

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

MICHAEL L. SHAKMAN, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 69 C 2145
)	
CITY OF CHICAGO, et al.,)	Judge Wayne R. Andersen
)	Mag. Judge Sidney I. Schenkier
Defendants.)	

**PLAINTIFFS' REPORT WITH REGARD TO THE THIRD PROGRESS REPORT OF
THE CITY OF CHICAGO'S OFFICE OF COMPLIANCE**

The Plaintiffs, through their undersigned counsel, submit this response to the third progress report filed by the City of Chicago's Office of Compliance on October 5, 2009 ("Third Report").

INTRODUCTION

The Office of Compliance's ("OCX") Third Report again (1) does not provide specific and detailed information for analysis (*i.e.*, the who, what, when, where and why of compliance), (2) does not adopt a voice and attitude of independence and neutrality, as opposed to advocacy for the City's efforts,¹ and (3) does not reflect an investigation or analysis of the highly publicized shortcomings in the City's employment system that led to the *Sorich* indictments and to the City's continuing mischaracterization of common law employees as independent contractors. These concerns were discussed in detail in Plaintiffs Report With Regard to the

¹ There are several examples of improper advocacy scattered throughout the Third Report. For example, the OCX describes a novel approach created with the help of the SDM, namely, a self-certification hiring program to be implemented by the City's Tourism Fund. (Third Report at 13). The OCX notes that "[w]hile we must address additional concerns at the Board of Directors level, I am confident that this self-certification program will prove a successful model in this context." (*Id.*). The OCX's prediction of future success is not a helpful compliance statement.

First and Second Progress Reports of the City of Chicago's Office of Compliance, filed on October 6, 2009 ("Plaintiffs' First Report"), and will not be repeated here. Although OCX filed its Third Report the day before the filing of Plaintiffs' First Report, and thus did not have the benefits of the Plaintiffs' First Report when issuing OCX's Third Report, Plaintiffs' counsel had communicated similar concerns to OCX in prior conversations.

Accordingly, based on the OCX reports the Plaintiffs are unable to identify persuasive evidence that the City is on course to achieve substantial compliance. Based on the OCX reports and conversations with Mr. Boswell and Mr. Meany, Plaintiffs have concluded that the concerns with OCX performance noted in our prior report and in this one stem from several fundamental disagreements between Plaintiffs and OCX with regard to the following issues, which are more fully discussed in the balance of this report. Plaintiffs respectfully suggest that the Court become involved in resolving these issues:

First, OCX focuses primarily on employment processes – that is, the rules and procedures by which the City is to operate its employment system – not on compliance by the City personnel with responsibility for employment decisions. While Plaintiffs agree with OCX that reforming City employment processes is one element in achieving substantial compliance, it is not enough by itself to ensure achieving and sustaining substantial compliance by the City. It is essential that process reform be matched by aggressive, neutral and professional monitoring and investigations, coupled with detailed public reporting, and City-imposed sanctions for personnel responsible for non-compliance.

Second, OCX has not embraced or pursued a significant role as an investigatory agency, despite the fact that the OCX ordinance empowers OCX to "oversee and monitor the City's compliance programs" and to "review[,] . . . detect and prevent noncompliance." (City

Ordinances, 2-26-040). OCX appears to operate on the erroneous view that it is not authorized to investigate and report publicly on compliance issues. This misunderstanding may grow out of erroneous advice from the City's legal department or out of the assertion of primary jurisdiction to investigate by the City's Inspector General's Office ("IGO"). But whatever the cause of the misunderstanding, implementing the investigatory and reporting roles of OCX are, in Plaintiffs' view, essential to the City's ability to achieve substantial compliance. Plaintiffs believe that both the IGO and OCX need to have concurrent jurisdiction to investigate non-compliance, broadly defined, with the Agreed Settlement Order and Accord ("Accord") and with City hiring rules and procedures. Both agencies need to have and exercise the authority to make recommendations for redress where appropriate. Recognition of such concurrent jurisdiction and evidence that it is being effectively utilized on a consistent basis by both OCX and IGO are essential to achieving substantial compliance.

