

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

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MICHAEL L. SHAKMAN and)	
PAUL M. LURIE, et al.,)	Case No. 69 C 2145
Plaintiffs,)	
)	
v.)	
)	
DEMOCRATIC ORGANIZATION OF)	Sidney I. Schenkier
COOK COUNTY, et al.,)	United States Magistrate Judge
Defendants.)	

NINTH REPORT OF THE SPECIAL MASTER

On November 18, 2014, the Court directed the Special Master, along with her staff and appointed legal counsel, 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. (*See* Order Appointing a Special Master for IDOT, Dkt. 4202 ¶ 3).¹

Since filing the Eighth Report of the Special Master (“Eighth Report”) on July 18, 2018 (Dkt. 5920), the Special Master and her staff have continued to work with the parties and the Office of the Executive Inspector General’s Hiring and Employment Monitoring Unit (“HEM”) toward implementing the Special Master’s previous recommendations to IDOT. Specifically, the work has primarily focused on identifying which positions at IDOT are properly classified as “technical,” which, as previously reported, is a prerequisite to finalizing the list of IDOT positions

¹ On May 1, 2017, the Court expanded the Special Master’s responsibilities to include working with the parties to develop a list of exempt positions for all agencies under the jurisdiction of the Governor and to make recommendations for how individuals placed into positions treated as *Rutan*-exempt in violation of the 1972 Decree should be treated going forward. *See* Agreed Order, Dkt. 5004. The Special Master’s work regarding agencies other than IDOT is addressed in separate reports to the Court. *See e.g.* Third Report Regarding Statewide Identification of *Rutan*-Exempt Titles, Dkt. 5992, filed on September 7, 2018.

that are appropriately exempt under the *Branti* standard (“Exempt List”).² The Special Master’s office has also worked with HEM and IDOT to identify Exempt Positions at IDOT that will no longer be classified as technical, but will remain “at-will” through exemption from the Personnel Code under other sections (*e.g.* 4d(3) and 4d(1)). In addition, the Special Master’s office has continued to make recommendations regarding potential violations of the 1972 Shakman Decree, and assess the implementation of such recommendations, to reform IDOT’s employment practices. This Ninth Report of the Special Master (“Ninth Report”) summarizes the work that has been completed, as well as ongoing work.

I. IDOT’S PROGRESS REGARDING THE SPECIAL MASTER’S PREVIOUS RECOMMENDATIONS

Since the Eighth Report, IDOT has made progress regarding the Special Master’s previous recommendations.³ Specifically, IDOT, through collaboration with the Special Master and HEM, took meaningful steps pertaining to the following recommendations:

1. Applying the proposed “technical” definition to determine which positions at IDOT are:
(a) truly technical and should remain subject to 4c(12) of the Personnel Code; or (b) not appropriately designated as technical and should be reclassified under Jurisdiction B of the Personnel Code.
2. Revising the proposed Exempt List to reflect the impact of the “technical” definition. Positions that will no longer be covered by 4c(12) will gain job protection under the Personnel Code, unless they qualify for Personnel Code provisions 4d(1)⁴ or 4d(3).⁵ Those

² See *Branti v. Finkel*, 445 U.S. 507, 518 (1980); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1980) (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 the effective performance of the position).

³ Cf. Eighth Report at 2 (describing the recommendations regarding which IDOT had yet to make significant progress).

⁴ Each agency’s 4(d)(1) positions generally consist of one to two private secretaries (two only if the agency head has Sangamon County and Cook County offices) and one confidential assistant to the head of each agency, board, or commission. 20 ILCS 415/4d(1).

⁵ “The Civil Service Commission, upon written recommendation of the Director of Central Management Services, shall exempt from jurisdiction B other positions which, in the judgment of the Commission, involve either principal administrative responsibility for the determination of policy or principal administrative responsibility for the way in which policies are carried out, except positions in

positions that do not qualify for coverage under Personnel Code 4d(1) or 4d(3) cannot be included on the Exempt List.

3. Updating a draft Comprehensive Employment Plan for technical positions within IDOT (“IDOT Technical CEP”). The IDOT Technical CEP will only apply to positions that will remain technical under section 4c(12) of the Personnel Code. All other hiring will be governed by the CEP for other state agencies under the jurisdiction of the Governor.⁶ IDOT has cooperated with the Special Master in identifying best practices to be included in the IDOT Technical CEP, but it is far from completion.

