

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

**MICHAEL L. SHAKMAN and
PAUL M. LURIE, et al.,
Plaintiffs,**

v.

**DEMOCRATIC ORGANIZATION OF
COOK COUNTY, et al.,
Defendants.**

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) **Case No. 69 C 2145**
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) **Sidney I. Schenkier**
) **United States Magistrate Judge**
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**SIXTH REPORT REGARDING STATEWIDE
COMPLIANCE WITH THE SHAKMAN DECREE**

On November 18, 2014, the Court appointed the Special Master to investigate and make recommendations regarding the Illinois Department of Transportation’s (“IDOT”) employment practices and compliance with the 1972 *Shakman* Decree.¹ On November 28, 2016, the Court granted the Plaintiffs’ Motion to Expand the Special Master’s Responsibilities and for Related Relief. (Memorandum Opinion and Order, Dkt. 4798). The Court’s November 28, 2016 Memorandum Opinion and Order expanded the Special Master’s responsibilities to include the review of *Rutan*-exempt positions at all State agencies under the jurisdiction of the Governor and directed the Special Master to:

- (1) Review all positions under the jurisdiction of the Governor that are identified as *Rutan*-exempt to determine whether the Governor has adequately demonstrated that the positions meet the *Branti* standard;²

¹ The Court directed the Special Master to: (i) investigate the scope and reason for any violation of the 1972 Decree regarding the Illinois Department of Transportation (“IDOT”); (ii) recommend measures that may be necessary or appropriate to prevent any recurrence; (iii) assess the implementation of those efforts to ensure that they are effective; (iv) address whether positions in IDOT labeled as *Rutan*-exempt were properly exempt under applicable legal principles; and, (v) make recommendations for how to remedy any violations of the 1972 Decree. (Order Appointing a Special Master for IDOT, Dkt. 4020 at 2).

² “Exempt positions are those for which an employer may take into account political considerations when deciding whom to hire, promote, or transfer to fill those positions. *See Branti v. Finkel*, 445 U.S. 507, 518

- (2) Develop an approved and comprehensive list of all *Rutan*-exempt positions across all agencies in the State (“Exempt List”);
- (3) Develop procedures for correcting and revising the Exempt List; and,
- (4) Analyze any *Rutan*-exempt positions that are also protected under either the State Personnel Code or are subject to a collective bargaining agreement and make recommendations about whether these positions may continue to be classified as exempt and still adhere to the *Branti* criteria.

(Dkt. 4798 at 6-7).

On May 1, 2017, the Court entered an Agreed Order further delineating the process for achieving the objectives listed above. (Agreed Order, Dkt. 5004).

I. History of Recommendations and Collaboration Between State and Special Master’s Office

As part of her investigation into the scope and reason for IDOT’s violations, the Special Master discovered and reported on various weaknesses in the employment practices that allowed the Staff Assistant political hiring scheme to flourish. The investigation also revealed political manipulation in filling other IDOT positions, such as Asset Recovery Analyst, Realty Specialist, Local Program Technician, among others. (*See, e.g.*, Dkt. 4128, 4292, 4631). Additionally, during that investigation, the Special Master’s office uncovered political manipulation of employment practices in agencies outside of IDOT. (*See*, Dkt. 5012). As a result of those discoveries, the Special Master made numerous recommendations regarding the State’s employment practices aimed at preventing future recurrences.

Since the Initial Report of the Special Master regarding IDOT, filed on March 4, 2015, the State of Illinois, the Plaintiffs, the Illinois Department of Transportation (IDOT), the Special

(1980), *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990) (holding that, to correctly classify a job as exempt, the hiring authority must be able to demonstrate that party affiliation is an appropriate requirement for effective performance of the office).” (Memorandum Opinion and Order, Dkt. 4798 at 2).

Master and (later) Office of Executive Inspective General’s Hiring and Employment Monitoring division (“HEM”) have been discussing a Comprehensive Employment Plan for IDOT to limit the possibility of future manipulation in IDOT’s employment practices. Similarly, since at least early 2018, the Parties have been discussing a Comprehensive Employment Plan (“CEP”) for the entire State and most Court status hearings since that time have included a discussion of a new Employment Plan for the State of Illinois. Although the initial plan was to have separate Employment Plans for IDOT and for the rest of the State agencies, that plan was abandoned, and the State elected to proceed with one CEP that would be applicable Statewide, including IDOT.

The decision to create an entirely new Statewide CEP was premised upon agreement that the existing employment practices were unworkable. After many months of discussions, including on weekly teleconferences, during individual meetings with CMS and HEM, meetings with the Governor’s Office and the Plaintiffs, it was determined—by the State—that rather than attempting to revise the existing employment practices, the old system should be replaced. Each of the subsequent Reports by the Special Master Regarding the State of Illinois have included updates to the Court regarding progress on the new Statewide CEP. *See* Second Report at 13 (Dkt. 5822); Third Report at 6 (Dkt. 5992); Fourth Report at 5 (Dkt. 6306); Fifth Report at 10-11 (Dkt. 6565).

In a memorandum dated October 22, 2019, to the Special Master’s office and the Office of Executive Inspector General (copied to the Governor’s Office), CMS identified “numerous problems with the current hiring process” including: hiring cycles of 250+ days; agencies’ inability to provide core services; lack of quality candidates; an inability to hire individuals not currently employed by the State; *Shakman* non-compliance; lack of electronic and standardized systems that are easily auditable, among other things.³ These, along with other deficiencies identified by the

³ The Governor’s Office has indicated that it vigorously disagrees with CMS’s characterization.

Special Master's office, HEM and the Plaintiffs have resulted in a long-term collaboration among the Parties to replace and reform the State's employment practices through a Comprehensive Employment Plan.

