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

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

PLAINTIFFS' REPORT WITH REGARD TO THE FIRST AND SECOND PROGRESS REPORTS OF THE CITY OF CHICAGO'S OFFICE OF COMPLIANCE

The Plaintiffs, through their undersigned counsel, submit this consolidated response to the progress reports filed by the City of Chicago's Office of Compliance on June 2, 2009 ("First Progress Report") and August 3, 2009 ("Second Progress Report") (collectively, the "Progress Reports").[1]

INTRODUCTION

On March 30, 2008, the Court entered a Memorandum, Opinion and Order requiring the Executive Director of the Office of Compliance, Anthony Boswell, to submit a series of progress reports giving a summary of actions taken by the City toward achieving "substantial compliance" under the provisions of the Agreed Settlement Order and Accord ("Accord"). The Court also ordered the Shakman Decree Monitor ("SDM") to file a report within 30 days of each Progress Report.

[1] This report was prepared before the Office of Compliance's Third Progress Report was filed on October 5, 2009. No effort has been made in this report to evaluate the Third Report. Plaintiffs will provide their views with respect to the Third Report at a later date.

The Accord sets forth the standards the City must achieve to show that it is in substantial compliance with the Court's orders:

1. The City has implemented the New Plan, including procedures to ensure compliance with the New Plan and identify instances of non-compliance.

2. The City has acted in good faith to remedy instances of non-compliance that have been identified, and prevent a recurrence.

3. The City does not have a policy, custom or practice of making employment decisions based on political factors except for positions that are exempt under the Accord.

4. The absence of material noncompliance which frustrates the Accord's essential purpose. The SDM and the Court may consider the number of post-Accord complaints that the Inspector General found to be valid. However, technical violations or isolated incidents of noncompliance shall not be a basis for a finding that the City is not in substantial compliance.

5. The City has implemented procedures that will effect long-term prevention of the use of impermissible political considerations in connection with City employment.

(Accord, § I.G(8)).

This report is critical of the Office of Compliance ("OCX") Progress Reports in three principle areas. However, Plaintiffs remain hopeful that OCX can successfully address the areas of concern noted in this report and become an effective agency to investigate and remedy the City's long-standing political employment practices.

The OCX correctly emphasizes the importance of changing the culture that has permitted political patronage to continue at the City as a threshold requisite for achieving substantial compliance. However, as explained below, the OCX's Progress Reports fall short in three important areas discussed in this Report:

(1) The OCX Reports lack necessary information and detail to permit the Court or the parties to use the Reports as a means of evaluating the City's progress toward substantial compliance. Without detailed and specific information – the who, what, when, where and why

of compliance – it will be impossible for the Court or the parties to evaluate the City's performance.

(2) The OCX has not adopted a voice and attitude of independence and neutrality, as opposed to a certain advocacy for the City's efforts, but without supporting data. This tone undermines confidence in OCX's role as the entity that will be able, in the long-term, to investigate and police the City's employment practices. Plaintiffs have a serious concern, which we have discussed with Mr. Boswell, that in attempting to garner good will and cooperation with City departments and the Mayor's office, OCX may be losing the ability to serve as the neutral, independent agency intended for it in the Accord and the City's New Hiring Plan. Plaintiffs also take issue with OCX's conclusion that determining whether illegal employment practices are occurring is outside its responsibilities.

(3) Plaintiffs' concern with the functioning of OCX is underscored by what seems to be a considerable reluctance on OCX's part to address effectively highly publicized and important failures in the City's effort to come into compliance with Court orders. So far as can be determined from its first two reports, OCX has not analyzed in detail or suggested remedies for the corruption of the City's employment practices as reflected in the Sorich indictments and convictions, the widespread disregard of the *Pennick* order on the use of contract employees, or the serious problems alluded to, but not adequately described or addressed by the OCX, in the Department of Streets and Sanitations and Human Resources. Plaintiffs' counsel has spoken with Director Boswell about the need for more detail in future progress reports and about the need for a more aggressive approach to investigating and remedying known shortcomings. Director Boswell has agreed to provide more detail in future reports.

Accordingly, neither the Court, nor the SDM, nor the Plaintiffs adequately can determine from the OCX reports whether the City is on course to achieve substantial compliance. What we can glean from the OCX reports generates more questions and concerns than answers.

