

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

MICHAEL L. SHAKMAN, et al.,)	
Plaintiffs,)	
)	No. 69 C 2145
v.)	
)	Hon. Sidney I. Schenkier
COOK COUNTY RECORDER OF DEEDS,)	
Defendants.)	

REPLY BRIEF IN SUPPORT OF MOTION TO AMEND EXEMPT LIST

Defendant, Cook County Recorder of Deeds (the “Recorder’s Office”), by its attorney, Anita Alvarez, State’s Attorney of Cook County, through Lisa M. Meador and Thomas E. Nowinski, Assistant State’s Attorneys, replies in support of its Motion to Amend Exempt List as follows:

On December 16, 2015, the Recorder’s Office filed a Motion to Amend Exempt List seeking to add the positions of Chief of Human Resources and Special Assistant to the Recorder-Community Affairs (“Special Assistant”) to the Exempt List. On December 16, 2016, Plaintiffs’ counsel advised the Recorder’s Office and the RCA that they have no objection to adding the Chief of Human Resources position as a new Exempt Position. *See Chronology attached as Exhibit A.* As such, the Exempt List should be so amended upon agreement of the parties. Section XI of the Cook County Recorder of Deeds Employment Plan (“Employment Plan”) provides that changes to the Exempt List may be implemented where the DOC approves of the change and Plaintiffs’ counsel have no objections to the change. Any recommendations by the RCA regarding this position are, therefore, moot and need not be considered by this Court.

On January 5, 2016, Plaintiffs’ counsel filed Plaintiffs’ Response to the Cook County Recorder of Deeds’ Motion to Amend Exempt List (“Plaintiffs’ Response”) delineating their objections to adding the Special Assistant position to the Exempt List. On January 28, 2016, the

RCA filed the Recorder of Deeds Compliance Administrator's ("RCA") Statement concerning the Recorder's Motion to Amend the Exempt List ("RCA's Statement") pursuant to the Court's request. The Recorder's Office submits that this Court should grant its motion because Plaintiffs' counsel have agreed that the Special Assistant position is properly Exempt and because the Special Assistant position is properly Exempt under applicable law.

I. Plaintiffs' Counsel Agreed that the Special Assistant Position is Properly Exempt

Plaintiffs' counsel conceded that the Special Assistant position is appropriately Exempt. This agreement can be established through both direct and circumstantial evidence.

On September 1, 2015, the parties appeared before this Court on the Recorder's Office's Motion to Amend Exempt List, specifically requesting that the position of Chief of Human Resources ("Chief of HR") be added to the Exempt List. During that hearing, Plaintiffs' counsel claimed that they had insufficient information to respond to the requested change, raising a concern that the position may be unnecessary. Plaintiffs' counsel asked the Court to allow them to engage in formal discovery including depositions. Counsel for the Recorder's Office advised the Court that discussions regarding this position were part of discussions between the parties dating back to the prior year and related to the reorganization of Human Resources. Further, there is no legal basis to object to the position being designated as Exempt and that the RCA and Plaintiffs' counsel had sufficient information to proceed. The Court acknowledged that the Chief of HR position could not be held hostage by their concerns related to the Director of Human Resources ("Director of HR"), but requested that the parties engage in further discussions to address both the Chief of HR position as well as the individual in the Director of HR position. The Court emphasized that the point of this process is not to be in adversarial mode, but rather to

work cooperatively toward a common goal. *See Transcript attached as Exhibit B to RCA Statement.*

Immediately following the court hearing, Plaintiff's counsel approached counsel for the Recorder's Office and proposed that the Recorder's Office consider moving the Director of HR into an Exempt position. He noted that the RCA previously had made this suggestion in order to resolve the concern that there was not a sufficient amount of work to sustain both the Director of HR position and the Chief of HR position. The Recorder's Office advised Plaintiffs' counsel that it had no open Exempt positions, but that there were several positions which the Recorder's Office had intended to propose as Exempt, one of which suited the skills and qualification of the Director of HR. Plaintiff's counsel suggested that we provide them with the job description to review. The Recorder's Office expressed concern that this suggested process could expose the Recorder's Office to objections on the basis that the position was created solely as an opportunity to move the Director of HR into an Exempt position. Plaintiff's counsel stated that their review is based upon only the job description and whether the position meets the requirements for an Exempt position, then whether the individual selected meets the minimum qualifications of that position. Plaintiff's counsel advised further that the basis for the Recorder's Office's selection of that individual is outside of their consideration. Specifically, Plaintiffs' counsel stated that if the position was appropriately Exempt, the Recorder could select whomever she wants to fill that position and the only matter for consideration by Plaintiffs was whether that individual met the minimum qualifications of that position. In furtherance of their proposal, Plaintiff's counsel reiterated that the RCA previously had made this suggestion and that it was a good course to proceed and for the Recorder's Office to consider.

