

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

MICHAEL L. SHAKMAN and	)	
PAUL M. LURIE, <i>et al.</i> ,	)	
Plaintiffs,	)	Case No. 69 C 2145
	)	
v.	)	Honorable Wayne R. Andersen
	)	
DEMOCRATIC ORGANIZATION OF	)	
COOK COUNTY, <i>et al.</i> ,	)	
Defendants.	)	

**INSPECTOR GENERAL’S OFFICE REPORT REGARDING  
INVESTIGATIONS OF POLITICAL DISCRIMINATION**

In its March 30, 2009, Memorandum Opinion and Order, the Court directed the Inspector General of the City of Chicago (“IGO”) to submit a report to the Court summarizing (i) his investigations of political discrimination in connection with any aspect of employment with the City; (ii) any recommendations for corrective or disciplinary action he has made; and (iii) his views with regard to the City’s response to those recommendations.<sup>1</sup> The IGO submits this report pursuant to that Opinion and Order.

**I. Summary of Investigations Post Accord**

Since entry of the May 31, 2007 Accord, the IGO has received 107 Accord complaints related to claims of political hiring. In response, the IGO opened 17 investigations.<sup>2</sup> To date, 16

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<sup>1</sup> The Court originally ordered this report to be filed by December 7, 2009. However, on November 30, 2009 Joseph Ferguson replaced David Hoffman as the City’s Inspector General. In order to give Mr. Ferguson time to become acquainted with the issues and investigations involved in Shakman-related matters, the Court, on December 4, 2009 extended the time for filing this report until January 29, 2010.

<sup>2</sup> The IGO declined to open investigations into the other 90 complaints because they failed to meet the appropriate standards of an Accord Complaint for reasons such as: (1) the complaint did not allege unlawful political discrimination in relation to an employment action; (2) the complaint did not involve a

of those investigations have been completed, with each classified as “not sustained.”<sup>3</sup> Based on this recent history, the IGO therefore reports the absence of findings suggesting the ongoing presence of wholesale illegal political hiring in the City. The numerical overview of *per se* political hiring matters as requested by the Court, however, does not adequately reflect the current state of affairs. Years of vigorous watchfulness by the Plaintiffs, bolstered by spans of direct Court oversight, and, most notably, the current cycle of active oversight by the court-appointed Monitor have produced a hiring environment in which political influence is seldom overtly and expressly manifested. A more robust assessment of compliance requires reference to the universe of *Shakman* investigations beyond simple, political patronage complaints.

The number of complaints of *Shakman*-related violations received since May 31, 2007 total 113, of which 53 were opened. Of those opened, 8 were sustained, 12 are ongoing, with the remaining 33 closed as not sustained. Additionally, during this period, 65 cases involving preferential treatment in employment actions were opened. Of those opened, five were sustained and 18 are ongoing, with the remaining 42 closed as not sustained. It is in this broader *Shakman* rubric where more nuanced forms of political patronage equally violative of the decrees and the Accord lurk. Because no longer undertaken in overt fashion, improper political motivation in hiring is difficult to establish. While the IGO pursues leads where such evidence might be found, subject to certain fundamental jurisdictional prohibitions as discussed in Section III.C below, more typical are cases in which there are violations of the prophylactic hiring plan effected in a manner that could mask actions based on a nexus to political influence in the City.

A short summary of some of the more significant cases of this nature follow:

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City employment action; or (3) the complaint concerned actions that occurred prior to the date of the Accord.

<sup>3</sup> Most of these investigation involved allegations that were sparse and dubious from the outset, and there were also misrepresentations of facts in some cases.

**A. Completed Investigations**

- Department of Environment (“DOE”)

In a case reported to the court on October 26, 2009 (Case # 09-0281), we described how DOE hired two common law employees<sup>4</sup> through a vendor. DOE had initially attempted to hire these two individuals as regular, payroll City employees but was unable to do so because of the City’s hiring freeze. DOE then turned to a contractor and requested that the contractor create two positions for the two individuals on the understanding that they would be assigned to work at DOE, which the contractor did. Additionally, the IGO found that DOE committed similar violations with respect to eight additional individuals who were hired by a DOE contractor. In each instance, (i) the employees in question were common law employees; (ii) DOE, not the contractor, chose the individuals for the positions; and (iii) none of them were hired in accordance with *Shakman*.