Third, unlike IGO, OCX has not adopted a public attitude of independence and neutrality vis-à-vis the City departments and personnel whose compliance is the focus of its activities. Instead, OCX seems to operate on the belief that it can be more effective working behind the scenes and in private to remedy compliance issues it has discovered. But without detailed public reporting of violators, sanctions and remedies, there is no way for the Court, Plaintiffs or the public to know that the City is complying with the Accord. Moreover, once the Accord terminates the City will no longer have a motivation to cooperate with behind-the-scenes OCX efforts. Therefore, an established and accepted practice of independent, neutral and detailed public reporting on compliance by OCX is also, in Plaintiffs' view, essential to the City's ability to achieve substantial compliance.

As noted in our prior report, Plaintiffs believe the OCX leadership operates in good faith and brings substantial prior compliance experience to its task, albeit in contexts different from those presented by the City with its long history of illegal employment practices. But without resolution of the fundamental disagreements between Plaintiffs and OCX with respect to the role and responsibilities of OCX, Plaintiffs do not see OCX as fulfilling the responsibilities needed to achieve substantial compliance with the Accord by the City.

PLAINTIFFS' DETAILED CONCERNS WITH THE THIRD REPORT

I. Contrary to the OCX's suggestion, enforcement and discipline is more effective in promoting a "culture of compliance" than simply relying on new rules and procedures.

The OCX states that "if City leadership actively models principles and values of the Accord by working to implement management control systems City-wide, I will comfortably conclude that a change toward a culture of compliance has taken place." (Third Report at 4). This statement reflects a basic misapprehension on the OCX's part and prioritizes form over substance.

The problem is that while the City policymakers and the OCX are drafting, adopting and implementing appropriate policies, City employees, including management and lower-level personnel, are evading, frustrating and defying the policies. Therefore, the City can adopt state of the art "management control systems," but it simply will not matter in the long run without effective monitoring and enforcement of the new procedures, and discipline of violators.

Although the OCX notes that the Shakman Decree Monitor ("SDM") has identified "lack of discipline for past offenders" as a major problem, the OCX's first three reports contain virtually no discussion of the imposition of sanctions for violations of the Accord, which is, of course, a Federal Court injunctive order entitled to compliance and respect. Without significant

consequences, there will not be the commitment by City management personnel necessary for long-term prevention of political considerations in City employment. Effective compliance should be transparent to the point that non-compliance is embarrassing and leads to significant sanctions for an individual to attempt politically to influence the hiring or advancement of public employees.

The OCX makes a similar error when it states that integrating OCX into City operations is evidence of substantial compliance. (Third Report at 18–20). This statement would only be correct if the OCX actually, and publicly, performs the responsibilities set forth for it under the Accord, the New Hiring Plan and this Court’s orders, including investigating, policing and sanctioning misconduct (*see*, Plaintiffs’ First Report at 4–6), and if the City adopts OCX recommendations. Based on the information provided in the OCX’s first three progress reports, the OCX is not yet fulfilling the role intended for it.

II. The OCX’s “culture of fear” analysis is misguided and is an improper attempt to limit the powers of the IGO.

The Plaintiffs disagree with the OCX’s theory that the Inspector General’s Office has created a “culture of fear” that serves as a roadblock to reform. (Third Report at 3–4). Specifically, the OCX suggests that the IGO’s investigations have created an “atmosphere of fear and intimidation” which makes it less likely for employees “to come forward and admit mistakes” out of “fear that the organization will blame them and then discipline them for past mistakes.” (*Id.* at 23). The Plaintiffs’ disagreement is in three-parts.