Based upon these representations from Plaintiff's counsel and with the Court's directives in mind, the Recorder's Office in good faith engaged Plaintiffs' counsel and the RCA in a continued dialogue spanning 5 months through numerous discussions, meetings, and communications related to Special Assistant position to be submitted to the Court as Exempt and into which the Director of HR would be placed. *Exhibit A*. The Recorder's Office provided the proposed job description, job descriptions for other community affairs related positions, as well as the job description for an individual currently performing some of those duties, and explained the operational needs and thought processes behind the creation of the position. *Id.* At all times, the job description for this position stated that it was an Exempt Position and discussions between the parties involved ensuring that the job description was appropriately styled for that purpose. The parties exchanged drafts of the job description through numerous iterations over the course of those months-long discussions.

Ultimately, on October 22, 2015, Plaintiffs' counsel sent their draft with their last suggested changes. *Id.* Counsel for the Recorder accepted these last changes and circulated it to Plaintiffs' counsel and the RCA as the final version of the job description. *Id. See also Special Assistant Job Description attached as Exhibit B.* Having agreement on the Exempt job description, counsel for the Recorder then provided Plaintiffs' counsel and the RCA with the resume for the individual proposed for that position and engaged in extensive discourse with the Plaintiffs' counsel to discuss the qualifications of that individual, address any questions or issues, and provide all information requested. *Id.* We note that it was not necessary or required to engage in a discourse about the individual and the qualifications, yet the Recorder's Office did so acting in good faith upon the representations of Plaintiffs' counsel and in the spirit of transparency. On November 10, 2015, counsel for the Recorder's Office confirmed that

Plaintiffs' counsel's questions and requests had been satisfied and further advised that if there was agreement, a motion to amend the Exempt List would be prepared. *Id.* With no response indicating any unresolved concerns or issues, on November 23, 2015 the Recorder's Office provided Plaintiffs' counsel with the proposed Motion to Amend the Exempt List, updated Exempt List, and proposed Agreed Order and asked whether they could be filed. *Id.* On December 1, 2015, the Director of Compliance ("DOC") advised the parties and the RCA that he had reviewed the proposed changes to the Employment Plan and approved those changes. *Id.* Counsel for the Recorder's Office then requested that Plaintiffs' counsel and the RCA advise them of any objections. *Id.* Ten days elapsed with no notice of any objections from Plaintiffs' counsel or the RCA. As such, per the Employment Plan, the Recorder's Office filed the Motion to Amend the Exempt List on December 16, 2015.

In a surprising turn of events, the next day Plaintiffs' counsel advised the Court that they objected to the Motion and claimed that the Recorder's Office was somehow aware of their objections. Plaintiffs' counsel disingenuously seek to now ignore the months-long discourse between the parties on this issue, feigning ignorance of their own actions, representations, and inactions, pretending instead that this matter came out of nowhere. At all times, the Recorder's Office has been forthcoming and transparent in this matter, seeking to accomplish the necessary and important goalposts while addressing concerns raised by Plaintiffs' counsel and the RCA and following their recommendations. In good faith, the Recorder's Office relied on the representations of Plaintiffs' counsel that moving the Director of HR to a suitable Exempt position to be proposed would be appropriate and acceptable. In return, it appears that Plaintiffs' counsel was merely engaged in a set-up, inexplicably disavowing its representations for the sole purpose of making the Recorder look bad.

Notwithstanding, it is clear that Plaintiffs' counsel agreed through their representations, actions, and inactions that the Special Assistant is properly an Exempt position. As such, the Exempt List should be so amended.

II. The Special Assistant Position is Properly Exempt Under Applicable Law

Generally, political loyalty may be a valid qualification of employment for one of two reasons: either because the job involves the making or implementation of policy and thus the exercise of political judgment or it is a job that gives the holder access to his political superiors' confidential, politically sensitive thoughts. *See Elrod v. Burns*, 427 U.S. 347 (1976). Since *Elrod*, the Supreme Court has stated that the ultimate inquiry 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) Nonetheless, the Seventh Circuit has recognized that the terms "policymaking" and "confidential" do accurately describe the vast majority of offices that fall within the realm of legitimate patronage under the *Branti* formulation. *Davis v. Ockomon*, 668 F.3d 473, 477 (7th Cir. 2012)

A public official is considered a policymaker where the position authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation. *Davis*, 668 F.3d at 477. An employee with responsibilities that are not well defined, or are of broad scope, more likely functions in a policymaking position. *Id.* citing *Elrod*, 427 U.S. at 368. In determining whether a government official is a policymaker, courts examine the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office. *Davis*, at 478. Cir. 1981). Elected officials may rely on official job descriptions to determine the inherent powers of

a given office and whether these duties render political loyalty appropriate. *Riley v. Blagojevich, et al.*, 425 F.3d 357, 360 (7th Cir. 2005). Unless the job description is systematically unreliable, the job description is the pivot on which the case turns. *Riley*, at 360-61.