- Chicago Department of Public Health (“CDPH”)

In another case reported to this Court on October 26, 2009 (Case #09-0479), we described how CDPH violated the Accord by retaining the services of a nurse who in reality was a common law employee employed through a medical services agreement with an area hospital. Under the terms of the agreement, the “contract” nurse supervised City employees, and her work was directly overseen by CDPH rather than her purported contract employer. The evidence showed that CDPH did not follow the hiring plan because the main people at CDPH who were

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<sup>4</sup> To determine who should be classified as a common law employee, the IGO follows the multi-factor test set forth by this court in *Shakman v. Democratic Org. of Cook County*, No. 69 C 2145, 1997 U.S. Dist. LEXIS 6029, at \*15-16 (N.D. Ill. April 25, 1997). In its ruling, the court considered five factors to determine whether a worker was an employee or an independent contractor, the first being the most important: (i) the extent of the employer’s control and supervision over the worker, including direction on scheduling and performance of work; (ii) the kind of occupation and skill required; (iii) the responsibility for costs of operations, such as equipment, licenses, fees, and supplies; (iv) the method and form of payment and benefits; and (v) length of job commitment.

involved in the creation of the position did not recognize that it implicated a *Shakman* concern. This failure to recognize the hiring of the nurse as a *Shakman* issue came about because four City-issued memos issued over a ten-year period (which the City contends should have properly alerted CDPH) did not make it clear that they applied to contracts let under the 2004 ordinance. In addition, the IGO found a history of inadequate training on the City's part regarding the common law employee issue.

- Mayor's Office of Special Events ("MOSE")/Department of Cultural Affairs ("DCA")

An IGO investigation showed that, beginning in mid-2006 and extending into mid-2007, a high-level employee who simultaneously held positions in MOSE and DCA, attempted to manipulate a City hiring sequence to hire a favored candidate. When DHR raised questions about the hiring and refused to go ahead with it, the City official simply placed the favored applicant on the payroll of the Chicago Tourism Fund ("CTF"), an Affiliated-Not-For-Profit ("ANFP")<sup>5</sup> that is so closely aligned with MOSE that it is essentially impossible to distinguish between the two. In fact, the City official controlled hiring at CTF. While at CTF, the favored applicant functioned as a common law employee of the City. For example, the employee worked in a City office as the executive assistant to a City employee, took direction from a City employee, had a City e-mail address and access to the City's computer system, and was paid a salary by CTF that was completely reimbursed by the City. The IGO's investigation showed that this use by MOSE (and its sister department, the Department of Cultural Affairs ("DCA")) of

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<sup>5</sup> ANFPs take a variety of forms but are usually City-created not-for-profits that are closely aligned with City departments. Although ANFPs are ostensibly independent of the City, many are so closely intertwined with the City that they operate as "shadow" City departments. For example, the Chicago Tourism Fund ("CTF"), an ANFP aligned with the Mayor's Office of Special Events ("MOSE") and the Department of Cultural Affairs ("DCA"), receives over 90% of its operating budget from the City, has a Board made up of City employees, and works almost exclusively on MOSE and DCA projects. CTF employees work alongside City employees in City facilities, have access to City databases, use City e-mail and mailing addresses and take day to day direction from City employees. For all practical purposes, there is no separation between CTF and MOSE/DCA.

ANFPs to hire common law employees was not unique to this hire — it was standard operating procedure for DCA and MOSE. Additionally, DCA and MOSE have used CTF and other ANFPs to hire *dozens* of common law employees outside the City’s standard hiring procedures and outside the scrutiny of DHR, the Office of Compliance (“Compliance”) and the Court-appointed Monitor (“Monitor”).

- Department of Law

An IGO investigation showed that in 2007, a high-level attorney in the Law Department committed misconduct aimed at hiring a preselected candidate into a Chief Assistant Corporation Counsel (“CACC”) position in the Law Department’s Traffic and Branch Court division. The attorney had attempted to appoint the candidate into the CACC position but was informed that the position would have to be posted, which required that the candidate would have to apply. Subsequently, the attorney interfered with the selection process by spreading unfounded rumors about one of the applicants in order to improve the preselected candidate’s chances of getting the job. In addition, the investigation showed that another high-level attorney, who was the Law Department’s authority on *Shakman*-related hiring issues at the time, provided erroneous advice to the department as to the process of filling CACC vacancies, including the one at issue in this case.

## **B. Unreported and Ongoing Investigations<sup>6</sup>**

- City Department A

A completed, but as yet unreported, IGO investigation shows that in 2008 a City department hired secretaries and supervisors through a consultant, in violation of the *Shakman* Decree, Accord and City hiring and procurement policies. City Department A utilized a Master Consulting Agreement for management and information technology services to hire secretaries for high-level department staff and to hire supervisors for line employees. City Department A directed the consulting firm to hire specific individuals for the department. These employees fit all the critical characteristics of common law employees. In many instances, the employees had almost no contact with the consulting firm, other than receiving a paycheck. In other words, the consulting firm functioned simply as an outsourced payroll service for workers, who in all critical respects, were functionally City workers. As we will note later in this report, these common law employees went undetected in the “audit” of common law employees and contractors conducted by the Office of Compliance. The results of the investigation are expected to show that the individuals involved in these violations are those who are, or recently were, at very high levels within the department.

