

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

In the months since the Seventh Report, IDOT continued to work on a number of ongoing employment practice and policy related matters, including some of the Special Master’s prior recommendations. Although IDOT has made some progress, the following tasks remain uncompleted: (a) finalizing a definition of “technical”; (b) identifying positions that fall within the “technical” definition in order to eliminate the over-designation of positions as “technical”; (c) revising the *Rutan*-exempt list of positions to take into account the impact of the “technical” definition; and (d) creating a Comprehensive Employment Plan (“CEP”) for technical positions within IDOT. The Special Master acknowledges that some work has been done and encourages IDOT to stay focused on completing these projects, some of which have been pending for a significant amount of time.

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

As previously reported, IDOT is an agency that historically classified the majority of its workforce as “technical.” Technical positions are exempted from the Illinois Personnel Code under Section 4c(12) and thus are not overseen by Central Management Systems (“CMS”) as a result.² The lack of oversight historically created the opportunity for political manipulation (*e.g.*, Staff Assistant hires). The Personnel Code does not define “technical” and, prior to the Special Master’s appointment, IDOT had not defined the term itself. To safeguard against reoccurrence of prior violations of the 1972 Decree, and at the Special Master’s recommendation, IDOT agreed to create and apply a narrow definition of “technical” in order to reclassify positions that are not truly technical in nature as positions covered by the Personnel Code.

Decree, as well as related matters. Separate reports pertaining to the Special Master’s statewide (non-IDOT) work are filed with the Court periodically. *See e.g.*, Initial Report Regarding Statewide Identification of *Rutan*-Exempt Titles, Dkt. 5132, and Second Report Regarding Statewide Identification of *Rutan*-Exempt Titles, Dkt. 5822.

² Section 4c of the Illinois Personnel Code states, “General exemptions. The following positions in State service shall be exempt from jurisdictions A, B, and C, unless the jurisdictions shall be extended as provided in this Act: [...] (12) The technical and engineering staffs of the Department of Transportation....” 20 ILCS 415/4c(12).

In May 2017, IDOT submitted a proposed “technical” definition to the Special Master, and after discussion, IDOT and the Special Master generally agreed upon the draft definition. However, the Special Master recommended that IDOT identify specific titles that it believes are sufficiently technical in nature and include a list of those titles in the definition. Incorporating a list of specific titles into the definition will minimize the potential for over-designation of positions as falling into the “technical” code in the future.

As reported in the Seventh Report, IDOT stated its intention to provide to the Special Master an updated draft of the definition, including the list of position titles, by the end of 2017. While IDOT reports that it continues to review current technical titles to determine whether they should remain technical, to date, IDOT has not provided the Special Master with an updated draft of the definition that identifies which positions should be included in the definition. IDOT reports its intent to provide a list of such titles by the end of July 2018.

As stated in the Seventh Report: “Without a final definition of technical, the parties are unable to: create a finite list of *Rutan*-exempt positions at IDOT, convert positions improperly classified as technical to code-covered, and finalize a Comprehensive Employment Plan (“CEP”).” (Seventh Report at 3). As such, the Special Master recommends IDOT finish its review of positions and finalize the “technical” definition as soon as practicable and no later than July 2018 so that completing the other outstanding recommendations is not delayed further.

B. Revising the Proposed Finite IDOT *Rutan*-Exempt List

In March of 2015, the Special Master’s office recommended that IDOT create a finite list of *Rutan*-exempt positions. As previously reported, IDOT and the Special Master’s office discussed the appropriate *Rutan* designations for each position that was designated *Rutan*-exempt at that time. IDOT and the Special Master reached preliminary agreement on many positions based on whether the positions appeared to perform *Rutan*-exempt duties.