I. The Plaintiffs' Concerns Regarding The First Progress Report

A. The OCX misconstrues its role in the compliance process.

In the First Progress Report, the OCX explains that it did not – and will not in future reports – opine on whether any "unlawful political discrimination has taken place in a hiring sequence." (1st Prog. Rep. at 2 n.1). According to the OCX, the determination of whether any illegality has taken place falls solely within the authority of the Inspector General's Office ("IGO"). (*Id*.).

The OCX's position is incorrect. As the SDM noted in her July 16, 2009 report, the OCX will assume the SDM's role after the Accord sunsets. (SDM Rep. 7/16/09 at 1). The SDM already has been transitioning some of its duties and responsibilities to the OCX. (*Id*.). The SDM noted that the future effectiveness of the OCX is grounded in the following four principles:

> First, OCX must have the authority and knowledge necessary to implement effective monitoring of the City's employment practices. Second, it must establish a record of success in identifying potential hiring compliance problems, addressing compliance problems and adapting to emerging hiring compliance issues. . . . Third, OCX must be able to effectively monitor the City's employment practices but still maintain its independence from the Mayor's office and/or Law Department. Finally, OCX's reports and recommendations must be both documented and transparent.

(*Id*. at 1–2).

The OCX's position is also inconsistent with the Court's March 30, 2009 Order, which requires the OCX and the IGO to prepare:

> each report in writing regarding their respective review and investigation [of concerns raised by the SDM] and provide copies to the Commissioner of the Department of Human Resources, the Court, the Monitor, the Corporation

> Counsel, and Plaintiff's Counsel. The reports shall include any recommendations for policy, procedure and practice changes and ***remedies or sanctions***.

(March 30 Order at ¶ 1) (emphasis added). Under the New Hiring Plan governing the City's hiring process, the OCX is given the specific task of certifying that the New Hiring Plan rules are followed in each hiring decision. The OCX simply cannot carry out the important duties set forth in the Accord, recommend remedies and/or sanctions as required in the Court's March 30, 2009 Order, and certify compliance with New Hiring Plan rules, if the OCX is unwilling to investigate and opine on whether any *Shakman* violations have taken place.

The OCX states that it has developed a positive working relationship with the IGO and that the two Offices have developed a protocol that permits the two Offices to work synergistically. (1st Prog. Rep. at 6). In describing the relationship between the two Offices, the OCX stated that the OCX provides "the necessary 'carrot' to the IGO 'stick.'" (*Id*. at 6). That the IGO and the OCX are working together is commendable, but there can be no mistake that both Offices are responsible for wielding "sticks" in the compliance process. Indeed, in the City's Response to the Plaintiffs' Submission on the City's Proposed Hiring Plan, the City went to great lengths to explain to the Court and the parties that OCX and the IGO are both tasked with "root[ing] out and prevent[ing] misconduct in hiring." (City 11/2/2007 Resp. at 8). On page 10 of its Response, the City made clear that the OCX should have the following functions: "(i) regular and effective training of City employees in personnel functions; (ii) ongoing and effective education of all City employees regarding all personnel-related rules, policies, and procedures; (iii) the creation of additional policies and procedures to help ensure future compliance; ***(iv) strong and consistent decisions regarding what remedial and/or corrective actions should be taken when problems are identified (such as the suspension of hiring or***

promotion sequences, and the imposition of discipline when misconduct is uncovered); and (v) timely implementation of such remedial and/or corrective actions." (emphasis added).

The Plaintiffs' concerns in this regard are not trivial. It will be difficult, if not impossible, for the City to achieve substantial compliance if all of the various parties in the process do not understand and fulfill their roles. The OCX should make public the protocol it has developed with the IGO so that the Court, the SDM, the Plaintiffs and the public can evaluate whether the OCX and the IGO are performing the functions required of them pursuant to the Accord and the IGO Ordinance. The OCX should also reevaluate its responsibilities under the Accord, the New Hiring Plan and this Court's orders; otherwise, it has little chance of successfully filling the role intended for it.

B. The OCX should provide further details regarding the "internal resistance" to the City's compliance efforts.

The OCX reported that, initially, there was a "healthy level" of resistance from the City's senior executives to several changes proposed by the OCX. (1st Prog. Rep. at 4). The OCX provided an example from early 2008, when the then-Chief of Staff apparently failed to implement the OCX's proposal to establish a training unit within OCX. (*Id*.). The OCX report should have described how the then-Chief of Staff resisted the OCX's efforts and provided OCX recommendations for sanctions to prevent such obstruction from reoccurring with the new Chief of Staff. Moreover, the OCX should have described other instances in which it encountered resistance from City personnel as opposed to providing one generalized example.

