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MEMORANDUM

CHICAGO OFFICE

TO: Sue-Ann Rosen
FROM: Rodger A. Heaton
DATE: June 17, 2013
RE: Internal Investigation of Alex Clifford Allegations Made on April 3, 2013

This is a draft final executive summary of my conclusions drawn from an internal investigation conducted in response to allegations made by Executive Director Alex Clifford on or about April 3, 2013. The investigation was conducted over roughly a five week period. I interviewed three Metra Board Directors and obtained facts from the three other Board Directors who were assigned as ad hoc liaison committee for my analysis. I also interviewed eleven Metra employees, including Alex Clifford. For virtually every interview, I obtained the email files for the interviewee dating back to January 1, 2011, or the appointment date of the Director or commencement of employment of the employee if it was after January 1, 2011. I developed search terms to identify relevant emails, but the volume of emails reviewed was in the thousands. I used the services of two younger Hinshaw lawyers to review emails and documents, and also obtained assistance from one of Metra's Senior Attorneys, Suzy Choi-Lee. In addition, I searched approximately 36,000 emails of other Metra employees that Mr. Clifford had requested from Metra's IT Department, and reviewed the emails relevant to my investigation.

I shared my preliminary analysis and findings with the JG Law Firm, who at the time was serving as outside counsel to the Metra Board, and with Laner Muchin, outside counsel retained by Metra to defend any claims made by Alex Clifford. My analysis and investigation was put on hold in mid-May of 2013 when Metra and Mr. Clifford engaged in mediation and ultimately entered into a settlement agreement. I was not authorized to contact third parties as part of my investigation, nor was I ever instructed to complete my analysis and investigation or do any further work after being put on hold in mid-May.

Given that my investigation essentially ended in mid-May, I did not consider nor was I requested to evaluate additional facts that emerged or statements that were made at the RTA and legislative hearings. The Alex Clifford allegations that I was asked to investigate and analyze are described below. Those allegations, in short, were that:

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- Mr. Clifford has refused on several occasions to make employment-related decisions requested by influential members of the Illinois General Assembly based upon their political sponsorship of an employee or job applicant. Mr. Clifford believes his refusals have led to retaliation from Board members.
- Director Huggins “disregarded the advice of Metra’s counsel” and “over Mr. Clifford’s objections, sought to influence subcontracts for the Englewood Flyover project.” Mr. Huggins allegedly, “either directly or indirectly, . . . undertook negotiations with the successful low bidder, IHC, and with persons in the Englewood community to add additional minority subcontractors” and Mr. Clifford believes that those actions are “highly problematic” in view of the law and regulations described in Metra’s Law Department memorandum dated May 22, 2012.
- Mr. O’Halloran or Mr. Huggins or both have pre-selected Alex Wiggins to replace Mr. Clifford and that the employment review process is a sham. Mr. Clifford challenges their involvement in the employment review process and especially their being 2 of 3 members of an employment practices committee assigned to consider his performance.
- Chairman O’Halloran directed Mr. Clifford to discharge Terry Barnett and Paul Kisielius because of Mr. O’Halloran’s view that they are incompetent.

In effort to investigate these allegations, I have reviewed a substantial amount of electronic mail communications to and from Metra staff and certain Board members, interviewed numerous Metra employees and certain Board members, and reviewed several pertinent internal Metra memoranda and other documents, such as procurement and personnel files. The engagement did not include contacting, interviewing, or requesting documents from, third parties, and I have not done so.

My primary conclusions are as follows:

First, Mr. Clifford appears to believe that all hiring and firing and employment related decisions for Metra staff should be his decision without prior approval requirements from the Board. Although there has been a hiring ordinance adopted after negotiation involving Mr. Clifford, my sense is that Mr. Clifford would prefer that he have complete control and responsibility in this regard. Mr. Clifford appears to believe that the RTA Act and his employment contract support this governance approach. In contrast, several Board members believe that oversight and involvement is appropriate for certain senior staff positions and positions at higher salary levels. Reasonable people can, and often do, disagree on this corporate governance topic.