Notwithstanding preliminary agreement on the nature of specific positions, positions that are ultimately included on the finite *Rutan*-exempt list must be at-will. The parties have agreed that those positions cannot have job protection through the Personnel Code or Collective Bargaining Agreements. Therefore, before the *Rutan*-exempt list can be finalized, IDOT must: (1) finish its review of positions to determine which will remain technical; and (2) reach agreement with the union to exclude from the bargaining unit union-covered *Rutan*-exempt positions that IDOT believes should remain *Rutan*-exempt; or, reclassify those positions as *Rutan*-covered. As

stated in the Seventh Report, IDOT agreed to identify positions that will become covered under the Personnel Code, and those that will remain “technical” or potentially be exempt from the Personnel Code under one of its provisions (*i.e.*, 4d(1-3)), on a rolling basis to be completed by February of 2018. (*See* Seventh Report at 4). To date, IDOT has not started the rolling production of such information.

C. Establishing a Comprehensive Employment Plan

The Seventh Report discussed progress toward IDOT establishing a Comprehensive Employment Plan (“CEP”). (*See* Seventh Report at 4). Specifically, as stated in the Seventh Report, IDOT provided the Special Master with a draft CEP, and the Special Master provided preliminary feedback and recommendations in the Fall of 2017. Additionally, IDOT and the Special Master’s office agreed that the CEP should only apply to technical positions, as code-covered positions are subject to the Illinois Personnel Code and CMS procedures.

In the months between the Seventh Report and this report, IDOT has not provided a revised CEP draft to the Special Master’s office. IDOT has averred to the Court and the Special Master that it continues to work on the CEP and intends to circulate an updated draft by mid-July 2018, pursuant to a timeline the Special Master proposed. The Special Master urges IDOT to meet this deadline to avoid further delay.

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

A. The John Doe Process

As previously reported, the Governor filed a Motion for Clarification on April 25, 2017, seeking an order to clarify what consideration IDOT should give to knowledge and experience individuals gained as Staff Assistants when they apply for current or future postings for *Rutan*-covered positions. Plaintiffs and Teamsters Local 916 (as intervenors) both filed responses to the motion. On July 26, 2017, the Court granted the motion for clarification. Because certain former Staff Assistants who were improperly appointed could have an unfair advantage in interviews for future positions for which their Staff Assistant experience is relevant, the Court directed IDOT and the Plaintiffs to work with the Special Master’s office to develop a procedure for determining what consideration IDOT should give such experience. As described in the Seventh Report, after the parties collaborated to develop a process, the Court entered an Order Creating a Review Process

for Applications of Former Staff Assistant for Positions at IDOT (“John Doe Process”) on December 4, 2017. (Dkt. 5644; *see* Seventh Report at 2-3).

Former Staff Assistants were provided notice of the John Doe Process in December 2017. In May 2018, IDOT invoked the John Doe Process regarding six interview sequences, which involved five former Staff Assistant candidates who applied for *Rutan*-covered positions at IDOT. Pursuant to the Court’s Order, the Special Master reviewed each candidate’s personnel file and other relevant materials and conducted additional investigation to determine whether there is sufficient evidence to support a *prima facie* case that the candidate was appointed to a Staff Assistant position in violation of the 1972 Decree for four of the identified interview sequences.³ (*See* Dkt. 5644 at ¶ 3). The Special Master issued reports of her findings to the relevant parties per the Court’s Order.

Each candidate has the opportunity to dispute the Special Master’s conclusion and may reach agreement with IDOT that the experience gained as a Staff Assistant should be credited. (Dkt. 5644 at ¶¶ 5-7). If any candidate and IDOT are unable to reach agreement, IDOT shall file a motion with the Court to request a hearing to determine whether the candidate has met the burden of proving his or her appointment did not violate the 1972 Decree. (Dkt. 5644 at ¶¶ 8-9). If the process proceeds to that stage, the Court will consider a number of factors to make a determination. (Dkt. 5644 ¶ 10).

B. 2018 Seasonal Engineering Technician and Technician Trainee Hiring

As discussed in previous reports, IDOT hires Seasonal Engineering Technician (“ET”) and Technician Trainee (“TT”) interns each summer. In July 2016, the Special Master recommended various ways to improve upon the ET and TT programs. (*See generally*, Fourth Report). The Special Master emphasized that IDOT should aim to obtain as broad an applicant pool as possible.⁴

³ Two of the six sequences involved Staff Assistants who remained the recommended candidate without crediting experience gained in the Staff Assistant position. The Special Master did not object to IDOT moving forward with those candidates.