IDOT has not fully completed any of the tasks outlined above. However, IDOT has made significant progress in those areas, and the Special Master acknowledges the work that is being done.

A. Applying the Proposed Definition of “Technical” to Reclassify Positions

As discussed in previous reports to the Court, historically IDOT’s positions have been over-designated as “technical,” excluding them from part of the Illinois Personnel Code under Section 4c(12): “The technical and engineering staffs of the Department of Transportation, the Department of Nuclear Safety, the Pollution Control Board, and the Illinois Commerce Commission, and the technical and engineering staff providing architectural and engineering services in the Department of Central Management Services.” ILCS 415/4c(12).

As of the filing of the Eighth Report, IDOT was in the process of applying the preliminarily agreed upon technical definition to its currently designated technical positions to determine which positions are truly technical, and which do not meet the definition of “technical” as currently agreed upon by the parties. In the Eighth Report, the Special Master recommended that they complete that task and provide an updated technical definition, listing the position titles that fall

agencies which receive federal funds if such exemption is inconsistent with federal requirements, and except positions in agencies supported in whole by federal funds.” 20 ILCS 415/4d(3).

⁶ See Third Report Regarding Statewide Identification of *Rutan*-Exempt Titles, September 7, 2018. Since filing the Third Report Regarding Statewide Identification of *Rutan*-Exempt Titles, the parties continued to collaborate toward developing a Statewide CEP. The Special Master anticipates continued discussions in that regard before the Statewide CEP can be finalized and implemented.

under the definition, no later than the end of July 2018.⁷ (Eighth Report at 3). IDOT did not meet that goal. However, IDOT provided lists of positions and proposed designations on a rolling basis until it completed its initial review of all of the currently designated technical positions and provided a master list (“Technical Position List”) of positions under consideration to be truly technical on November 15, 2018. The Technical Position List includes STEM skills and proposed minimum required qualifications (“MRQs”) that are purported to be necessary to perform each job. The Special Master’s and HEM’s review of the Technical Position List is ongoing and will entail additional follow up with IDOT to determine whether the positions are truly technical and the MRQs for such positions. Once the Technical Position List is finalized, IDOT has agreed to update the position descriptions for each position identified as truly technical to include the MRQs. IDOT has made significant progress, in collaboration with the Special Master’s office and HEM, and has represented to the parties and the Court that the final Technical Position List will be finished within weeks. The next step will be to verify and standardize the MRQs for such technical positions; IDOT, the Special Master’s office, and HEM have discussed a process for completing this important step and have already begun this work as technical positions become vacant and are being prepared to post.⁸

B. Revising the Proposed Finite IDOT Exempt List

As previously reported and stated above, IDOT must determine which of its positions are properly classified as technical before its Exempt List can be finalized. (*See* Eighth Report at 3). Finalizing IDOT’s Exempt List is contingent upon application of the technical definition because only positions at IDOT that are non-union and truly at-will under the Personnel Code (*i.e.*, not subject to any job protection) will be on the Exempt List. While the Technical Position List is being finalized, IDOT has identified which of its currently *Rutan*-exempt positions it feels: (a) should be reclassified to fall under the Personnel Code but qualify for exemption under 4d(1) or

⁷ The most recent draft of the technical definition, dated June 20, 2018, includes a list of titles which are inherently technical, and the parties agree they will continue to fall under the 4c(12) exception: Aircraft Technician, Cartographer, Chemist, Civil Engineer, Geologist, Land Surveyor, Landscape Architect, and Photogrammetrist. The positions currently under review include other titles at IDOT for which the minimum requirements, as currently described in their position descriptions, do not uniformly require technical skills on their faces.

⁸ *See* section II. A., *infra*.

4d(3) and are recommended for the Exempt List (“Category A”); or (b) should remain technical and are also recommended for the Exempt List (“Category B”).

The Special Master’s office and HEM have completed preliminary reviews of both categories of positions. On December 28, 2018, IDOT was notified of positions in Category A that the Special Master and HEM agree qualify for the Exempt List. A list of those positions, as well as positions identified as appropriately exempt at other agencies under the Governor’s jurisdiction (“Statewide Exempt List”), was entered by this Court on January 22, 2019, pursuant to an Agreed Order between the parties.⁹ The Special Master and HEM provided recommendations to IDOT regarding the remainder of Category A positions and Category B positions on February 12, 2019. Once the final list is agreed upon, the Statewide Exempt List will be revised to include those positions.¹⁰ The Special Master also anticipates that IDOT’s own Exempt List will be filed with the Court separately, reflecting the same agreed upon IDOT exempt positions as will appear on the Statewide Exempt List.