On November 25, 2019, the State filed a proposed CEP with the Court. Despite efforts among all Parties, some of the components of the CEP have not been agreed to. Even those components that are agreed to, including many of the key components (Electronic Hiring Process, creation of a Compliance Unit in CMS, among others) have not been rolled out Statewide. Until such a rollout is completed (the date of which is uncertain), much of the current system remains in place. Although CMS and its officials have issued several interim guidance memoranda in an effort to alleviate some of the most problematic current practices, those guidance memoranda cannot or do not address certain current systemic practices that are vulnerable to manipulation or could lead to *Shakman* violations. Because of the State's intention to seek a finding of substantial compliance with the 1972 *Shakman* Decree, we identify below those practices most likely to lead to *Shakman* violations.⁴

Before addressing the specific problematic employment practices discussed below, we note the following. Although the level of cooperation and communication between the Governor's Office, CMS, the Special Master's office and the individual agencies had been very productive over the years, that communication has been diminished by new restrictions placed on the Special Master's ability to communicate freely with agency personnel. Although it is within the province

⁴ These concerns impact all agencies under the jurisdiction of the Governor's office, including IDOT. As reported in the Tenth IDOT Report (Dkt. 6458 at 8), many formerly technical IDOT positions are in the process of converting to personnel code covered positions and will be subject to Jurisdiction B of the personnel code. The Court's November 18, 2014 appointment order directed the Special Master to recommend measures that may be necessary or appropriate to prevent future violations. Correcting the deficiencies discussed herein are appropriate in order to avoid the risk of future violations at IDOT, as well as at other agencies.

of the Governor's Office to impose such restrictions, the restrictions have impeded the progress being made to develop legally-compliant reforms to the State's employment processes. We believe these new restrictions imposed by the Governor's Office are unproductive to the previously cooperative efforts of the parties to eliminate unlawful patronage, reform state employment practices and implement lasting improvements.

II. Current/Historical State Employment System

During the Special Master's investigation and review of Exempt positions at agencies under the jurisdiction of the Governor and through the Parties' collaboration in developing a proposed Comprehensive Employment Plan, the Special Master's office noted several areas of concern with respect to the State's current and historical employment system. Two of these concerns raise systemic issues that implicate potential *Shakman* violations, discussed in Sections A and B below. Section C below identifies other problematic practices which create opportunities for manipulation by agencies.

A. Concept of "Reachability" Excludes Consideration of Most Individuals Not Currently (or previously) Employed by State of Illinois

Positions covered by jurisdiction B of the Personnel Code are non-Exempt because they have job protection. Hence, the selection process for these non-Exempt positions cannot be influenced by political reasons or factors and is subject to posting and competitive selection requirements pursuant to the General Principles and Commitments Applicable to Hiring filed with the Court on January 7, 2019 ("General Principles") (Dkt. 6158), CMS guidance and Sections IV and V of the proposed CEP (Dkt. 6612-1).

The State's current personnel system for positions subject to jurisdiction B of the Personnel Code is controlled in large part by the "reachability" of candidates. "Reachability" refers generally to whether an applicant is eligible for appointment to a vacant position. A State agency cannot

even consider a candidate for a vacant position subject to jurisdiction B of the Personnel Code unless the candidate is “reachable.” As discussed below, the concept of reachability significantly favors current and former certified State employees and often excludes consideration of qualified external candidates.

As explained by CMS, the term “reachable” does not appear in the Personnel Code. The term derives from rules set forth in the Illinois Administrative Code. Section 302.90 of the Illinois Administrative Code sets forth how vacant positions can be filled:

- 1) by appointment from the appropriate open competitive list⁵;
- 2) by promotion of a certified employee or a probationary employee who has been certified during the current period of continuous service from the applicable promotional list after giving appropriate consideration to employee qualifications, performance, seniority, and conduct;
- 3) by reinstatement of a former certified employee;
- 4) by intra-agency, inter-agency or merit system transfer;
- 5) by demoting an employee after having filed charges;
- 6) by accepting an employee's request for a voluntary reduction.⁶

Ill. Admin. Code, §302.90.

Methods two through six limit the pool of potential candidates to current (or former) certified state employees. Method one (the OC list) is the only way an external candidate *may* be considered for a vacancy. An agency has discretion to choose which method to use to fill a vacancy. In practice, after the posting period ends, an agency receives the promotional list of

⁵ The open competitive (“OC”) list is a list of all qualified applicants for a position classification based on open competitive examination and grading by CMS. *See* Ill. Admin. Code, §302.80. According to CMS, the OC lists often contain the names of “applicants” who did not apply to the specific job posting and may no longer be in the job market. Their names may appear on the list because they were previously deemed qualified for the position classification based on CMS examination and grading. Names remain on the OC list for an extended period of time. External (non-state) candidates can be included on the OC list if they submit an application (CMS 100) and obtain a qualifying grade from CMS.

⁶ There are two additional ways to fill a vacancy listed in the rule, neither of which are relevant to this analysis.

reachable current (or former) certified State employees and may decide to limit the interview pool to only those candidates. Under this scenario, external candidates who applied for the job will never be considered. The promotional list may contain only one or two reachable current or former State employees. The agency may nonetheless proceed with interviewing and hiring from this limited pool, although current CMS guidance now instructs the agency to first obtain CMS permission.

If there are no reachable current or former certified State employees or if the agency otherwise decides to do so, the agency can pull the OC list. The OC list includes a blind list of internal and external candidates who have a current qualifying grade for the position classification from CMS, regardless of whether the candidates applied to the specific job posting, or are qualified for the specific job. The agency then blindly chooses candidates to interview from the OC list.⁷ The candidates selected for interview may have no interest in the specific job, may lack qualifications for the specific job and/or may not include external candidates who applied for the job.⁸ For these reasons, agencies often avoid pulling the OC list. Agencies instead choose to fill vacancies through the other methods that strongly favor current or former certified State employees or by finding other “work arounds,” such as using personal services contracts or temporary assignments.

We are concerned with the State’s current process that so heavily favors current or former State employees, given the historical patronage abuses in State employment practices. These non-Exempt positions should be open to all qualified State of Illinois residents and competitively filled.