First, the OCX’s concerns about City leadership punishing employees for honest mistakes is impossible to evaluate because the OCX does not provide any factual content, details, or examples. Have any employees have been disciplined for honest mistakes? If so, what were the mistakes that led to the punishment? The Plaintiffs are not aware of even a single instance,

in part, because the OCX's three reports did not include any disclosure of employee discipline for any Accord violations, whether the violations were deliberate or accidental. The OCX should describe in detail the basis for the OCX's concern that employees are fearful of reporting mere errors. If the concern is well-founded, it should be addressed, with the Court's assistance.

Second, the OCX's suggestion that the IGO has created an "atmosphere of fear and intimidation" is similarly unsupported by any reference to specific facts or circumstances. The OCX states that it supports the IGO's work, but then criticizes the work of that office by stating that "without appropriate checks and balances, even a good process can have negative impact and undermine the very people it is supposed to serve." What does this statement mean? If the OCX is suggesting that the IGO has undermined the City's efforts to achieve substantial compliance, the OCX should provide an explanation or justification for such a serious allegation. If the underlying problem is attributable to jurisdictional differences between the IGO and OCX, those issues should be addressed directly, and with the Court's assistance.

The OCX proposes to promulgate its own rules defining what constitutes "misconduct" so that "the IGO can focus limited taxpayer resources on conduct involving corrupt or other criminal activity." (*Id.* at 23–24). If this is intended as addressing the jurisdictional disagreements between OCX and IGO, Plaintiffs do not believe it is the right way to proceed. The OCX's suggestion to limit the authority of the IGO to investigate only "corrupt or other criminal activity" is inappropriate for a compliance official and contrary to the IGO Ordinance. The IGO's duties under Executive Order No. 2005–2 are to "detect, investigate, eliminate, and deter misconduct, inefficiency and waste by City employees and promote integrity, honesty and efficiency in City government." Indeed, if the IGO's duties were to be limited as the OCX proposes, it likely would have precluded the IGO's important report in October 2008 describing

widespread waste and inefficiency in the Department of Streets and Sanitation, one of the principal City agencies with a long history of patronage practices that involved wholesale violations of this Court's orders.

The OCX's proposal to rein in the ability of the IGO to conduct investigations is particularly disturbing because the IGO has been effective as an independent, neutral and professional investigator of City conduct since 2005. If the IGO is unable to investigate situations that appear to be, on their face, "honest mistakes" or to involve less than "corrupt or other criminal" activity, it would be difficult, if not impossible, for Plaintiffs, the Court or the public to know when an apparently neutral policy is being manipulated for political reasons. The OCX seems to contemplate that the IGO should be unable to investigate when all that is known is a questionable employment decision for which some innocent explanation can be offered. But the IGO will almost never have hard evidence of illegality *before* an investigation. The IGO must be permitted to investigate "technical" violations, which are typically the only indication of deliberate non-compliance with the judgments and the Accord.

Third, the OCX is wrong when it opines that fear of discipline by the City, or investigation by the IGO, is a significant obstacle to employee disclosure of honest mistakes. There are two material obstacles to employee disclosure of violations:

(1) The City's "culture of patronage" has not yet been eliminated. This culture is so ingrained that, in the minds of many, patronage is the right and only way to conduct the City's business. The fact that the culture of patronage is alive and well in Chicago and state politics is demonstrated by the recent, highly-publicized indictments of Robert Sorich and Governor Rod Blagojevich, and by articles that have appeared in the *Chicago Sun-Times* in the last few weeks

describing in detail “clout lists” maintained by the Blagojevich administration to facilitate political sponsorship and hiring for non-exempt jobs.

(2) The fear factor that cripples compliance is the employee’s fear of losing a job if he or she takes exception to ongoing political discrimination. It is important to note that the ONLY occasions on which City employees have come forward in substantial numbers to complain of patronage abuses in the 40 years that this case has been pending was when the United States Attorney’s Sorich investigations generated a level of confidence that reprisals would not occur, and when the SDM provided the opportunity for an agent of the Court, not the City, to receive and evaluate claims of patronage abuse. The OCX should have emphasized the fear of a loss of a job and a pension as a factor discouraging voluntary reporting of unlawful activity – not the fear of punishment for disclosing an honest mistake. If the City is punishing employees based on honest mistakes concerning perceived unlawful political employment discrimination, the OCX should refer this matter to the Court to enforce the non-retaliation provision of the Accord (§ VI).