Second, communication styles between Mr. Clifford and some Board members seem to be very different, which has contributed to Mr. Clifford’s behavior and judgment being questioned. Mr. Clifford’s communication style is very matter of fact and direct. He does not appear to feel that it is necessary in all instances to acknowledge the interests or concerns of others when stating what the position of Metra is. This approach can lead to persons feeling disrespected or

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disregarded, which can cause them to have negative feelings toward Metra. Certain Board members have expressed concerns that Mr. Clifford's communication behaviors toward elected officials may have caused negative feelings toward Metra to occur unnecessarily.

Third, I did not find any evidence of Mr. Clifford engaging in illegal conduct or other misconduct that appears to warrant him being dismissed for misconduct.

Fourth, I did not find any credible evidence of Board members directing Mr. Clifford to take any illegal actions, or expressing disappointment that he did not do so. Nor did I find any credible evidence of any Board member engaging in illegal conduct.

Fifth, Mr. Clifford appears to be loyal to his staff, and proud of the staff's performance as a whole. Although he has concerns about Mr. Kiselius's performance, and believes some unacceptable mistakes occurred with some procurement efforts, Mr. Clifford has a detailed action plan in place to monitor and improve the performance of the procurement department.

Sixth, the employment review process for Mr. Clifford is incomplete. Regardless of whether Mr. O'Halloran or Mr. Huggins have personally decided to support replacing Mr. Clifford with Mr. Wiggins, the Board has not made that decision, and the full Board retains the responsibility for making that decision. The Employment Practices Committee of the Board does not have authority or responsibility for that decision.

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POLITICAL HIRING/EMPLOYMENT RELATED DECISIONS

Mr. Clifford alleged in his April 3, 2013 memorandum and correspondence that he has refused on several occasions to make employment-related decisions requested by influential members of the Illinois General Assembly based upon their political sponsorship of an employee or job applicant. He believes his refusals have led to retaliation from Board members.

I did not find evidence that Mr. Clifford has been retaliated against because he refused to engage in political hiring or succumb to political influence in employment related decisions. But, I do believe that Board members are dissatisfied with Mr. Clifford’s decisions about how to respond in situations where an elected official makes inquiries that relate to employment decisions. Oversimplified, this amounts to questions of judgment about how to say no.

Underlying Information/Conclusions:

1. As to the March 2012 meeting with the Latino caucus, in which Rep. Arroyo expressed a desire to see an increase in Latino employees at Metra, and inquired regarding whether the Latino caucus could suggest a candidate or candidates for the open DED position, there was no clear request that a particular action be taken. (Smith, Clifford, Huggins)
2. As to the inquiry by Speaker Madigan, purportedly made to Tom Cullen (Metra lobbyist) later communicated to Sam Smith, later yet communicated to Alex Clifford, regarding whether Pat Ward should receive a raise, Mr. Clifford originally told Sam Smith to convey in response that the class and comp study was underway and that if it revealed a raise was warranted, then it would happen, but very shortly thereafter, instructed Sam Smith not to respond at all. (Smith, Clifford)
3. As to Pat Ward’s attempt to be considered for a promotion within Labor Relations, or the support for it by Jeff Barton, it appears that Mr. Clifford spoke with Pat Ward and inquired why he was getting inquiries from Speaker Madigan about Mr. Ward’s employment / compensation. Mr. Ward advised Mr. Clifford that he had had a conversation with Speaker Madigan (a long time friend of his family’s) at a social function and had mentioned to Madigan in response to a question about how he was doing that he would like to be making more money, but was doing well. Mr. Clifford advised Mr. Ward that his comments to Speaker Madigan were inappropriate. Mr. Ward was upset by that conversation and resigned thereafter. (Clifford, Barton, Pat Ward personnel file)
4. Staff members had a clear understanding that Mr. Clifford was against all political influence in hiring or employment related decisions. Mr. Clifford did not approve of Metra staff members even accepting resumes of applicants from politicians. (nearly everyone interviewed was aware of this)

