

**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.)	

**TWELFTH REPORT OF THE *SHAKMAN* COMPLIANCE ADMINISTRATOR
FOR THE COOK COUNTY RECORDER OF DEEDS**

Cardelle B. Spangler, *Shakman* Compliance Administrator for the Cook County Recorder of Deeds (“RCA”)¹, by and through her attorney, Matthew D. Pryor, pursuant to Art. III.C of the Supplemental Relief Order for the Cook County Recorder of Deeds (“SRO”), submits this Twelfth Report as follows:

I. Introduction

On February 5, 2015 the RCA filed her Interim Report to the Court (“2015 Interim Report”) (Dkt. 4092) in which she discussed the Cook County Recorder of Deeds² Karen Yarbrough’s efforts to comply with the SRO. The RCA noted in that Report: (1) the Recorder’s continued need for a strong, supported and fully functioning Human Resources Division (“HRD”); (2) the Recorder’s progress toward hiring a new

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.

Director of Compliance (“DOC”); (3) the Recorder’s training on the Employment Plan (the “Plan”) and Policies and Procedures Manual (the “Manual”); and (4) that the Recorder had issued responses to the OIIG’s June 2014 recommendations in connection with a finding that “impermissible political factors were considered in the employment decision to terminate the former Concourse Manager”. See 2015 Interim Report at 2-5.

Since the 2015 Interim Report, two significant developments have occurred: (1) the Recorder hired a Director of Compliance (“DOC”) and (2) the Recorder has taken substantial steps to professionalize her HRD. The RCA is hopeful these two steps will significantly help the Recorder address the concerns raised in prior reports (and noted below) and begin moving toward Substantial Compliance³ with the SRO.

II. The Five Prongs of Substantial Compliance

A. Prong 1: *Has the Recorder implemented the Employment Plan, including procedures to ensure compliance with the Plan and identify instances of noncompliance?*

The first prong of Substantial Compliance requires the Recorder to implement a Plan and other procedures to ensure compliance with the principles of *Shakman* and identify instances of non-compliance. To properly implement the Plan (and Manual), the Recorder must have an effective DOC overseeing such implementation and a robust HRD

³ The SRO states that “Substantial Compliance” means: (1) the Recorder has implemented the New Employment Plan, including procedures to ensure compliance with the New Employment Plan and identify instances of non-compliance; (2) the Recorder has acted in good faith to remedy instances of noncompliance that have been identified, and prevent a recurrence; (3) the Recorder does not have a policy, custom or practice of making employment decisions based on political reasons or factors except for Exempt Positions; (4) the absence of material noncompliance which frustrates the Recorder’s Consent Decree and the SRO’s essential purpose. The RCA and the Court may consider the number of post-SRO complaints that have been found to be valid. However, technical violations or isolated incidents of noncompliance shall not be a basis for a finding that the Recorder is not in substantial compliance; and (5) the Recorder has implemented procedures that will effect long-term prevention of the use of impermissible political considerations in connection with employment with the Recorder. SRO at 13.

capable of administering the Plan and Manual. Since the 2015 Interim Report, the Recorder hired a DOC and implemented certain suggestions from the DOC aimed at more effectively and consistently implementing portions of the Plan and Manual. The Recorder also recently hired a Chief of HRD following the departure of the former Director of HRD.

1. Director of Compliance

The Plan requires the Recorder to hire a DOC to oversee the Recorder's compliance with the provisions of the Plan, SRO and Consent Decree. The person occupying this position is charged with ensuring that the principles of the *Shakman* Consent Decree (including the Plan and Manual) are adhered to even after the Recorder's Office is found in Substantial Compliance with the SRO. The DOC must be able to identify and investigate instances when the Recorder's Office is not in compliance with the Plan and Manual and recommend effective and corrective actions to the Recorder. The DOC must be neutral in his or her approach to compliance oversight and be willing to recommend corrective actions (including discipline) of any Recorder employee if the findings support the same.

Thomas McMahon began employment as the Recorder's DOC on June 1, 2015. Since beginning employment with the ROD⁴, the DOC has received comprehensive training on the Plan and Manual; met with his Honor, Magistrate Judge Schenkier, the OIIG and Plaintiff's Counsel; monitored Employment Actions under the Plan and

⁴ As noted in the 2015 Interim Report, Recorder's Counsel and the RCA worked quickly and collaboratively to amend both the Job Description and hiring process for this position after discussing the concerns raised by the prior DOC, who resigned after six weeks of employment (*see* Dkt 4036). The RCA approved the final changes and believes the amendments kept the integrity of the position and the hiring process. The RCA monitored interviews and did not have any concerns at that time.

Manual; initiated 14 investigations into alleged violations of the Plan and Manual pursuant to Section IV.M.2 of the Plan; and issued Incident Reports with findings and recommendations for nine of those investigations. In addition, the DOC has met regularly with the RCA who has made her, her Counsel and staff available to assist him in any way he would deem helpful.