⁴ In the Fourth Report, the Special Master reported that a large percentage of ET and TT hires had relatives at IDOT or previous IDOT experience, which demonstrated IDOT did not reach a broad applicant pool. The Special Master’s staff has continued to track the percentage of ET and TT hires with IDOT relatives or previous IDOT experience since then. This year, a smaller number of ET and TT hires had relatives at IDOT or previous IDOT experience.

For the 2018 Seasonal ET and TT Programs, IDOT intended to hire 143 ET employees and 99 TT employees. IDOT posted the ET positions for three weeks on the IDOT website, IDOT intranet site, work.illinois.gov/CMS website, and at all IDOT facilities. IDOT also conducted information sessions and reached out to engineering schools. IDOT posted the TT positions for two weeks on the IDOT website, IDOT intranet site, work.illinois.gov/CMS website, and at all IDOT facilities. IDOT also reached out to colleges.

IDOT received no applications for several bureaus. Additionally, over 200 applicants were deemed ineligible for a variety of reasons, including minor errors in completing the application (e.g., numerous applicants did not properly follow the application directions about choosing a work location). Because IDOT did not have enough candidates to fill its ET and TT operational needs, upon IDOT's request, the Special Master's office did not object to IDOT's processing applications for candidates who were originally deemed ineligible for minor errors. IDOT hired a total of 183 ET and TT employees combined (120 ET; 63 TT) for the summer 2018 season, instead of the intended combined total of 242. The Special Master recommended that IDOT reword or reformat the application to clarify confusion and avoid applicants being deemed ineligible for minor errors in the future. IDOT agreed to that recommendation.

The Special Master renews the recommendation that IDOT take additional steps to broaden the applicant pool. IDOT should post ET and TT positions on a variety of job search websites (e.g., Indeed, Monster, etc.), as well as continue to post the positions where they have historically been posted.

C. Internal Posting Procedure

As previously reported, beginning in January 2017, after consulting with the Special Master's office, IDOT adopted an internal posting procedure for certain position classifications. (See Sixth Report at 7-8). IDOT presented the internal posting procedure as a mechanism to provide promotional opportunities for current IDOT employees, who might otherwise be screened out of interviews for external postings. IDOT identified ten classifications of positions that were likely ideal for internal postings: Engineering Technician IV, Engineering Technician V, Civil Engineer IV, Civil Engineer V, Civil Engineer VI, Civil Engineer VII, Technical Manager IV, Technical Manager V, Technical Manager VI, and Technical Manager VII. Pursuant to the internal posting procedure, those classifications may be posted internally as a matter of course, or they may be posted externally as approved on a case by case basis.

As stated in the Seventh Report, the Special Master's staff reviews data regarding postings on an ongoing basis to monitor the positions that are approved to be posted internally. (*See* Seventh Report at 5-6). IDOT indicates on its weekly job posting reports to the Special Master whether postings are internal or external. From January 2017 to March 31, 2018, only 92 of 399 IPRs that could have been posted internally were posted internally (23%).

Given IDOT's stated intent for internal postings to provide current IDOT employees promotional opportunities, the underutilization of internal postings suggests that the list of position classifications previously identified as appropriate for that purpose may be too broad. Additionally, selective use of the internal posting process creates the opportunity for manipulation. For example, a hiring department could choose to post internally or externally depending upon whether there is an internal candidate it specifically wants or does not want for the position based on improper considerations.

In addition, at the Special Master's request, IDOT provides notice when an internal posting results in three or less applicants and/or three or less applicants schedule to interview for a position. Internal postings have generated applicant pools of three or less on a number of occasions since January 2017, as stated in previous reports. In some cases, the Special Master asked IDOT to repost the positions externally to ensure the competitive nature of the *Rutan*-covered process, and IDOT complied. However, the small number of applicants for internal postings belies the idea that there is a large pool of internal IDOT employees seeking promotional opportunities that would not exist absent internal postings.

