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

MICHAEL L. SHAKMAN, et al.,) Docket No. 69 C 2145
)
Plaintiffs,) Chicago, Illinois
) October 22, 2014
v.) 9:35 a.m.
)
COOK COUNTY ASSESSOR, et al.,)
)
Defendants.)

TRANSCRIPT OF PROCEEDINGS - Motion Hearing
BEFORE THE HONORABLE SIDNEY I. SCHENKIER

APPEARANCES:

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1 (In open court.)

2 THE CLERK: 69 C 2145, Shakman, et al. vs. Cook County
3 Democratic, et al., status.

4 THE COURT: Good morning.

5 MR. FELDMAN: Good morning, Judge. Edward Feldman for
6 the plaintiffs with Mr. Shakman. Not Mr. Hayes, excuse me.

7 MR. STRATTON: Good morning, your Honor. Brent
8 Stratton from the Attorney General's Office for the defendants.

9 MR. MACDONALD: Neil MacDonald for the Attorney
10 General's Office on behalf of amicus OEIG.

11 THE COURT: Good morning, everyone. I didn't bring
12 out into the courtroom the various filings because the
13 wheelbarrow that we use for those voluminous filings was in use
14 in another courtroom. But I have gone through all those
15 materials.

16 Is there anything that anybody feels it's important to
17 add to what's in the record?

18 MR. STRATTON: Your Honor, I guess I would like to
19 point out a couple of things, since the surreply was kind of
20 the first that we heard from plaintiffs regarding the OEIG and
21 kind of what its role is and could be. And I think there are
22 some inaccuracies in there at least that I'd like to point out.

23 In broad strokes, I think plaintiffs kind of elevate
24 form over substance with respect to their criticisms of the
25 OEIG. They point out, well, the OEIG wouldn't, couldn't do

1 things, hasn't done things the way a monitor would do, but
2 reality -- in reality in substance, that's exactly what the
3 OEIG can do, could do, has done.

4 So I think if you go through our surresponse, if you
5 go through what the OEIG filed as an amicus, you will see that
6 that's exactly -- and it derives from their statutory
7 authority. And it's not just to do investigations of -- that
8 are prompted by a specific complaint, although they do those.
9 They have the ability to initiate reviews of all hiring, all
10 employment files for all agencies under the governor.

11 And so that is as broad of an authority as you could
12 have. And that then leads to some of the other things that
13 they could do, have done. They can counsel, contrary to what
14 plaintiffs say. They can make recommendations. They do
15 identify causes. They do identify and recommend long-term
16 solutions.

17 In this case, I think a very good example they made
18 more than a dozen recommendations. The governor's office
19 adopted all of them, implemented all of them, implemented more
20 than just those, have taken those recommendations beyond IDOT,
21 which was the primary focus of this particular investigation,
22 into an audit of all agencies' Rutan positions.

23 So, you know, and obviously you have a lawyer for the
24 OEIG here, and if you wanted to direct questions to them, they
25 certainly could answer them as well. But I think in broad

1 strokes, that's the role that the OEIG could play. It's an
2 option that frankly your Honor did not have when it was faced
3 with appointing a monitor for the city, the county, the sheriff
4 and the forest preserve.

5 Here we have a standalone, independent agency funded
6 by taxpayer money, so it's already being paid for, 75
7 employees. They're doing exactly this kind of work. So we
8 think at least that counsels against appointing a monitor at
9 this point with respect to the plaintiffs' motion.

10 MR. SHAKMAN: I don't think we want to rehash what
11 we've said. I don't think it will be productive to rehash what
12 we've said in our, as you pointed out, voluminous filings. We
13 have nothing against the Inspector General. As we said, the
14 Inspector General can play a role in cleaning up a problem in
15 state or local government, and that's great.