⁷ Subject to an absolute preference for “A” grade veterans.

⁸ On October 1, 2019, CMS issued an Updated Grading Procedures Memorandum to agency personnel officers and HR staff that changes the procedures for grading promotional applications but does not impact the issue reachability.

Limiting the candidate pool to current or former certified State employees, raises serious concerns about whether the State's current personnel system complies with the 1972 Consent Decree.

B. Promotions Through Temporary and Interim Assignments Are Unilaterally Decided by Managers and Not Subject to Competitive Process

As discussed in the IDOT Initial Report of the Special Master filed March 4, 2015, the initial investigation into IDOT's employment policies revealed several structural deficiencies that did or could result in *Shakman* violations. (Dkt. 4128 at 23). One of those deficiencies is the use of "Temporary Assignments." *Id.* A temporary assignment is a process whereby specific individuals are selected to fill a higher-level position without going through a competitive process, where they usually receive higher pay and an advantage in the eventual hiring process for the permanent position.⁹ As noted in the March 4, 2015 Report:

Data provided by IDOT during our investigation shows that between 2010 and 2014, **more than 1600 employees** were Temporarily Assigned into higher paying positions. That practice allows managers to unilaterally promote employees without any CMS or central office personnel oversight and without any competitive process. *Id.* at 23.

During discussions with the State regarding the proposed CEP, the Special Master's office determined that this practice is used in other agencies outside of IDOT. Accordingly, the Special Master made recommendations to limit or restrict the practice, but those recommendations have been largely rejected by the State. There are a number of problems with the temporary assignment process. First, it gives agency personnel unfettered discretion to hand pick individuals for promotion, outside of any competitive process and to the exclusion of other interested and qualified State employees. These individuals assume more desirable and higher paid positions without any competition from other internal qualified applicants. External candidates are excluded entirely.

⁹ Although this section focused on the Temporary Assignment process, the Interim Assignment process, which is used to promote non-bargaining unit employees outside any competitive process, is equally concerning.

Second, once selected for the “temporary” promotion, although the procedure was meant to be a short-term fix while the job is opened up to qualified applicants, the favored actors frequently remain in those jobs for months or years. As a result, the job is not timely posted and filled competitively. Third, even where the appointment is truly “temporary,” the person who holds the temporary assignment gains an unfair advantage over other qualified applicants because he performed those duties for a period of time. This advantage, in the Special Master’s experience, is difficult for other candidates to match. Accordingly, the temporary actor has an unfair advantage once the job is posted and filled, and is often the selected candidate. Even in temporary assignments where there is no increase in pay, the temporary actor is often given the eventual promotion to the desired job when it is posted.

The State’s current practice for making temporary assignments may also violate the State’s Administrative Orders governing employment practices and the principles of the proposed CEP filed by the State with the Court on November 25, 2019. In particular, the practice circumvents the State’s commitment to “implementing proactive and transparent employment policies, practices and procedures,” the requirement to “[p]ost[] all non-exempt positions for no less than ten days,” the requirement to interview a number of candidates, among others.

The CEP did include a provision regarding Temporary Assignments that reads:

Temporary Assignments. “Temporary Assignments” are less-than-permanent assignments of bargaining unit employees to perform the duties of another position’s classification. The manner in which temporary assignments are handled varies by bargaining unit, as set out in the applicable CBA. The State commits that temporary assignments are not intended to favor or specially qualify certain employees for future promotional opportunities. Therefore, the Agency Personnel Officer or designee will document the justification for selection of employees for temporary assignment and retain such documentation for review for compliance with this commitment.

This provision, however, does not address four primary concerns: First, there is no definition of “temporary” and therefore leaves open the possibility of long-term appointments. Second, there is no requirement to consider all qualified candidates for the temporary assignment. Third, the AFSCME Collective Bargaining Agreement (which covers the vast majority of State union employees) actually does favor temporarily assigned candidates in future promotions. Specifically, the applicable language states:

Criteria for Promotion

It is not the Employer's intention to use temporary assignment to favor or specially qualify certain employees for future promotional opportunity (except in RC-10). However, time in temporary assignment, if included on CMS-100B, shall be given appropriate consideration by the Department of Central Management Services.

If the employee who has been temporarily assigned is selected for the posted vacancy, the employee shall have his/her creditable service date adjusted to reflect the first date on which he/she was temporarily assigned without interruption. Such uninterrupted time in a temporary assignment shall be credited in determining semi-automatic promotions, if such employee has successfully performed the duty or duties which distinguish the position to which the employee has been temporarily assigned. AFSCME Master Contract, Art. XIV, §7 (emphasis added).

Although the Special Master’s office and the State have discussed concerns regarding temporary assignments on numerous occasions, the State has responded that temporary assignments are regulated and overseen by CBAs, are generally limited to 90 days or less, and do not require additional monitoring or audit. Preliminary information provided by the State undermines that response. Specifically, as part of the discussions as to whether the temporary assignment process required additional restrictions and limitations in the CEP, the Special Master’s office requested data on the use of temporary assignments. CMS provided data about its use of temporary assignments demonstrating that a small number of individuals were temporarily assigned for in excess of 90 days, including for more than one year in some instances.

Thereafter, the Special Master's office requested the same data for the Department of Human Services. Although the State has to date refused to provide the requested information¹⁰, preliminary data reviewed by the Special Master revealed that during a two-year period, there were 3000 temporary assignments and 600 individuals were temporarily assigned for more than 90 days. Thus, we remain concerned that the use of temporary assignments (and interim assignments) violates provisions of the CEP and Administrative Orders, is insufficiently regulated, and provides opportunities for manipulation.