- City Department B

In a second completed, but as yet unreported IGO investigation, we found that in 2007 two interns whose student internships had expired were hired as common law employees at the request of City officials, by a vendor working under a consulting contract. The vendor

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<sup>6</sup> We recognize that, with respect to these cases, because summary reports have not been issued, the City has not yet been afforded an opportunity to respond to our findings. Thus, we do not summarize these cases in this report with the intent that they be construed against the City for a failure to address the issues raised. Rather, we include them in this report because the Court, in its March 30, 2009 Order, requested that we summarize “*investigations* of political discrimination in connection with any aspect of employment with the City” (emphasis added).

conducted no interviews prior to hiring and provided no supervision of their work. In addition, the evidence suggests that City employees pre-selected one of the former interns for a permanent City position and then effectuated a rigged (albeit ultimately unsuccessful) hiring sequence which included conducting sham interviews of non-preferred candidates and supplying the former intern with a copy of the screening criteria to prepare for his interview.

- Interns Case (Multiple Departments)

The IGO will soon conclude an investigation regarding student intern hiring for which it expects to issue a summary report in the near future. We examined student intern hiring in seven City departments during the period 2005-2008. Although the details of our investigation results cannot be disclosed at this time, we note some general observations:

- Nearly half of the approximately 900 interns examined had a connection to a City employee, and almost half of these interns were related to a City employee.
- Many of the interns with City connections were hired for multiple or recurring internships.
- Several of the interns with City connections were later hired into full-time City jobs.
- None of the departments evaluated were required to maintain and track intern applicant information.

Interviews of various City employees with involvement in student intern hiring indicate that many interns were pre-selected based on their connection to a City employee, and in some instances, the hiring criteria was tailored for the desired candidate. For example, one employee admitted making prior internship experience in the department the most weighted of the hiring criteria to ensure that previously pre-selected interns remained in the department's exclusive hiring pool.

What is even more troubling is that such preferential treatment in hiring student interns continued after a new Plan for Hiring Student Intern Workers (effective April 2006) was

incorporated into the City's New Hiring Plan pursuant to the Accord. In addition, the ongoing nature of the activity suggests that it continues today. It appears that, in the departments examined, the implementation of the new policy regarding hiring student interns had little to no effect on intern hiring practices, which continued through the end of the investigational period. Thus, it is likely that preferential treatment continues to be given to interns with City connections in those departments. Employee statements also indicate that these problematic hiring practices continue to be utilized with no indication of ceasing. The harm in these and other such similar practices is not mitigated by the qualifications of those so selected. Rather, the preferential treatment foreclosed a meaningful opportunity for other equally, if not more, qualified candidates to be allowed to fairly compete for positions and opportunities with the City.

## **II. The City's Operational Resistance to the IGO**

Taking an expansive view of the City's responses to IGO investigations, which the nuanced forms of political patronage and protection require — and invited to do so by the Monitor — the IGO here reports on three key areas where the IGO has experienced stiff resistance from the City in its efforts to investigate and prevent *Shakman* violations: (i) the City's assertion of the attorney-client privilege to block the IGO's access to relevant information; (ii) failures by Compliance to notify the IGO of allegations of improper political hiring; and (iii) the City's resistance to disciplining employees who have admitted to criminal manipulation of the hiring process during the *Sorich* political patronage trial.

### **A. City's Assertion of Attorney-Client Privilege**

A deeply troubling recent development bearing directly on the question of substantial compliance is that the City has begun routinely invoking the attorney-client privilege to preclude the IGO from obtaining key documents in investigations, including in employment

investigations. For example, the City asserted the privilege and withheld documents in an investigation relating to the hiring of a former high-level City employee through a sole source contract. In fact, the City now routinely adopts the position that it need not provide the IGO with information that it characterizes as “privileged.”

If the conduct and decisions of high-level City employees are cloaked from the IGO under the auspices of a wholesale invocation of privilege, it is difficult to conceive how substantial compliance with the *Shakman* decree could ever be obtained. As detailed below, regardless of its obligations under *Shakman*, and under the IGO ordinance, the City has made it clear that it has every intention of continuing this posture. If the Law Department can shield information from disclosure in official investigations of possible government misconduct in employment and other matters, the IGO’s power to investigate will be blocked and in some instances eviscerated, depending on the contents of the information withheld, and their significance to a given investigation.

