Executive Level Rutan Training

October 2014

History of the Rutan Decision

- Rutan v. Republican Party of Illinois 497 U.S. 62 (1990)
  - Supreme Court held that:
    - Hiring, promotion, transfer and recall may not be based on party affiliation or support.
    - Hiring must be based on the merits and qualifications of the candidate(s).

Rutan Covered v. Rutan Exempt

- Most positions in State agencies, boards, and commissions under the jurisdiction of the Governor are Rutan Covered.
  - The Rutan decision applies to all governmental units throughout the United States. As such, under the jurisdiction of the Governor, this includes:
    - All Code and non-Code positions; and
    - All Personal Services Contracts
    - Procurements of Independent Contractors
  - These positions may not be acted upon based on political affiliation or support.
- Rutan Exempt positions are determined to be exempt based on the level of a position's duties associated with:
  - Principal policy-making;
  - Spokesperson; and/or
  - Confidentiality duties.
- Positions meeting the "bar" for at least one of these categories are known as "Rutan Exempt."
  - These positions may be acted upon based on political affiliation or support.

Inquiries and Recommendations

- Political affiliation or support means:
  - Considering whether an individual has declared herself to be affiliated with a particular party, has worked in a campaign in support of a candidate from a particular party, or has an elected official's support.

- Rutan Exempt positions
  - Political affiliation or support (or lack thereof) <u>may</u> be considered.

- Rutan Covered positions
  - Political affiliation or support (or lack thereof) <u>may not</u> be considered.

  - If you receive a contact regarding political affiliation or support (or lack thereof):
    - Do not accept the personnel request, recommendation or referral, but obtain contact information from the contacting party.
    - Politely advise the contacting party that pursuant to Governor's office policy, all such requests, recommendations and referrals must be directed to CMS Governmental Affairs.
    - Direct the contacting party to CMS Governmental Affairs Office to ensure objectivity during the hiring process
    - Contact CMS Governmental Affairs Office and provide the contact information for the contacting party
  - If you receive a recommendation about a candidate's qualifications for the specific job, contact your agency's HR Office and/or CMS Personnel to determine how to handle it.

CMS Contact for Inquiries

- **Tim Duckworth**
- **(217) 785-1941**

- Director of Governmental Affairs
  - Central Management Services
- Wm. G. Stratton Building, Floor 7, Rm 711
  - Springfield, Illinois 62706

Issuance of Administrative Orders

- Since the Rutan decision, 4 Administrative Orders have been issued to:
  - Set forth and reaffirm policies and procedures to:
    - Designate CMS as the authority for determining the Rutan status of each position;
    - Establish the Structured Interview Process; and
    - Require documentation of the Employment Decision.
  - Extend the policies to cover dismissal, demotion, discipline, and denial of consideration for a raise or promotion.
  - To ensure compliance and defensibility.

Reference: Administrative Orders #1 & 2 (1990), Administrative Order #1 (1991) and Administrative Order #2 (2009) .

Administrative Order #2 (2009)

- New and important provisions included:
  - Posting of each Rutan Covered position on work.illinois.gov.
  - CMS must grade each application for a classification in the order received and shall not grade any application out of order.
  - Blind grading and blind eligible lists
  - Multiple interviewer panels unless a single interviewer is approved by the Director of CMS

Determination of Rutan Status

- CMS is responsible for determining the Rutan status for all of Code and non-Code positions and personal services contracts.
- When position must be submitted for Rutan review:
  - Establishing new positions in titles shown on the Not Always Covered by Rutan listing.
  - Clarifying positions currently determined to be Exempt from Rutan.
  - Clarifying positions previously determined to be covered by Rutan that the agency would like to be re-evaluated for possible exemption from Rutan.

When is a CMS Rutan review <u>not</u> necessary?

- A CMS Rutan review is not necessary for:
  - Establishing positions included in titles shown on the Always Covered by Rutan listing.
  - Clarifying positions previously reviewed and determined to be covered by Rutan.