Concerning the DOC's first year, the RCA would like to recognize how the Recorder responded to the Court's direction by making certain efforts to integrate the DOC into the Office. While the former DOC stated she felt an "us versus them" dynamic from the executive staff, the new DOC has reported feeling "completely accepted" by the executive staff. The DOC has noted, however, that his acceptance by the executive staff has come with a considerable degree of skepticism from the rank and file. The DOC has informed the RCA that his main goal is to earn the trust of all employees, given that trust is essential for the effectiveness of the DOC position. The RCA has made several recommendations to the DOC on how to earn that trust.

Discussion of other aspects of the DOC's duties – including completed and ongoing investigations into alleged violations of the Plan and Manual – are found below.⁵

2. Human Resources

Since the 2015 Interim Report, the Recorder informed the RCA of her desire to reorganize HRD including the addition of a new *Shakman* Exempt Chief of HRD position. In December 2014, the Recorder proposed to create a new Chief of HRD position that would oversee all of HRD – and to make this position *Shakman* Exempt. Over the following months, the Recorder also proposed to overhaul the job description of

⁵ Further discussion of the DOC will come in the RCA's next regular report.

the current Director of HRD and alter other HRD job descriptions on account of the shifting of certain duties from the Director to the new Chief of HRD. After much discussion with the Recorder's Office, the RCA sent the Recorder's Counsel a letter⁶ explaining why she could not support the Recorder's proposal.

In that letter, the RCA explained that while she agreed that the Recorder needed to reorganize and reconstitute HRD with leadership capable of implementing the Plan and Manual she held serious reservations about the Recorder's proposal for three reasons: 1) the proposal would perpetuate the Office's disparate treatment of the then-current Director of HRD more favorably than other Non-Exempt employees; 2) the Office's justification for the change – that the Director's job duties were too burdensome to fulfill – was without merit; and 3) that the proposed new Director of HRD job description would not constitute a full-time position, much less one that would remain one of the highest paid positions in the Recorder's Office.

The Recorder never responded to the RCA's letter; however, she proposed amending her Exempt List by adding a Chief of HRD position. On September 1, 2015, the Court heard the Recorder's Motion to Amend the Exempt List and provided direction to the parties on the need to address the entirety of the HRD concerns raised by the Plaintiffs and the RCA and that any proposed amendment to the Exempt List concerning HRD must not submerge those concerns.

Later, the Recorder proposed adding another new Exempt Position – Special Assistant to the Recorder – Community Affairs. Recorder Counsel stated that the Recorder's intention was to move the then-current Non-Exempt Director of HRD into the

⁶ The RCA attached this letter as Exhibit A to her Statement Concerning the Recorder's Motion to Amend the Exempt List. *See* Dkt. 4471-1 (filed January 28, 2016).

new Exempt Special Assistant to the Recorder – Community Affairs position. After Plaintiffs’ Counsel objected to the Recorder’s Motion, the Court asked the RCA to provide a statement on the Recorder’s proposal.

On January 28, 2016, the RCA filed her Statement Concerning the Recorder’s Motion to Amend the Exempt List. *See* RCA Statement (Dkt. 4471). The RCA recommended that: (1) 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” (RCA Statement at 10) and (2) based upon the information she was provided by the Recorder’s Office, she could not conclude that the proposed Exempt Special Assistant to the Recorder – Community Affairs Position satisfied the analysis for an Exempt Position held in existing case law because a “non-employee is by all accounts excelling in this capacity – despite Democratic party affiliation not being a requirement of his job.” RCA Statement at 14.

The Recorder and Plaintiffs’ Counsel subsequently filed additional arguments in support of and in opposition to the Recorder’s Motion. *See* Dkts. 4519 and 4517-18, respectively. Ultimately, the Plaintiffs and Recorder’s Office reached an agreement on the contested Motion and an Agreed Order was filed with the Court. *See* Dkt. 4551 (filed April 7, 2016). This Agreed Order stated that: (1) the Chief of HRD Position and a revised Special Assistant to the Recorder – Community Affairs Position would be added to the Recorder’s Exempt List; and (2) the Director of HRD would retire and would not be hired or retained by the Recorder in any capacity.

In the week following the filing of this Agreed Order, the Recorder’s Office began working to fill the Chief of HRD Position. In that effort, the Recorder reached out

to the RCA to discuss a possible need to alter the Exempt hiring process and did so in an effort to achieve consensus on the matter prior to implementing the change. The RCA appreciates this proactive attempt to change a policy in a transparent and deliberative manner.

While the Recorder has not yet hired a Special Assistant – Community Affairs, she hired Erwin Acox, Jr. as her new Exempt Chief of HRD effective April 19, 2016. Since his hire, the RCA participated in the DOC and Recorder Counsel’s training of Mr. Acox on the Plan and Manual. The OIIG also participated in this training. Additionally, Mr. Acox attended the most recent status hearing with the parties before Judge Schenkier and later met separately with the RCA. The RCA informed Mr. Acox that she is available to assist his efforts and that she hopes prior issues with receiving truthful and accurate information from his predecessor will prove to be ills of the past.

3. The Recorder’s Training on and Implementation of the Plan and Manual

The Recorder’s Manual became effective on March 1, 2015. Recorder’s Counsel, the OIIG and RCA trained employees on the Plan and Manual just prior to the Manual’s effective date. During the training sessions numerous employees raised questions and the RCA and ROD agreed that the ROD would address those questions via a follow-up memo; however, it took over seven months and several inquiries by the RCA for such a memo to be circulated.

