

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

MICHAEL L. SHAKMAN, et al.,)	
)	
Plaintiffs,)	
)	Case Number: 69 C 2145
v.)	
)	Magistrate Judge Schenkier
COOK COUNTY RECORDER OF)	
DEEDS, et al.,)	
)	
Defendants.)	

**STATEMENT BY THE *SHAKMAN* COMPLIANCE ADMINISTRATOR
FOR THE COOK COUNTY RECORDER OF DEEDS CONCERNING THE
RECORDER’S MOTION TO AMEND THE EXEMPT LIST**

Cardelle B. Spangler, *Shakman* Compliance Administrator for the Cook County Recorder of Deeds (“RCA”)¹, submits this Statement concerning the pending Motion to Amend the Exempt List (the “Motion”) filed by the Cook County Recorder of Deeds (the “Recorder”)² on December 16, 2015 (Dkt. 4426).

I. Introduction

The Recorder seeks permission from this Court to add to the current list of positions exempt from the general prohibition on conditioning government employment on political party affiliation (the “Exempt List”).³ Specifically, she asks the Court in her Motion to approve two newly-created positions – Chief of Human Resources and Special Assistant to the Recorder – Community Affairs – as exempt. Plaintiffs do not object to the addition of the Chief of Human Resources position to the Exempt List, but do object

¹ “RCA” hereinafter shall refer to the Recorder Compliance Administrator and/or her staff.
² The “Cook County Recorder of Deeds”, the “Recorder”, “ROD”, and/or “Recorder’s Office” hereinafter shall refer to the Recorder, Karen Yarbrough, and/or her staff.
³ The Recorder’s Exempt List is attached to the Recorder’s Employment Plan (the “Plan”) as Exhibit A (Dkt. 3739). The seven Positions on the Exempt List are: Chief Deputy Recorder, Deputy Recorder – Finance, Deputy Recorder – Operations, Special Assistant to the Recorder – Government Affairs, Deputy Recorder – Communications, Labor Counsel, and Chief Legal Counsel.

to the addition of the Special Assistant to the Recorder – Community Affairs position. *See* Pl.’s Resp. at 3-6 (Dkt. 4444).

Under the Plan, if Plaintiffs do not approve of a proposed new Exempt Position, “the Position will not be placed on the Exempt List and the matter shall be referred to the RCA, while acting, for a recommendation and then to the court having jurisdiction in the Shakman Case for final resolution.”⁴ Plan § XI.C.2 (Dkt. 3512).

At the January 6, 2016 Status Hearing, this Court asked me to provide a statement addressing the two proposed Exempt Positions as they relate to the current, Non-Exempt, Director of Human Resources Position. In order to put the matter in proper context, I include below a history of relevant events leading up to the Recorder’s Motion and the general legal framework concerning exempt status. I conclude with my observations and recommendations with respect to these two proposed Exempt Positions and their relation to the Director of Human Resources Position.

II. Background

The ROD’s need to professionalize its Human Resources Division (“HRD”) if it is to exit this *Shakman* litigation has been well-documented. In my prior reports to the Court, I repeatedly have noted substantial problems with the performance and ability of the Director of HRD, the highest-ranking employee in that Division and currently the fifth-highest paid employee in the ROD. *See e.g.*, RCA’s Ninth Report to the Court at 11-24 (Dkt. 3616). The Recorder has acknowledged that the Director “is not an HR guy”, notwithstanding the fact that he has been in this role for nearly fifteen years, that he

⁴ The RCA notes the Recorder argued that Plaintiffs waived their right to object to the Recorder’s Motion by not doing so within the timeframe allowed in the Plan. Plaintiffs argued in their Response that the Recorder did not strictly follow the notice provisions in the Plan and therefore the time period within which the Plaintiffs had to object was never triggered. (Dkt. 4444 at 3-4.) I have not been asked to make recommendations on those issues and they therefore will not be addressed in this Statement.