The OCX points out that over time, "the initial organizational resistance has subsided." (*Id*. at 5). This begs the questions that remain: What organizational resistance remains? Who is involved in this resistance? What does the OCX propose should be done about it? The City will never be able to certify that it "does not have a policy, custom or practice of making employment

decisions based on political factors" if internal resistance to changing unlawful practices remains active in the various City departments. The individuals who continue to evade and frustrate the OCX's compliance efforts – more than two years after the Accord was entered and more than four years after the Court's appointment of the SDM – should be identified and removed from their positions or otherwise sanctioned. This will assist the City to demonstrate that it is acting "in good faith to remedy instances of non-compliance" and to "prevent a recurrence."

Plaintiffs agree with the SDM's recommendation in her September 18, 2009 report that the City, the OCX and the IGO should be required publicly to report all *Shakman* complaints and violations. The reporting should be done no less than quarterly, and the reports should include the number of escalations and complaints received that quarter, the nature of each escalation or complaint, the number of escalations or complaints sustained, the Departments involved in the sustained escalations or complaints, and whether the City followed the OCX and IGO's recommendations and remedies. These reports would enable the Court, the parties and the public to identify weaknesses in present practices and provide reminders about how carefully structures and procedures must be crafted to minimize evasion and manipulation of otherwise neutral policies and procedures. To the extent a pattern of errors are identified, those responsible for the errors must be held accountable.

C. The OCX's concerns about the Department of Human Resources and the Department of Streets & Sanitation are not adequately described or addressed.

As the OCX acknowledged, "the New Hiring Plan contemplates a robust Department of Human Resources (DHR) that would oversee employment actions and would monitor compliance with hiring processes and procedures." (1st Prog. Rep. at 3). In the section of the report entitled "Ongoing Leadership Challenges," the OCX goes on to criticize the work of the

DHR and its leadership and raises serious questions about the ability of the DHR to achieve substantial compliance. (*Id*.).

The OCX deserves credit for recognizing the problems with DHR's leadership. But the First Progress Report should have provided additional detail to enable the Plaintiffs and the Court to fully understand the scope of the problems. For example, the OCX noted that "[o]n a number of occasions, DHR's leadership has shown that it lacks a basic understanding of the fundamental requirements of the New Hiring Plan. This continues to result in numerous incidents of noncompliance and questionable decision-making." (*Id*. at 10). The First Progress Report was incomplete because it did not describe those instances in which DHR's leadership demonstrated a lack of understanding of the New Hiring Plan nor did it propose a specific remedy tailored to each particular situation.

The OCX correctly observed that "it is vital that DHR's leadership become experts in the full implementation of the New Hiring Plan." (*Id*. at 11). Thus, to the extent the OCX has "concerns about the ability of DHR's current leadership" to oversee employment actions and monitor compliance, those concerns should be explained in detail so that the Court, the SDM and the Plaintiffs can scrutinize the DHR's leadership. Further scrutiny is particularly appropriate in light of the OCX's remark that several "indicators of hiring process irregularities have increased" since April 2008: (1) SDM's Office referrals, (2) Helpline complaints, (3) complaints received via other methods, such as e-mail or telephone, and (4) the OCX's monitoring activities. (*Id*.).

Confusion on the part of City managerial personnel, whether real or feigned, can provide cover to evasion of the *Shakman* decrees. The fact that the DHR's leadership – at least under the former Commissioner – did not get it was a major red flag in any assessment of the City's efforts to eliminate unlawful practices. But it was a red flag not adequately exposed by OCX.

The leadership and resistance problems noted by OCX are not limited to the DHR. According to the OCX, the Department of Streets & Sanitation's ("S&S") refused to implement OCX recommendations to overhaul the manner in which S&S chooses its snow supervisors, and has refused to cooperate with the OCX's and the SDM's requests for information. (*Id*. at 12–13). The Accord requires good faith efforts on the part of the City to implement new procedures to remove political considerations in employment practices and to remedy past instances of non-compliance. (Accord § I.G(8) 1–2). Therefore, the Mayor's Office should sanction the individuals responsible for this recalcitrance. Moreover, OCX should have identified the individuals and made specific, public recommendations.