In the final analysis, it seems counterintuitive that the OCX, as compliance professionals, would be critical that offenders are fearful of reporting non-compliance. Statutes, ordinances, and compliance procedures can only operate when those subject to their requirements treat seriously the consequences of non-compliance. Otherwise, nobody would ever obey the statute, ordinance or compliance procedure, much less speak up about a violation. The Plaintiffs understand that human error will occur, but there must be someone – the IGO and the OCX – watching for patterns of error and holding the responsible parties accountable. That is why compliance with the Accord and the New 2007 Hiring Plan, including the reporting

requirements, are the best way to reduce or eliminate the possibility that someone not qualified for a position is hired or promoted based on unlawful political considerations.

III. The OCX's overtime analysis does not provide a useful analysis of a significant problem.

In response to the SDM's concern that those who have benefitted from inequitable distribution of overtime benefits will continue to do so in the future, the OCX embarked on an analysis of overtime that is un-illuminating and unhelpful. (Third Report at 14–17). OCX analyzed the data on the allocation of overtime in certain City departments to determine whether it fell into a normal distribution (the well-know bell curve of statistics) (Doc. # 1361-2). Unless there is some reason why overtime should be allocated on a bell curve (and none was suggested), there is no reason for the OCX to look for that kind of pattern during the audit, and the assumption of normality was not justified.

This is underscored by a statement in the OCX's overtime analysis with which Plaintiffs' agree: "[T]here may be acceptable operational considerations that enable individuals to accrue more overtime benefits vis-à-vis other employees. Any such factors should be understood and transparent." (*Id.*). This statement is inconsistent with OCX's analysis of overtime in the Department of Water Management ("DWM") and Department of Streets & Sanitation ("S&S"), and the OCX appears to have made no attempt to ascertain whether lawful operational considerations played a role in the uneven distribution of overtime benefits.

The data used by the OCX put even a lay reader on notice that some misconduct may be present in allocating overtime, and should be further investigated. For example, in DWM, only 8% of all employees received 33% of all overtime. (*Id.* at 16). Similarly, in S&S, 15% of all employees received nearly half of the available overtime. (*Id.*). However, instead of attempting

to determine *why* so few individuals received the bulk of the overtime, the OCX avoided further analysis.

The OCX report stated: (1) Regarding DWM: “Based upon consistent documentation and internal protocols, our auditor was less concerned with the fact that the distribution did not follow strict mathematical or statistical principles.” (*Id.*).

(2) Regarding S&S: “Given the lack of documentation and internal controls within [S&S], we were not able to verify whether [S&S] abnormal distribution patterns were simply the result of its failure to follow governing CBA [collective bargaining agreements] requirements or whether there was some other wholly justifiable reason for the distribution pattern.” (*Id.*).

These comments by OCX lead to some obvious questions: Where was common sense curiosity? Why didn't OCX undertake an on-the-ground investigation to determine whether there was any politically awarded overtime and, if so, who were the individuals responsible so that they could be held accountable? Further, the OCX's analysis should not be limited to overtime *hours*. The OCX should also analyze overtime *pay rates*, which differ for different types of work. For example, weekend snow removal in S&S generates a significant boost in overtime pay. It is important that, in addition to the items discussed in the section of the report entitled “Next Steps” (*Id.* at 14–15), the OCX determine what happened with respect to overtime during the May 2008-May 2009 timeframe that the OCX spent three pages discussing. Furthermore, the OCX is charged with proposing remedies. While devising remedies may sometimes be difficult, not all remedies are complex. For example, has the OCX suggested that all parties involved in both awarding and performing overtime in S&S and DWM be required to sign *Shakman* certifications?