C. Establishing a Comprehensive Employment Plan

In the Eighth Report, the Special Master reported that IDOT intended to circulate an updated draft of the IDOT Technical CEP by mid-July 2018, pursuant to a timeline put forth by the Special Master in response to IDOT’s failure to provide an updated draft between Fall of 2017 and July of 2018. (Eighth Report at 4). IDOT did not meet that deadline but provided an updated draft on August 31, 2018. A draft of the Statewide CEP was provided on the same day.

Since that time, the parties have primarily been focused on the Statewide Exempt List, the Statewide CEP, applying the technical definition, and IDOT’s Exempt List, among other ongoing matters. In the coming months, the Special Master anticipates the parties will engage in ongoing discussions to facilitate completing the IDOT Technical CEP, which will apply only to positions

⁹ Dkt. 6180. The Special Master, HEM, and the parties dedicated a significant amount of work toward identifying which positions are appropriate for the Statewide Exempt List. Completion of the process that resulted in the January 22, 2019 Agreed Order will be discussed in a separate upcoming report to the Court that specifically pertains to the Special Master’s work regarding agencies other than IDOT.

¹⁰ The parties agree that the Statewide Exempt List may be revised, within six months of the initial filing, to address positions that were pending agreement at the time of filing, without going through the process described in the “Exempt Hiring Plan” (Dkt. 6158). As an agency under the Governor’s jurisdiction, IDOT is subject to the procedures outlined in the Exempt Hiring Plan (Dkt. 6158) regarding appointments of candidates into exempt positions.

classified as technical under the new technical definition.¹¹ Positions that will no longer be classified as technical under the new technical definition will be subject to the Statewide CEP.

II. THE SPECIAL MASTER'S ONGOING WORK REGARDING VARIOUS IDOT MATTERS

A. Creation and Implementation of Minimum Required Qualifications

As previously reported, since the Special Master's initial appointment in 2014, she has recommended that IDOT establish minimum required qualifications (as opposed to merely desired qualifications) for positions, based on specific essential job duties, and apply those requirements to the hiring process. (See Eighth Report at 11 (renewing recommendation and citing to prior reports)). In late 2018, IDOT created minimum required qualifications ("MRQs") for a number of technical titles to address an issue related to screening candidates for interviews. IDOT sought the Special Master's permission to implement those MRQs. The Special Master did not object to IDOT's proposal but emphasized that the MRQs that IDOT sought to include in postings for technical titles, to the extent IDOT intended that these titles remain "technical," must align with the STEM skills and proposed MRQs put forth as part of the review of technical titles agency-wide. Additionally, the Special Master requested that the job postings be submitted to her office in advance to allow for an opportunity to review the MRQ's and provide feedback.

In January 2019, the Special Master's office discovered that IDOT posted several positions and included MRQs without affording the Special Master's office the opportunity to review the postings in advance. Additionally, a review of the postings revealed that for at least some of the positions, the MRQs listed in the job postings did not align with the MRQs proposed on the Technical Position List. Further, the Special Master's office expressed concerns that the MRQs in the job postings were ambiguously worded and did not appear to identify the most qualified candidates for interviews. The Special Master's office addressed these concerns with IDOT. IDOT is working with the Special Master's office to ensure MRQs included in job postings both align with the MRQs from the technical review and are worded in a manner that is: (1) easy for candidates to understand; (2) allows IDOT staff to review applications for compliance with those

¹¹ IDOT must comply with the Agreed Principles Regarding Non-Exempt Hiring (Dkt. 6158), entered by this Court on January 8, 2019, where applicable, regarding both its code-covered and technical positions. The Statewide CEP, once finalized, will also apply to IDOT, where applicable. The IDOT Technical CEP will specifically govern only IDOT's technical positions.

MRQs in an objective rather than subjective manner; and (3) results in the most qualified candidates being invited to interview. Further, the Special Master, HEM, and IDOT are working to compare MRQs for similar titles across the agency to ensure consistency. The Special Master acknowledges the Bureau of Personnel Management's work in this area and looks forward to continuing to assist in the implementation of MRQs.