But the First Progress Report did not report on what was done with regard to this issue. What did the Mayor's Office's do to police one of its key infrastructure departments? Did the OCX ask the Mayor's Office for assistance with S&S? If not, why not? At a minimum, the First Progress Report should have addressed these questions and explained what support, if any, it asked for, and what support, if any, the Mayor's Office furnished to help overcome the S&S's recalcitrance.

The OCX notes that it is in the process of auditing the distribution of overtime benefits within specific divisions of the S&S and the Department of Buildings. (*Id*. at 12). The results of the audit should be published so that the Court and the parties can determine whether the S&S's problems go beyond the way it chooses its snow supervisor. OCX's goal should not be to embarrass the City. Nor should it be to facilitate keeping City problems out of the public eye. Its goal should be to call it the way it sees it to develop a better understanding of what unlawful practices continue to exist, what factors allow the practices to persist, and how these practices impact individuals and departments. It should state publicly what steps might be necessary to

stop the unlawful practices. In other words, all of the City's warts should be exposed ***now*** so that the "parties can track the City's progress toward Substantial Compliance," as this Court ordered on March 30, 2009. (Order at ¶ 3).

D. The table of actions taken by City leadership is incomplete.

The table on page 7 of the First Progress Report listing the City's accomplishments appears to be advocacy, not even-handed analysis. It might give the wrong impression about how far the City has come. To begin with, the table does not include dates for when most of the actions occurred. Thus, it is difficult for the Court or the Plaintiffs to track the City's progress toward substantial compliance.

In addition, the table lacks detail in a number of important respects. Additional detail should be provided on the following items listed in the City's table of actions:

1. In **action # 5**, the OCX reports that the Mayor is participating in a training video introducing the Code of Conduct and stressing the importance of compliance. The video, which has been made available to plaintiff's counsel, should be released and publicized to demonstrate that the City has implemented procedures endorsed by the Mayor to ensure compliance with the New Hiring Plan, and that the City does not have a policy, custom or practice of making employment decisions based on political factors. Moreover, disclosure is necessary to foster public confidence that the City is serious about compliance with the *Shakman* judgments.

2. In **action # 6**, the OCX reports that the Mayor has established regular meetings with the Director of the OCX. This information tells only a small portion of the relevant story. The OCX report should have described how many meetings have occurred, when those meetings occurred, what topics were discussed at those meetings and what, if any, actions

were requested and/or taken as a result of each meeting. This is the only way the Court and the parties will be able to track the progress made toward substantial compliance.

3. In **action # 12**, the OCX reports that the Mayor participates in Cabinet Code of Conduct training and emphasizes the importance of compliance to his senior leadership team. This information is incomplete. The OCX report should have described how often these training sessions occur and how the Mayor participates in these sessions.

4. In **action #13**, the OCX reports that the Mayor's Office and City departments proactively utilize the OCX audit function to improve various operational processes. But the report does not explain what the OCX audit function is, much less explain *how* the Mayor's Office and City departments have used the OCX audit function, and what results have been achieved by so doing. Again, the City's progress cannot be measured without this type of information.

5. In **action # 14**, the OCX reports that the Mayor's Office incorporates OCX metrics into City performance management sessions. The OCX report should have explained what those metrics are, *how* the Mayor's Office has incorporated OCX metrics into City performance management sessions and what results have been achieved through these efforts.

6. In **action # 15**, the OCX reports that the Mayor's Office provides support to the HPCM in gaining full access to senior department management. But the OCX does not explain *how* the Mayor's Office has provided support nor does it describe *how many* times the Mayor's Office has provided support to the HPCM. In light of the "resistance" and other difficulties the OCX and the SDM have encountered from the S&S and other departments, this particular item should have been further developed. At a minimum, the First Progress Report

should have included a description of each instance in which the Mayor's Office provided support to the HPCM, including a description of the situation that led to the Mayor's Office's involvement.

7. In **action # 16**, the OCX reports that the Mayor's Office, DOL, and IGO support the efforts of OCX to develop and disseminate the City of Chicago's first Code of Conduct. Again, the OCX's report is deficient, because it does not explain *how* the various Offices have supported the OCX's efforts. Moreover, in the interests of transparency, the Code of Conduct should be released and publicized to foster public confidence that the City is serious about compliance with the *Shakman* judgments.

8. In **action # 18**, the OCX reports that, in response to an OCX recommendation, departmental leadership terminated a deputy commissioner who violated the City hiring protocols. The OCX should have listed *all* instances in which an employee was sanctioned for violating City hiring protocols, the position held by the sanctioned person, the nature of the sanction, when the sanction occurred, and whether the sanctions were undertaken as a result of an OCX recommendation.