In one recent instance, this failure to provide documents escalated to the point where the Law Department refused to comply with a subpoena issued by the IGO pursuant to its ordinance. In a currently pending action captioned *Ferguson v. Georges*, No. 09 CH 43287 (Hon. Nancy J. Arnold) (filed Nov. 4, 2009), the IGO seeks resolution of this legal issue in the Circuit Court of Cook County, Chancery Division. Specifically, the Inspector General seeks a declaratory judgment, a writ of mandamus and enforcement of a subpoena to compel Corporation Counsel to produce unredacted copies of any and all materials duly subpoenaed by the IGO as part of an investigation by the IGO into possible misconduct in City government. The IGO is of the belief that the documents redacted and withheld by the Law Department are directly relevant to the IGO’s investigation.

The IGO also firmly believes that, as a matter of State law, City law, and compelling public policy, it has a clear and unequivocal right to the materials being withheld by the Corporation Counsel, and that the attorney-client privilege cannot be invoked to shield documents and testimony from discovery in IGO investigations — including in employment investigations implicating *Shakman*. The IGO outlined the overwhelming law and policy considerations in support of this position in an October 8, 2009 letter to the Corporation Counsel. See Exhibit A (also attached as Exhibit D to the publicly-filed Complaint in *Ferguson v. Georges*). Although this legal issue is currently pending before another tribunal, it is noted here because of its critical bearing on the question of the City's compliance with the Accord.

The importance of this matter to the City appears not to be borne merely out of a cautious impulse by the City to steer clear of any possible breach of the attorney-client privilege. To the contrary, the Corporation Counsel has publicly asserted in a hearing before the City Council that even if the Chancery Court were to issue a ruling favorable to the IGO on the privilege issue, she would seek to override an adverse ruling by seeking an amendment to the Municipal Code that adopts her position. Corporation Counsel testified during the November 12, 2009 hearing of the City of Chicago Committee on Budget and Government Operations that in response to IGO service of a document subpoena, she:

[I]dentified documents that [she] refused to turn over because [she] believed they were protected by the attorney/client privilege.

11/12/09 Tr. at 58:12-14.

However, Corporation Counsel went on to say:

If a court held that I would have to submit these documents to the IG because of statutes within the Municipal Code, I'd probably ask you all [the City Council] to amend the Municipal Code to say that my privilege is *sacred*.

11/12/09 Tr. at 60:21-22 – 61:1-3 (emphasis added).

Such a posture is in direct conflict with the IGO's mandate to root out misconduct in City government, which includes hiring and other employment decisions, and the obligation of all City employees to cooperate with the IGO in its investigations of such matters. *See* Chicago Municipal Code § 2-56-090. This issue is especially relevant here because history has shown that the hiring abuses, which the Accord seeks to remedy, occur not in the general population of City employees, but by those at higher levels with decision-making power. At bottom, the broad invocation of privilege at present means that the IGO cannot inform the Court that it is even able to fully investigate *Shakman* violations.

**B. Office of Compliance**

The Office of Compliance ("Compliance") was created by ordinance (Chicago Municipal Code § 2-26) on September 5, 2007. Under the City's current Hiring Plan, Compliance is responsible for monitoring and auditing the City's hiring procedures to ensure that the City is in compliance with the Hiring Plan's requirements.

As reflected in previously filed court documents, the Monitor and the IGO objected to the creation of Compliance as the hiring watchdog. One of the concerns raised by the Monitor was that the separation of the investigative function from the monitoring and auditing functions would "unnecessarily hamper the City's ability to identify problems and detect irregularities." Monitor's Report and Recommendations Regarding City of Chicago's Proposed "New Plan," at 6 (Case No. 69 C 2145, Docket No. 721, September 27, 2007) ("Monitor's Report").

Over the past two-and-a-half years, it has become evident that the Monitor's and the IGO's concerns about the splintering of the hiring compliance functions have become reality. Since the creation of Compliance, the IGO has been hindered in its ability to assist the City in redressing problems. The City's current Hiring Plan "contemplates the HPCM [Hiring Process Compliance Manager] and the IGO working collaboratively." City of Chicago Hiring Plan, Section XIII.B. Unfortunately, such a collaborative relationship does not exist, in large part, because of Compliance's refusal to share information with the IGO — information that it is required to provide by either its ordinance or the Hiring Plan.