Moreover, on April 30, 2018, Acting Assistant Director of CMS, Sarah Kerley, issued a memorandum to agencies under the Governor's jurisdiction providing guidance regarding a number of hiring practices.⁵ As an agency under the Governor's jurisdiction, IDOT should have received the guidance and should be subject to the guidance. The guidance states, in part:

For positions for which there is no contractual rights to filling of vacancies, postings should not be limited to internal agency candidates only. The guidance provided in Administrative Order No. 2 (2009) directs that '[t]o the extent practicable, the agency shall interview all reachable applicants.'I am aware of no legal authority for agencies to limit the interview pool to existing agency employees only....

⁵ At Ms. Kerley's request and as part of our collaborative efforts to reform the State's employment practices, prior to her issuing the guidance, the Special Master's office and HEM provided input.

(April 30, 2018, “Reminders and Guidance Regarding Posting; Limiting Vacancies to Internal Candidates; and Involvement of OEIG Hiring and Employment Monitoring Division,” at 2).

In light of IDOT’s underutilization of the internal posting procedure, the small number of applicants for internal postings, and CMS’s guidance, the Special Master’s office would like to revisit IDOT’s use of the internal posting procedure going forward.

D. IDOT’s Disclosure of Employment Related Complaints

As discussed in previous reports, IDOT forwards information concerning employment related complaints received internally at IDOT or referred back to IDOT by the Office of the Executive Inspector General (“OEIG”) to the Special Master’s office pursuant to a letter agreement. (*See* Sixth Report; Seventh Report). The Seventh Report disclosed the Special Master’s concerns regarding one investigation by IDOT’s Bureau of Investigation and Compliance (“BIC”). The Special Master previously addressed the concerns to IDOT in a November 17, 2017 memorandum, which resulted in a meeting with IDOT to discuss the issues. Since that time, based on recommendations by the Special Master’s office, IDOT took steps to strengthen BIC’s investigative practices.

The Special Master’s office continues to review complaints and investigations forwarded by IDOT. In the course of reviewing three recent investigations, the Special Master identified additional areas for improvement in BIC’s processes. The Special Master highlighted the areas for improvement and recommended steps IDOT should take to further strengthen BIC’s investigative practices in a memorandum to IDOT on June 22, 2018. The Special Master anticipates ongoing discussions with IDOT on these matters.

E. Tracking of Temporary Assignments

The Special Master’s office continues to track IDOT’s usage of temporary assignments (“TAs”). Numerous reports of the Special Master discussed concerns about IDOT’s continued use of temporary assignments. (*See e.g.*, Initial Report at 23; Fourth Report at 14-15; Sixth Report at 8-9; Seventh Report at 7). The Special Master has repeatedly recommended that IDOT limit the use of temporary assignments and create a mechanism for allowing all qualified employees to be considered for TA opportunities on a fair and impartial basis. (*See e.g.*, Fourth Report at 15, 18; Seventh Report at 7-8).

At the Special Master’s recommendation, IDOT has issued Internal Personnel Requests and posted some positions that were formerly TAs. Those positions were permanently filled

through the *Rutan*-covered process. By doing so, IDOT decreased the overall number of TAs. Recent data shows that there are nineteen employees currently receiving increased pay for temporary assignments at IDOT. However, concerningly, a number of individuals in these TAs have been renewed for multiple six-month periods (*e.g.*, one TA has been renewed eleven times, which amounts to more than five years).

Moreover, in the course of monitoring IDOT's *Rutan*-covered hiring sequences, the Special Master's office continues to encounter the issue of temporarily assigned candidates having a built in advantage in the competitive interview process to permanently fill positions in which they were temporarily assigned.⁶ Since early 2017, the Special Master tracked approximately 140 Temporary Assignments. This tracking revealed that over the past year, approximately eighty percent of candidates who were temporarily assigned to positions that were posted and filled through the *Rutan*-covered process obtained those positions permanently. In several cases, the individuals appeared to be qualified for the positions largely because they had already been performing the job in a temporary capacity.

Additionally, as of the date of this filing, IDOT has not established a structured TA policy to: (1) identify the eligible candidate pool for each position at issue; (2) fairly select candidates to fill the TA from the eligible pool; and (3) rotate candidates if it is necessary to temporarily assign employees into the position for a significant time period. (*See* Sixth Report at 9; Seventh Report at 7-8). The Special Master renews these recommendations.