16 The only thing new that I heard from Mr. Stratton was
17 that we say the IG can't provide counsel, and he says the IG
18 can provide counsel. If that's true, that's also great. It
19 didn't happen in this instance. We point out in our brief that
20 the IDOT secretary at the time, Mr. Hannig, asked for meetings
21 with the OEIG, and they were declined. So in this instance,
22 years went by between that request and the OEIG's report.

23 But other than that, I think we've really canvassed
24 this issue. It would be unproductive to have an oral argument
25 on the merits or demerits of the OEIG. Our point is not that

1 the OEIG doesn't do a good job and can't do a good job.

2 It's that the problems presented by patronage really
3 require, under a Court order that the Court's enforcing, really
4 require somebody reporting to the Court who is an agent of the
5 Court. And you know as well as we do how effective that's been
6 in other circumstances. Our view is it would be equally
7 effective here.

8 THE COURT: All right. Anything else?

9 MR. MACDONALD: On behalf of the Inspector General, I
10 would say I agree with the parties. There are things about
11 that Mr. Stratton has said and also counsel for plaintiffs have
12 said.

13 It's true that there are limits, statutory limits on
14 the range of OEIG's conduct, but they're very broad and
15 they're, particularly in this context, in the Rutan context,
16 identified specifically.

17 As to the independence of the office -- and that is
18 the only thing I'll raise -- I don't -- they're statutorily
19 independent from the governor's office, and I think anybody
20 who's ever met the Inspector General would not reasonably
21 contest his independence.

22 THE COURT: And I have and I don't. I have and I
23 don't.

24 All right. Well, this particular round of briefing
25 commenced back in April of this year when the plaintiffs filed

1 an amended motion for entry of supplemental relief that seeks
2 relief based on the May 5th, 1972, consent judgment entered in
3 the case.

4 Now, that motion has been narrowed, I think, and
5 focused through the extensive briefing by the parties that I've
6 alluded to through the issuance of the report by the Office of
7 the Executive Inspector General. I think I'll just say
8 "Inspector General." It's less of a mouthful. Is that okay?

9 MR. MACDONALD: Absolutely.

10 THE COURT: Of its investigation into certain
11 employment practices of IDOT. The amicus briefs submitted by
12 the Inspector General -- and I joked about the length of the
13 briefing, but as I've said many times to parties, I don't
14 really mind long briefing.

15 What I mind is unproductive briefing, and I think here
16 the briefing was long, but productive. Because it did really,
17 I think, focus the issues that I have to address.

18 And so I really do thank the parties and amicus for
19 the real professional way in which you approached this, as
20 evidenced by the fact that you were sitting at the same table
21 when I came in.

22 MR. SHAKMAN: We get along, Judge.

23 THE COURT: So plaintiffs ask that I appoint an
24 officer to conduct an investigation in the wake of the evidence
25 that was related in the OEIG report, Inspector General report,

1 at IDOT regarding the use of staff assistant positions that
2 were labeled as exempt, meaning that partisan political
3 considerations could be used in determining who would receive
4 those positions. But that, in fact, the people who went into
5 the positions performed job duties that largely or exclusively
6 fell into the category of non-exempt positions, meaning that
7 the people who filled jobs of that character had to be selected
8 without regard to partisan political considerations.

9 As detailed in the Inspector General's report, some of
10 those people who obtained staff positions already were employed
11 at the Department of Transportation. Others were hired into
12 the positions from outside IDOT, and then later formally
13 obtained non-exempt positions through transfers or an
14 application process.

15 And according to the Inspector General report, some of
16 the people who were hired into the staff assistant positions
17 but who actually performed non-exempt work, had partisan
18 political connections.

19 Now, the plaintiffs, as they have repeated this
20 morning, say that this conduct violates the 1972 consent
21 decree. Under that decree, IDOT is prohibited from
22 conditioning, basing or knowingly prejudicing or affecting any
23 term or aspect of governmental employment with respect to one
24 who is at the time already a governmental employee, a part or
25 the cause of any political reason or factor.