For example, the Hiring Plan requires the HPCM to "provide copies of the Call Log to the IG . . . on a weekly basis" and to "provide copies of the Resolution Log to the IG . . . on a semi-annual basis."<sup>7</sup> Hiring Plan, Section XIII.D. Nevertheless, Compliance has been, to put it charitably, lax in providing this information to the IGO, even after many reminders to do so. Similarly, Compliance's ordinance requires it "to provide notice of all complaints to the office of the inspector general in a timely manner." § 2-26-040(j). Despite this requirement, Compliance has continually failed to provide this information to the IGO. On numerous occasions, the IGO discovered that Compliance had started reviewing a matter without providing the requisite notice to the IGO, after which the IGO would once again remind Compliance of its duty under its ordinance.

These reminders were ineffective because Compliance has deliberately refused to share all of the statutorily-required information with the IGO. Although some of the difficulties encountered by the IGO might be alleviated if Compliance's officers and staff were to adopt the

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<sup>7</sup> According to Section XIII.D of the Hiring Plan, the Call Log is maintained by the HPCM and contains information relating to calls made to the Complaint Line, which is the telephone number designated by the City for complainants to call and register complaints regarding the hiring process. The Resolution Log is also maintained by the HPCM and tracks the complaints received, as well as their resolution.

more collaborative and cooperative approach called for in the Hiring Plan and Compliance's ordinance, we remain concerned that the current framework will continue to cause unnecessary, but easily avoidable, administrative problems. Even with the full cooperation of both offices, separating the hiring compliance functions will always carry a higher potential for information, such as a complaint, to be lost or misdirected. In addition, some of the issues that the Monitor raised prior to Compliance's creation would continue to exist. The Monitor expressed concern that even if the HPCM is required to forward all complaints of patronage hiring to the IGO, it is possible that the HPCM may not recognize a potential patronage violation because such problems are often not self-evident, in which case the complaint would not be forwarded. *See* Monitor's Report at 7. Also, the Monitor felt that even if the HPCM forwards its Call Log to the IGO, the log would only provide basic information that may not be as helpful to the IGO, and the HPCM would be hindered as well because he or she would not have the benefit of the IGO's expertise and body of knowledge. *Id.* Such institutional problems are difficult to fully eliminate because of the logistical challenges that are inherent when attempting to coordinate the work of separate offices with separate but potentially overlapping responsibilities.

### **C. The City's Failures to Repudiate Criminal *Shakman* Violations**

The City sent a decidedly weak message about its commitment to *Shakman* compliance when it failed to follow the IGO's recommendation to discipline two employees who were deeply and manifestly involved in criminal violations of the *Shakman* decree. The more egregious of the two instances involved the high-ranking Christopher Kozicki,<sup>8</sup> who at the time of his crimes was the Managing Deputy Commissioner of the Department of Buildings. Kozicki

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<sup>8</sup> Kozicki is identified by name in this report because he has been self-identified in the *Sorich* court proceedings and records, which were public. Other City employees referenced in this report have not been publicly identified, and thus are referred to anonymously. However, should the court desire further details of any investigation discussed herein, the IGO's will make its relevant summary reports available for *in camera* review.

testified at the trial of *United States v. Sorich* in June 2006. Kozicki agreed to testify following a grant of immunity from criminal prosecution, and admitted to taking steps in 2004 to ensure that a 19-year-old son of a trades union president — whom he knew to be unqualified for the position — was hired to a *Shakman* covered position as a City Buildings Inspector. Kozicki's admitted actions included creating and submitting a false document to increase the teenager's interview score. Despite his admitted concerns about the potential negative public impact of hiring a 19-year-old, he nevertheless changed his interview score to ensure that the candidate was hired.

In December 2006, the IGO concluded that Kozicki knowingly and willingly participated in a criminal scheme to circumvent the 1983 Consent Decree and the City's Detailed Hiring Provisions, and recommended to the City that Kozicki be terminated. The City, however, did not terminate Kozicki. Instead, the City merely removed him from "personnel-related decisions or processes." Eventually, and only after the City's refusal to terminate Kozicki was reported in the press, Kozicki was allowed to resign in 2008.<sup>9</sup>

The City's refusal to terminate Kozicki (and failure to date to discipline Employee A) raises concern about the vigor of the City's commitment to rooting out all illegal patronage hiring. In the IGO's view, the City had an opportunity, on the basis of unimpeachable underlying facts, to clearly and unequivocally repudiate the long-standing and pervasive illegal hiring practices revealed in the *Sorich* trial. Instead, its actions sent a message that participation in the long-standing patronage army need not necessarily be fatal to one's City career.

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<sup>9</sup> There is a second employee ("Employee A") who falls into the same category as Kozicki. This instance arose from the May 2006 testimony at the *Sorich* trial of an administrative City employee ("Employee A"). Employee A agreed to testify following a grant of immunity from criminal prosecution, and admitted to rigging nearly 50 hiring and promotion sequences over a seven-year period. These actions violated the both the Consent Decree and the City's Detailed Hiring Provisions. This information was passed onto the City by the IGO, who, notwithstanding some initiative on the Law Department's part, has never been disciplined.

