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To: Chairman FitzGerald; Commissioners Anderson, Cummings, Krey, and Urlacher
From: Daniel Stralka
Date: September 17, 2014
Subject: IDOT Rutan Investigation – OEIG Final Report Summary

The Office of Executive Inspector General (OEIG) released its Final Report (Report) into alleged hiring improprieties at the Illinois Department of Transportation (IDOT) on August 22, 2014. As the Report is over 250 pages long, the following is a summary focused on the parts that affect the Personnel Code and, subsequently, the Civil Service Commission.

To recap, this issue first came up at our May meeting when I reported on the efforts of the Shakman Decree attorney to have the Federal court appoint a hiring monitor for IDOT. Some of the allegations that were made hinted at potential Personnel Code violations in personnel administration at IDOT. The matter was tabled for one month to our June meeting. At the June meeting, after discussion it was the consensus of the Commissioners that Staff should continue to monitor the proceedings and report back from time to time. While there has not been any substantive action in this pending litigation, the OEIG then issued this Report which addresses, for our purposes, the same Personnel Code issues as the Shakman Decree litigation.

RUTAN DECISION

The State equivalent of the Shakman decree is the Rutan decision. The Rutan decision essentially held that the vast majority of State positions must be filled by merit selection excepting those with meaningful input into policy-making decisions, spokesperson positions, and some confidential positions.¹ Determinations of whether a position is “Rutan-covered” (must hire from open competitive lists, veterans preference applies, oftentimes protected by collective bargaining agreements) or “Rutan-exempt” (can hire any person with the stated qualifications so bypasses hiring lists) are made by Central Management Services (CMS). The Civil Service Commission does not play any part in making these Rutan determinations. There is nothing in the Personnel Code or Personnel Rules which addresses the Rutan determination process. It is strictly a creature of the Rutan decision.

¹ As an FYI, all Section 4d(3) exempt positions that the Commission reviews have been determined to be Rutan-exempt by CMS prior to our consideration.

OEIG FINAL REPORT

The IDOT is made up of both Personnel Code covered employees and employees fully exempt from the Personnel Code. (There is more on this below.) Rutan exemption determinations made by CMS included all the non-Personnel Code employees at IDOT as well as Coded covered employees. The non-Personnel Code covered group included the Staff Assistant positions at issue in the Report. The Report essentially found that for years IDOT had violated “Rutan hiring rules” in the way it administered agency-created Staff Assistant positions. While the position description forms for these Staff Assistants may have justified their “Rutan exempt” classification, the majority of the employees hired into these positions performed significantly less-significant duties. These actual duties would be insufficient to support a “Rutan exempt” determination. In addition, often these individuals were then able to ensconce themselves into positions that were legitimately Rutan-covered – with attendant employment protections – while having bypassed the merit-based hiring process. In essence, this scheme also served as a back-door manner to use the Rutan-exempt position to hire an employee – who should have then remained “at will” due to the policy nature of the position they were being hired into – but then routing them into non-policy positions (ahead of unidentified others who never received an opportunity to compete for these positions) so they now received the protections that were reserved for merit-based appointments.

The Report does make reference to the Personnel Code, notably Section 4c(12) that fully exempts “the technical and engineering staffs of the Department of Transportation.” The Report notes how IDOT has created “technical positions” and classified most of these as “Technical Managers,” a formal title at IDOT. All these “Technical Manager” titles are considered to be part of the “technical staff” of IDOT and are therefore fully exempt from the Personnel Code. Positions that are fully exempt from the Personnel Code do not fall within our jurisdiction. The Report points out that the Personnel Code does not provide any further definition of “technical.” The Report also notes that even though IDOT at some point in time determined that these Staff Assistant positions were “technical,” no one at IDOT was able to identify any policy, rule, procedure or anything else that further defined the term. It concluded that IDOT misused the “Staff Assistant” positions by deeming them “technical” without any apparent justification.

There is also reference to a 2005 IDOT internal audit that came up with the following recommendation:

Illinois Department of Transportation and CMS work in conjunction to review all positions classified as technical or engineering in the Technical Manager and Management Technician job classifications to ensure that the positions are sufficiently technical to be classified as non-code. Positions that are not considered exempt should be reclassified as coded employees and remedial corrective action should be taken to ensure compliance with the Personnel Code.