The Special Assistant position is properly designated as an Exempt position under the law. The Recorder's Office and this Court may rely on the official job description to determine whether the position is Exempt. *Riley*, at 360. The job description, the pivot on which the case turns, demonstrates that the position is accurately described as "policymaking" and "confidential."

A. Plaintiffs' analysis is flawed and contrary to the law

Plaintiffs' argument as to why the Special Assistant job description should not be exempt is not supported by law or fact, and is belied by their own conduct and statements made during the lengthy negotiation concerning this position. Plaintiffs focus their analysis on the proposed occupant of the Special Assistant position rather than the job description. However, the Seventh Circuit has routinely held that the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office, controls the analysis. *Davis*, at 478. Focusing the inquiry on the inherent powers of an office provides greater certainty to litigants and relieves courts of the burden of having to re-examine a certain position every time a new administration changes the mix of responsibilities bestowed upon the officeholder. *Id.* Contrary to this well settled law, Plaintiff provide no analysis or discussion of the job description. As such, Plaintiffs' argument should be disregarded by the Court.

B. Special Assistant job description

A review of the Special Assistant job description demonstrates that the job involves policymaking duties related to the policy goals of the Recorder's Office and implementation of

those policies. The job description specifically details that the position is responsible for, *inter alia*, developing and executing a strategic plan to implement, and participate in, community outreach programs that expands the public knowledge and participation in programs that fall under the Recorder's policy agenda; creating opportunities to further the policy goals of the Recorder; and working independently and maintaining confidential and sensitive information. To be sure, the RCA highlighted these duties and noted that the position entails broad discretionary authority within the Recorder's Office. Such is squarely in line with the Supreme Court's pronouncement in *Elrod* that an employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. *Elrod*, at 368.

The above analysis is enough for this Court to grant the Recorder's Office's instant motion and find that the Special Assistant position is properly designated as exempt. Both the RCA and Plaintiffs, however, seek to extend the analysis further into how the position was created. Such analysis here is unnecessary. If no basis is presented for thinking the official job descriptions are systemically unreliable, elected officials can rely on them. *Riley*, at 360. Focusing the inquiry on the inherent powers of an office provides greater certainty to litigants and relieves courts of the burden of having to re-examine a certain position every time a new administration changes the mix of responsibilities bestowed upon the officeholder. *Id.*

In this case, there is no basis for thinking that the Special Assistant job description is systematically unreliable. As discussed above, the Special Assistant job description was discussed at length with the both RCA and Plaintiffs' counsel and revised as a result of those discussions and negotiations. The Recorder's Office accepted and incorporated all of Plaintiffs' counsel's suggested changes and revisions, none of which included removing the designation of Exempt from the job description. The argument now that somehow the job description is

systematically unreliable and further analysis is needed is undoubtedly belied by those negotiations and the agreement reached by the RCA, Plaintiffs, and Recorder's Office.

C. The development of the Special Assistant position

Assuming *arguendo*, that the job description is systematically unreliable, a complete analysis of the genesis of the job description again demonstrates that the Special Assistant position is properly designated as exempt. Plaintiffs make the unsupported claims that the position was not created in the ordinary course of business and that there would not be enough work for the Special Assistant. However, Plaintiffs provide absolutely no factual support for those arguments or concerns. To be sure, that is most likely because the Recorder's Office provided Plaintiffs with whatever information they wanted during the negotiations and they then agreed with the job description.

The RCA suggests that formal discovery may be needed to fully inform a decision on the Special Assistant position. However, that suggestion is at odds with the RCA's own investigation. The RCA requested to interview numerous Recorder's Office employees and was given free rein to do so. At no time did the Recorder deny the RCA access to the office, her employees, or any relevant documents. Each employee that the RCA requested to interview complied with her request and was unaccompanied by counsel. The RCA had every opportunity to speak to whomever she wanted and to gather whatever other information she felt was necessary. As such, there is no need for formal discovery as the RCA now suggests.