C. Other Current State-Wide Employment Practices Create Opportunities For Manipulation by Agencies

1. Agencies Can Cancel Hiring Sequences and Select Other Favored Candidates through Personal Services Contracts

The Special Master's office's review of various hiring sequences at agencies under the Governor's jurisdiction revealed that currently (or until very recently) agencies have the discretion to deem a hiring sequence "failed" without applying uniform objective standards. After posting a non-Exempt position, an agency can simply decide on its own: (1) to interview candidates but not offer the job to any of the candidates who interviewed; or (2) not to interview minimally qualified "reachable" applicants in the first place. The following "failed" sequences are examples. In these particular instances, the agencies later hired seemingly preferred individuals to perform the duties of the unfilled job through Personal Services Contracts.

¹⁰ The Special Master requested this information in response to the State's assertion that temporary assignments were restricted based on applicable CBAs and that unions were monitoring the use and duration of temporary assignments. Although the State initially agreed to produce this information, it has not done so based on reasons that will be reported at a later date.

a. Employment First Coordinator

The Department of Human Services (“DHS”) Employment First Coordinator (“EFC”) position was a non-Exempt position posted in late 2018 during initial phase of the electronic hiring process the State is currently testing on a limited basis (“Electronic Hiring Process”).¹¹ After learning that the selected candidate was never offered the position, the Special Master requested the hiring packet in September 2019. On October 31, 2019, the Special Master’s office issued a memorandum regarding the review of the file.

The Special Master’s review of the paperwork revealed that, after the position was posted, interviews were conducted, and the highest ranked candidate was slated to receive an offer of employment, the agency abruptly abolished the position. The selected candidate based on competitive interviews was never hired. Instead, a different candidate, who had declined to interview for the position due to an unwillingness to relocate, was hired on a Personal Services Contract (“PSC”) without going through the non-Exempt competitive interview process.

In the October 31 memorandum, the Special Master requested additional information to shed further light on the situation. The State produced documents in response to the request on November 8, 2019. The documents produced confirmed that DHS improperly used a PSC to circumvent the non-Exempt hiring process in order to hire a pre-selected candidate.

i. Job Posting and Candidate Interviews

The non-Exempt Employment First Coordinator position was posted in late November 2018 during the initial testing of the Electronic Hiring Process. Four candidates were scheduled to interview – three on February 6, 2019, and a fourth on March 5, 2019.¹² Two candidates were

¹¹ See *infra*, Section III.B, discussing the Electronic Hiring Process.

¹² The fourth candidate, a veteran, was permitted to interview on a later date due to a scheduling conflict related to military training.

interviewed on February 6, both of whom scored above 3 on a scale of 1 to 5. The other candidate scheduled to interview that day (hereinafter, “Candidate A”) decided not to proceed with her interview after she arrived. Candidate A was interested in the position, but she was unwilling to relocate to Springfield, where the position was located.¹³ Candidate A’s application for the Employment First Coordinator position reflected having worked with DHS’s Division of Rehabilitation Services through a private contractor.

On March 5, the fourth candidate (hereinafter “Candidate B”) interviewed. She was also Chicago-based but indicated her willingness to relocate. After interviewing, Candidate B was the highest ranked candidate with a score of 3.9 out of 5. Her application, resume, and the interviewers’ notes demonstrate her qualifications for the job. Additionally, Candidate B’s application was ranked number one going into the interviews.¹⁴ She exceeded the education and experience requirements of the job and met the preferred qualifications of being a Certified Employment Support Professional, having an ACRE Certificate of Achievement, and having experience with public policy, among other attributes. After the interviews, the interviewers completed and submitted an Employment Decision Form identifying Candidate B as the selected candidate in mid-March 2019. However, an offer was never made.

ii. Abolishment of the Employment First Coordinator Position

Despite having just completed a covered hiring process and selected a qualified candidate, on April 11, 2019, DHS decided that it would abolish the Employment First Coordinator position.

¹³ According to CMS, there was initially confusion about the location of the position based on the job posting. However, Candidate A (and other candidates) had been informed that the position was located in Springfield before interviews.

¹⁴ The Electronic Hiring Process, which this position went through, includes scoring applications numerically and ranking candidates based on their application scores to identify the top ranked applicants to invite to interviews.

The individuals that decided to abolish the position knew or should have known that a hiring sequence had just been completed and a qualified candidate had been identified.

iii. Candidate A Hired Through an “Exempt” Personal Services Contract for the Employment First Coordinator Position

After formally abolishing the position, DHS shortly thereafter hired Candidate A through an “Exempt” (*i.e.*, non-competitive) Personal Services Contract into the Employment First Coordinator position. Emails in August and September 2019 show the concerted efforts of various DHS employees to hire Candidate A through a PSC, without posting the PSC and allowing other candidates to compete. While seeking approval for Candidate A’s hire, DHS Personnel Officer, Scott Viniard, stated in an email to the Governor’s Office’s Director of Executive Appointments, that since “they are going directly after her and not posting and interviewing we will have to add it to the 4d3 PSC list according to [CMS].” On September 19, 2019, Mr. Viniard followed up with the Governor’s Office again about the status of approving Candidate A’s PSC. The Governor’s Office official responded, “Scott, it’s approved as long as all the proper processes are followed.”

Candidate A was appointed to a PSC to perform the non-Exempt Employment First Coordinator position with an effective date of September 23, 2019. Although the State has not conveyed its interpretation of the circumstances described above, DHS circumvented the non-Exempt hiring process to hire its preselected candidate for a covered position.

b. World Shooting Complex

As discussed in the Fifth Report, the Department of Natural Resources (“DNR”) Executive Director of World Shooting Complex was an existing 4d(3) position that was deemed not to qualify for the Exempt List through the *Shakman* Exempt List review process. *See* Fifth Report at 7-9. When CMS presented the position to the Civil Service Commission (“CSC”) for rescission of 4d(3) status, the agency made a counter argument that it should not be rescinded. *Id.* Ultimately,

the CSC agreed with the agency that the position should remain excluded from jurisdiction B of the Personnel Code under section 4d(3). As a result, the CSC's decision conflicted with the *Shakman* recommendation that this title should be non-Exempt.