IDOT agreed to this recommendation. However, from anecdotal testimony provided by the IDOT Chief of Personnel Management, it does not appear that IDOT ever implemented the recommendation. The Report reached the conclusion that IDOT failed to work with CMS as it agreed to do in the internal audit report.

The Report makes reference to interviewing a long-term IDOT personnel manager who retired in 2004, but continued to work for the agency on several 75-day contracts. On this issue, he indicated as follows:

Employee 97 was asked whether any entity ever evaluated the Technical Manager series to determine whether the positions were actually technical in nature, such that they are appropriately exempted from the Personnel Code. In response, he said he had concerns that these positions were not technical, but that to his knowledge no other entity evaluated the Technical Manager series. According to Employee 97, on a couple occasions, he believed that the technical nature of the Technical Manager series was challenged. Employee 97 said that he responded to questions from CMS, the Civil Service Commission, or somewhere else, but for whatever reason, the challenges never got to the point of having to defend the classification to the Civil Service Commission. Employee 97 said that most of the Technical Manager positions are not defensible to a challenge that they are not technical in nature, and that most of the duties are being performed at other agencies by employees in positions covered by the Personnel Code.

This anecdotal account indicates that there was some activity or at least agency concern in the past about the practice of classifying so many of IDOT's positions as "technical" thereby avoiding both CMS and Civil Service Commission oversight.

PERSONNEL CODE

It is the agency's determinations to classify all these Staff Assistant positions as "technical" and thereby exempt from the Personnel Code that is the concern for the Civil Service Commission. The State's system of personnel management starts with the premise that ALL State positions are under the Personnel Code and, subsequently, under our jurisdiction. Section 4 states:

All offices and positions of employment in the service of the State of Illinois shall be subject to the provisions of this Act unless exempted in this or any other Act.

Section 4c provides for all general exemptions from the Personnel Code, meaning positions that are exempt from all three jurisdictions (A: Classification and Compensation; B: Merit and Fitness; and C: Conditions of Employment). There are presently 30 subsections identifying exempt employees. Some are obvious (elected officials, members of the judiciary); some not so obvious (Illinois Power Agency employees). As indicated previously, subsection 12 provides a general exemption as follows:

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 services and engineering services in the Department of Central Management Services.

It is by virtue of this subsection that IDOT employees classified as “technical” (such as these Staff Assistants) were exempted from the Personnel Code and, subsequently, our jurisdiction.

COMMISSION INTEREST

Section 10 of the Personnel Code sets forth the duties and powers of the Commission. Subsection 9 states as follows:

If any violation of this Act is found, the Commission shall direct compliance in writing.

It is by virtue of this subsection that the Commission investigates and determines allegations of any Personnel Code and/or Personnel Rule violations. While the Commission received four such appeals in FY2014, none were related to the improper classification of employees at IDOT as technical and exempt from the Personnel Code as opposed to non-technical and covered by the Personnel Code. In fact, there have been no such complaints or appeals filed with the Commission in at least the past 14 years.

It must be noted that the primary focus of the Report is not whether the Staff Assistant positions were properly determined to be part of the “technical staff” of IDOT and in compliance with the Personnel Code. Rather, the Report focuses on the finding that the vast majority of these positions were determined to be “Rutan exempt” despite evidence to the contrary. The Report follows the consequences of those inaccurate determinations as well. However, it is this initial determination by unknown IDOT employees to categorize these Staff Assistants as “technical staff” and thereby fully exempt from the Personnel Code that looms as a likely Personnel Code violation. It is clear from the Report that many of the Staff Assistants performed duties that were unmistakably non-technical in nature. What the report did not provide was a thorough explanation of the methodology used by IDOT in making the “technical staff” determination, if there even was any. The impact of these determinations goes well beyond the Staff Assistant title since IDOT has 2235 Personnel Coded employees out of a total employee population of approximately 5400 (from the FY2015 budget book). The simple math places the “technical and engineering staffs” of IDOT at around 3200 employees. That number appears excessive. It is the initial determination that IDOT has been making to classify non-technical positions as technical positions, and by these numbers alone has probably been doing for decades and not just limited to Staff Assistants, that would constitute a potential ongoing violation of the Personnel Code.