While training is an important step in implementation, it is not the only one. As this Court has noted, training “is essential groundwork” but it is vital that the policies and procedures “be followed rigorously” and “without exception”. Feb. 6, 2015 Tr. (Dkt. 4202) at 17:21-18:2. Missteps are common with the implementation of any new policy or

procedure; however, the RCA is concerned with the ROD's failure to follow its own policies and procedures. This failure is reflective of a chronic issue that has been present in the ROD for many years: ad hoc decision making for the sake of convenience. *See, e.g.*, RCA's Second Report (Dkt. 2179) at 7-9; RCA's Ninth Report (Dkt. 3616) at 31.

On multiple occasions the Recorder's Office has intentionally chosen to disregard the Manual because the administration disagrees with its own policy. The RCA acknowledges that the other *Shakman* defendants' Plans and Manuals have been amended numerous times and reminds the Recorder that the procedures to amend the Plan and Manual are memorialized to ensure transparency and clarity. To date, the Recorder has chosen to not follow that process, but has rather made ad hoc decisions concerning Employment Actions. Examples of such ad hoc decisions since the last RCA Report include: 1) denying an employee's request for Flex Time because the Office "was planning" to remove it from the Manual despite the Manual still containing the policy; 2) resetting some employees' progressive disciplinary tracks contrary to the Manual and CBA while enforcing other employees' tracks and waiting several months to correct the issue; and 3) transferring an employee (found by the RCA to be working outside her Job Description) to another Department without following the Office's Transfer policy. The RCA is optimistic that the new HRD Chief will be able to help resolve some of the current instances of inconsistent application of policies and procedures and prevent future instances from occurring.

B. Prong 2: *Has the Recorder acted in good faith to remedy instances of non-compliance that have been identified?*

The second prong of Substantial Compliance concerns whether the Recorder has made good faith efforts to cure instances of non-compliance when identified. While they

may be self-reported, non-compliance has primarily been identified by the OIIG, DOC and RCA. The Recorder's actions in response to findings of non-compliance have thus far lacked the directness and openness required by the SRO. Below are updates on the Recorder's actions in response to findings of non-compliance by the OIIG and RCA (in her capacity as Interim DOC). Incident Reports filed by the DOC and the Recorder's responses to the same will be discussed in a subsequent report.

1. The OIIG's Summary Report Concerning Disparate Treatment Favoring the Director of HRD

On September 18, 2015, the OIIG issued a Summary Report concluding that, "the office of the Recorder has an established custom and practice of treating [the Director of HRD] differently than other non-exempt employees." Summary Report IIG14-0408 at 19. The OIIG noted that there were "five separate instances where Recorder employees gave false information to either the OIIG or the Recorder and was [sic] terminated." Id. The OIIG wrote that the explanation provided by the Recorder's Office to a Non-Exempt employee at his termination proceeding ("we are obligated to cooperate with the OIIG's office with regard to Shakman issues. . . . [y]our subsequent qualified statements that you 'may have' or 'not intentionally' do not provide plausible deniability or relieve you of your duty to provide truthful answers") was not later followed when the OIIG found the Director of HRD to have provided false information concerning the hiring of his Executive Assistant.⁷

⁷ In this instance, the Recorder's disciplinary hearing with the Director of HRD did not directly address several of the OIIG's detailed findings of the Director providing false information and allowed the Director to qualify and deny many of his earlier statements to the OIIG. The Hearing Officer ultimately concluded that the Director did not provide "false information"; rather, he provided "inaccurate" information to the OIIG. This consideration was not extended to several other Non-Exempt employees accused of providing false information to the OIIG.

The OIIG also concluded that the Director of HRD “appears to escape discipline despite routine incidents, detailed above, where he exhibited poor performance or was otherwise not knowledgeable about Employment Plan provisions.” The OIIG concluded that, “[t]he fact that the Recorder fails to discipline [the Director of HRD], particularly in light of (a) the District Court’s admonitions about professionalizing human resources functions, (b) the Recorder’s professed lack of HR professionals in the office, and (c) the Recorder’s professed desire to stabilize the Human Resources [Division] is remarkable.” The OIIG explained it “explored with the Recorder her rational [sic] supporting her decision to retain [the Director of HRD]” and that her opinion was:

based in part not on performance reviews or any observations of her own, but on accounts from persons not working in the office of the Recorder (whose names she could not recall) who opined to her that [the Director of HRD] is a good employee. . . . This does not, in our view, constitute a basis on which to justify retention of an employee who has exhibited both poor performance and a routine willingness to violate the SRO by providing false information during OIIG investigations. Indeed, the Recorder has summarily terminated other employees who have exhibited identical behaviors. Accordingly, we believe that the Recorder’s justification for insulating [the Director of HRD] is pretextual.