“has been prone to mistakes that have affected the office’s ability to enact efficient and consistent policies and practices, thus hindering the progress in substantial compliance”, and that there is a need for a professional HRD. (Recorder’s Report in Response to Office of the Independent Inspector General (“OIIG”) Summary Report No. IIG14-0408 at 3 (issued on Nov. 18, 2015)). The Court itself even has stressed the importance of “a strong, supported, full functioning human resources department” to reaching Substantial Compliance. *See, e.g.*, Dec. 19, 2014 Hr’g Tr. at 28:21-29:4 (Dkt. 4056). I do not believe any disagreement exists on this point. Where disagreement has existed between me and the ROD is on how to achieve such a functioning HRD while remaining in compliance with the Court’s orders (i.e. the 1992 Consent Decree, 2010 Supplemental Relief Order (“SRO”) and the 2013 Employment Plan).

A. The Recorder’s Proposal to Add an Exempt Chief of HRD Position

In December 2014, the ROD proposed a solution to the problems plaguing its HRD: reorganize the Division by adding to it a new Exempt Chief. Under this proposal, the Recorder would hire a Chief who then, among other things, would assess the Director’s abilities as well as the need to retain the Director position. The ROD’s proposed job description for the Chief, however, was nearly identical to the job description for the Director. This created very real problems, not the least of which was that the Chief would be performing all high-level duties and nearly half of all duties of the Director position, leaving the Director with virtually no work to do. The ROD disagreed with my assessment, but attempted to alleviate this concern by proposing revisions to the Director’s job description. The duties contained in those revisions, in my estimation, however, left the Director with barely enough work for a part-time job.

After many months of discussions, the ROD asked me to put my concerns in writing, which I did in a letter to the ROD dated August 20, 2015. *See* Exhibit A. In that letter, I identified the above issues as well as a third, fundamental, one: that I believed the ROD was proposing this reorganization in order to insulate the Director from his own inability to perform the duties assigned to him, which was in stark contrast to the way the ROD has treated other non-exempt employees who have been disciplined, suspended and terminated for similar performance and other deficiencies also exhibited by the Director. *Id.* The following day, August 21, 2015, the Recorder filed a motion to amend the Exempt List to add the Chief of HRD (Dkt. 4293), which the Court entered and continued and later deemed moot (Dkt. 4463) due to the instant Motion.

B. The OIIG's Investigation Regarding Favored Treatment of the Director of HRD

It is important to note that at the same time I was engaged with the ROD on the Recorder's proposals concerning a Chief of HRD, the OIIG was completing an investigation into whether impermissible Political Reasons or Factors were influencing the Recorder's decisions to (1) continue to employ her Director of HRD despite his "repeated performance deficits and [his] willful provision of false information to the OIIG during an investigation under the Recorder's SRO", and (2) refrain from disciplining [the] Director [of HRD] in a manner consistent with the disciplinary action imposed upon other non-exempt employees within the office." In a report issued on September 18, 2015, the OIIG concluded, in pertinent part, that:

[t]he preponderance of the evidence developed during the course of this investigation strongly supports the conclusion that impermissible political factors, namely the strong political affiliation between [the] Director [of HRD] and Speaker Madigan's organizations, have and continue to affect employment actions regarding a non-exempt employee. The 1992 Consent

Judgment in the *Shakman* litigation expressly prohibits the Recorder of Deeds from considering political factors in making employment decisions regarding non-exempt positions. The evidence developed by the investigation establishes that the conduct of the Recorder and her staff has served to repeatedly insulate [the] Director [of HRD] from the consequences of (a) performance so poor it rises to the level of obstructing substantial compliance and (b) repeated acts of providing false statements to the OIIG during investigations conducted under the SRO. The tangible consequences of this employment scheme are to deprive the people of Cook County of faith in their government along with the significant monetary costs triggered by these circumstances.