When should an agency request a Rutan review?

- Immediately upon establishing or clarifying a position (as discussed in previous slides) and/or
- Prior to initiating any steps towards filling a position, including posting.

- Reminder: Completion of annual employee evaluations, in part, requires review of job duties. Clarifications should be processed as needed to ensure employee's duties are consistent with the current job description.

- Important: Several Rutan-related cases have been won based, in part, on the presence of an accurate, up-to-date job description.

- Any questions regarding Rutan reviews or whether a review is necessary may be directed to CMS Division of Technical Services at 217-524-8773.

Structured Interview Process

- Established in Administrative Order #2 (1990) and clarified by Administrative Order #2 (2009)
- For all Rutan covered positions:
  - The agency must use uniform, job-related criteria and interview questions;
  - The responses to such questions must be evaluated by reference to the requirements for the particular position; and
  - Such evaluation must be thoroughly documented and must demonstrate the basis on which the selection was made.
- Agencies may receive requests for accommodation in the interview process. Please consult with CMS on such requests.

Structured Interview Process

- Administrative Order #2 (2009) directed and/or reaffirmed the following policies regarding the Structured Interview Process:
  - Any agency employee who participates in the interview of a candidate must be an up-to-date Rutan certified interviewer.
    - Exception: Technical Expert – a non-certified member of an interview panel functioning in a technical expert capacity, does not count as member of multiple-interviewer panel.
      - May ask specific technical follow-up questions to clarify a response and assist the certified interviewers in understanding technical responses
      - May <u>not</u> participate in the evaluation and scoring process

Structured Interview Process

- Each Rutan interviewer must successfully complete the Rutan Refresher Course and be recertified at least once every 3 years. It is the agency's responsibility to ensure that its Rutan interviewers have up-to-date certification.
- Agencies shall utilize multi-member interviewer panels to provide greater input and reduce the risk of improper influence in the hiring.
  - This means at least two Rutan-certified interviewers must conduct interviews.
  - Exceptions to multi-member interviewer panels must receive CMS approval in advance.
  - Only currently Rutan-certified interviewers count toward a multiple-member interview panel.

7 Steps of the Structured Interview Process

1. Determine the hiring criteria.
2. Define the hiring criteria.
3. Assign weights to the hiring criteria.
4. Develop the structured questions.
5. Conduct the structured interviews.
6. Evaluate the candidates.
7. Justify/document the employment decision.

7 Steps of the Structured Interview Process cont'd

- The hiring criteria and structured questions should be based on the current duties. Prior to posting:
  - Review the current job description and discuss with supervisors to ensure it reflects all current job duties
  - Clarify, if necessary
  - Submit for Rutan review, if required

- Administrative Order #2 (2009) requires that interview hiring criteria and structured questionnaires shall be developed prior to posting.

- While many positions are filled through collective bargaining provisions, it is often impossible to accurately predict which positions may reach "other means" and require a Rutan interview process. As such, we strongly advise that previously used hiring criteria and interview questionnaires be re-reviewed prior to posting to ensure continued accuracy.

Rutan Documentation

- The hiring agency must maintain chronological files for each position filled. See Administrative Order #2 (1990) and Administrative Order #2 (2009).
- Candidate Evaluation Form – The CEF is the tool used to document and evaluate the candidate's responses against the weighted hiring criteria, <u>not</u> against other candidates. One is completed for each candidate.
- Employment Decision Form – The EDF is the tool that documents the reason(s) for employing the selected candidate and provides summary comments comparing the selected candidate with others who were interviewed for the specific position.