1 Now, the Court retained jurisdiction under that 1972
2 decree to enforce that prohibition and to address violations of
3 it. The Court also retained jurisdiction to allow the parties
4 to litigate the question of which job positions properly are
5 exempt from that prohibition, meaning that political
6 considerations could be used in filling new positions.

7 Plaintiffs asked that a Court-appointed officer, a
8 special master investigate the scope of any violation of the
9 1972 decree, recommend appropriate remedial action and oversee
10 and assess any actions to assure that they are effective to
11 prevent future recurrence.

12 In addition to seeking the appointment of a special
13 master, plaintiffs asked the Court to authorize them to conduct
14 discovery to determine whether violations of the decree also
15 have occurred outside of IDOT.

16 Defendant opposes the appointment of a special master
17 and the request for discovery. Based on my review of the
18 material submitted and for the reasons that I'm going to
19 explain in a moment, I agree that a special master should be
20 appointed to address the issues in plaintiffs' motion
21 concerning IDOT. I disagree that the discovery plaintiffs seek
22 is warranted at this time.

23 I want to start with a couple jurisdiction or
24 procedural questions. One is whether the defendants' motion is
25 a timely one. That issue has been addressed in the briefing,

1 and I do find that the motion -- the amended motion is timely.
2 An argument has been raised that the motion is untimely based
3 on the proposition that borrowing from a requirement under
4 Title VII law, plaintiffs were required to raise their request
5 within 180 days of the alleged conduct, but here did not do so.

6 That argument is based on *Smith vs. City of Chicago*,
7 769 F.2d 408, a 7th Circuit decision from 1985, which applied a
8 180-day limitations period to a plaintiff by an individual
9 employee for relief for an alleged violation of the decree.

10 Unlike the case in *Smith*, here we are not dealing with
11 an individual employee arguing that he or she was the victim of
12 a particular instance of discrimination based on political
13 considerations. This instead is a motion brought by the
14 Shakman plaintiffs alleging noncompliance with the 1972 decree
15 and invoking the Court's jurisdiction to enforce its orders.

16 I don't consider the Court's authority to enforce its
17 own order as turning on whether requests for the enforcement is
18 made within 180 days of the alleged noncompliance. Now,
19 despite the absence of a strict requirement to bring the motion
20 within 180 days, I also consider the question of whether
21 plaintiffs' request is barred by the doctrine of laches, which
22 prohibits a plaintiff from unreasonably delaying in pursuing a
23 claim when that results in a defendant being prejudiced due to
24 the passage of time, such as by witnesses or other evidence no
25 longer being available or by a defendant engaging in a course

1 of conduct in reasonable reliance on the plaintiffs' inaction.

2 Here I find that the plaintiffs have not unreasonably
3 delayed in bringing the amended motion. I note that the
4 amended motion is a follow-on to a motion that was filed in
5 December of 2009, a motion that provided notice that the
6 plaintiffs were concerned that violations of the decree had
7 occurred.

8 Plaintiffs and the Court stayed their hand in acting
9 until further evidence of violations were cited in a UGA report
10 in August of 2013, which led ultimately to the amended motion
11 in April of 2014. And the recently filed Inspector General
12 report provided further information that was not previously
13 available to the plaintiffs.

14 So given that timeline of events, I don't believe that
15 there's been unreasonable delay here by the plaintiffs. I also
16 find that there's been no prejudice to the defendant to IDOT in
17 the timing of the motion.

18 As I said, the plaintiffs raised concerns by filing an
19 original motion in December of 2009. That, of course, was
20 sufficient to provide notice that plaintiffs believed that
21 there may be violations of the decree, and thus that IDOT could
22 not have reasonably relied on plaintiffs' subsequent
23 forbearance, which in fairness was at the request of the
24 defendant, as a basis to engage in conduct that could violate
25 the decree.

1 Indeed, even in the absence of action by the
2 plaintiffs, IDOT had an obligation to follow the terms of the
3 decree. So we see no prejudice to defendant in terms of lost
4 witnesses or other evidence. The Inspector General report
5 shows that there remains an ability to investigate fully what
6 occurred, the reasons for it and to shape appropriate remedial
7 action. So for those reasons, I conclude that the plaintiffs'
8 motion is not time-barred.