These findings provided additional support for my conclusion that the design of the HRD reorganization was to insulate the Director of HRD from shortcomings that would result in severe discipline and/or termination for similarly situated non-exempt employees. The Recorder issued her response to the OIIG's Report on November 18, 2015, acknowledging some of the Director's professional shortcomings, stating that she would "continue to work with the RCA, the OIIG and the Plaintiffs' Counsel in an effort to implement its HR Restructuring Plan" and that the Office was willing to train relevant employees on the importance of and how to administer discipline consistently.

C. The Recorder's Proposal to Add an Exempt Special Assistant to the Recorder – Community Affairs Position

On September 1, 2015, the parties appeared before the Court on the Recorder's original Motion to Amend the Exempt List to add the Chief of HRD. The Court heard brief argument from both sides, after which it commented that, "it doesn't make sense to have an exempt and a non-exempt position doing the same thing". Sept. 1, 2015 Hr'g Tr. at 9:14-15 (attached as Exhibit B). The Court also noted that the Recorder, "at some point, someday, somehow", in order to move forward, would have to address the issue of "who is in the non-exempt position and what that person does or doesn't do and who that person's connections are or are not." *Id.* at 9:18-25.

Approximately two weeks later, the Recorder circulated a draft Job Description for another proposed new Exempt Position – the Special Assistant to the Recorder – Community Affairs (the “Community Affairs Position”). At a meeting with my Office and Plaintiffs’ Counsel the next day, an ROD representative stated that the Recorder’s intention was to move the Director of HRD into the new Community Affairs Position, thus resolving any concerns with an overlap in the duties of a Chief and Director of HRD.

The parties and RCA engaged in a substantive dialogue about the Community Affairs Position including the exchange of proposed amendments to the underlying Job Description and an inquiry by Plaintiffs into the Director’s qualifications for the Community Affairs Position. The ROD subsequently sent the Job Description to its internal Director of Compliance who approved it on December 1, 2015.

D. The Pending Motion

On December 16, 2015, the Recorder filed the instant Motion asking the Court to approve the addition of both the Chief of HRD and Community Affairs Positions to the Exempt List. (Dkt. 4426.) The Recorder represented that neither I nor the Plaintiffs had any objections to the proposed amendment.⁵ *Id.* at 2. Plaintiffs filed a Response to the Motion on January 5, 2016 objecting to the addition of the Community Affairs Position to the Exempt List. (Dkt. 4444.) At the January 6, 2016 status hearing, the Court asked me to provide a Statement and recommendation on the interplay between the “trifecta” of Positions: Chief of HRD, Director of HRD, and the Special Assistant to the Recorder – Community Affairs. *See* Jan. 6, 2016 Hr’g Tr. at 28:13-19 (Dkt. 4454). I submit this Statement on the issue requested.

⁵ On December 18, 2015, I filed a Response to the Recorder’s Motion clarifying that I had never told the Recorder I had no objections to her proposed amendment to the Exempt List (Dkt. 4432).

III. Legal Framework

The broad legal framework governing the appropriate use of political affiliation in government employment decisions is fairly well-settled. In *Elrod v. Burns*, the Supreme Court held that patronage dismissals severely encroach fundamental constitutional freedoms of political belief and association in violation of the First and Fourteenth Amendments. *Elrod v. Burns*, 427 U.S. 347, 371-73 (1976). A governmental entity wishing to base such an employment decision on political loyalty, therefore, bears the burden of demonstrating “an overriding interest in order to validate an encroachment on protected interests.” *Id.* at 368. The *Elrod* Court held that limiting patronage dismissals to “policymaking positions” was sufficient to balance the need of the governmental entity to ensure the effective implementation of a new administration against public employees’ constitutional rights. *Id.*

A few years later, the Supreme Court in *Branti v. Finkel* replaced the “policymaking” moniker with a more functional inquiry holding that the question for courts to consider is “not whether the label ‘policymaker’ or ‘confidential’ fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.” *Branti v. Finkel*. 445 U.S. 507, 518 (1980). The *Branti* Court cautioned, however, that, “party affiliation is not necessarily relevant to every policymaking or confidential position.” *Id.*

