to oversee compliance with the Hire Plan. For example, the Office of Compliance sought to be involved in the recent City lay-off decision-making process to ensure that the lay-offs were conducted in compliance with the Hire Plan and *Shakman* principles. The Department of Law refused to allow the Office of Compliance to participate in that process, citing attorney-client privilege as its justification. As a result, the Office of Compliance was blocked from exercising one of its most basic duties.

## IV. CONCLUSION

Despite the concerns detailed above, the Monitor believes that the City can reverse course and transform its current "litigation" oriented approach into a collaborative approach which encourages transparency and movement towards the goal of substantial compliance with the *Shakman* principles. The City took a very positive step towards that goal when it hired some of the Nation's top compliance professionals to run the Office of Compliance. These professionals are both equipped and committed to working with the City to create and maintain a hiring system that complies with the *Shakman* principles. By merely allowing the Office of Compliance to perform the functions it was created to perform, the City will make substantial movement towards satisfying the requirements of the *Accord*. Additional movement will also be made if the City disciplines individuals who flagrantly violated the *Shakman* Decree in the past.[4] By doing so, the City would send a clear message that political discrimination in all employment

[4] In the upcoming months, the Monitor will issue a detailed report related to disciplinary issues.

actions is not tolerated. These two measures, allowing the Office of Compliance to do its job and disciplining the individuals who are serial violators, are simple actions the City could take that would demonstrate that it is dedicated to achieving true substantial compliance with the *Shakman* principles.

Respectfully submitted this 5th day of March, 2009.

___/s/ Noelle C. Brennan_____
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