In sum, the OCX's analysis of overtime is an example of the OCX's failure to investigate, determine the nature of the problem, and propose effective remedies.

IV. Like the First and Second Progress Reports, the Third Progress Report lacks detail in a number of important respects.

Additional detail should be provided on the following items discussed in the Third Report:

1. The OCX refers to meetings with Mayor Daley and states that "we had a vigorous discussion about the importance of educating City employees so they are clear as to what is expected of them." (Third Report at 7). What was said? What were the issues about which there was the "vigorous discussion"? There must have been some area of disagreement in order for there to have been a "vigorous discussion." But the Third Report does not provide any information about these issues. The OCX "analysis" of the meetings with Mayor Daley states: "Finally, you [Mayor Daley] made several suggestions about our new assignment in the area of supplier diversity." (*Id.*). If Mayor Daley was the only intended recipient of the Third Report, this statement might have been enough. But the First, Second and Third Reports are public documents filed with the Court for the express purpose of permitting the Court, Plaintiffs and the public to track the City's progress towards substantial compliance. Therefore, the OCX should have explained what suggestions the Mayor offered concerning elimination of political considerations in City employment decisions and whether those suggestions were implemented.

2. The OCX refers to an "open dialogue about compliance issues among the senior officials on your leadership team." (*Id.* at 8). In evaluating the City's progress toward substantial compliance it would likely be very helpful to know the content of the dialogue and the identity of the senior officials involved in the dialogue. The Third Report does not provide

any of these important details that would seem to be relevant to evaluating the City's progress toward achieving substantial compliance.

3. The OCX states that the new S&S leadership has "reached out to both the OCX and the [SDM] to seek input into the development of transparent job assignment processes." (*Id.* at 11–12). The OCX is to be commended for its role in the new S&S leadership's actions to not continue the previous regime's pattern of evasion and noncompliance. However, it is impossible to evaluate S&S's progress because the OCX did not provide any details. What is the S&S doing differently with respect to the job assignment process? What is the OCX doing with respect to monitoring that process? When? How? These are the type of questions that need to be addressed in OCX reports if the reports are to be useful in evaluating progress toward achieving substantial compliance.

4. In a discussion about independent contractors, the OCX refers to "minor issues relative to our recommendations" with respect to DOE. (*Id.* at 13). What are these minor issues that need to be discussed? Did the DOE refuse to implement one or more of the OCX's recommendations regarding the use of independent contractors?

5. The OCX states that at a meeting between the Mayor and OCX, the Mayor "made the decision to transfer specific certification and compliance functions from the Department of Procurement Services (DPS) to OCX." (*Id.* at 20). What specific certification and compliance functions are being transferred to OCX from the DPS, and how will this transfer improve the efficiency, fairness and transparency of the City's hiring procedures?

6. The OCX commendably points out that the DHR only trained their recruiters on the "customer service" aspects of their jobs, but failed to train the recruiters to uncover instances in which a City department may be trying to manipulate a hiring sequence, a

process that was at the heart of the conduct giving rise to the *Sorich* indictments and convictions. (*Id.* at 10). The OCX should describe how many people are being trained and what actions they are being told to take. DHR personnel may have known all along when a hiring sequence was being manipulated but did not report anything because DHR leadership did not instruct recruiters to report the misconduct. Indeed, in the *Sorich* case there was evidence of such knowledge. The OCX should investigate and express an opinion on why DHR personnel did not blow the whistle despite obvious red flags. The OCX appears to suggest that the only reason was the employees' lack of awareness that the Accord and an Executive Order mandated reporting such noncompliance. Is that lack of knowledge supportable? After investigation? The report does not provide that information.

V. The OCX did not adequately follow-up on issues raised in prior reports.

In the First and Second Progress Reports, the OCX provides a "Chart of Recommendations," which purport to list all of the various OCX recommendations the City has agreed to implement. (*See*, 1st Rep. at Chart #1; 2d Rep. at Chart #2). The OCX appears not to have followed up on some of the recommendations to ensure that the City is actually implementing them.