Since *Elrod* and *Branti*, many courts have faced the question of whether a public employee’s specific position was protected from politics.⁶ The Seventh Circuit has held

⁶ See, e.g., *Tomczak v. City of Chicago*, 765 F.2d 633, 641-43 (7th Cir. 1985) (finding that the First Deputy Commissioner of the City of Chicago’s Department of Water was not protected from political firing due, in

that, “the test is whether the position held by the individual authorizes, either directly or indirectly, meaningful input into governmental decision making on issues where there is room for principled disagreement on goals or their implementation.” *Painter v. Nekolny*, 653 F.2d 1164, 1170 (7th Cir. 1981); *see also Fuerst v. Clarke*, 454 F.3d 770; 2006 U.S. App. LEXIS 18792, at *5 (7th Cir. July 27, 2006) (finding that “it is only when objectives are poorly specified that political rather than technical or professional judgments properly shape the choice of means for achieving them”). This determination “in many cases presents a difficult factual question”, *Painter* at 1169 (citing *Rosenthal v. Rizzo*, 555 F.2d 390 (3rd Cir. 1977)), and may need to go beyond a review of the position’s job description. *See Riley v. Blagojevich*, 425 F.3d 357, 365 (7th Cir. 2005) (stating that not “every *Elrod/Branti* case can be resolved just by reading the job description. The description might leave the reader unclear whether the job confers any policymaking or confidential discretion, and then additional evidence would be necessary.”) And even though a job description may initially appear to satisfy the *Branti* standards; “[t]he use of buzz words such as ‘formulates policies,’ ‘broad latitude,’ and ‘substantial independent judgment’ in a position description, do not transform professional or technical judgment into political judgment.” *Moss v. Martin*, 473 F.3d 694, 699 (7th Cir. 2007).

If there are reasons to doubt the job description’s reliability, a deeper analysis is required. *See Riley* at 361 (holding that a job description’s reliability is determined by “how the description was created [and] how it was updated and thus kept realistic”). The

part, to him having substantial input into ultimate policy decisions of the Water Commission and he had meaningful input into matters on which there could be principled disagreement which would impact the administration’s goals); *see also Barnes v. Bosley*, 745 F.2d 501, 508 (8th Cir. 1984) (where Deputy Circuit Clerks for the St. Louis Clerk of the Court were found to be protected from political firing because “their duties were, for the most part, ministerial” and their “discretionary decisions were, for the most part, referred to the circuit clerk”).

inquiry must then focus on whether the job description “has been manipulated by officials seeking to expand their power to appoint loyalists beyond the lawful bounds” and if the job description has been “altered by the elected officials not to reflect actual changes in the duties of a position but rather to enable them to fill jobs that do not involve such duties with their political favorites.” *Id.* at 365; *see also Vajner v. City of Lake Station, Indiana*, No. 09-245, 2011 WL 1671637 at *4 (N.D. Ill. May 3, 2011) (finding that “[i]n such circumstances, courts in this circuit often look to when the job description was promulgated, when and how it was last updated, and whether the written duties have been finessed, engineered, or deviated from so as to provide officials with expanded political powers.”)

With this framework in mind, I turn to the issue the Court has asked me to address.

IV. Observations and Recommendations

A. Can the Chief and Director of HRD Positions Co-Exist?

Plaintiffs have not objected to the inclusion of the Chief of HRD Position on the Exempt List, thus, the traditional *Elrod/Branti*-based inquiry likely is not necessary here. What is necessary, however, is an examination of whether permitting the Recorder to fill the Chief Position while also retaining the Director is consistent with this Court’s prior orders prohibiting the impermissible use of Political Reasons or Factors in employment at the ROD. I do not believe it is.