### **III. Areas at Continued Risk for Political Hiring Abuses**

This report is the IGO's last opportunity under the existing schedule to speak to the Court relating to *Shakman* matters. We therefore would be remiss if, in offering our overall assessment of the current *Shakman* landscape, based upon our investigations and considered against the current institutional and statutory backdrop, we did not highlight for the Court several areas that pose substantial and continuing risks to achievement of *Shakman* compliance. As discussed below, some of these risk areas center on hiring constructs that bypass the otherwise applicable Hiring Plan, and which consequently make it virtually impossible to ferret out patronage hiring relating to City operations. Other risks focus on areas where political influence may be hidden within decisions to discipline employees. And, finally, we note that the statutory prohibition against IGO investigations of members of City Council and their staff establishes a vast and impenetrable *terra incognita* regarding prohibited hiring decisions instigated by members of the City Council.

#### **A. Hiring Outside the Accord's Hiring Plan**

As shown in Part I, several recent IGO investigations have revealed a significant weakness in the City's hiring procedures that has allowed the continued hiring of "common law" City employees outside of the City's Hiring Plan. This hiring has primarily occurred by hiring effected through City vendors and through entities known as ANFPs. These hiring practices, which the IGO has discovered in several departments over a number of years, operate outside the City's Hiring Plan and generally without scrutiny from the Department of Human Resources ("DHR"), the Monitor, the HPCM or Plaintiffs. The IGO highlights these investigations because this "shadow" hiring system could be easily exploited to hire clouted individuals by circumventing the traditional City hiring process with its attendant scrutiny.

As the IGO previously reported to the court (IGO Cases # 09-0281 and # 09-0489), the City's efforts over the course of nearly 15 years to instruct City departments about *Shakman* common-law employee problems have been fundamentally inadequate. The City's efforts to ensure *Shakman* compliance on the common-law employee issue consisted largely of issuing four skeletal advisory memos to department heads, along with distributing copies of the Accord to department heads. Critically, the City failed to ensure that employees responsible for contracting decisions within the various departments (whether new hires or transferred for another assignment) were ever trained about common law employee issues.

These efforts were inadequate in light of the known severity of the problem. Since the *Pennick* petition was filed in 1994, it has been clear that contract employees have presented a major *Shakman* compliance issue. Critically, in 2001, the Court agreed with the Plaintiffs that approximately 94% of the 2,034 subjects of the *Pennick* petition who were hired on a contract basis were common-law employees, and that they were hired in violation of the 1983 Consent Decree. Hundreds of similar violations continue today. Compliance reported that as of August 2009, there were 338 contract workers who qualified as City common-law employees.<sup>10</sup>

Compliance has crafted a new policy on common law employees and filed it with the Court on December 11, 2009. The policy has yet to be implemented. The proposed policy reiterates that the Accord "prohibits the City from employing persons who meet the definition of common law employee (i) pursuant to personal service contracts or similar mechanisms, or (ii) by or through temporary personnel agencies or other organizations, except in full compliance with the terms of the *Shakman* Decree." The proposed policy then sets forth procedures apparently intended to implement the existing policies set forth above. For the most part, the

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<sup>10</sup> This number certainly understates the number of common law employees, as Compliance's review did not include the employees working in City Department A referenced above. We also note that with respect to the 338 positions that were identified, none were referred to the IGO.

additional procedures merely constitute sign-off by, and periodic reporting to, Compliance. The proposed policy does not explicitly refer to, nor does it directly deal with, hiring by City officials through vendors or ANFPs. The IGO believes that the proposed new policy adds little or nothing of substance to the existing patchwork of memos on the issue.

But whatever the merits of Compliance's proposal, the IGO believes that the City's response needs to go beyond a new policy. Hiring employees through vendors and ANFPs has occurred across the City despite numerous memos issued to supposedly rein in the practice. Here, the issue is not the City's failure to have a policy. Rather, it is the City's failure to integrate the policies regarding common law employee hiring with the City's Hiring Plan. While IGO investigations have shown that some City employees have knowingly circumvented the Hiring Plan by hiring through vendors and ANFPs, the IGO has also found that many City employees simply do not appreciate that the hiring of common law employees *is* City hiring governed by the Hiring Plan because it has not been made explicit. Maintaining separate policies for City hiring and common law employee hiring, as well as a lack of adequate training and education on this issue, exacerbates that disconnect. It is our view that the definition of hiring governed by the Hiring Plan should be amended to specifically include the hiring of common law employees through ANFPs and vendors, and City employees must be educated to understand that, when they hire employees through vendors and ANFPs, they are engaging in the same hiring that is governed by the Hiring Plan.