9. Finally, in **action # 21**, the OCX reports that the Mayor's Office, DOL, and IGO have collaborated to establish a corrective action plan. The corrective action plan should be released and publicized.

II. The Plaintiffs' Concerns Regarding The Second Progress Report

Like the First Progress Report, the Second Progress Report demonstrates that the OCX has engaged in substantial efforts to assist the City to achieve substantial compliance within the meaning of the Accord. However, the Second Progress Report also lacks detail in a number of critical areas. Below, the Plaintiffs highlight some of their concerns regarding the Second Progress Report.

A. OCX constructive criticisms need more inquiry and specification and less generalization.

In the Introduction to the Second Progress Report, the OCX noted that it "previously expressed concerns and made recommendations relative to DHR leadership. As a result, changes have been made to address those recommendations." (2d Prog. Rep. at 3). These statements, by themselves, are incomplete leaving the Court and the parties to guess what specific recommendations were made, to whom were they made, and what changes were made in response to the recommendation. (Similar information is provided in Chart #2, Document 1286-3. However, it is not clear whether Chart #2 contains the information discussed on page 3 of the Second Progress Report regarding changes to the DHS leadership). For instance, it would be helpful to know whether the OCX expressed any concerns over the activities of former Commissioner of Human Resources Homero Tristan, when and to whom were the concerns expressed, and whether the recipient was responsive?

The OCX notes the importance of transparency. The Tristan incident is a good example of where it is needed. It appears from the OCX report, however, that the recipient of the expressed concerns, if any, was not responsive since Mr. Tristan was not disciplined prior to the IGO recommendations, and he eventually resigned on his own accord. Thus, the OCX's blanket statements that it made recommendations regarding DHR leadership and that some of them were implemented are not helpful in determining whether "the City has acted in good faith to remedy instances of non-compliance that have been identified, and prevent a recurrence." (Accord, II.G.(8) 2).

In addition, the OCX reports that "a significant number of current DHR managers are HR professionals." (2d Prog. Rep. at 7). Credentialing impacts two aspects of substantial compliance: (i) it could give credence to the argument that "the City does not have a policy,

custom or practice of making employment decisions based on political factors" and (ii) it could be an indicia that "the City has implemented procedures that will affect long-term prevention of the use of impermissible political considerations in connection with City employment" (Accord, I.G.(8) 3 and 5).

But the generalization that a "significant number" of DHR managers are HR professionals does not provide any meaningful information. What percentage of the DHR managers have HR professional credentials? How does this percentage compare to one, two or five years ago? How does it compare to similar departments in other large cities? Is there a plan to increase the percentage and does the percentage compare favorably to relevant benchmarks? This type of information and analysis are necessary if the City is to demonstrate that it is on its way towards substantial compliance.

By raising these issues, the Plaintiffs do not intend to detract from the Second Progress Report's well taken and correct critiques of the City's paper-based hiring processes, lack of job descriptions and postings, absence of an established screening process, failure to consistently create well vetted referral lists and lack of test protocols. Rather, the Plaintiffs raise these issues so that the parties can move beyond the missing building blocks and towards specific remedies to address the OCX's numerous expressed concerns.

The OCX also reports that DHR "morale continues to be somewhat problematic." (2d Prog. Rep. at 7). The low morale could have been the result of the failure of one or more of the components of substantial compliance:

> (i) implementation of "procedures to ensure compliance… and identify instances of non-compliance,"
>
> (ii) is the City acting in good faith to remedy instances of non-compliance,
>
> (iii) whether the City is "making employment decisions based on political factors",

> (iv) the "absence of material non-compliance which frustrates the Accord's essential purpose", and
>
> (v) whether "the City has implemented procedures that will affect long-term prevention of the use of impermissible political considerations in connection with City employment." (Accord, I.G.(8) 1-5).

But the conclusion that morale is "somewhat problematic" without further detail leaves the public, the Court, the parties, and counsel with little comfort and much concern. What are the morale problems? Why have they developed? Is there a plan in place for correction? Do the problems stem from something other than the previously-mentioned leadership issues? The Second Progress Report should have addressed these questions and provided details regarding whether any actions or inactions by DHR leadership have adversely affected DHR morale.