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5. I do not believe there was any improper or illegal action by Mr. Clifford, or any other Metra employee. It does not appear that there was any direct request from a legislator that Metra hire or reward or promote a particular employee. However, the indirect inquiry from Speaker Madigan's office regarding a raise for Pat Ward gets close, if the message was communicated accurately from Cullen to Smith to Clifford.
6. It appears that Mr. Clifford takes a very black and white approach on this issue, presumably to avoid any appearance of potential impropriety. However, he seems unconcerned or unaffected by the way the message was delivered or might be perceived. For example, taking resumes if offered and routing them to Metra's HR department to be handled along with other applicants with no preference being given would be legally permissible per Metra's Law Department, and would convey a different message to the official who presented them.
7. The RTA Act appears to be designed to ensure that someone is not hired or rewarded purely or decidedly on the basis of their political party or affiliation. It does not appear to require that an inquiry by a politician be ignored or rejected even if it does not seek a particular hiring or employment decision.

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II. ENGLEWOOD FLYOVER

Mr. Clifford alleges that Director Huggins “disregarded the advice of Metra’s counsel” and “over Mr. Clifford’s objections, sought to influence subcontracts for the Englewood Flyover project.” He allegedly, “either directly or indirectly, . . . undertook negotiations with the successful low bidder, IHC, and with persons in the Englewood community to add additional minority subcontractors” and Mr. Clifford believes that those actions are “highly problematic” in view of the law and regulations described in the Law Department’s May 22, 2012 memorandum on the subject.

My ability to fully investigate this allegation is limited by my inability to interview people outside Metra and/or review external documentation relating to communications with those outsiders (e.g., reps of IHC).

Underlying Information/Conclusions:

1. Unquestionably, Director Huggins (and others including Congressman Rush) were disappointed that the low, responsible bidder had only included \$112,000 of subcontracted work for African American businesses. He expressed that disappointment and there were discussions about what could be done about it.
2. Congressman Rush appears to have encouraged, if not led, picketing of Metra and IHC related to this concern.
3. Director Huggins may have engaged in communications with representatives of IHC and Congressman Rush’s office about the issue. From the internal investigation, there is no evidence that Mr. Huggins threatened IHC with consequences if it did not add additional AA subcontractors on the project. However, it appears that Director Huggins contributed to delay in the awarding of the contract, and it was the statements about the delay that likely caused Mr. Clifford to fear that the Director’s actions were in violation of the law and regs, and contrary to the legal advice in the Law Department’s memo. Ultimately, IHC apparently elected to add african-american subcontractors, and the tension dissipated. Absent threats or an improper degree of coercion, there is no actionable claim against Director Huggins for this, although it is apparent that Mr. Clifford did not believe Director Huggins should engage in these communications. Mr. Clifford’s view appears to be that because the successful bid was lawfully sufficient, Metra should take no action to influence the contractor’s actions related to the contract.
4. Mr. Clifford’s position is that the May 22, 2012 memorandum from the Law Department did not allow for any involvement by Metra or a Metra Board member to seek to influence IHC to do more than what was in its bid. Ms. Barnett does not believe that is correct. This may merely be a situation of Mr. Clifford wanting to stay far away from the line.

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5. Mr. Huggins’s view is that the IHC bid had to be considered in the context of the history of the Flyover being originated to be a “model” for the country in terms of how to handle large procurement construction projects. The failure of the outreach efforts to have led the bidder to have included a broader collection of subcontracts to minorities was, in some sense, more important to Mr. Huggins than to Mr. Clifford.
6. The subsequent efforts by Mr. Huggins to ensure that Metra provided a \$50,000 professional services outreach contract to an AA contractor arose from the earlier problems with the successful IHC bid. Mr. Clifford’s views made him reluctant to agree to it, without Board approval and without attribution of it being made to Mr. Huggins’s efforts, rather than Mr. Clifford’s or the staff’s. Mr. Huggins did not want it to be presented to the Board as his own proposal.
7. When Chairman O’Halloran took over the chair in November 2012, the contract matter was not pursued by either Mr. Clifford or former Chairman Huggins.