Concerning why the Director of HRD had and continued to receive such favorable and disparate treatment, the OIIG concluded that despite the Recorder’s denial of “any awareness of [the Director of HRD’s] strong affiliation with Speaker Michael J. Madigan. . . it is difficult to conceive, if not absolutely impossible, that Recorder Yarbrough, a former legislator and member of the party leadership, could somehow be completely unaware that her Director of Human Resources has strong ties to the Madigan organizations. To profess such unawareness is, in effect, to submerge the truth.” The OIIG stated that the “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 the Non-Exempt Director of HRD. The OIIG continued by stating,

[t]he 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.

The OIIG recommended that the Recorder "cease and desist from further actions which constitute a violation of the 1992 Consent Judgment and *Supplemental Relief Order*."

In her Response to the above OIIG Summary Report, the Recorder said she "has acknowledged that the HR Director 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 reaching substantial compliance." The Recorder acknowledged the need for a professional HRD and pointed to her proposal to reorganize HRD as the solution to resolving any issues in that group that stand in the way of Substantial Compliance. The Recorder closed by stating that the ROD would continue to work toward implementing a HR Restructuring Plan and noted that the office was "willing to train all employees at or above the supervisor level on the importance of consistent application of discipline and how to ensure that discipline is administered consistently."

While the RCA has concerns with the lack of directness and thoroughness in the Recorder's Response, the RCA hopes the Recorder's recent decisions to hire a new Chief of HRD and end the employment of the Director of HRD proves a positive one.

2. The Recorder responded to the OIIG's June 19, 2014 Post-SRO Complaint Summary Report

On June 19, 2014, the OIIG issued a Post-SRO Complaint Summary Report (IIG13-0176) concerning a Post-SRO Complaint filed by the former Recorder Concourse Manager. The OIIG concluded that the Recorder's termination of the former Concourse Manager was pretextual and constituted Unlawful Political Discrimination ("UPD"). The OIIG also concluded that the Recorder's senior staff had violated the SRO by attempting to mislead the RCA concerning the basis for the termination. *See* RCA's Eleventh Report (Dkt. 4036) at 7-9. The OIIG recommended the Recorder place her former Chief Deputy Recorder on the Do Not Rehire Without Further Consideration List ("DNH List") and impose significant discipline on the current Chief Deputy Recorder and a Deputy Recorder for their roles in the pretextual termination.

The Recorder issued a limited response on February 2, 2015 citing ongoing litigation brought by the Post-SRO Complainant related to the subject matter of the Post-SRO Complaint. On October 21, 2015, the Recorder issued a supplement to the earlier Recorder's Report. In the supplemental report, the Recorder wrote that there were "insufficient facts to support" a conclusion that her staff committed UPD through the Concourse Manager's termination and that the "totality of the circumstances do not support [the] claim" that the termination was pretextual. Concerning the OIIG's findings that certain Exempt employees attempted to mislead the RCA concerning the rationale for terminating the former Concourse Manager, the Recorder wrote, "[o]ne senior Recorder staff member that allegedly participated in the pretextual action is no longer employed with the Recorder's Office. There are two employees referenced in the Summary Report that remain on the Recorder's staff, and they sincerely believe that their

conduct was based on the concourse manager's performance, and not as a part of an effort to mislead the RCA." The Recorder's Office rejected all of the OIIG's recommendations for corrective actions.

Here, the OIIG concluded that two current Exempt employees had provided false and misleading information to the RCA and the Recorder responded to this recommendation with a single sentence noting that those employees "sincerely believed" that their conduct was not misleading. The RCA questions whether this type of cursory response is reflective of an administration focused on providing good faith efforts to resolve identified instances of non-compliance.

3. The Recorder's responses to the RCA findings and recommendations were unsatisfactory

After the Recorder's first DOC resigned on September 23, 2014, the Court asked the RCA to serve as Interim DOC pending the Recorder's hiring of a new DOC. During her nine-month tenure as Interim DOC, the RCA received four complaints from employees alleging various violations of the Plan and Manual. The RCA conducted investigations into these complaints consistent with Section IV.M of the Plan and, at the conclusion of those investigations, issued four separate Incident Reports that included findings and recommendations. Brief summaries of those complaints, findings and recommendations are below as well as the Recorder's responses to the same. The RCA notes that the length of time it took the Recorder to issue substantive responses to the RCA Incident Reports was problematic. While the Plan does not specify the length of time within which the Recorder must respond to findings and recommendations for corrective actions in DOC Incident Reports, the four to five months it took to respond to

the four Incident Reports raised questions as to the Office's commitment to making serious efforts to remedy instances of identified non-compliance.⁸

a. Incident Report 15-001 (Employee working outside Job Description)

On June 19, 2015, the RCA issued Incident Report 15-001 that stemmed from a complaint by a Recorder employee that she had been working outside her job description since 2012 without receiving a performance and salary review or opportunity for reclassification or upgrade. The RCA investigated whether the claimant had been working materially outside her job description and, if so, if the Recorder's Office had followed the appropriate policies in the Plan and Manual accounting for the changed duties.

The RCA concluded that the employee had been working materially outside her job description for nearly the entirety of the Yarbrough administration and the Recorder had not followed any written policies or procedures to allow the employee to so work. The RCA also found that the employee "made several efforts to raise [this issue] with various personnel up the current Recorder's chain of command" – a fact corroborated by several employees interviewed by the RCA – but that no corrective measures had been undertaken.