After discussions between the agency and CMS, the agency posted the job using the State's non-Exempt hiring process. The job posting generated four applications – two candidates were “reachable” as current (or former) State employees; one candidate was a current (or former) State employee but was not “reachable” because he/she was waiting for CMS to grade his/her application; and one candidate was a non-State employee and was not “reachable” unless the agency pulled the OC List and happened to select that person from the blinded list.

Rather than interview the reachable candidates and wait for a grade for the third candidate, DNR decided: (1) not to interview the two reachable candidates because they did not “look particularly qualified” for the job; and (2) not to wait for a grade for the State employee who had timely submitted an application to CMS for grading. Instead, the agency deemed the posting a “failed” sequence. Subsequently, the agency posted the position as a non-Exempt Personal Services Contract. The posting generated 13 applications and DNR interviewed six of those candidates. The agency hired a qualified non-State employee. By posting and filling the position as a PSC, the agency was able to avoid the constraints of reachability to hire an otherwise ineligible candidate. As a non-State employee, the individual hired through the PSC would not have been “reachable” if she had applied to the original posting. Moreover, regarding the original posting, the agency's ability to look at applicants, know their identities, and then decide not to interview them, despite being minimally qualified, reveals that the current system includes too much discretion on the part of the agency and creates opportunities for political manipulation.¹⁵

¹⁵ The CEP includes a provision that requires agencies to seek approval from CMS before deciding a sequence is “failed.” However, agencies do not appear to be complaint with that provision.

2. Bypass Process Is Subject to Misuse, Lacks Uniform Processes, and Allows for Excessive Discretion

The Special Master's Office received information raising concerns about the Department of Information and Technology's ("DoIT") misuse of the bypass process. Under the AFSCME contract, certain bargaining unit positions are to be filled through promotion based on seniority. The bypass process allows for a more senior candidate to be "bypassed" in favor of a less senior candidate if the less senior candidate has "demonstrably more superior skill and ability to perform the work required in the position classification." AFSCME Contract, Article XVIII, §2(b).¹⁶

In response, the Special Master's office requested and reviewed hire packets for three sequences at DoIT. That review uncovered inconsistencies in the scoring of candidates, which suggested possible scoring manipulation to justify the "bypass" of more senior candidates in favor of less senior candidates. We also noted disparities in how the bypass process was documented and reviewed. On April 3, 2019, the Special Master's office sent a Memorandum to CMS summarizing the results of our review and requesting additional information. We also recommended that CMS establish and circulate guidance on a uniform process and level of review for all agencies under the Governor's jurisdiction.

In July and October 2019, we received some of the additional information we requested, which revealed additional concerns about inconsistent and incomprehensible scoring and the misuse/overuse of the bypass process. For example, many of the bypass justification memoranda referred to a single candidate interview and the bypass of that single candidate, without reference to a less senior candidate who had demonstrably more superior skills. On October 31, 2019, we

¹⁶ All positions subject to collective bargaining agreements are non-Exempt and the selection process cannot be influenced by political factors or reasons. According to CMS, the State's workforce is approximately 93% unionized with AFSCME being by far the largest labor organization.

issued a second Memorandum to CMS, the Governor's Office, HEM and the Plaintiffs summarizing the results of our continued review and reiterating our concerns about inconsistent scoring and potential misuse of the bypass process.¹⁷ We also reiterated our recommendation that CMS establish and circulate guidance on a uniform process and level of review for all agencies under the Governor's jurisdiction and requested additional information, including the hiring packets for a subset of the sequences filled through the bypass process.

On November 12, 2019, CMS sent the Special Master's office an "Initial Response" to the October 31, 2019 Memorandum. CMS explained that the State uses the bypass process in two scenarios: (1) when a position requires "specialized" skills identified in the position descriptions, the State can bypass a more senior candidate who lacks the specialized skills of the particular job¹⁸; or (2) when a less senior employee has "demonstrably superior" skills than a more senior employee. CMS explained that DoIT also uses the bypass process to exclude candidates who do not receive a minimum interview score of 2 on a 4 scale. CMS agreed to make the requested hiring packets available for review at DoIT's offices in Springfield.

On December 16, 2019, when the Special Master's office traveled to Springfield, DoIT made the hiring packets available for review. Based on the review to date, we remain concerned about scoring inconsistencies and discrepancies, lack of uniformity in the use and documentation of the bypass process and lack of meaningful compliance oversight. For example, in one hiring sequence reviewed, scores were changed after-the-fact based on comments from non-interviewers in DoIT personnel. Other hiring sequences did not include the same level of scrutiny. DoIT

¹⁷ DoIT used the bypass process in 65 hiring sequences in 2018 and 2019 (through October 2019).

¹⁸ CMS explained that this was the reason for the "single candidate" bypass justification memoranda.

officials also stated that they can, in some circumstances, elect to promote employees that score less than 2.0, contrary to the stated policy. We continue to believe that this is an area ripe for manipulation and in need of uniform guidance and oversight.

3. Reachability Restrictions Limit Meaningful Competition By Restricting Candidate Pools

As set forth above, we are concerned that the State's current system, which is tied to the reachability of candidates, significantly restricts the candidate pool and calls into question whether positions are being truly competitively filled. Although the State has agreed in principle that a competitive selection process should include a minimum of three interviewees, the State's current employment system does not follow this principle.

A position filled in the Illinois Environmental Protection Agency ("IEPA") illustrates the point. In February 2019, the IEPA filled a non-Exempt SPSA position after interviewing only one candidate. The position had been posted for 12 days and the agency received six applications. Two of the applicants were external candidates and four were current State employees. The external candidates were not reachable because they did not have a qualifying grade from CMS.¹⁹ One of the current State employees was not reachable because she had never held certified status. Another State employee was not reachable because he did not receive a qualifying grade from CMS. The remaining two State employees were invited to interview, but only one accepted and was promoted after a single candidate interview. The Special Master raised concerns about this selection as a result of the single candidate interview. CMS explained that the State was constrained by the rules of reachability and CMS had no basis to reject the hire.

