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

MICHAEL L. SHAKMAN, *et al.*, Plaintiffs, v. COOK COUNTY RECORDER OF DEEDS, *et al*,, Defendants.	Case No. 69 C 2145 Magistrate Judge Schenkier

EDMUND MICHALOWSKI'S RESPONSE TO PLAINTIFFS' MOTION FOR RULE TO SHOW CAUSE

Now comes Edmund Michalowski, a non-party, through his counsel, Dana L. Kurtz and Heidi Karr Sleper, of Kurtz Law Offices, Ltd., and respectfully responds to Plaintiffs' Motion For Issuance of a Rule to Show Cause Why Certain Senior Staff In The Cook County Recorder of Deeds' Office Should Not Be Held In Civil Contempt and for Related Relief, ("Motion for Rule to Show Cause"). Plaintiffs' Motion should be denied for among the following reasons: (1) Plaintiffs' failed to follow this Court's standing order requiring a meet and confer; (2) the motion is barred by the statute of limitations and laches; (3) Michalowski cannot be held personally liable; and (4) Michalowski did not violate the *Shakman* decree. In support, Michalowski states as follows:

INTRODUCTION

"[I]t is settled that a party asserting a violation of a consent decree has the burden of proving the violation by clear and convincing evidence." *Bartsh v. Northwest Airlines,*

Inc., 831 F.2d 1297, 1303, n. 3 (7th Cir. 1987). In this case, Plaintiffs cannot show a violation of the decree by clear and convincing evidence. Nor can Plaintiffs show that Michalowski was not being "reasonably diligent and energetic" in his efforts to implement and train on the Employment Plan and bring the Recorder's office into substantial compliance. *See* Dkt. 4644 at 2, *citing Stotler & Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989). As set forth below, it is clear that many of Plaintiffs' allegations against Michalowski are not made in good faith, much less proved by clear in convincing evidence. Some border on frivolous. For example, and as discussed in more detail below, Plaintiffs cite the OIIG Report IIG 13-0292 as a reference throughout their motion to suggest that Michalowski violated the *Shakman* decree. However, the OIIG "13" does not refer to Michalowski. The Report actually refers to former Labor Counsel, and not Michalowski. Therefore, Plaintiffs' motion for issuance of a rule to show cause should be denied.

ARGUMENT

I. Plaintiffs Failed to Follow This Court's Order Requiring A Meet and Confer

This Court has instituted a meet and confer requirement prior to the filing of all motions based on Local Rule 37.2. *See* Judge Schenkier's Meeting Requirement on Motions. As mentioned in the text of the meeting requirement, "[a] candid discussion between the parties prior to filing motions . . . can limit the scope of such motions or eliminate the need for them to be filed at all." *Id*. This requirement has been repeated by the Court throughout the case. *See e.g*., Dkt. 4647.

In this case, once Plaintiffs proposed that they were filing a Motion for Rule to Show Cause, seeking contempt against the Recorder as well as naming Michalowski and Giles individually, they created a conflict of interest that required separate counsel for Michalowski and Giles. However, Plaintiffs refused to wait to file their motion until Michalowski and Giles had separate counsel and further took the position that they were under no obligation to meet and confer with Michalowski's or Giles' counsel once appointed. *See* 7/29/16 Emails between Brian Hays and Dana Kurtz, attached hereto as Exhibit 1. Plaintiffs' counsel, Hays, further stated that he was going to file the motion unless Michalowski agreed by 3:00 p.m. on that same day to be held in contempt. *Id*. Plaintiffs filed the motion on July 29, 2016. *See* Dkt. 4644. Michalowski's counsel was not granted leave to file their appearance until August 2, 2016. *See* Dkt. 4647.

As discussed more thoroughly in the Recorder's Response to Plaintiffs' Motion for Rule to Show Cause (Dkt. 4720), and incorporated herein, the court has broad discretion to determine how and when to enforce local rules. *See Waldridge v. American Hoechst Corp*., 24 F.3d 918, 923 (7th Cir. 1994). Denial of Plaintiffs' motion outright is appropriate where, as here, Plaintiffs have refused to meet and confer. *See e.g., Jagla v. LaSalle Bank*, 05 C 6460, 2006 U.S. Dist. LEXIS 73834 at 36 (N.D. Ill. 2006) (motion to Compel denied because it fails to include a Local Rule 37.2 statement of effort to reach an accord). Additionally, emails and letters are not enough to satisfy the "meet and confer" requirement. *See Infowhyse Gmbh v. Fleetwood Grp*., 2016 U.S. Dist LEXIS 99217, *2 (N.D. Ill. 2016).