Based on the above findings, the RCA concluded that (1) the Director of HRD, two Deputies Recorder and Labor Counsel violated Plan Section IV.I by permitting the employee to function in a capacity that was materially inconsistent with her written Job Description and (2) the Director of HRD violated Manual Section 5(c)(i)(f) by failing to

⁸ Accordingly, the RCA recommended to the parties at the November 9, 2015 status hearing that the Plan be amended to clarify a timeframe within which the Recorder must respond to DOC Incident Reports. The RCA raises that proposal again here.

maintain an “accurate and updated Job Description of the duties and requisite qualifications” for the position.

The RCA recommended that the Recorder issue the Director of HRD Disciplinary Action consistent with the above findings and conclusions; (2) the Recorder ensure all *Shakman* Exempt employees found to have committed violations understand those sections in the Plan and Manual and abide by them in the future; (3) the Recorder take whatever action consistent with the Plan, Manual and CBA that she deems appropriate to ensure the employee’s Job Description is updated and accurate and that she works within that Job Description; and (4) the Recorder inform the employee of (a) the finding that the employee was not afforded the protection provided in Plan Section IV.I and Manual Section 5(c)(i)(f) and (b) the third recommendation above.

The Recorder’s response to the above findings included moving the employee to a new department because, the Recorder reasoned, the employee’s job description “was, in essence” a better fit for the new department. The RCA met with Recorder’s Counsel to discuss her concerns with this response. The RCA explained that while the employee had never worked within her job description since being promoted into the position in 2009 – the Recorder’s move of the employee was not done in compliance with the Plan and was perplexing given the employee’s lack of training and experience related to the new department. The RCA further explained that the Yarbrough Administration had developed a policy (“Change in Job Duties Not Involving a Transfer”) for this precise situation – to allow the Recorder to keep an employee in her present position but merely update her job description when necessary – but did not follow that policy in this instance. Recorder’s Counsel acknowledged the RCA’s concerns but the Recorder

ultimately decided to keep the employee in the new department. The employee's Job Description has still not been updated and thus remains significantly inaccurate.

The Recorder also met with all Exempt staff to discuss the importance of having updated and accurate Job Descriptions for all employees. Lastly, on January 28, 2016, over seven months after the RCA issued her report, the Recorder issued the Director of HRD a Supervisor Counseling for "failing to follow CCRD policies and procedures".

b. Incident Report 15-002 (Courtesy Policy Violation by Exempt Employee)

On June 2, 2015, the RCA issued Incident Report 15-002 that was originally referred to the RCA by a Shakman Exempt employee. The RCA found that a Deputy Recorder violated Manual Section 1(b)(1) by acting in a discourteous manner toward a Non-Exempt employee. The RCA recommended, in pertinent part, that: (1) the Recorder ensure that all Shakman Exempt employees understand that Non-Exempt employees are provided certain protections in the Plan and Manual – including the right to be treated courteously – and that Exempt employees must honor those protections; and (2) the Recorder inform the Non-Exempt employee of the RCA's findings and recommendation.

Five months later, the Recorder informed the RCA that she would be implementing the recommendations by: 1) issuing a memo to all Shakman Exempt staff reminding them of the need to comply with the Plan and Manual and to treat Non-Exempt employees courteously and 2) providing the complainant with a letter informing him of the information referenced in the RCA's second recommendation. The RCA has since spoken with the Recorder's counsel about how such a response does not achieve actual corrective action. The RCA recommended that the Recorder actually meet with both: 1) the Exempt employee implicated by the Incident Report to discuss the findings

and ensure he understands how to comply with the Plan and Manual going forward; and 2) the complainant to discuss the findings and recommendations by the RCA and how the Recorder has attempted to issue corrective action to ensure the complainant's protections as afforded to him in the Plan and Manual are honored in the future. The Recorder subsequently met with all Exempt employees to discuss the need to treat employees courteously and Recorder's Counsel met with the complainant to discuss the Incident Report and Recorder's response to the same.

c. Incident Report 15-003 (employee improperly denied tuition reimbursement by HRD)

On June 19, 2015, the RCA issued Incident Report 15-003 finding that the Director of HRD improperly rejected an employee's request for tuition reimbursement. The RCA recommended the Director of HRD reconsider the employee's tuition reimbursement request based on her findings and the Recorder's Office revise the tuition reimbursement policy to clarify the eligibility requirements for participation in the program.