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III. PARTIALITY OF O’HALLORAN AND HUGGINS/PRE-SELECTION OF WIGGINS

Alex Clifford alleges that Mr. O’Halloran or Mr. Huggins or both have pre-selected Alex Wiggins to replace him and that the employment review process is a sham. He challenges their involvement in the employment review process and especially their being 2 of 3 members of an employment practices committee assigned to consider his performance.

Chairman O’Halloran has explained that this working group’s role was limited to developing a formal process for the employment review. (See the 4/3/13 email from A. Greene to some Board members) The full Board is to be involved in the employment performance review.

I have been permitted to review a document provided by Mr. Clifford’s attorneys, under an agreement that I will not disclose directly or indirectly the apparent author’s identity, which purportedly supports Mr. Clifford’s allegation. The document suggests that someone was allegedly told by Mr. Wiggins that Mr. Wiggins has been told by O’Halloran or Huggins that he will be succeeding Mr. Clifford as an interim Executive Director.

Underlying Information/Conclusions:

1. The A. Greene email referred to above clearly suggests that the working group will not control the employment review.

“After that meeting, the Working Group decided to start by developing a process for the evaluation. We obtained samples of forms used by other government entities for reviews of their chief executives/managers. We also interviewed several HR consultants who perform employee assessments. If you would like any of the underlying materials, please let me know.

Based upon these materials, we have developed the rough outlines of a process, which consists of the following:

1. A confidential online assessment be completed by senior staff and other staff who deal directly with the CEO. The assessment would be conducted by a consultant for purposes of quality and confidentiality. Current estimates for such an assessment are between \$4,800 and \$11,500, although we may be able to get a better price once we ask for firm proposals.
2. Interviews of third-party stakeholders (union officials, PSA’s, community leaders, elected officials, etc.) by 2-3 board members at a time.
3. A written self-evaluation by the CEO.
4. After the other feedback is obtained, feedback from every Board member (either in writing or in executive session).
5. A group discussion of the results in executive session with the CEO.

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6. A group discussion in executive session by Board members only. “

2. Alex Clifford’s allegation seems premature, and assumes the accuracy of the information conveyed to him in the document shown to me. That information was not confirmed by Alex Wiggins.

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IV. O’HALLORAN DIRECTING THE DISCHARGE OF BARNETT/KISIELIUS

Alex Clifford alleges that Chairman O’Halloran directed him to discharge Terry Barnett and Paul Kisielius because of Mr. O’Halloran’s view that they are incompetent.

I am unable to resolve with certainty the different accounts between Chairman O’Halloran and Mr. Clifford regarding whether Mr. O’Halloran directed Mr. Clifford to discharge Paul Kisielius. This may be a situation where the words spoken created an unintended understanding in the listener.

Underlying Information/Conclusions:

1. In an early meeting between the two after Mr. O’Halloran was elected Chairman, they met at O’Halloran’s request. Mr. O’Halloran certainly communicated his concerns about the competency of both Barnett and Kisielius, and provided examples.
2. Mr. Clifford did not subsequently advise Ms. Barnett that he had been directed to discharge her, or any words to that effect.
3. Although Mr. Clifford denies telling Mr. Kisielius to hire a lawyer or that he was on a “hit list,” Mr. Kisielius recalls being told words to this effect. Mr. Kisielius remembers being told by Mr. Clifford that the Chairman wants to fire you for incompetency, and that Mr. Clifford said he was not sure his own contract would be renewed. Mr. Clifford also advised Mr. Kisielius that Alex Wiggins is in Chairman O’Halloran’s camp (understood as a warning because Mr. Kisielius reports to Mr. Wiggins).
4. O’Halloran denies asking or directing AC to take specific negative employment action against either.
5. Note: I have not reviewed any contemporaneous notes or records of the full content of the meeting and there were no other witnesses to the conversation. Mr. O’Halloran has an index card with some of his notes regarding the meeting. Neither appears to have discussed the conversation immediately thereafter with others. (I have not made a clear request to either AC or O’Halloran for any notes they have of the meeting.)

RAH