In this case, not only did Plaintiffs fail to meet and confer, they actually refused to, taking the position that they were only required to confer with Parties, despite the fact that they are seeking monetary sanctions against Michalowski and Giles. Additionally, they created a conflict by seeking contempt against Michalowski and Giles personally, and then refused to wait to file the motion until Michalowski and Giles were represented by counsel. Moreover, Plaintiffs attempted to strong arm Michalowski and Giles by demanding that they agree to be held in contempt and pay a fine, or else face the rule to show cause. These actions by Plaintiffs are grossly counter to the letter and spirit of the meet and confer requirement. Furthermore, Plaintiffs' conduct is not reasonable or appropriate monitoring as contemplated by the SRO.

Therefore, because Plaintiffs failed to comply with the standing order of this court and refused to have a meet and confer, this Court should deny the motion outright as to Michalowski. In the alternative, this Court should exercise its broad discretion to enforce the meet and confer requirement.

II. Plaintiffs' Motion Is Barred By The Statute of Limitations

As discussed in the Recorder's Response, (Dkt. 4720), Plaintiffs' motion should be denied as it is barred by the statute of limitations and laches. Michalowski adopts the Recorder's argument and states further that the allegations against Michalowski are beyond the 180 day statute of limitations; therefore, Plaintiffs' motion should be denied.

The *Shakman* decree is a judicial decree; a violation of that decree is contempt of court. *Smith v. Chicago*, 769 F.2d 408, 411 (7th Cir. 1985). The Seventh Circuit has held

that the 180-day period of limitations established by Title VII of the Civil Rights Act of 1964 applies to contempt proceedings for violations of *Shakman* decree. *Smith,* 769 F.2d at 413. Plaintiffs' filed the instant motion seeking to hold Michalowski in civil contempt for violating the *Shakman* decree on July 29, 2016. As such, any alleged violations must have occurred no earlier than January 31, 2016.

The allegations that Plaintiffs cite as the bases for holding Michalowski in civil contempt all occurred well outside the limitations periods established by *Smith* and the SRO. Plaintiffs allege that Labor Counsel Michalowski violated the *Shakman* decree by "protecting" politically connected employees and retaliating against his executive assistant. Each of these allegations relate to events that took place over 180 days ago. Moreover, Plaintiffs were aware of the alleged facts that they rely on for over 180 days. *See, e.g.*, IIG13-292 issued on February 26, 2014 (884 days before filing of the motion); *see also* IIG14-0408 issued on September 18, 2015 (333 days before the filing of the motion).[1] Plaintiff Shakman has been very involved in this case, including attending the court statuses and working on motions; therefore, Plaintiffs have had knowledge of the facts of each of the incidents set forth in their motion. However, Plaintiffs waited over a year before bringing this motion since the date of the last alleged incident, long passed the 180 day deadline. As such, the instant Motion is untimely as to Labor Counsel Michalowski and must be denied.

[1] As stated above and below, none of the alleged facts in the IIG "13" relate to Michalowski ***at all***. Plaintiffs did not provide the Court with copies of the reports referenced in their motion.

III. Michalowski Cannot Be Held Personally Liable

As discussed more fully in the Recorder's response (Dkt. 4720), and incorporated herein, the Motion for Rule to Show Cause seeks a contempt order against Michalowski in his individual capacity. The allegations that support the Plaintiffs' Motion involve allegations of violations of the Recorder's Consent Decree and SRO by virtue of his position as the Labor Counsel for the Recorder's office. *See* Dkt. 4644 at 3-4. The SRO and Recorder's Consent Decree are injunction orders pursuant to Federal Rule of Civil Procedure 65. *See Id*. at 3; *see also* Recorder's Consent Decree, May 22, 1992. Federal Rule of Civil Procedure 65(d), which allows injunctive relief against successors in office, does not create personal liability and neither does the *Shakman* decree. In *Hernandez v. O'Malley*, the Seventh Circuit stated:

> O'Malley and Orozco are bound by virtue of the offices they hold; Fed.R.Civ.P. 65(d), which makes an injunction effective against successors in office, does not create personal (as opposed to official) liability, and neither does *Shakman v. Democratic Organization of Cook County (Cardilli)*, 533 F.2d 344, 351–52 (7th Cir. 1976), which does not discuss the difference between personal and official capacities. The *Shakman* consent decree waives the limitations on respondeat superior liability that might otherwise obstruct collection from public bodies. *Wzorek v. Chicago*, 906 F.2d 1180 (7th Cir.1990). Plaintiffs who pursue official-capacity litigation need not surmount a defense of immunity, because the organization is the real party in interest. *Leatherman v. Tarrant County*, 507 U.S. 163, 166, 113 S.Ct. 1160, 1162, 122 L.Ed.2d 517 (1993). ***We cannot fathom why a person suing to enforce the Shakman decree might want to pursue the officeholders in their personal capacities, except for purposes of harassment, which is hardly a reason the court should approve***.