The OCX repeated the concerns raised in the First Progress Report when it remarked that it continues to have "concerns about the ability of [DHR] management and staff to steer the course through complex terrain." (2d Prog. Rep. at 12). This suggests that the OCX has a fundamental concern about whether the City has implemented long-term reforms to prevent impermissible political consideration in employment. But concern is not enough. The OCX should provide specifics that provide the basis for its concerns, why they have arisen and what is being done about them. This sort of information would also provide a baseline for reporting in the future on progress made in remedying observed deficiencies, as requested by the Court.

For example, the OCX reports that "we have now concluded of the 4,339 contractors reviewed by the Office of Compliance, 338 appear to be working as independent contractors." (*Id*. at 19). This reflects the kind of detail that allows readers of the report to appreciate the magnitude of the violations that have occurred and reflects the OCX's considerable work. However, these statistics call for further explanation beyond the status summary in Chart #1. Why these violations, which exceed in number those found in the *Pennick* enforcement

proceeding, could possibly have occurred in the face of the Accord, the Court's March 24, 2005 opinion in Pennick, and three Corporation Counsel memos requiring Department of Law and Office of Budget and Management preapproval of temporary and independent contractor use.

Finally, in item # 3 of Chart 2 (Document 1286-3), the OCX reports that "OCX's recommendations were accepted and discipline for identified hiring violations [was] administered and ranged from written warnings to suspensions." Remedying instances of non-compliance is a key component to substantial compliance. However, the chart is incomplete because the Court and the parties are left to speculate regarding a variety of issues. The OCX report should have included a description of the positions held by the violators, the events giving rise to the OCX's recommendation of discipline, how many times did the OCX make a recommendation that an employee should be disciplined, and how many times the recommendations were accepted and how many times they were rejected.

For example, in item # 5 (second) on Chart #2, the OCX reports that one Deputy Commissioner was disciplined for violating hiring rules. This situation was adequately explained on page 8 of the Second Progress Report, which states that the HPCM "recommended that DHR terminate a Deputy Director for making unauthorized changes to an applicant's file in the Taleo System. Based on that recommendation, the deputy commissioner was indeed terminated by DHR." Each instance of noncompliance should be reported, at a minimum, with this level of detail.

Similar concerns are found in Item #1 of Chart #2, wherein the OCX states that "OCX recommended that DHR Acting Commissioner review prior concerns regarding the deficiencies that OCX identified in the past." This statement has little meaning without knowing which prior concerns were to be reviewed. Likewise, in item #8 of Chart #2, the OCX reports that "OCX

recommended to the Mayor's Office that the City enforce hiring rules by disciplining offenders." There is no list or magnitude estimates of the number and positions for which enforcement has been recommended or taken against disciplining offenders.

B. At times, the remedies proposed by the Second Progress Report appear to misapprehend the nature of the problem. The proposed remedies are, therefore, insufficient to accomplish successful remediation.

Before Homero Tristan resigned, OCX recommended educational efforts as a remedy for Commissioner Tristan's failure to report political contacts made to his office. However, as Commissioner of the Department of Human Resources, Mr. Tristan was responsible for teaching to others the compliance requirements of the political contact provisions of the SRO. His failure to report the political contacts could not credibly have been viewed as due to lack of training and, therefore, training would not be a helpful remediation for this issue.

There are other instances in which the OCX's recommended remedy does not contain adequate analysis or fit the violations it noted. For example, the OCX reports that prior to 2005: "[i]nadequate resources and staffing levels, in turn, led to the inability to administer independent screening of job applicants and requisite compliance functions." (2d Prog. Rep. at 4). This, and other references in the Second Progress Report appear to be referring to the rigged interview episode under the direction of Robert Sorich that led to the Sorich indictment and conviction and the conviction of some of his co-conspirators. But the appropriate remedy for the rigged interview episode is not more resources and staffing for the department of Human Resources. As the parties and the Court are well aware from the evidence presented in the Sorich indictments and trial, high-level City personnel implemented a well-designed program of deliberate intervention by the Office of Intergovernmental Affairs, and fraudulent administration of a scripted interview process that was supposed to operate honestly under the Hiring Plan.