The OCX should follow up on its recommendations in order to enable the "parties [to] track the City's progress toward Substantial Compliance." (March 30, 2009 Order at ¶ 3). For example, in the First Progress Report (at Chart #1, Recommendation #5), the "OCX recommended that the City enforce hiring rules by disciplining offenders and by creating a corrective action plan." Other than citing one example in which a Deputy Director was disciplined for making unauthorized changes to a job applicant's file in the Taleo System, the OCX does not address enforcement or discipline in any of the three progress reports. The OCX's failure to address these issues make it impossible for the Court, Plaintiffs and the public

to determine from the Reports progress on a number of key factors that bear on whether the City is achieving substantial compliance. As set out in the Accord, the factors include the extent to which (i) the City has acted in good faith to remedy instances of noncompliance, (ii) whether the City continues to have a policy, custom or practice of making employment decisions based on political factors, (iii) whether there have been incidents of material noncompliance, and (iv) whether the City has implemented procedures that will effect long-term prevention of the use of impermissible political considerations in employment decisions. (Accord, § I.G(8)).

This is not the only instance in which the OCX failed to follow up on his recommendations. In the First Progress Report, the OCX recommended that (a) DHR review certain DHR policies and analyze their effect on hiring, and (b) that DHR permit a third-party audit of the Taleo system. (1st Rep., Chart #1, Recommendations #7, 9). The OCX did not address these issues in subsequent reports.

Similarly, in the Second Report, the OCX made the following recommendations:

- DHR to develop Standard Operating Procedures for all employment actions. (2d Rep. at 13).
- DHR should provide reports to the HPCM for all employment actions. (2d Rep., Chart #2, Recommendation #2).
- City to adopt a revised policy regarding contractors. (2d Rep., Chart #2, Recommendation #11).

The OCX has not provided any indication that the City has implemented any of these recommendations.

The Plaintiffs raise these concerns not to nitpick the OCX's report, but because the City routinely has failed to follow through with its prior promises – even promises that were memorialized in a Court order. For example, the City promised to develop a New Hiring Plan for all of its employees on May 31, 2007 – the date the Accord was entered. Almost two-and-a-

half years later, the City still has not negotiated, much less implemented, a New Hiring Plan for over 50% of its employees, including the police and fire departments.

CONCLUSION

As the foregoing reflects, Plaintiffs believe that the jury is out on the effectiveness of the OCX as an instrumentality to police and remediate the City's unfortunate history of illegal political employment practices. Plaintiffs have outlined specific deficiencies that the OCX should address to establish its effectiveness, and have made recommendations for involvement by the Court in confirming the role and responsibility of the OCX, so that it may function as intended to ensure compliance with the Accord.

Dated: October 29, 2009

Respectfully submitted,

MICHAEL L. SHAKMAN, et al.

By: /s/ Brian I. Hays
One of the Attorneys for Class Plaintiffs

Roger R. Fross
Brian I. Hays
Katherine Heid Harris
LOCKE LORD BISSELL & LIDDELL, LLP
111 S. Wacker Dr.
Chicago, Illinois 60606
Phone: (312) 443-1707

Michael L. Shakman
Edward W. Feldman
MILLER, SHAKMAN & BEEM, LLP
180 N. LaSalle Street, Suite 3600
Chicago, Illinois 60601
Phone: (312) 263-3700

CERTIFICATE OF SERVICE

I, Brian I. Hays, hereby certify that I have caused a true and correct copy of the foregoing to be served upon:

Mara Georges
Corporation Counsel's Office
City of Chicago
Suite 1020
30 N. LaSalle St.
Chicago, IL 60602

via E-Filing and by causing the same to be deposited in the U.S. Mail, first-class, postage prepaid on the 29th day of October, 2009.

/s/ Brian I. Hays
One of the Attorneys for Class Plaintiffs