¹⁹ The agency did not pull the OC list to fill the position. Regardless, the external candidates would not have been included on the OC list because they did not have qualifying grades.

The Special Master continues to be concerned about the State's current employment system, which in certain circumstances allows for single candidate interviews and extremely limited candidate pools that often favor existing State employees and exclude external candidates.

III. Report on Progress of State's Comprehensive Employment Plan

The Parties started to discuss the terms of a Statewide CEP beginning in late 2017. As the Acting Director of CMS stated in a Memo to all State Agencies in October of 2017:

We have made great progress in removing improper political influence from the personnel practices of agencies and other entities under the Governor's authority ("Agencies"). Working together among ourselves and with the court-appointed Special Master in the *Shakman* case, we will accelerate that progress. Our goal is to improve our personnel system to ensure Agencies have the necessary tools and training to hire the most qualified people for available positions while preventing improper political influence and enabling all Illinois residents to compete for permanent state jobs.

See 10/5/2017 Memo. Beginning in March of 2018, CMS, HEM, the Governor's Office and the Special Master's office began discussing more concrete provisions to include in a CEP. Accordingly, the group exchanged a series of outlines, recommendations, and potential policies for a CEP that would cover both IDOT and all other agencies under the jurisdiction of the Governor. Since at least late 2018, those negotiations have included Plaintiffs' counsel. A majority of the provisions discussed or recommended were ultimately included in the State's proposed CEP, but some were not.

A. Filing of Proposed Comprehensive Employment Plan

On November 25, 2019, the State filed the proposed CEP with the Court. (Dkt. 6612). Three important portions of the CEP that were agreed upon include, among other provisions, requiring CMS to review and approve pre-posting documents (*i.e.* job posting, application questions/screening, interview questions, etc.) before agencies proceed to post; requiring CMS to

review and approve documentation after interviews and before agencies offer the position and officially hire a selected candidate; and creating a compliance office within CMS. Although CMS does not currently have the ability to perform these important functions, the State has committed to them. Similarly, the State has committed to rolling out the Electronic Hiring Process Statewide even though it is unable to do so presently.

B. The Electronic Hiring Process

In CEP discussions, the Parties have focused extensively on the new Electronic Hiring Process, which contemplates that the majority of steps for non-Exempt hiring will be completed electronically. Specifically, job postings, applications, application screening, and interview scheduling will be handled electronically. Interviewer notetaking, interview scoring, and documented reasons for employment decisions will be stored electronically. The process aims to eliminate some of the opportunities for manipulation and inefficiencies identified above. The State asserts that the Electronic Hiring Process will eliminate the old grading system, remove the issue of “reachability,” eliminate the use of OC lists and require uniform documentation. The State will be able to consider all interested candidates, whether current State employees or external candidates, for job postings to which the candidates apply. Additionally, completing a hiring cycle will take a fraction of the time as compared to the average time it currently takes.

The State began testing the Electronic Hiring Process in late 2018 with five Department of Human Services positions. Four of the five job postings resulted in successfully hiring a qualified candidate.²⁰ Since the initial test phase, there have been several phases that involved agencies proposing positions to go through the process based on hiring needs or unique circumstances

²⁰ The fifth job posting, the Employment First Coordinator, is discussed above in Section II.C.

related to the positions. As of October 29, 2019, CMS reported that 45 positions at 14 agencies were completed through the Test Track and that 18 individuals have been hired using the Electronic Hiring Process. According to the State, the Electronic Hiring Process will be fully implemented Statewide for merit compensation positions (*i.e.*, non-bargaining unit jobs) by the end of the first quarter of 2020. As of January 9, 2020, CMS reported that the Department of Revenue was using the Electronic Hiring Process for all merit compensation hiring.

Additionally, the State reports that it intends to roll out the Electronic Hiring Process for bargaining unit positions by the end of the third quarter of 2020. At the December 2, 2019 status hearing with the Court, the State reported that agencies will be required to utilize the process for all hiring once the Electronic Hiring Process is completely rolled out. The Electronic Hiring Process is a vast improvement to the State's historical hiring system, and we commend the CMS personnel who have worked diligently over the past few years to develop the new system.

1. The Special Master's Review of Electronic Hiring Process Files

The Special Master's office reviewed hiring files for seven job postings that went through the Electronic Hiring Process: DHS Employment First Coordinator; DHS Legislative Liaison; DoIT Enterprise & Mainframe Manager; DOC Chief of Oral Health; DOR Payroll, Timekeeping & Benefits Manager; CMS Statewide Facilities Manager; and CMS Procurement Portfolio Manager.²¹

By reviewing the files, the Special Master's office was able to make a preliminary assessment of how the process was working. In terms of the overall goal of improving the State's

²¹ Four postings resulted in hiring qualified candidates. Three were "failed" sequences. The number of successful sequences versus unsuccessful sequences is not proportionate to the overall outcomes of the Electronic Hiring Process. The Special Master's office intentionally requested the "failed" sequences to determine why they were unsuccessful.

hiring procedures, the files revealed that the Electronic Hiring Process is a step in the right direction. Earlier sequences revealed certain problems such as incomplete or missing documentation, some inconsistent scoring of applications and interviews, and inadequate written justification for selected candidates. The State has reported making improvements after each phase of testing the Electronic Hiring Process, including steps that address some of the issues listed above. The sequences reviewed range from the very first job postings using the Electronic Hiring Process (Employment First Coordinator and Legislative Liaison) to more recent hiring sequences (Procurement Portfolio Manager and Statewide Facilities Manager). Some of the steps taken to refine the process along the way were apparent in the files.

2. The Special Master's In-Person Observations of the Electronic Hiring Process

On December 16, 2019, the Special Master and her staff traveled to Springfield to participate in the beginning of an Electronic Hiring Process sequence. Prior to a position being posted through the Electronic Hiring Process, the hiring agency attends two "Kickoff Meetings" with CMS. The subject matter expert/manager for the position, the agency's Personnel Officer, and another agency personnel employee (assigned to the specific job posting) typically attend the Kickoff Meetings. The Kickoff Meetings familiarize the agency with the Electronic Hiring Process. Additionally, with assistance from CMS, the agency reviews the Position Description for the job, the minimum and preferred qualifications, and drafts and allocates weight to the electronic application questions and interview questions, among completing other tasks related to the job posting.