Because the OCX attributes the cause of these serious violations and criminal conduct to inadequate resources – a suggestion we cannot accept – there is no suggestion of any effective remedy for the rigged interview episodes, nor is there any analysis of the involvement of DHR in the rigged interview process, how that involvement was perverted for the rigged interviews to occur and what steps should be taken to remediate this failure of DHR activities. There is, of course, also no indication whether any such steps have been taken. This level of inquiry is important because Mr. Sorich did not act alone. The OCX should engage in this type of analysis and provide the appropriate recommendation to assist the City in implementing procedures to ensure compliance and identify instances of noncompliance. Such evidence, if it exists, would be heartening, and support Plaintiffs' hope that the City is on the road to compliance with this Court's orders. But to provide evidence that the City is acting in good faith to remedy instances of noncompliance and to implement procedures that will assure long term prevention of political considerations in City employment requires detailed analysis by OCX of past practices and of remedies developed in response, not generalized and inaccurate statements of the sort noted above. (Accord §§ I.G. (8) 1–5).

A similar problem is reflected in the OCX's conclusion that the prior problems in testing were that the "DHR lacked a systematic approach to testing protocols in the job interview process". (2d Prog. Rep. at 6). Again, the principal problem, the problem that sent people to jail, was not the lack of a systematic testing approach. Colored-coded Excel spreadsheets were used to implement a systematic plan to pervert the DHR protocols and job interview rules. The cause of the rigged interviews was not analyzed by the OCX and, therefore, an effective remedy has not been suggested. In short, it will be impossible to eliminate political considerations from employment decisions until the DHR and department roles in this watershed event are closely

evaluated by the OCX, referral is made to the Inspector General where appropriate and appropriate remedies are suggested and then implemented by the City.

The OCX has done commendable work ascertaining the extent of the continued misuse of the independent contractor status for individuals who are, in fact, common law employees of the City, and thus have been hired in violation of this Court's injunction of March 24, 2005. The OCX concludes that there are over 4,000 such misclassified common law employees. (*Id*. at 19 and Chart #1).

But, again, the OCX misapprehends the problem as being attributable to (i) the failure to disseminate the May 13, 1996 policy formulated by the Corporation Counsel, the Budget Director, the City Controller and the Acting Purchasing Agent on the use of temporary agencies and personal service contracts, and (ii) the excuse that the policy only addressed contracts with individuals and not contracts with firms to provide the City with groups of individuals. Both of these assertions are wrong.

It is difficult to believe that a May 13, 1996 memo from the Corporation Counsel, Budget Director, City Controller and Acting Purchasing Agent to "All Department Heads" was "[n]ever disseminated in the proceeding 13 years." At a minimum, the OCX should have investigated the extent to which the memo was disseminated and included a discussion on this in the report. Notably, the May 13, 1996 memo, which was attached as Exhibit F to the City's January 11, 2002 Memorandum of Law in Opposition to Plaintiffs Motion for Rule to Show Cause, included an attachment entitled "City of Chicago Request For Individual Contractor Services" and a separate "City of Chicago Request For Temporary Agency Services." Furthermore, the May 13, 1996 memo was preceded by an earlier memo on the same subject dated October 1995 from the Corporation Counsel which effectively terminated the use of temporary personnel unless such

personnel were approved "for compliance with applicable legal restrictions" by the City's Office of Budget and Management as well as the Law Department (attachment E to the January 11, 2002 Memo). The May 13, 1996 memo was followed by a clarification memo from the present Corporation Counsel dated May 11, 2006 to all department heads and a further clarification memo of August 14, 2007 from the then Mayoral Chief of Staff (*see* 2d Prog. Rep. at 20). The problem is not a lack of dissemination. Nor should the problem be characterized as a lack of clarity of the March 24, 2005 injunction which reads:

> "The City of Chicago…the present and future officers, agents, servants, employees and attorneys of the City of Chicago…are permanently enjoined from directly or indirectly, in whole or in part:
>
> (1) Employing persons (i) pursuant to personal service contracts or similar mechanisms, or (ii) by or through temporary personnel agencies or other organizations except in full compliance with the terms of the Consent Decree and the Plan of Compliance as amended from time to time, …. [emphasis added].

The injunction **clearly** prohibits the conduct at issue. The language clarifying the scope of the injunctive relief was included in the Accord. Section I.C provides that "'employment' means the relationship that constitutes employment at common law by the City . . . and includes probationary, temporary, part time and permanent employment, whether pursuant to a written contract or otherwise." (Accord § I.C.) Therefore, it is difficult to believe that the City's continued employment of over 4,000 misclassified common law employees was an honest mistake.