Five months later, the Recorder notified the RCA that HRD had reconsidered and accepted the employee's application for tuition reimbursement. Recorder Counsel also provided proposed edits to the tuition reimbursement policy. The RCA and Recorder subsequently agreed to the policy edits which effectively addressed the issues raised in the Incident Report. The Recorder has not yet implemented this changed policy.

d. Incident Report 15-004 (Director of HRD incorrectly advising employee of office policy)

On June 11, 2015, the RCA issued Incident Report 15-004 which stemmed from a complaint filed by an employee alleging that (1) when she was experiencing a medical

emergency at work her supervisor instructed her that she had to be accompanied in the ambulance per office policy and (2) on account of her supervisor ultimately accompanying the employee, the supervisor learned sensitive medical information concerning the employee and shared that information with other employees. After several interviews and review of relevant documentation, and acknowledging that the main actors had good intentions, the RCA concluded, in pertinent part, that: (1) the Director of HRD enforced a non-existent policy when he instructed the employee's supervisor to accompany the employee to the hospital – which was a violation of Manual Section 6(b); (2) the Director of HRD violated Manual Section 3(c)(iii) by putting the employee's personal medical information at risk; and (3) the supervisor violated Manual Sections 6(b) by not being knowledgeable of the office policy and 3(c)(iii) by sharing the employee's personal medical information with three employees. The RCA recommended the Recorder: (1) issue Disciplinary Action to the Director of HRD and supervisor consistent with the findings; (2) require the Director of HRD and two other employees involved to receive training on certain relevant office policies; and (3) take whatever action necessary to ensure all employees are knowledgeable of certain relevant office policies.

On August 3, 2015, the Recorder issued a Recorder's Report within which she stated she would implement the RCA's second and third recommendations – but not the first – and that she would provide notice of implementation. Five months later, Recorder's Counsel informed the RCA of additional corrective actions: (1) the Recorder updated her policy on Reporting Accidents and Illnesses to address issues raised in the Incident Report; (2) the Recorder would provide notice to all employees of this changed

policy; and (3) the DOC and Recorder Counsel would train relevant personnel involved in the events surrounding Incident Report 15-004 on the Office's policies concerning Confidentiality and Employee Privacy. While the Recorder's final corrective measures appeared effective, the RCA stresses the need for the Recorder to respond to instances of non-compliance far more swiftly.

C. Prong 3: *Is there a policy, custom or practice of making employment decisions based on political factors except for Exempt Positions?*

The RCA has noted that she has been "concerned that the culture within the Office still permits the existence of politically-based decision-making." Eleventh Report (Dkt. 4036) at 16. The RCA said her concerns were based upon the OIIG's findings to date and her observations of ongoing seemingly disparate discipline in favor of the Director of HRD. Since the RCA filed her Interim Report, (1) the OIIG released a report finding that the Recorder's treatment of the Director of HRD was based on the Director's significant political connections and (2) the Recorder continued to treat the Director of HRD more favorably than other Non-Exempt employees despite the RCA consistently raising concerns that the Director was providing false and inaccurate information to the RCA. Based on the OIIG's findings to date – as well as the RCA's own observations – the RCA believes there remains a practice of making employment decisions based on political factors.

The RCA's belief stems from OIIG Reports and RCA observations spanning the first three years of this Recorder's administration. First, prior to becoming the Recorder, Ms. Yarbrough and her then-Chief of Staff attempted to prevent the former Recorder's Administration from conducting certain Non-Exempt hiring. *See* RCA Interim Report (filed November 2, 2012) (Dkt. 3108); *see also* OIIG Investigation No. IIG12-0067 (filed

January 11, 2013). The OIIG found the Recorder's senior staff then engaged in a pre-textual campaign to terminate the very employee hired by the former Recorder whose hire then-Candidate Yarbrough had previously attempted to prevent. During these efforts, Recorder's senior staff attempted to mislead the RCA regarding the basis for the termination. *See* OIIG Investigation No. IIG13-0176 (filed June 19, 2014). The OIIG also found that the Recorder and her senior staff considered political reasons or factors when hiring for several Non-Exempt Positions. The OIIG concluded that several senior Recorder employees (including the Recorder herself) provided false or misleading information to the OIIG during its investigation into these hiring processes. *See* OIIG Investigation Nos. IIG13-0292, IIG13-0289, IIG13-0301, IIG13-0403 (issued jointly on February 26, 2014). No employees were terminated on account of the OIIG's findings; however, three of the five Non-Exempt employees implicated by the OIIG were suspended for varying lengths of time.

The Recorder and her staff were then found by the OIIG to have insulated 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." OIIG Summary Report No. IIG14-0408 at 21 (filed September 18, 2015). The RCA believes this policy of insulating the Director of HRD continued until the day of the Director's retirement.

On January 26, 2016, the RCA informed Recorder's Counsel that information provided by the Director of HRD during a recent interview with the RCA materially conflicted with information provided by the Director several months earlier.⁹ On March

⁹ At issue was the Director's involvement in the drafting of a Job Description. Last fall, the Director stated in writing that he had "sat with" the Division Head "to draft" the Job Description. This would have been

11, 2016, Recorder's Counsel provided the Director with an Incident Report for the alleged provision of false information to the RCA and told the Director he could obtain counsel for the disciplinary hearing. While the Recorder's Manual requires disciplinary hearings to take place within 30 days of issuing an Incident Report, the Recorder's Office never conducted a hearing on this matter before the Director's departure on April 29, 2016. Rather, the Office conducted a pre-disciplinary hearing at which the Director provided written questions for the Recorder's Office and requested an extension. The Office never responded to the Director's written questions and never reconvened a disciplinary hearing prior to the Director's retirement.