On December 16 and 17, 2019, the Special Master's office attended the Kickoff Meetings for a merit compensation position at the Department of Innovation and Technology ("DoIT"). The

Special Master's impression of the Kickoff process was largely positive. CMS helped the agency to decide what it was truly looking for in an ideal candidate for the position and formulate application and interview questions that would attract and allow DoIT to hire the most qualified candidate for the job.

a. Ensuring Interview Questions Relate to Minimum and Preferred Qualifications

During the meetings, the Special Master's office recommended that the agency/CMS ensure that interview questions relate more closely to the required and preferred qualifications. One of the purposes of the Kickoff Meetings is to draft application questions that relate to the required and preferred qualifications on the Position Description. In the Electronic Hiring Process, the application score is the screening mechanism to determine the interview pool. If a candidate does not meet the minimum required qualifications, they are ineligible for interviews. The candidates who meet the minimum required qualifications are ranked based on how well they meet the preferred qualifications. Agencies typically invite the top 10 candidates to interview.

The Special Master's office observed that, because the application questions already asked about the minimum and preferred qualifications, initial drafts of interview questions did not always focus on those requirements. . The Special Master recommends that interview questions clearly align to the qualifications for the following reasons:

- (a) Weighting of Application Scores Versus Interview Scores: At the end of the Electronic Hiring Process, the agency selects a candidate based on combining the application score and the interview score- the application score equals 10% of candidates' final score, while the interview score equals 90% of candidates' final score. In effect, if the interview questions are not tied to the qualifications, candidates may not be given appropriate scores for either minimum or preferred qualifications.²²

²² This problem impacted the outcome in hiring for the CMS Statewide Facilities Manager position that the Special Master's office reviewed.

- (b) Application Not Used to Score During Interviews: Although the State issued guidance about “informed interviews” (*i.e.*, using candidates’ applications during interviews to ask follow up questions to encourage candidates to state their qualifications or address gaps in job history), State agencies (other than IDOT) do not use applications during interview scoring. The candidate must state their experience in the interview to get credit. As a result, interview questions should give candidates the opportunity to state their experience and get credit for it.

b. Consider Extending the Posting Period Beyond 10 Days

Pursuant to CMS guidance, agencies must post non-Exempt positions for a minimum of 10 business days. During the Kickoff Meetings, the Special Master encouraged DoIT to consider posting the position for more than 10 days. Extending the posting period could be beneficial, particularly for highly technical positions for which it may be more difficult to find a broad pool of qualified candidates. The attendees discussed extending the posting period after five days depending on how many applications had been received at that point. The Special Master recommends that, whenever possible, the decision to extend the posting period should be made prior to posting. A system that allows process changes to be made after posting is vulnerable to manipulation.

Notwithstanding the opportunities for growth in the Electronic Hiring Process, it is undoubtedly an improvement over the State’s antiquated hiring system, and we acknowledge CMS’s efforts in revamping the process. We look forward to continued collaboration.

IV. Recommended Provisions to Help Prevent Future Violations

Although the Parties reached agreement on a number of provisions in the proposed CEP, some provisions recommended by the Special Master were either not included or not sufficiently addressed, including those discussed below. *See also* Section II.B and C.

A. Use of Personal Services Contracts and Temporary Employees

The State's proposed CEP filed with the Court includes a provision regarding Personal Services Contracts which states, in part:

State agencies shall not use Personal Services Contracts in lieu of hiring an individual into an employment position, and may enter these contracts only in exceptional circumstances, and pursuant to the procedures below. A Personal Services Contract shall not be utilized to circumvent the competitive hiring process for non-exempt positions set out in this Comprehensive Employment Plan. Personal Services Contract shall be only for the length of time reasonably necessary to complete the described project and must not extend beyond one year. ...

Although the CEP states that PSCs should not be used in lieu of direct hiring, the extent of the use of PSCs is unknown and some evidence suggests that they are used in lieu of direct permanent hiring. *See* Section II.C. According to the Illinois Comptroller's Office,²³ in 2019 the State paid 1700 "Contractual Workers," ranging in pay from \$13 per hour to \$103 per hour. Many of those same workers were also contract employees in 2018, suggesting that the PSC or temporary employee process is used for extended periods of time.

As discussed in the Initial Report of the Special Master regarding IDOT, the overuse of temporary employees is a process ripe for manipulation and can result in unfair advantages for those employees selected for temporary employment outside the usual onboarding process. As noted in the IDOT Initial Report:

First, many of the temporary hires are rehired numerous times until a permanent position is created or found for the employee. Additionally, many of these employees acquire rehire rights that trump the rights of other employees. Thus, those current employees interested in applying for that position are often excluded. Second, because the temporary hires are provided extensive "on the job" training, at the exclusion of other current IDOT employees, current IDOT employees are at a competitive disadvantage, if they are allowed to compete

²³ *See* <https://illinoiscomptroller.gov/financial-data/state-expenditures/employee-salary-database/> This database also includes agencies that are not under the control of the Governor's office, such as the Attorney General's Office.

for the permanent position. Finally, because IDOT often rehires the same individuals several times for “temporary” positions, those individuals are favored over current government employees for the purposes of obtaining a particular position.