Moreover, the many years of litigation over this issue could not credibly have left anyone with knowledge of the Court record in any doubt about the existence of a significant hiring issue involving about 2,000 employees in the *Pennick* matter, and of this Court's subsequent rulings. If there was such doubt after this Court issued an injunction order against the process, that fact

should have been investigated by OCX. The OCX should have laid blame where it belonged, and suggested remedies.

The OCX's assertion (2nd Prog. Rep. at 20) "that the City has never addressed the situation where the City contracts with a firm and the firm provides the City with staff to work within City Departments" ignores the attachments to the May 13, 1996 memo, the specific facts of the *Pennick* enforcement proceedings, and the precise language of the injunctive relief.

Having misunderstood the nature and cause of the misuse of independent contractors, the OCX recommends as remedies: (i) to "change the nature of the relationship between the City and the Contractors into one that is a true independent contractor relationship" and (ii) that the City seek to amend the terms of the 2005 Shakman injunction to "allow CDPH to continue to contract with these medical professionals." (2d Prog. Rep. at 26). A prospective amendment of the injunction does not address the knowing violations of the injunction that currently is in place. The OCX should have investigated the City's conduct further and provided recommendations for consequences for this deliberate violation of an important court order.

Nor is amending the injunction an advisable remedy. The employees are admittedly performing as common law employees and not independent contractors. The City has offered no basis or explanation for why it cannot hire genuine independent contractors or, alternatively, fill the positions through the City's Hiring Plan. The parties were able to negotiate procedures for filling these positions in prior Hiring Plans and Plaintiffs' counsel has worked with the City to fashion procedures to allow the City to have flexibility in filling other positions while still protecting the constitutional rights of applicants and employees.

C. The OCX's prediction of future compliance should not be confused with a finding of actual implemented compliance.

In its summation on the independent contractor issue, the OCX states that "we anticipate the City will achieve full compliance within six months." (2d Prog. Rep. at 25). This is not a helpful statement since it's a prediction of future yet to be determined behavior. It falls into the category of advocacy, not independent analysis. Moreover, it is based on a woefully inadequate record, insofar as the OCX's critiques described here are concerned.

Although employed by the City, the OCX is charged with, among other things, *independently* overseeing compliance with Court ordered requirements to prohibit the use of political considerations in City employment decisions involving nonexempt employees. The City's use of over 4,000 employee "independent contractors" in violation of the City's own internal procedures as well as several of this Court's orders is no small matter. The OCX should conduct a thorough investigation regarding who authorized such a large program. The OCX's investigation should include whether this large program was implemented solely to evade the *Shakman* Judgments and should answer the question why the individuals involved in this program ignored the Corporation Counsel memos. These issues require diligence and independence on the part of the OCX. They provide an opportunity to demonstrate the independence of the OCX, which is to be addressed in the Third OCX Progress Report. (*See* 2d Prog. Rep. at 3 n.1 & at 43).

The OCX states that its audits of both in-process and completed hiring sequences will "[ensure] that any political references included in resumes or applications are removed." (*Id*. at 32). This is an important start. However, consistent with the OCX's stated goal of promoting a cultural change, the OCX should focus on why these political references were included in resumes or applications and what kind of remedial action should be taken to make sure that

everyone involved in the process, including applicants and the elected officials who purport to sponsor them, are more sensitive to the unlawfulness of political references in resumes and applications.

CONCLUSION

As the foregoing reflects, Plaintiffs believe that the jury is out on the effectiveness of the OCX as an instrumentality to police and remediate the City's unfortunate history of political employment practices.

Plaintiffs' concerns about the OCX, as noted in the introduction, fall into three specific areas: (1) Lack of detailed and neutral analysis and reporting of City practices, without which it will be impossible to evaluate City compliance. (2) Failure to adopt a voice and attitude of independence, with a duty to evaluate the lawfulness of City practices, as opposed to a certain advocacy for the City's efforts that undermines confidence in OCX's long-term ability to investigate and police the City's employment practices. (3) Failure to analyze in detail and suggest remedies for well-publicized failures by the City, including the Sorich debacle, the widespread disregard of this Court's *Pennick* order, and the serious problems alluded to in the Departments of Streets and Sanitation and DHR. Since the jury is out, however, and Plaintiffs attribute good faith and diligence to OCX, there is reason to believe that the issues noted in this Report can successfully be addressed.

Dated: October 6, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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via E-Filing and by causing the same to be deposited in the U.S. Mail, first-class, postage prepaid on the 6th day of October, 2009.

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