Notably, despite interviewing numerous individuals as part of her review, the RCA did not interview or discuss this issue with either the Director of Compliance or the Recorder herself. These two individuals are crucial to this analysis. Accordingly, the Recorder's Office provides that information to the Court now.

1. Analysis and information from the Director of Compliance

The Employment Plan specifically notes that, “[i]t is expressly acknowledged and understood that the DOC is being provided with authority to opine on proposed additions or deletions to the Exempt List.” Section XI(C)(1). Inexplicably, there is no mention of the reasoning, analysis, or opinion of the DOC related to the Special Assistant position in either Plaintiffs’ response or the RCA’s statement.

The DOC reviewed the Special Assistant job description and noted several key duties of the position. Namely, the DOC specifically highlighted that the job description requires that the Special Assistant:

- Develop and maintain relationships with constituent, community and business groups, and other interested parties in an effort to create opportunities to further the policy goals of the recorder. This implies that the person in this position will assist the recorder in developing policies and stating those policies to community based organizations. In essence, this position will be the voice of the Recorder’s Office and must have the knowledge of the overall goals and policies of the Recorder.

- Analyze data in an effort to target communities for community-based outreach programs. In this position a Special Assistant would be looking for methods to bring the Recorder’s agenda to constituent groups who support the Recorder and on the other side target constituent groups with a less than favorable image of the recorder in an effort to change or modify public opinion of the Recorder.

In further support of his opinion that the Special Assistant position is properly designated as Exempt, the DOC provided his understanding of the need for the position within the Recorder’s Office. The DOC noted that “many of the job duties outlined in the job description are being conducted by the Director of the Public Information which oversees the Financial Fraud Unit. Within the last year the work load and duties of the Fraud Unit have substantially grown. An example of this was the recent arrest of four individual charged with felonies from an investigation first conducted by the Office of the Recorder of Deeds. It can be expected that the Director of the Public Information will be drawn more into the work load of the Fraud Unit and

less into the Community Outreach component.” Pursuant to his review and analysis, the DOC approved adding the Special Assistant position to the Exempt List.

2. Information from the Recorder of Deeds

In their respective filings, both Plaintiffs’ counsel and the RCA claim that more information is needed about this position. Again inexplicably, neither Plaintiffs’ response or the RCA’s statement mention the reasoning or analysis of the Recorder herself, the very individual responsible for the operations of the office and the person with sole authority to appoint Exempt personnel.

The Recorder originally envisioned having an Exempt outreach position when she was elected Recorder. She knew that she wanted to have an office that engaged in advocacy, not simply a ministerial office that performed the functions required by existing law. The Recorder had a policy agenda that, if enacted, would serve the taxpayers in a variety of ways. Specifically, the Recorder wanted Property Fraud and Veterans Services to be the two centerpieces of her administration. The Recorder knew that instituting these new initiatives would require significant public outreach so that 1) the public was aware of what these new programs were; and 2) the programs would be utilized to benefit the taxpayers and communities as a whole. The Recorder believed that the outreach efforts by the previous administration were not adequate.

When the Recorder came into office, she aggressively pursued her policy agenda and had many successes. In 2013, the Recorder passed legislation to create a “Refer and Review” process that allowed the Recorder’s Office to initiate administrative proceedings against individuals that recorded fraudulent documents. The passage of this law allowed the Recorder to transform the old mortgage fraud division into the Property Fraud division of today. To date, the Property Fraud division has instituted numerous administrative actions that allowed aggrieved

homeowners to clear their title without going through long and costly processes and even investigated a case that resulted in a criminal prosecution.

When the Recorder envisioned the Exempt outreach position, she expected that this person would work very closely with her and would be dedicated to carrying out her mission and policy goals. This person would be 100% dedicated to outreach work and would serve as the face of the Recorder's Office in the community. The Recorder also anticipated that this employee would work closely with other policymakers in the Recorder's office to develop other agenda items and determine effective ways to market these initiatives in the community. This person would actually do outreach presentations and field questions from constituent groups and other people who attend the outreach presentation that bring back concerns that may result in the development of new policy items. At almost every outreach event, there are questions from citizens regarding how to dispose of property after their death. This concern has been such a recurring issue that the Recorder was motivated to introduce legislation that would establish a process for Recorders to record wills in the Recorder's Office. The bill was advanced and, although it did not become law, the Recorder plans to aggressively pursue the passage of this legislation again in the General Assembly. If passed, this law would require significant outreach to the public and various groups involved in this area. A dedicated community outreach person such as the Special Assistant would be responsible for working with other policymakers on developing this program and a strategy to market it to the public.