Finally, in justifying why the Recorder decided to move an employee to a new department in response to findings in RCA Incident Report 15-001, Recorder Counsel wrote in a letter dated January 27, 2016, that one consideration was the Recorder's belief that the employee had received her position "because of political considerations taken into account by the previous administration". While the RCA has noted above her concern with how the Recorder's transfer of this employee was a departure from her written policies and procedures, Recorder Counsel's stated basis for this departure – that it was at least, in part, based on political reasons or factors – is especially concerning.

Based on the above findings, the RCA believes there currently exists a policy and practice of making employment decisions based on political reasons for (at least some) Non-Exempt Positions in the ROD. Now that the Director of HRD has departed, the RCA hopes this practice ends and the Recorder ensures all her staff (especially her

compliant with the process outlined in the Plan. *See* Plan Section IV.I. However, in a January 2016 interview with the RCA, the Director stated that he had virtually no role in drafting the Job Description other than being given a final draft by the Division Head and making minor edits. The Director stated he had never "sat with" or even spoken with that Division Head about the Job Description.

Exempt staff) begin embracing the principles of *Shakman* compliance.

D. Prong 4: *Is there an absence of material noncompliance which frustrates the Recorder's Consent Decrees and the SRO's essential purpose?*

The fourth prong of Substantial Compliance concerns whether the Recorder has materially not complied with the SRO. The RCA believes there are myriad examples of material noncompliance including: (1) the Recorder's politically-motivated treatment of her former Non-Exempt Director of HRD and his pattern of providing false and inaccurate information to the RCA; (2) efforts by the Recorder's control group to prevent employees from bringing complaints to the RCA; and (3) the Recorder's inconsistent application of various of her own policies.

1. Politically-motivated treatment of former Non-Exempt Director of HRD

On several occasions the former Director of HRD provided the RCA with false and/or inaccurate information with no adverse consequences. Three examples include: (1) telling the RCA that he had significant involvement in the drafting of a Job Description and later admitting to having virtually no involvement whatsoever; (2) falsely assuring the RCA that an issue concerning an employee's Compensatory Time had been resolved when it had not been and (3) falsely telling the RCA twice that certain disciplinary files did not exist before admitting that they did in fact exist. For several years, the RCA discussed with senior Recorder staff her concerns with being consistently told inaccurate and false information by the former Director of HRD; however, no significant effective corrective action was taken. The OIIG concluded, in part, that the Recorder's disparate treatment of the former Director of HRD was motivated by political reasons and factors. While the departure of the former Director of HRD opens up the

potential for a more robust HRD to develop, the senior staff who allowed him to provide inaccurate and false information to the RCA virtually unchecked remain.

2. Preventing Employees to Bring Issues to RCA and DOC

Section I.E of the SRO requires the Recorder to cooperate with the RCA in connection with the RCA's efforts to adjudicate claims and to oversee and ensure implementation of the remaining portions of the Recorder's Consent Decree and the SRO, including providing reasonable access to all relevant non-privileged documents and to current employees at all levels. Similarly, Section IV.J of the Plan requires all HRD staff to cooperate fully and at all times with the DOC by assisting the DOC in carrying out his duties under the Plan. Since her Interim Report, certain senior Recorder employees have frustrated the above requirements to cooperate and have attempted to discourage Non-Exempt employees from raising issues with the RCA. Below are two of the most alarming examples of these efforts.

In April 2015, several employees reported to the RCA (who was then serving as Interim DOC), that they had been recently informed by their union steward that union employees were no longer permitted to speak with the RCA as Interim DOC. The RCA then spoke with these employees' union steward who told her that at a union meeting, Recorder's Counsel had conveyed the above message and had also told the union stewards present what the RCA's staff's billing rates were and that they should know it costs money when they come to see the RCA or her staff.

The RCA contacted Recorder's Counsel and expressed her concern about the above reports. She explained that the effect of the reported communications was chilling at least some employees from bringing relevant employment-related concerns to the

RCA. The RCA requested that the Recorder's Office take some affirmative step to assure employees that they may (and are encouraged to) bring any alleged violations of the Plan or Manual to the RCA. While Recorder's Counsel denied any intent to discourage employees from bringing issues to the RCA, he agreed that any lack of clarity needed to be resolved. Subsequently, the RCA had several conversations with Recorder Counsel on this issue – each time stressing the need for the ROD to clearly inform employees that there were free to discuss Plan and Manual-related concerns with the RCA and DOC. The ROD never issued any further communication on the matter.

Also since the RCA's 2015 Interim Report, a Non-Exempt employee filed a complaint with the DOC alleging she was working outside her job description with inadequate training. The DOC interviewed Recorder's Counsel in connection with the complaint (which had been filed by that Counsel's Executive Assistant). During that interview, the DOC informed Recorder's Counsel that he was investigating a filed complaint and – after Recorder's Counsel alleged his Executive Assistant had provided false information in that complaint – asked him to hold off on pursuing any discipline against his Executive Assistant until the DOC completed his investigation. Recorder's Counsel agreed. Within 48 hours of that interview, Recorder's Counsel issued five major cause infractions against the Executive Assistant on the belief that she had provided false information in her complaint to the DOC. After discussions between the RCA and the State's Attorney's Office on the seriousness with which the RCA viewed Recorder's Counsel's actions – as well as input from the DOC – the Recorder rescinded the discipline pending the resolution of the DOC's investigation.