98 F.3d 293, 294–95 (7th Cir. 1996) (emphasis added). Exactly as the Seventh Circuit

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Michalowski's counsel can provide these documents to the Court *in camera.*

pointed out, there is no reason why Plaintiffs are pursuing contempt against Michalowski individually other than to harass him.[2] Michalowski has only been employed at the Recorder's office since 2014 and he has been recognized by the RCA as being cooperative and helpful assisting the Recorder's office in attempting to reach substantial compliance. (Dkt. 3759 at 4.) Michalowski is committed to this purpose in his new position as Labor Counsel. Plaintiffs' motion against Michalowski ignores all of the cooperation and work that Michalowski and the Recorder's office were engaging in with the monitors, especially in the area of addressing the issue of the Director of Human Resources,[3] and unreasonably places blame squarely on Michalowski. It should be noted that the prior Director of Human Resources was employed by the Recorder's office long-before Michalowski was hired, and Michalowski was not even aware of his political affiliation. Additionally, Plaintiffs make completely frivolous arguments seeking to hold Michalowski liable for the actions of the prior Labor Counsel. For instance, Plaintiffs state:

> Mr. Michalowski has also acted to protect other politically-connected employees. Mr. Michalowski conducted a similar sham hearing for Proviso Township Trustee Don Sloan in connection with his hire as the Director of Human Resources' executive assistant. Mr. Michalowski accepted Mr. Sloan's testimony as true without providing the OIIG an opportunity to present the evidence rebutting the Trustee's testimony.

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[2] This is consistent with Plaintiffs' counsel's blatant refusal to have a meaningful meet and confer with Michalowski's counsel.

[3] The hearing regarding the former Director of Human Resources occurred less than 1 month after Michalowski was hired.

Dkt. 4644 at 7 (citing IIG Report IIG13-0292). However, a review of this IIG Report makes clear that the incidents being discussed occurred in 2013 ***prior*** to Michalowski's ever being hired at the Recorders office. Plaintiffs' attempts to connect Michalowski to these allegations are simply not made in good faith and are frivolous. Therefore, there is absolutely no basis for holding Michalowski personally liable.

Plaintiffs' motion, by targeting and harassing Michalowski, will further hinder cooperation and efforts by Michalowski to work towards compliance. As the Recorder argues in her Response, granting Plaintiffs' motion would not be in the best interest of the Parties and would create further conflict into a process that is supposed to be cooperative. (Dkt. 4720.) Therefore, Plaintiffs' motion against Michalowski in his individual capacity should be denied.

IV. Michalowski Did Not Violate The *Shakman Decree*

Despite Plaintiffs' attempts to suggest that there were findings by the RCA that Michalowski violated the *Shakman* decree, in the 10th Report, where the incidents alleged by Plaintiffs are discussed, the RCA concluded that the Recorder and her staff had made "necessary and welcome developments," and she "appreciates the positive exchanges with the Recorder's representatives. . . ." Dkt. 3759 at 20. There was no finding that Michalowski violated the *Shakman* decree and there is no discussion in the report that Michalowski made his disciplinary hearing recommendations based on political influence. Regarding Mr. Babatunde, as the RCA admitted in the 10th Report, Michalowski held an internal disciplinary hearing regarding the allegations that

Babatunde made false statements to the OIIG. It is the OIIG and RCA's providence to determine whether Babatunde violated the *Shakman* decree – not Michalowski's as the internal Labor counsel. While Plaintiffs admit that Michalowski recommended suspension, they fail to advise this Court that Michalowski in fact recommended a 29-day suspension. It is incongruous to suggest or even conclude that Michalowski would have coached Babatunde on answers to questions, and then turn around and recommend a 29-day suspension.[4] Moreover, there is no mention in the report of any improprieties occurring during the hearing, even though the RCA mentions that she monitored the interviews. *See* Dkt. 3759 at 11. The allegations are completely unsupported and false. The fact that the OIIG made different disciplinary recommendations does not mean that Michalowski's recommendations were based on political influence or that he failed to cooperate with the OIIG.