As set forth in the 1992 Consent Decree entered in this case, “[t]he purpose of this judgment is to eliminate the conditioning, basing or affecting of employment with the Cook County Recorder of Deeds on or because of political reasons or factors.” Consent

Decree at 1. The OIIG recently found that the Recorder is basing the continued employment of the Director, a non-exempt employee, on prohibited Political Reasons or Factors (namely, his connection to the Madigan political organization) in violation of that Decree and the SRO. The Director is protected from discipline and termination despite engaging in offenses, such as providing materially false information to the OIIG during an investigation pursuant to this Court's order, that have resulted in the termination of similarly-situated non-exempt employees. My own observations have shown that the Director currently is not required to fulfill many of the job duties required of his position such as conducting Plan training, preparing job descriptions, performing desk audits, drafting employment policies, and the like. These duties, instead, are being performed by exempt staff, other non-exempt employees and even an independent contractor.

Allowing the Recorder to formally assign these and other of the Director's duties to an exempt Chief of HRD in order to further protect the Director from his own performance deficiencies is precisely the type of action that would frustrate, rather than promote, the purpose of the Consent Decree and SRO. For this reason and the reasons set forth in my August 20, 2015 letter (attached as Exhibit A), I do not believe the Chief and Director Positions can co-exist. I recommend, therefore, that the Chief of HRD Position not be added to the Recorder's Exempt List until such time that the Recorder eliminates the Director of HRD Position.

B. Has the Recorder Demonstrated that the Community Affairs Position is One for which Party Affiliation is an Appropriate Requirement for the Effective Performance of Her Office?

My review of the relevant legal precedent revealed no cases directly addressing the proper standard to apply when assessing the exempt nature of a newly-created

position. Where there is no question about the reliability of a job description, courts typically defer to the written language on the page. *See Powers v. Richards*, 549 F.3d 505, 510 (7th Cir. 2008). Here, however, I did not have a full understanding of the position after reviewing the proposed job description, so I relied upon those cases that permit further inquiry into the underlying duties contemplated by the hiring authority when the job description is not clear. *See, e.g., Riley* at 365; *Vajner* at *4. In those cases, courts asked such questions as: how was the description created, when and how was it last updated, and whether the written duties had been finessed, engineered, or deviated from so as to provide officials with expanded political powers. *Id.* The ROD was helpful in providing me with access to individuals and documents to aid my effort.

1. How Was the Community Affairs Job Description Created?

The job description for the Community Affairs Position evolved from a different Position – a Non-Exempt Public Outreach Coordinator – for which the ROD considered posting in the fall of 2015. On August 11, 2015, the ROD provided my Office with a draft job description for a Public Outreach Coordinator Position. Some of the duties included in the job summary and essential job duties listed for this Position, which would have reported to the Non-Exempt Director of Public Information, included:

promot[ing] the advocacy goals of the Recorder’s Office by coordinating community outreach activities[. . . .] assisting the Director in identifying community outreach opportunities and assessing requests for participating in community events[. . . .] [i]nform[ing] the community about office programs through attendance and presentation at community outreach events, including but not limited to CCRD’s Property Fraud Alert and Veterans Service Office[. . . .] assist[ing] the Director in developing Section policies and mak[ing] recommendations on outreach policies[. . . .] identif[ying] and screen[ing] public outreach events and partnerships in conjunction with the Director[. . . .] [r]epresent[ing] CCRD at off-site community outreach and

educational events, using verbal presentations and office literature[, . . .] [and] maintain[ing] a strong familiarity with laws and legislation regarding property fraud and veterans issues.

Despite the language relating to making policy recommendations, promoting advocacy goals, and identifying community outreach opportunities, and the like, the ROD told me that it intended this Position to be largely administrative in nature.⁷ The ROD never posted for this Position.

2. When and How Was the Community Affairs Position Last Updated?

Instead of posting the Public Outreach Coordinator Position, the ROD created the proposed Exempt Community Affairs role, which largely encompassed the Public Outreach Coordinator job. This occurred shortly after the Court's September 1, 2015 motion call on the Recorder's original Motion to Amend the Exempt List (discussed at 4 above). The ROD explained that (1) it originally contemplated some version of the Community Affairs Position in the Fall of 2014 and (2) it abandoned the Public Outreach Coordinator Position in favor of the Community Affairs job in order to create an Exempt Position for the Director of HRD; that, in turn, would solve the duty overlap issue with the proposed Exempt Chief of HRD. The ROD circulated the final proposed version of the Community Affairs Position on November 4, 2015.