B. The John Doe Process

The Special Master and the parties have continued to apply the process delineated in the Court's December 4, 2017 Order Creating a Review Process for Applications of Former Staff Assistant for Positions at IDOT ("John Doe Process") to hiring sequences that involve former Staff Assistants who have applied for *Rutan*-covered jobs and are the proposed selected candidates after interviews. (Dkt. 5644; *see* Seventh Report at 2-3, Eighth Report at 4-5). Since the Eighth Report was filed, two former Staff Assistants chose to utilize the process to dispute IDOT's agreement with the Special Master's conclusion that, regarding their individual hires, there is sufficient evidence to support a *prima facie* case that each of them was appointed to a Staff Assistant position in violation of the 1972 Decree. (*See* Eighth Report at 5 (stating that the Special Master submitted reports regarding several pending interview sequences and describing the process for disputing the Special Master's findings)). On January 22, 2019, the Court held a hearing to determine whether the candidates met their burden of proving his or her appointment did not violate the 1972 Decree. (Dkt. 5644 at ¶¶ 8-9). The Court considered a number of factors, pursuant to the terms of the John Doe Process. (Dkt. 5644 ¶ 10). Ultimately, the Court ruled that the candidates did not meet the burden of rebutting the *prima facie* case, and IDOT is not required to credit experience these candidates obtained as Staff Assistants when they apply for *Rutan*-covered postings.

C. 2018-2019 Seasonal Highway Maintainer ("Snowbird") Hiring

As discussed in previous reports, IDOT hires Snowbirds each winter season. The Special Master's office monitors the Snowbird hiring process to ensure IDOT continues to follow recommendations the Special Master issued in response to historical vulnerabilities in the Snowbird hiring process. (*See e.g.*, Initial Report at 22-23; Third Report at 4; Fourth Report at 15-16). The Special Master acknowledges that the Snowbird hiring process this year went smoothly. However, IDOT had to repeatedly post Snowbird job opportunities on a rolling basis (*i.e.*, as of the filing of this Ninth Report, several districts were on the tenth or higher posting) because earlier

postings did not result in a sufficient applicant pool to meet IDOT's hiring needs. The Special Master renews the recommendation that IDOT should find ways to publicize seasonal hiring opportunities more broadly to obtain a sufficient applicant pool.

D. Cooperative Education (“Co-op”) Program

As discussed in the Sixth Report of the Special Master (Dkt. 5069, “Sixth Report”), in 2017, the Special Master made several recommendations regarding IDOT's Co-op Program after identifying issues of concern related to the program. (*See* Sixth Report at 11-12). In July of 2018, IDOT sent the Special Master and HEM a proposal for a revised hiring process for the Co-op program. In September 2018, the Special Maser and HEM provided feedback to IDOT on its proposal. In January 2019, IDOT replied with additional revisions and comments that took into account the feedback. In February 2019, the Special Master informed IDOT that she does not object to it proceeding with the Co-op Program pursuant to the revised process. The Special Master believes that the revised process that IDOT will utilize this year is an improvement from the previous one. The Special Master anticipates that certain aspects of the Co-op Program will require additional discussion.

E. Discontinuation of Internal Posting Procedure

After discussions with the Special Master's office, HEM, and Central Management Services (“CMS”), IDOT agreed to discontinue its use of the internal posting procedure, which allowed IDOT to post jobs in certain position classifications for internal candidates only. (*See* Sixth Report at 7-8, Seventh Report at 5-6, Eighth Report at 6-8). As stated in the Eighth Report, the procedure was underutilized and conflicted with guidance issued by CMS for all agencies under the Governor's jurisdiction in April 2018. (*See* Eighth Report at 7-8). The Special Master looks forward to continuing to work with IDOT on the IDOT Technical CEP, which may include employment policies and practices that could help address IDOT's initially stated goal for internal postings (*i.e.*, to provide current IDOT employees more promotional opportunities).

F. IDOT's Disclosure of Employment Related Complaints

As reported in previous reports, the Special Master's office receives, and reviews complaints and investigations forwarded by IDOT pursuant to a letter agreement. (*See e.g.*, Eighth Report at 8). Part of the review process entails identifying areas for improvement in the investigative processes of IDOT's Bureau of Investigation and Compliance ("BIC"). As stated in the Eighth Report, in June of 2018, the Special Master issued a memorandum that recommended steps to address some trends observed in the review of BIC investigations. IDOT responded with its own memorandum on August 29, 2018. IDOT and the Special Master's office discussed the matter and reached agreement on a number of points, and IDOT took certain steps to strengthen its process. The Special Master anticipates additional discussions regarding best practices for conducting complaint investigations.