MOVING FORWARD

The Governor's Office responded to the Report with a number of proposed actions to be taken in response to the recommendations made by the OEIG. The vast majority of these address *Rutan* decision issues. There are, however, two directives that the Governor's Office made to IDOT that should be of interest to the Commission:

1. Reforming the Department's Technical Code – The Department shall, in consultation with and with the approval of CMS's Bureau of Personnel: (i) create a narrowly tailored definition of "technical," for the purposes of classifying positions that are exempt from the Personnel Code under Section 4(c)(12) and thus fall under the Department's Technical Code, (ii) create and implement personnel policies and procedures for the Department's Technical Code, including, but not limited to, a merit-based classification and salary administration plan, (iii) work with an outside consultant to review all current Technical Code positions against that "technical" definition to determine whether they are appropriately classified, and (iv) if they are not appropriately classified, take the necessary steps to move those positions to fall under the State's Personnel Code.
2. Creating a Technical Code Merit Board – In addition to the above and to the independent Office of the Executive Inspector General's *Rutan* jurisdiction and investigatory powers, signed into law by the Governor in 2009 and detailed below, the Administration will seek to create a separate and independent statutory Technical Code Merit Board, to oversee and ensure the integrity of the Technical Code process.

Both of the above initiatives appear designed to address the issue of IDOT positions being classified as "technical" without any legitimate analysis occurring, the issue brought up in its 2005 internal audit. Any steps that are taken to tighten up this process would certainly be welcome. As to the specific proposals:

- A. "(i) create a narrowly tailored definition of 'technical,' for the purposes of classifying positions that are exempt from the Personnel Code under Section 4(c)(12) and thus fall under the Department's Technical Code." It is unclear how this expanded definition of technical would be implemented. Would it occur by amendment to the Personnel Code? By a new Personnel Rule? In some other fashion? This may be important for the Commission to retain jurisdiction over rule violations brought by aggrieved employees who do not agree with the administration's determinations. In any event, a "narrowly tailored definition" of "technical" would be beneficial for all involved.
- B. "(iii) work with an outside consultant to review all current Technical Code positions against that "technical" definition to determine whether they are appropriately classified, and (iv) if they are not appropriately classified, take the necessary steps to move those positions to fall under the State's Personnel Code." A review of all "technical" positions at IDOT to ensure they have been properly classified as such can only benefit all involved. However, there may be aggrieved employees who disagree with these reviews. Those employees, under the Personnel Code as presently structured,

would have the right to appeal these reviews to the Civil Service Commission by a Rule Violation appeal. In addition, other unforeseen issues may arise related to reclassifying these employees as Personnel Code covered.

- C. “The Administration will seek to create a separate and independent statutory Technical Code Merit Board, to oversee and ensure the integrity of the Technical Code process.” This is the most interesting of the initiatives. It must be pointed out that there already exists a separate and independent statutory board with the authority to review IDOT decisions as to what constitutes a technical position – the Civil Service Commission. However, the Commission has not had the resources to independently review IDOT’s decisions in this regard for well over ten years. In addition, there have been no employees or aggrieved citizen complaints in this regard either. So this initiative would end up creating a new entity – a Technical Code Merit Board – which may make personnel decisions (technical v. Code-covered) that are ultimately reviewable by the Civil Service Commission. I must point out that as of this time it is unknown what role the Governor’s Office foresees the Commission having in this oversight process, but I note that this initiative references creating a “statutory” Board. This may result in a statutory diminishment of the Commission’s powers.

There have been no further publicized details as to the specifics or mechanics of these initiatives.

COMMISSION REACTION

It is clear that much attention has been brought to the issue of IDOT inaccurately classifying Staff Assistants as “Rutan Exempt.” Much less attention has been directed toward the collateral issue of improperly classifying these positions as part of IDOT’s technical staff. In addition, there is evidence to suggest that technical staff misclassifications go beyond Staff Assistants. The Governor’s Office has articulated plans to address this issue in a manner that goes beyond the Staff Assistants addressed by the Report. However, as noted previously, it is the Commission that is charged with the responsibility to order compliance when violations of the Personnel Code are found. In addition, the Commission’s Annual Report sets forth the following as one of the Duties of the Commission:

Upon identification of instances of noncompliance, the Commission is responsible for ensuring the enforcement of the Personnel Code and Rules through the issuance of directives for compliance.

Considering all of the above, a determination must be made as to what further action, if any, is to be taken with regard to IDOT’s misclassifying positions as technical and therefore fully exempt from the Personnel Code which in itself would be a Personnel Code violation.