3. Have the Written Duties of the Community Affairs Position Been Finessed, Engineered, or Deviated from so as to Provide the Recorder with Expanded Political Powers?

The written duties of the Community Affairs job appear to include "policymaking" and/or confidential functions. These include, for example, responsibility

⁷ No ROD employee actually involved in drafting this job description took ownership for including the policymaking language into the job description. One individual surmised that such language was sloppy wording and likely referred to "procedures" concerning "packing bags and staffing" outreach events.

to “[d]evelop and implement an overall strategic community outreach plan”, “[d]evelop and maintain relationships with advocacy and policy groups involved in subjects related to the Recorder’s policy agenda”, and “maintain the confidentiality of sensitive information”.

The ROD employee who drafted the job description informed me that this Position would have broad discretionary authority for not just scheduling outreach events, but implementing a strategic plan to promote programs falling under the Recorder’s policy agenda. This would include, for example, utilizing data to target specific communities for outreach programs; developing and maintaining relationships with organizations, businesses and community groups; and developing policies and programs to help effectuate the policy goals of the Office. On this last point, the employee stated that generating ideas on policies and programs would not be a significant part of the Position’s duties, though it may play some role. Nevertheless, the ROD’s position is that the Position would “involve meaningful input on governmental decision-making on issues where there may be disagreement on goals or their implementation.” This would include “significant input into which programs get promoted, and to whom those programs are promoted.”

While it did not appear that the ROD “finessed” or “engineered” the Community Affairs Position, its inclusion on the Exempt List nevertheless may provide the Recorder with improper expanded political powers because there is another Non-Exempt ROD employee – the Director of Public Information – who already performs nearly all of the duties contained in the Community Affairs job description.

4. The Director of Public Information

The Director of Public Information, a non-exempt employee hired in April 2015, informed me that he is solely responsible for the entirety of the Recorder's public outreach program, he works autonomously and has broad discretion on how to shape the message at outreach events and where to conduct them. This assertion is borne out by one of the goals listed on his 30-day performance evaluation by his supervisor: assume "[f]ull ownership of outreach program." The Director of Public Information reported that this includes, for example, developing and implementing a strategic community outreach plan such as selecting where to conduct outreaches based on, among other things, results from his property fraud investigations; developing and maintaining relationships with community organizations for outreach purposes; and developing and updating outreach materials, brochures and Q&A sheets; staffing outreaches; coordinating events; presenting at all outreach events; and answering questions from attendees at events. According to the ROD, the Office is very pleased with his work.

Given the Director of Public Information's broad responsibilities for the Recorder's public outreach program, it is difficult for me to conclude at this time that the Recorder has demonstrated that political party affiliation "*is an appropriate requirement for the effective performance* of the public office [the Community Affairs Position] involved," *Branti*, 445 U.S. at 518 (emphasis added), or that the position would "involve meaningful input on governmental decision-making on issues where there may be disagreement on goals or their implementation." *Painter*, 653 F.2d at 1170. This non-exempt employee is by all accounts excelling in this capacity – despite Democratic party affiliation not being a requirement of his job. The Community Affairs Position very well

may fall within the *Branti* Court's pronouncement that "party affiliation is not necessarily relevant to every policymaking or confidential position." *Branti* at 518.

V. Conclusion

My observations and recommendations above are based upon the job descriptions I reviewed, monitoring activity by my Office, review of OIIG reports and court filings, as well as interviews with and information provided by relevant ROD employees. They were not, however, made with the benefit of a complete factual record of the myriad issues surrounding these matters. Such a record, if the Court deemed it necessary, likely would need to be obtained through formal discovery by the parties. I thank the Court for the opportunity to express my views on the important issues before it.