G. Interviewer Conflicts of Interest

On October 19, 2018, the Special Master submitted a memorandum to IDOT identifying the opportunity for manipulation created by potential conflicts of interests between interviewers and interviewees. After reviewing several interview sequences where conflict of interest paperwork was missing, incomplete, or inaccurate, the Special Master made recommendations to IDOT to improve its conflict of interest screening and reporting process, with the goal of greater transparency and avoiding potential complaints. IDOT has not implemented all of the recommendations, however, conversations about this topic have been positive. Further, IDOT has taken steps to ensure conflict of interest paperwork and any related follow up is documented and included in interview files. The Special Master anticipates that many of the areas that are potentially vulnerable to manipulation will be addressed in the process of finalizing the CEPs for both the IDOT technical positions and the State's code-covered positions.

H. Tracking of Temporary Assignments

The Special Master's office continues to track IDOT's usage of temporary assignments ("TAs"). Over the years, excessive use of temporary assignments has been an ongoing concern of the Special Master's. (*See* Eighth Report at 9 (discussing the advantage being temporarily assigned affords candidates when they apply for the position permanently and citing previous reports)). After filing the Eighth Report, the Special Master engaged in extensive discussions with IDOT

regarding its temporary assignment policies. While IDOT chose not to follow the Special Master's recommendation to establish a TA rotation procedure, it ended the long-term temporary assignments of several employees, which had been extended over the course of multiple years in some cases. IDOT is still in the process of completing hiring sequences in order to eliminate additional temporary assignments. Currently, IDOT reports that there are less than 10 employees on official temporary assignment. However, the Special Master is aware of more than one non-official TA scenario that allows IDOT employees to temporarily perform the duties of a different title and gain experience in that role, which would be advantageous to them in future interviews. IDOT has been receptive to the Special Master's concerns over these issues and continues to collaborate with the Special Master to minimize the impact of such non-competitive opportunities. IDOT also committed to only create new official TAs for limited time periods, if operationally necessary, and only if the position has been posted to permanently fill.

IDOT continues to object, however, to the Special Master's recommendation that it rotate employees who are temporarily assigned to higher paying positions. Failure to rotate individuals or use some other competitive process provides the non-competitively, hand-selected candidate chosen for temporary assignment an unfair advantage over every other individual that subsequently applies for that job. This is a system that is ripe for manipulation. Although IDOT has succeeded in reducing the number of individuals that are temporarily assigned, it has not dealt with the unfair advantage given those individuals.

III. RECOMMENDATIONS

In the months following the Eighth Report, IDOT provided weekly reports of the status of implementing the Special Master's renewed recommendations from the Eighth Report. (Eighth Report at 10-11 (listing renewed recommendations)). The Special Master acknowledges the progress IDOT made. Many of the Eighth Report's renewed recommendations and IDOT's progress are discussed above. It is important that IDOT continue to move forward in those areas. The Special Master's recommendations (renewed or related to prior recommendations) are as follows:

- Finalize the Technical Position List, with a target completion date within the next 14 days.

- After the Technical Position List is agreed upon, work with CMS to reclassify those positions that will no longer be classified as technical. (*See* Eighth Report at 10 (citing previous reports related to this recommendation)).
- After the Exempt List is agreed upon, work with CMS to submit positions that are proposed to become 4d(3) to the CSC. (*See* Eighth Report at 10 (citing previous reports related to this recommendation)).
- Finalize the Technical Comprehensive Employment Plan. (Eighth Report at 4, 10; Seventh Report at 4).
- In the interim, continue to streamline processes to incorporate best practices and minimize the opportunity for manipulation.
- Officially convert currently designated *Rutan*-exempt union-covered positions to *Rutan*-covered. (*See* Eighth Report at 3).
- Complete a comprehensive internal audit of all existing *Rutan*-covered position descriptions and update any outdated or inaccurate position descriptions. (*See* Eighth Report at 11 (citing previous reports related to this recommendation)).
- Add MRQs to the position descriptions of all positions. (*See* Eighth Report at 11 (citing previous reports related to this recommendation)).

The Special Master requests that IDOT provide periodic reports on the status of these recommendations.

IV. CONCLUSION

Former Governor Rauner's administration made significant achievements toward reforming IDOT's employment practices since the Special Master's initial appointment in November 2014. The Special Master and her staff look forward to continuing to work with IDOT and Governor Pritzker's administration toward the ultimate goal of achieving substantial compliance with the 1972 Decree.

Dated: February 26, 2019

Respectfully submitted,

/s/ Noelle C. Brennan

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