9 An issue also has been raised about the Court's
10 authority to address what's been raised in the motion under the
11 1972 consent decree because the 1972 consent decree does not
12 cover hire. And the plaintiffs agree that the 1972 decree does
13 not govern hiring practices, and they disclaim any attempt to
14 seek a remedy for hiring violations.

15 They say that their target is -- and I'm quoting from
16 their reply at page 4 -- "post hiring practices regarding
17 transfers, assignments, classifications and promotions," which
18 they say are clearly within the scope of the decree. And I
19 agree that those matters are within the scope of the decree.

20 The decree enjoins the conditioning, basing or
21 knowingly prejudicing or affecting any term or aspect of
22 governmental employment with respect to one who is at the time
23 already a governmental employee upon or because of any
24 political reason or factor.

25 The Inspector General report in this matter says that

1 there were at least 14 employees who were hired into staff
2 assistant positions that were labeled as exempt, and at a later
3 time transferred into non-exempt positions without the use of a
4 competitive process where others could have had a chance to get
5 those positions.

6 Three other employees who were performing non-exempt
7 job duties while staff assistants then competed for and
8 obtained non-exempt positions, which, of course, leads to the
9 possibility that their experience gained while nominally in an
10 exempt position gave them a leg up on others who were
11 unsuccessful in obtaining non-exempt positions.

12 At least 22 people who already held some position at
13 IDOT subsequently obtained a position as an exempt staff
14 assistant, but performed non-exempt work. And that leads to
15 the possibility that other existing employees were deprived of
16 a fair opportunity to obtain jobs that should have been labeled
17 as non-exempt.

18 The Inspector General report also -- and I quote here
19 from the amicus brief at page 10 -- "found evidence that some
20 of the staff assistants were hired based on political
21 affiliation." The report found that some 50 people who were
22 hired in the staff positions had known political affiliation
23 with elected officials, and that's recounted at pages 198 and
24 199 of the report.

25 The report rejected the IDOT explanation that it used

1 the staff assistant position to hire people to perform
2 non-exempt work due to a need for rapid hiring outside the
3 normal processes for hiring people into non-exempt positions.

4 The report concluded that the explanation was not a
5 viable one because IDOT had -- and I quote from the report at
6 page 203 -- "existing legitimate mechanisms at its disposal to
7 hire persons on an emergency or temporary basis."

8 That, of course, raises the question of why IDOT used
9 the nominally exempt staff position to hire many people and
10 many who had political affiliation to perform non-exempt work.
11 And that persuades me that there is jurisdiction under the
12 decree to determine the extent to which political
13 considerations may have improperly affected the terms and
14 conditions of existing employees. And if so, and if so, to
15 determine what remedial measures may be in order.

16 Now, under the decree, the Court also retained
17 jurisdiction to address disputes about whether particular job
18 positions are legitimately exempt. That is, whether political
19 considerations may be used in deciding who is to fill them.

20 We recognize that there are administrative orders that
21 were put into place long ago to govern the process of
22 determining which positions are exempt and that various
23 judicial decisions have relied on those processes, and the
24 response at page 18 recounts all of that.

25 But then when we look at the Inspector General report,

1 what it says is that that process, which we are not generally
2 calling into question, broke down at the Department of
3 Transportation. The report found that staff assistant job
4 descriptions -- and I'm quoting from the report at page 202 --
5 "are and have been systematically unreliable."

6 The staff assistant position was labeled as exempt,
7 and that allowed IDOT to operate outside the employment process
8 that normally would be used to fill a non-exempt position. And
9 that means that the positions were filled without the
10 safeguards in place to ensure that political considerations
11 would not be used.