Integrating the policies and effectively disseminating them to City employees, coupled with effective, targeted training, will serve two purposes. One, City employees who want to follow the rules will have a clear understanding of them. Two, City employees who do not follow the rules will not be able to claim ignorance of them when confronted.

1. *Affiliated Not-for-Profits*

Some further details concerning the MOSE and DCA case (referenced in Section I) demonstrate how ANFPs can be used to hire a favored, pre-selected candidate in contravention of the Accord. In that case, which constituted a blatant manipulation of the hiring process, the subject employee went to great lengths to ensure that a favored job-applicant was awarded a job. Those efforts included (i) communicating repeatedly with DHR for the purposes of having the favored candidate placed on the list of qualified candidates; (ii) downgrading some of the position's minimum qualifications to match the favored candidate's qualifications, (iii) adding requirements to the job description that matched those of the favored candidate, (iv) participating personally in the interview of this candidate; and — when all of those efforts failed (because of a hiring freeze) to get the preferred candidate hired as City employee — (v) hiring the candidate to work for one of the City's ANFP agencies, as a common-law employee, in direct contravention of the *Shakman* Decree and the Accord.<sup>11</sup>

2. *Vendor Hiring*

Likewise, a closer analysis of the DOE case shows how vendor agreements can be used to dodge the Accord. In Section I, we described how DOE hired two common law employees through a vendor. DOE had initially attempted to hire these two individuals as City employees, but were unable to do so because of the City's hiring freeze. DOE then turned to a contractor and requested that the contractor create two positions for the two individuals, who were subsequently hired by the contractor into the newly-created positions, all on the understanding that the individuals would work for the City. Additionally, the IGO found that DOE committed similar violations with respect to eight other individuals who were hired by a DOE contractor. In

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<sup>11</sup> The investigation found that the employee's actions spanned a period from May 2006 through July 2007.

each instance, the employees in question were (i) common law employees under the City's own definition; (ii) chosen for the contract positions by DOE, not the contractor; and (iii) not hired in accordance with *Shakman*.

**B. Lack of Consistency Regarding Discipline**

*1. Implementation of Discipline*

The IGO also observes that improper political considerations may affect decisions regarding whether to impose the discipline recommended by the IGO. The starting point in this analysis is the fact that the IGO has no power to impose the discipline it recommends. *See* § 2-56-050. Accordingly, a department head's decision to reject or significantly lessen the discipline we have recommended may reflect preferential treatment of a politically "clouted" individual. Earlier in this report, we noted that the City's failure to terminate Kozicki as the IGO recommended, sent a message that the City was not completely serious about rooting out political patronage. Even more alarming is possibility that the decisions not to terminate Kozicki may actually reflect preferential treatment of favored insiders.

Protection of insiders against IGO recommendations can take other forms as well. For example, a decision to accept a resignation from an employee when the IGO has recommended termination for that employee affords a significant benefit because the employee is free to seek a new job without the damage to his career that a termination would have caused. Examination of still further details from the MOSE and DCA case cited above shows how such a scenario could unfold. In the MOSE and DCA case, the IGO recommended that the subject employee — who is related to an alderman — be terminated from his City employment. Originally, the head of the main department employing the subject employee rejected the IGO's recommendation to

terminate him, and advised the IGO no disciplinary action would be taken against the employee.<sup>12</sup>

No further action was taken regarding this matter until the Monitor advised the City's Chief of Staff, the Corporation Counsel and the Executive Director of Compliance that the matter would be addressed in her then-upcoming report to the Court. The Monitor's statement of intention prompted a 180 degree reversal of position by the City. Corporation Counsel advised the Monitor (and the IGO) that the rejection of discipline was an error and that the commissioner of the employee's secondary department would be making the discipline recommendation (this despite an original response communicated to the IGO *and* Corporation Counsel with extensive justification of the outright rejection of *any* discipline that further stated that the commissioner of the second involved department *concurred* in the first commissioner's recommendation that *no* discipline was necessary). Only after the Monitor's statement of intent to disclose (and before the second commissioner issued her report) did the employee resign.

Thus, although the Monitor's disagreement with the City's rejection of the IGO's recommendation appears to have forced the City into a complete about face, disposition of the matter through the employee's resignation sidestepped thorny issues for both the City and the employee. The City avoided having to choose between terminating the employee and explaining why it did not accept the IGO's recommendation in such an egregious *Shakman* violation. And, of course, the employee benefited by avoiding the career damage associated with an actual firing.