With that background information known, the Recorder notes that there were internal discussions about creating the new Exempt outreach position long before the Special Assistant position was proposed. Dating back to the fall of 2014, the Recorder raised her desire to petition this Court for several new Exempt positions, including an Exempt outreach position such as the

Special Assistant position, during internal meetings. On advice from counsel, the Recorder decided to hold off on pursuing the position until the office could obtain an Exempt Chief of HR. In the meantime, the Recorder's outreach initiatives have been administered in a hodgepodge manner with a variety of individuals planning and performing outreach presentations. Although there have had some success in her outreach programs, they did not live up to their full potential or the Recorder's vision. The Recorder emphasizes that the Office has not even scratched the surface of its outreach potential because she does not have the staff dedicated to perform the work. There are a significant number of outreach opportunities that the Office did not participate in because of the lack of staffing, and the Recorder should not have to rely on volunteers to fill staffing gaps.

When informed of the Plaintiffs' suggestion that the office move the current Director of HR into an Exempt position, the Recorder saw an opportunity to institute the Exempt outreach position she had envisioned but had put on hold. She believed that she would finally be able to meet her outreach needs and initiatives while addressing an ongoing concern of the Plaintiffs and the RCA. Despite Plaintiffs' contention otherwise, even if there was no need to reorganize the Human Resources Department, the Recorder would still have a need to perform this outreach work.

Currently, the majority of the outreach work is falling on two Recorder employees – the Director of Public Information and the lone employee in the Veteran's Services department. The Director of Public Information's primary duty, as determined by the Recorder, is supervising the Property Fraud Unit and investigating and developing property fraud cases. While the Director of Public Information has been a tremendous asset to the Recorder's Office, and his work has resulted in several administrative actions and criminal prosecutions being initiated against

perpetrators of property fraud, he has not been able to do as much work on property fraud cases as the Recorder would like because he has had to spend a significant amount of time scheduling and attending outreach programs and initiatives. Currently, there are several investigations that the Recorder would like the Director of Public Information to focus on, but his attention is diverted to outreach work that also must be done. The Special Assistant position would allow the Director of Public Information to do the work of the Property Fraud Unit consistent with the Recorder's policy agenda and initiatives.

The lone employee responsible for staffing the Recorder's Veteran's Services office is also performing the majority of the veterans outreach events consistent with the Recorder's goals and agenda. However, that employee's main duties are focused with assisting Veterans with the recordation of their DD214 military discharge papers and administering the Veterans Discount Card Program offered by the Recorder's Office. This employee processes the applications, prints the cards, and makes sure that the cards get sent to the veterans along with information about the program and participating vendors. As a result of this employee having to perform outreach, the turnaround time in processing these applications for the discount cards can be in excess of three weeks. Recently, there was an outreach event at the Jesse Brown VA Hospital. In a little over 2 hours, there were over 300 applications for the Veterans Discount Card. The applicants were told that their cards should arrive in about 3 weeks. If the Special Assistant position is approved, the Veteran's Services employee will be able to focus on his regular and contemplated duties which would result in applications being processed much more quickly.

Armed with a more complete understanding of the nascent of the Special Assistant position, this Court should approve the proposed addition to the Exempt List. The need for the Special Assistant position has been recognized by the Recorder for a very long time. As

envisioned by the Recorder and recognized by the DOC, the Special Assistant will be a vital employee at the Recorder's Office. The Special Assistant will provide the Recorder with the ability to raise community awareness of important services, programs, and initiatives offered by the Recorder's Office. The Special Assistant will be relied upon to promote the Recorder's policy agenda as well as inform the Recorder about concerns and needs of the community. Moreover, the Special Assistant will allow current Recorder employees to focus on the duties and responsibilities that the Recorder expects and envisions for them. The Recorder is very cognizant of her obligations under the *Shakman* litigation and is not asking to be rewarded for "years of political discrimination." Rather, the Recorder is asking this Court to follow the law that would allow her to fully implement her policy agenda.

Based on the foregoing, it is clear that Plaintiffs' counsel have agreed that the Special Assistant position is properly Exempt and the Special Assistant position is properly Exempt under applicable law.

WHEREFORE, the Cook County Recorder of Deeds respectfully requests that this Court enter an order adding the position of Chief of Human Resources to the Exempt List upon agreement of the parties. Further, the Cook County Recorder of Deeds requests that this Court enter an order adding the position of Special Assistant-Community Affairs to the Exempt List.

Respectfully submitted,

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