12 The OIG report also makes clear that the people who
13 fill the staff assistant positions, in fact, did not generally
14 perform exempt duties, and largely and in some cases
15 exclusively performed non-exempt duties. In these
16 circumstances, I find that there is authority under the 1972
17 decree to address the plaintiffs' concerns about whether
18 positions in IDOT labeled as exempt truly were and are exempt.

19 Now, I want to turn, having addressed those matters,
20 to the appointment of a special master. Under Federal Rule of
21 Civil Procedure 53 and the Court's equitable powers, I have the
22 authority to appoint a special master, among other things to
23 assess compliance with the decree. And for that I cite *People*
24 *Who Care vs. Rockford Board of Education School District*
25 *No. 205*, 89 C 20168 1991 Westlaw 166960 at 1, a Northern

1 District of Illinois decision January 14th, 1991.

2 Given the information that I have summarized -- and
3 I've summarized from a much more voluminous record -- that has
4 been developed to date, I find that it is appropriate to
5 exercise that authority here. And in making that
6 determination, I want to emphasize that that is not intended as
7 and should not be interpreted as a criticism in any way of the
8 extensive investigative work conducted by the Inspector
9 General.

10 That work was extensive. It sheds important light
11 into events at IDOT and offers many recommendations that I
12 think are helpful. But the Inspector General's work in my
13 judgment does not eliminate the need for the Court to take
14 action to ascertain the extent of any violation of its order,
15 the 1972 decree, and what steps are necessary to ensure that
16 that decree will be followed in the future. And that function
17 is best carried out by an officer who is appointed by the Court
18 who is acting under the auspices of the Court.

19 In appointing a special master, I am also mindful of
20 the actions that have been taken that have been referred to
21 today by Mr. Stratton in response to the recommendations in the
22 Inspector General's report. My appointment of a special master
23 is not a criticism of those actions.

24 But given the history of what is in the Inspector
25 General's report, I again conclude that compliance with the

1 decree is best served by having a transparent process in which
2 an agent of the Court is involved in further investigating the
3 scope and reason for what occurred, recommending the measures
4 that may be necessary to prevent any recurrence and then in
5 assessing the implementation of those efforts to ensure that
6 they are effective.

7 A special master performing those very targeted
8 functions will not usurp the responsibilities of officials to
9 run the affairs of IDOT, but rather will help ensure that
10 IDOT's employment practices comply with the requirements of the
11 decree.

12 One of the issues that's been raised -- not so much
13 today, but in the pleadings, so I'll mention it briefly -- is
14 that a Court-appointed officer isn't necessary because any of
15 the issues that are raised by the plaintiffs' motion can be
16 addressed by the Court without assistance. And one of the
17 considerations in appointing a special master is whether the
18 Court basically needs the horsepower to get something done.

19 I think that when you look at the kind of work that
20 was done by the Inspector General, the length of that
21 investigation, the number of people it took to conduct the
22 investigation, the length of time it took, I think it's plain
23 that the Court is not, on its own, able to perform that kind of
24 function.

25 The Court, on its own, plainly is not in a position to

1 place boots on the ground to do an investigation of what may
2 have happened at IDOT or to determine on its own what actions
3 should be taken or to assess on its own the implementation and
4 effectiveness of actions that are taken.

5 In our system, judges are not the people who uncover
6 and assemble the evidence. We consider the evidence that is
7 presented to us. And that assembly and presentation of
8 evidence is generally done by attorneys as part of an
9 adversarial litigation process.

10 I don't consider that to be the best course in a
11 situation like this. My experience is that more progress is
12 made in achieving what we are all interested in, and that is
13 compliance with the decree. When the process is not an
14 adversarial one, but instead is one that is shepherded through
15 the efforts of a Court-appointed officer working through a
16 well-defined mandate that is developed with the input of the
17 parties.

18 So with that explanation, I'm granting the request for
19 a special master. I would like the parties to confer about an
20 order of appointment that sets forth the mandate for the
21 special master consistent with my ruling today.