The DOC issued an Incident Report wherein he concluded that Recorder's Counsel had (1) retaliated against his Executive Assistant for filing a complaint (originally with the RCA) concerning an alleged violation of the Plan and (2) knowingly provided false information to the DOC during the DOC's investigation of the same. *See* DOC Incident Report 15-009 (issued on November 6, 2015). The DOC concluded that there was "no question in this investigation that [Recorder's] Counsel knew there was an open investigation into the allegations raised by [the claimant] and as such the Office Incident Report should not have been filed." 15-009 at 9. The Recorder ultimately refused to discipline Recorder's Counsel instead concluding that the Non-Exempt employee's complaint was not made in good faith. The Recorder concluded that her Counsel had not provided false information to the DOC and had not interfered with the DOC's investigation because nothing prevented him from pursuing discipline of an employee for allegedly providing false information to the DOC in a complaint while the DOC investigated that very complaint.

The RCA continues to view Recorder Counsel's actions with concern and is alarmed at the Recorder's refusal to acknowledge the inappropriateness and seriousness of those actions. With the DOC's Report, there have now been three separate entities (the OIIG, DOC and RCA) who have all found that senior staff in the Recorder's Office have either (1) provided false information in connection with an investigation or inquiry or (2) attempted to retaliate against employees for exercising their SRO and Plan-mandated duty of notifying the appropriate entity of a perceived violation of the SRO, Plan or Manual. The RCA is aware of other examples (confirmed by the DOC) of senior staff discouraging Non-Exempt employees from reporting issues to the RCA. This

culture of making false statements and chilling employees from reporting Plan and Manual violations must change. Leadership from the Recorder herself is necessary to ensure that employees of all levels feel comfortable bringing complaints and concerns to the DOC, RCA and OIIG without fear of retaliation.

3. Continued Ad Hoc Decision Making Concerning Discipline

The RCA also continues to see the Recorder make decisions concerning employment policies on an ad hoc basis instead of following the policies and procedures laid out in the Plan and Manual. One example concerns the issuance of progressive discipline. Currently Section 6(a)(v)(c)(ii)(b) of the Manual states that for unionized employees, progressive discipline will be issued when such an Employee commits the same Minor Infraction more than once in an 18-month period. Section 14.8 of the CBA states that “all discipline *below suspension* will be discarded after eighteen (18) months if there has not been a like discipline problem” (emphasis added). Last year, the RCA discovered that certain employees’ disciplinary sequences had been reset for no apparent reason. This meant that while they had a suspension on their record for a AWOL infraction, for example, their sequence had been reset to Counseling despite the Recorder’s policy not permitting such a reset. The RCA discussed with Recorder’s Counsel why these employees’ progressive discipline sequences had been reset. After a few months, the then-recently hired DOC proposed resolving the issue by notifying the seven employees who had benefited from the reset that the next time they committed the same infraction, they would be placed at the correct progressive step. While this corrective measure has been made for some affected employees, it was not finalized for all of them.

E. Prong 5: *Has the Recorder implemented procedures that will effect long-term prevention of the use of impermissible political considerations?*

The last component of Substantial Compliance requires the Recorder to have implemented procedures to ensure that the principles that form the basis of the *Shakman* litigation will carry on long into the future. Since the RCA's 2015 Interim Report, the Recorder's Office has completed training on the Plan and Manual, hired a DOC, and hired a new Chief of HRD. While the RCA has noted above many problems, the good news is the Recorder has a Plan, a Manual, and hopefully hired a Chief of HRD who will be able to implement the written policies and procedures of the ROD. If this Chief of HRD is permitted to lead the Office's efforts toward compliance with the SRO, Plan and Manual, the RCA hopes the Recorder's senior staff will begin embracing the principles of *Shakman* compliance and start earning the trust necessary in this process.

III. Conclusion

The road to reaching Substantial Compliance is not an uncharted one; three defendants have successfully navigated it before. Moreover, the requirements are clear. First, the elected official must be willing to make *Shakman* compliance a serious priority and ensure that his or her entire staff follows suit. Second, the office must develop transparent and non-political employment policies. Third, the office must not just preach but *practice* transparency and consistency in Non-Exempt Employment Actions. Fourth, the Office must approach any instances of noncompliance with the seriousness and directness that demonstrate a commitment to not repeat the mistakes of the past. To achieve all of this, the office needs a robust and effective HRD as well as a strong and independent DOC. The RCA encourages the Recorder to take advantage of her new

HRD leadership to with her Office's efforts toward complying with the SRO, Plan and Manual. While hiring a single employee will not instantly cure all current issues of noncompliance or erase concerns raised by the many prior violations by this Administration, it can serve as a springboard to getting on a new path forward.

The RCA looks forward to working closely with the new Chief of HRD and continuing to be a resource for the Office in its efforts to reach Substantial Compliance.

Respectfully Submitted,

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