Similarly, Plaintiffs argue that "Mr. Babatunde was allowed to retire without facing discipline." Dkt. 4644 at 7. Plaintiffs ignore the Recorder's own policy manual, which requires that "at any time prior to the announcement of findings and decision the hearing officer may accept the Employee's resignation in lieu of Suspension or Termination; however, at no time shall any Employee be pressured to resign in lieu of facing potential Suspension, Termination or other Disciplinary Action." Policy Manual

[4] Being not even a month into the position Michalowski had no knowledge of the office's prior disciplinary history or practice when he made his recommendation, and he certainly did not know anyone's political affiliation.

at 55, excerpts attached hereto as Exhibit 2. Babatunde filed his retirement and resignation prior to the termination of the hearing; therefore, the Recorder's Office (and Michalowski implicitly) acted appropriately according to the policy manual. Furthermore, the Court itself acknowledged that Babatunde was retiring and granted and exempt position overlap his final weeks in the position so the Recorder's office could have a smooth transition in the Human Resources Department. These facts not only highlight that Plaintiffs' allegations have no merit, but more importantly that a true meet and confer would have avoided this flurry of filings with the Court. Instead, a true meet and confer could have focused efforts on true reform from the past (a past that existed long before Michalowski was hired), rather than hurling allegations based on miscommunication, misinformation, or false allegations.

Plaintiffs allege in conclusory fashion that when Michalowski was hired in 2014, Mr. Babatunde was a "politically-connected employee, with ties to Illinois House Majority Leader Michael Madigan," and that Michalowski was "instrumental in protecting politically-connected employees on many occasions." (Dkt. 4644 at 5.) However, this information has little relevance to an allegation of misconduct by Michalowski. First, Michalowski was hired in 2014 – long *after* Babatunde. He had no role in Babatunde's hiring. Second, Plaintiffs do not and cannot allege that when Michalowski was hired in 2014, he knew that Babatunde was "politically connected." Moreover, Plaintiffs' suggestion that Babatunde had clout because of his "ties" to Madigan is insufficient according to the Seventh Circuit case law to establish an employment decision was

made based on political patronage. *See Brown v. County of Cook*, 661 F.3d 333, 337 (7th Cir. 2011). Third, there is no violation of the *Shakman* decree by virtue of Babatunde being politically connected. Plaintiffs' argument is little more than *res ipsa loquitur*. The *Shakman* decree prohibits the use of political considerations in making employment decisions; it does not prohibit employees with political connections from gaining or maintaining employment, so long as those political connections were not the basis for employment decisions.

Additionally, Plaintiffs' argument that Michalowski violated the *Shakman* decree by issuing discipline to his Executive Assistant is also incorrect and unsupported. (Dkt. 4644 at 8.) The Personnel Policy and Procedure Manual requires the Department Head to issue an Incident Report upon the occurrence of an infraction. *See* Policy and Procedure Manual at 52-53, Exhibit 2. The Incident Report is prior to and separate from any discipline that may or may not be later imposed. Thus, Michalowski did not retaliate against his Executive Assistant and did not issue her discipline contrary to the request of the OIIG. Also important, which Plaintiffs do not even mention in their motion, despite having the Recorder's response dated February 16, 2016, the Executive Assistant did not make a complaint of political discrimination under the SRO, but rather the focus was that she was annoyed by people coming to her about FMLA documents. The Executive Assistant admitted that upon reviewing her job description she realized that FMLA duties were in her job description. The Recorder found that there was no retaliation under the *Shakman* decree. Even still, Michalowski and the

Recorder addressed the concerns of the DOC and implemented good faith procedures to remedy their complaints. 2/16/16 Recorder's Report, Re: DOC Incident Report #15-009. [5]

Thus, Plaintiffs have not shown by clear and convincing evidence that Michalowski violated the *Shakman* decree and have not shown that Michalowski was not being "reasonably diligent and energetic" in his efforts to bring the Recorder's office into substantial compliance. *See* Dkt. 4644 at 2, *citing Stotler & Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989). In fact, the opposite it true based on statements by the RCA, the Recorder and her staff, which includes Michalowski, had made "necessary and welcome developments," and she "appreciates the positive exchanges with the Recorder's representatives. . . ." Dkt. 3759 at 20.[6] Therefore, Plaintiffs' motion for issuance of a rule to show cause should be denied.

WHEREFORE, for the above stated reasons, Edmund Michalowski, Labor Counsel for the Recorder of Deeds Office, requests that this Court deny Plaintiffs' motion, and for other such relief as is just and equitable.

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[5] Michalowski's counsel can also provide a copy of this Report to the Court in camera to the extent necessary.

[6] The undersigned also understands that the RCA's counsel made representations to this Court complimenting Michalowski in or about 2014. In the event Plaintiffs' motion is not denied, the undersigned will endeavor to locate the actual date of the status hearing before this Court and order the transcript if necessary.

Respectfully submitted,

EDMUND MICHALOWSKI

/s/Dana L. Kurtz

Electronically filed on September 13, 2016

Dana L. Kurtz (ARDC #6256245)
Heidi Karr Sleper (ARDC # 6287421)
KURTZ LAW OFFICES, LTD.
32 Blaine Street
Hinsdale, Illinois 60521
Phone: 630-323-9444
Facsimile: 630-604-9444
E-mail: dkurtz@kurtzlaw.us
E-mail: hsleper@kurtzlaw.us