22 I'm happy to work with the parties to do that. I'm
23 happy to review what the parties may submit jointly if they
24 have agreement or in respect to proposals if they disagree. So
25 I'm open to your suggestions about the best way to do that.

1 MR. SHAKMAN: Thank you.

2 THE COURT: So let me, before I get your comments on
3 that, say wait till the last piece where I won't be as
4 long-winded. And that is the plaintiffs' request for
5 discovery, which I'm going to deny at this time without
6 prejudice.

7 In looking at the discovery request, much of what the
8 plaintiffs seek in my judgment overlaps with the investigation
9 that I would expect would be performed by the special master.
10 And to the extent that it sweeps more broadly, I don't think
11 that there's a sufficient basis to embark on it at this time.
12 So I want to focus on the activity of the special master.

13 So with respect to an order of appointment, what would
14 you all think would be a good approach to doing that? Do you
15 want to submit something and then we can sit down and go
16 through it?

17 MR. SHAKMAN: I think that's a good suggestion, Judge,
18 and we'll draft something up and send it over to Mr. Stratton
19 and give him a reasonable time, as long as perhaps 12 hours or
20 so, to respond. And if he asks for an extension, I'm sure
21 we'll grant it. I have a question, though, and that is --

22 THE COURT: Yes.

23 MR. SHAKMAN: -- I'm not clear from your ruling
24 whether you want us to address as well whether we can agree on
25 a candidate to serve as special master or whether you wish to

1 retain that for your own discriminatory --

2 THE COURT: I have one in mind, which I would like to
3 discuss with the parties. But I'd kind of like to do that in
4 camera, and I'm happy to do that whenever you'd like.

5 MR. SHAKMAN: Well, I'd like to do it in the next 10
6 minutes.

7 THE COURT: All right.

8 MR. SHAKMAN: Because it will affect --

9 THE COURT: Your time frames are getting shorter as we
10 speak.

11 MR. SHAKMAN: Well, not to pull my punches, but it
12 affects how much detail --

13 THE COURT: I understand.

14 MR. SHAKMAN: -- one has to generate in a written
15 document if you know who you're dealing with.

16 THE COURT: That's fair. So why don't we do this:
17 Unless there's anything else that we need to discuss out here,
18 we can adjourn to chambers for a moment, and I can discuss with
19 you those matters. All right?

20 MR. FELDMAN: Thank you.

21 THE COURT: I don't think we need amicus for that
22 function, but I do want to thank you for your participation
23 which has been helpful to the Court.

24 MR. MACDONALD: Thank you, Judge.

25 THE COURT: I'm sorry, we have ...

1 MR. MACDONALD: Your Honor --

2 THE COURT: Yes.

3 MR. MACDONALD: Here's the issue. To the extent --
4 it's unknown at this point, but to the extent that discovery or
5 the special master's work involves requests or for information
6 that was generated by the Inspector General, we have statutory
7 confidentiality issues. And so to that extent, it may be
8 prudent for us to be involved, at least as a spectator in the
9 process, if not an active participant. That remains to be
10 seen. But as a matter of statutory obligations and duties, I
11 think we do have a dog in the fight, so to speak.

12 THE COURT: Okay. Well, I guess what I intend to do
13 in the next now five minutes --

14 MR. SHAKMAN: Judge, your time is our time.

15 THE COURT: -- probably doesn't get to that level of
16 detail. But I think that it's good that you've made that issue
17 known, so perhaps the parties would find it useful to consult
18 with you in terms of their vision of how the special master
19 would operate.

20 And then when I meet, I'm happy to have a meet -- to
21 attend that meeting, if nobody has objection.

22 MR. SHAKMAN: Plaintiffs don't object.

23 MR. STRATTON: No objection, Judge.

24 MR. MACDONALD: Thank you.

25 THE COURT: Thanks very much. We are adjourned.

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(Concluded at 10:05 a.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ LISA H. BREITER
LISA H. BREITER, CSR, RMR, CRR
Official Court Reporter

October 22, 2014