As previously reported, a number of current TAs are positions that are *Rutan*-exempt union covered. (*See* Sixth Report at 9; Seventh Report at 7-8). As stated in the Seventh Report:

While the Special Master's Office appreciates that IDOT is not permanently filling these positions because of the conflict between job protection and *Rutan*-exempt status, the indefinite assignment of employees to those positions, absent a competitive or rotational process, is not an appropriate long-term solution. The parties continue to discuss long-term solutions for reconciling the status of those positions. The Special Master recommends that IDOT immediately take action to remove job protection from appropriate *Rutan*-exempt positions.

⁶ The Special Master's office continues to monitor IDOT's *Rutan*-covered hiring practices through in-person monitoring of interview sequences or document reviews of completed sequences. The Special Master's office addresses any issues that arise with IDOT. IDOT has been cooperative in this endeavor, and sometimes brings issues identified internally by IDOT to the attention of the Special Master without prompting.

(Seventh Report at 7-8). Since approximately January 2017, other state agencies with nominally *Rutan*-exempt positions with job protection under the Illinois Personnel Code have been instructed to fill those positions, if necessary, using a *Rutan*-compliant competitive hiring process. (See Dkt. 5822, Second Report Regarding Statewide Identification of *Rutan*-Exempt Titles at 10-11). The Special Master recommends that IDOT also permanently fill *Rutan*-exempt union positions by utilizing the existing *Rutan*-covered competitive process.

III. RENEWED RECOMMENDATIONS

The following are renewed recommendations discussed above in this report or recommended in prior reports to the Court:

- Finalize a definition of “technical.” Identify positions that will meet the “technical” definition and work with CMS to reclassify those that will become code-covered. See Initial Report at 28; Second Report at 11; Fourth Report at 19; Sixth Report at 10. Seventh Report at 3-4, 8.
- Complete a finite list of *Rutan*-exempt positions at IDOT. See Initial Report at 27-28; Second Report at 11; Fourth Report at 17; Sixth Report at 7; Seventh Report at 3-4, 8.
- Finalize the Comprehensive Employment Plan. See Seventh Report at 4.
- Develop a long-term solution for the issue of *Rutan*-exempt union-covered positions. See Initial Report at 28-29; Fourth Report at 19; Sixth Report at 9; Seventh Report at 7-8.
- Revisit the internal posting procedures and determine whether use should be discontinued. See Sixth Report at 7-8; Seventh Report at 8.
- Enhance the Bureau of Investigation and Compliance’s overall investigation process to ensure thorough and sound investigation of complaints. See Sixth Report at 6; Seventh Report at 5-6.
- Establish a structured TA process to avoid continued use of long-term temporary assignments, which impact competitive selection for permanent hires, and ensure fair access to TA opportunities. See Initial Report at 23, Fourth Report at 14-15, 18; Sixth Report at 8-9; Seventh Report at 7-8.
- Remove job protection from all appropriate *Rutan*-exempt positions. See Initial Report at 2, 26, 28; Fourth Report at 19; Sixth Report at 14; Seventh Report at 8.

- Complete a comprehensive internal audit of all existing *Rutan*-covered position descriptions and update any outdated or inaccurate position descriptions. *See* Initial Report at 27; Second Report at 10; Fourth Report at 19; Sixth Report at 14; Seventh Report at 9.
- 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* Initial Report at 24; Second Report at 10; Fourth Report at 19; Sixth Report at 14; Seventh Report at 9.

IV. CONCLUSION

IDOT's progress toward substantial compliance with the 1972 Decree has been hindered by its delay in establishing and implementing the technical definition. However, the Special Master commends IDOT for working collaboratively with the Special Master's office and HEM to improve its employment practices overall. The Special Master would like to impress upon IDOT the importance of completing the renewed recommendations above. The Special Master provided IDOT with a proposed timeline for completion of several outstanding projects, and IDOT agreed to complete the projects or make significant progress within the recommended timeframes. The Special Master and her staff look forward to continuing to work with IDOT toward that end.

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Respectfully submitted,

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