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<sup>12</sup> Though not taking any disciplinary action, the Commissioner advised she would direct this employee, "to comply strictly with Executive Order 2005-2 in the future . . . to continue the process commenced several months ago to create clearer distinctions between (department) and its affiliated not-for-profit agencies; and to undergo a review of City-approved hiring procedures."

2. *Rehiring by City, Sister Agencies and Contractors*

It is the IGO's understanding that the City is currently developing measures to ensure that the IGO's findings and disciplinary recommendations are permanently kept in an employee's personnel file. To date, however, it does not appear that such a process has been implemented. This is problematic because without such a permanent record, there is always the danger that individuals who have been recommended to be ineligible for City employment by the IGO and who have been terminated (or allowed to resign in the face of an IGO termination recommendation or during the pendency of an IGO investigation that would have otherwise resulted in a termination recommendation) may be re-hired at some future date. The problem is magnified when the prospect of "clouted" ex-employees is considered. The lack of a permanent record of the IGO's findings and recommendations in an employee's personnel file essentially clears the way for a favored ex-employee to return to the City's payroll after a "cooling off" period, while insiders responsible for the re-hiring deny any knowledge of the employee's past misconduct. In our view, no individual who has been terminated (or would have been terminated) based on an IGO recommendation should be re-hired by the City.

The IGO is also concerned that even if the City does not re-hire these employees, they may end up staying on a payroll funded by City taxpayers by being hired into positions with a City contractor or one of the City's sister agencies (*e.g.*, Chicago Transit Authority, Chicago Board of Education, Chicago Park District, Public Building Commission, etc.). Currently there is no process to ensure that the IGO's termination recommendations are made available to these entities so that they may take the recommendations into consideration should such an employee apply for a position. With respect to the City's sister agencies, an alternative solution may be a compact between the City and its sister agencies providing for comprehensive application of

terminations, rehiring bans, and flags for resignations under investigations. Absent some such measure, there remains a real potential for “clouted” employees who have been found to have engaged in misconduct warranting termination to be simply funneled onto other payrolls funded by City taxpayers.

### **C. Lack of Authority to Investigate Aldermen**

By ordinance, the IGO is prohibited from investigating members of City Council and their staff. § 2-56-050. This prohibition poses a severe obstacle to and gaping hole in any comprehensive effort to curtail improper political influence in hiring. The prohibition categorically walls off 94% (50 of 53) of the City’s elected officials from IGO investigations, including investigations of any and every form, whether direct or indirect, of aldermanic exertion of political influence on hiring decisions.

The impact of the prohibition is more than theoretical. Recent media reports have highlighted ongoing questions<sup>13</sup> about direct aldermanic hiring of friends and family through the so-called “1012 fund,” a \$1,326,000 line in the 2010 City budget used to employ subsidiary personnel as needed for secretarial, clerical, stenographic, research, investigations or other functions related to their office.<sup>14</sup> 1012 fund hiring is not *Shakman*-exempt. But due to the statutory prohibition, the IGO is prevented from conducting any investigation into such hiring.<sup>15</sup>

Not only is the IGO prohibited from directly investigating alderman but the prohibition also prevents the IGO from gathering relevant evidence in many investigations of City employees or contractors that are otherwise properly within its jurisdiction. Effectively, entire

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<sup>13</sup> Hal Dardick and Ellen Gabler, *Friends & Family Fund for Chicago Alderman*, Chi. Trib., Nov. 19, 2009.

<sup>14</sup> See 2010 Chicago Budget Ordinance, page 40, available at [http://egov.cityofchicago.org/webportal/COCWebPortal/COC\\_EDITORIAL/2010BudgetOrdinance.pdf](http://egov.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/2010BudgetOrdinance.pdf).

<sup>15</sup> The aldermanic bar applies equally to Compliance. See Chicago Municipal Code § 2-26-050.

avenues of investigation simply cannot be pursued where even the hint of aldermanic conduct is suggested. Regardless of whether a lift or partial lift of the aldermanic bar is regarded as an appropriate fix, the comparative lack of *Shakman* oversight of the City Council raises substantial doubt about the City's appreciation of the depth and breadth of *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the Accord, and its obligations and duties under each.

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In sum, while the City should be credited for structural progress in the curtailing of unlawful political patronage, operational resistance to the IGO in key situations, including the Corporation Counsel's assertion of attorney-client privilege in the face of an IGO subpoena into a hiring matter, combined with historic, broad risk areas that can easily be exploited by people willing to subvert City employment to serve their own political ends, suggest that the dangers of political hiring remain real and constant. Thus, despite the IGO's lack of findings of wholesale political hiring violations, the IGO advises the Court that no City plan for *Shakman* compliance can be complete or even adequate until the operational resistance has been ameliorated and the broad risks have been significantly reduced.