Although the CEP attempts to address this issue, it does not address previous use of the PSC/temporary employee process which can result in the same unfair advantages discussed in Section II.B. The CEP does not address the universe of temporary/contract employees, does not restrict the duration for all temporary/contract employees and does not address renewing temporary/contract employees. Although the CEP includes provisions intended to address the use of Seasonal Hires and Intern Positions, those provisions provide insufficient detail.²⁴

B. Concrete and Specific Minimum Qualifications

Although the CEP mandates that each job have identifiable minimum qualifications, the existing minimum qualifications for many State positions continue to be too vague and insufficiently tied to the position at issue. For example, to qualify for a Senior Public Service Administrator (“SPSA”) title, which cover hundreds of different types of positions, an applicant must have a four-year college degree, or equivalent, plus four years of progressively responsible administrative experience. The Class Specification states, “specific requirements vary according to the position’s duties or functions assigned by the agency” and approved by CMS.²⁵ The minimum qualifications for an SPSA position do not adequately explain what is deemed “equivalent” to a four-year degree²⁶; what constitutes “progressively responsible administrative

²⁴ On numerous occasions, over the past several months, the Special Master has requested that the State identify the universe of intern programs throughout the State. To date, the information has not been provided.

²⁵ There are different Options for SPSA positions that can require additional qualifications. Each of these Options, however, includes the language in the Class Specification quoted above.

²⁶ CMS does have instructions regarding how to apply the equivalency analysis, but those instructions are extremely vague and confusing.

experience” and permits “specific requirements [to] vary according to the positions’ duties ...”. This lack of specificity allows too much discretion to determine who actually meets the minimum qualifications, who is eligible to interview and how to score candidates. The lack of specificity also makes post-hiring auditing very difficult, especially given the lack of uniform documentation by agencies discussed below. In sum, minimum qualifications need to be narrowly and objectively defined or else they are subject to varying interpretations.

C. Other Items in CEP Not Currently in Effect or Excluded from CEP

Below is a summary of certain items either not included in the CEP or included in the CEP but not currently being implemented.

- Accurate Position Descriptions: Without meaningful minimum qualifications, it is difficult to have accurate job descriptions. Although one of the CEP “General Principles and Commitments” includes a mandate that agencies maintain accurate position descriptions, many agencies have failed to do so.
- Uniform Documentation Requirements: Meaningful auditing of the State’s employment practices requires uniform documentation that explain agencies’ decisions at the time they are made. Although the CEP states that uniform documents will be used throughout the state, it currently is not a requirement or a practice. Agencies use a variety of non-uniform ways to document reasons for screening out candidates, rejecting qualified candidates for interviews, scoring interviews, recording interview notes, and selecting specific candidates.
- CEP Items Not Currently Enforced: There are a number of provisions in the CEP that are not yet in effect. Some of the more pressing items not being enforced include the requirement that: CMS Review and Approval Prior to Posting Positions; CMS Review and Approval Prior to Job Offer; Creation and Implementation of CMS Compliance Office; and rollout of the Electronic Hiring Process.
- Items Excluded from the CEP: Other provisions have not been included in the CEP. Those provisions include: Mandatory Logging of Political Contacts; Uniform Processes for Background Checks; and Creation and Use of CMS Code to Identify Individuals Fired for Cause.²⁷

²⁷ There are other provisions of the CEP that remain under discussion including the public reporting of complaints and monitoring of the CEP by the Special Master.

V. Update on Other Matters

A. The Exempt Employment Plan

In the months since the Fifth Report was filed, agencies have continued to utilize the Exempt Employment Plan's hiring process for appointing individuals into positions on the Exempt List. Since January of 2019, the Pritzker Administration has made more than 500 appointments into Exempt List positions. HEM reviews the appointment paperwork for each appointment. To avoid duplication of efforts, the Special Master's office has not played an active role in reviewing each appointment in recent months.

Additionally, as of the filing of the Fifth Report, 33 positions had been added to the Exempt List since January 2019 pursuant to the request to change process outlined in the Exempt Employment Plan. As of the filing of this report, the number has increased to 40 position that have been added to the Exempt List. Five titles have been removed from the Exempt List under the Exempt Employment Plan process, either by rescinding 4d(3) status or abolishing the position.

B. Illinois Gaming Board and Illinois State Police Intergovernmental Agreement

According to Administrative Order No. 2 (2009), CMS guidance, the General Principles and Commitments Applicable to Hiring, and the proposed CEP, all non-exempt positions under the jurisdiction of the Governor's Office must be posted on Work.Illinois.Gov and competitively selected. The Special Master's office received several complaints that the filling of certain positions in the Illinois Gaming Board failed to comply with these requirements.

In the Fifth Report, the Special Master reported that an intergovernmental agreement between the Illinois Gaming Board ("IGB") and Illinois State Police ("ISP") gives the agency heads the discretion to fill certain non-Exempt IGB jobs through the Illinois State Police Merit

Board (“Merit Board”) process. Posting and filling IGB positions through the Merit Board means that only ISP employees are considered for the jobs, to the exclusion of IGB employees or any other applicants. *See* Fifth Report at 9-10. The Special Master voiced concerns that this arrangement violates or circumvents authorities that require the State to publicly post all non-Exempt jobs.

After the Fifth Report was filed, the Special Master and the Plaintiffs continued to request additional information. In November 2019, the State provided the Special Master a copy of a recent Interim Order regarding a union grievance filed on this very subject. The Interim Order reflects the obligation for IGB and ISP to try to equitably allocate who fills the positions at issue. At the status hearing on December 2, 2019, the State stated that under the arbitration award all positions are being posted by IGB as IGB positions. Following the status, in December 2019, the Special Master issued a memorandum seeking clarification because the wording of the Interim Order does not make it clear that all IGB positions are being posted and competitively filled in accordance with the authorities listed above. In fact, a plain reading of the Interim Order suggests otherwise. Moreover, an Interim Order resolving a grievance is not a permanent solution. The Special Master has not received a response from the State to her memorandum.

VI. CONCLUSION

The Parties have engaged in a significant amount of work to improve the employment practices at the State of Illinois, including and especially CMS and HEM. The Special Master looks forward to continuing to work with Governor Pritzker’s Administration as the Parties take the next steps in this process together. The Parties are making significant progress toward the future goal of substantial compliance with the 1972 Decree.

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Respectfully submitted,

/s/ Noelle C. Brennan

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