Employment Decision Liabilities

- The Employment Decision Form:
  - Contains an Affidavit stating: "I certify that the hiring criteria and questions related to this employment decision were developed prior to initiating the candidate interview process. Furthermore, I understand that the hiring decisions documented on this form have not been decided on the basis of political party affiliation, support or lack thereof."
  - Is signed and attested to by the Agency Head or Designee.
  - <u>The agency head remains liable for decisions delegated to a designee.</u>
  - <u>Consequences for violating any part of the Rutan hiring process include personal and professional liabilities and may result in discipline up to and including discharge/dismissal</u>.
  - It is important to recall that the Rutan process protects Constitutional rights.
  - The Administration is firmly committed to the Rutan principles and directs any employee aware of any potential Rutan violation to report such violation to the OEIG.

Required documentation

- Serves several important functions:
  - Fulfills documentation requirements
  - Substantiates interviewer comments
  - Provides a means of comparison
  - Supports selection decision
  - Provides detail for reference
  - Serves as your defense in Court

Other Hiring Considerations

- Compliance with Rutan-related policies and procedures does not replace other hiring policies or considerations.
- Regardless of a position's Rutan status, *if applicable*, the following must be adhered to:
  - Provisions of a collective bargaining agreement
  - Preference for Illinois residents
  - Veterans' Preference
  - Provisions of the Personnel Code
  - Other agency-specific hiring rules and procedures

Purpose and Policy

- The Rutan decision simply means that unless a position is determined by CMS to be Rutan exempt, politics cannot be considered.

- The Rutan procedures are designed to provide maximum legal protection and defensibility. It is in your best interest to follow the process.

- From Administrative Order #2(1990): "It is not the intent of this directive to mandate a single, specific set of personnel policies and procedures applicable to all agencies and all personnel transactions. Nor is it the intent of this directive to mandate agency employment decisions, but to provide a consistent, fair and objective basis to assure compliance with Rutan as well as the employment of fully qualified persons."

Purpose and Policy

- CMS works with agencies to assist with specific needs – such as pre-employment screenings, conditions of employment, background checks, mass hires, complex hiring processes with multiple layers such as Correctional Officers, Forensic Scientist Trainees at ISP, and State Mine Inspectors at DNR.

- Please address any specific process concerns or inquiries to the Deputy Director for Personnel or the Deputy General Counsel for Personnel.

Other Agency/Position Requirements

- Certain positions may have additional requirements to be evaluated outside of the scope of the structured interview process:
  - Required background checks;
  - Required drug testing; and/or
  - Conditions of Employment (may be asked at time of interview but should not be weighted or scored):
    - Work availability (e.g., evening hours, weekends, overtime, required travel)
    - Professional license/Drivers license
- These and other bona fide requirements may be properly used as rationale for bypassing and/or disqualifying otherwise acceptable candidates. Agencies need to document the rationale if hiring out of rank order.

Pre-employment Screenings

- Pre-employment screenings may be part of the interview process or separate from the interview process as a Condition of Employment.
- Section 302.105 of the Personnel Rules mandates that any pre-employment screening process used by agencies to assess the competency of candidates be reviewed and approved by CMS before implementation.
- A complete listing of Pre-employment Screenings is cited in the Rule and includes:
  - Any written assessment of a candidate's qualifications and/or
  - Any written instrument used in conjunction with the interview process.

Candidates with Criminal Records

Administrative Order #1 (2013)

- Directs agencies to "ban the box"
- Cannot consider an applicant's criminal history before beginning to evaluate an applicant's knowledge, skill and abilities with respect to a particular position.
- It is the policy of the State of Illinois not to base employment decisions on the criminal history of an applicant unless:
  - Federal or state law prohibits hiring an individual with certain criminal convictions for the position that an applicant is seeking; or
  - The applicant has been convicted of an infraction that is reasonably related to the position sought, and denial of employment based on that criminal conviction is consistent with business necessity and the State's duty to serve and protect its citizens.

Administrative Order #1 (2013)

- A nexus review of the candidate's criminal history must consider at least the following factors:
  - The nature and gravity of the offense;
  - The time that has elapsed since the conviction and/or completion of sentence; and
  - The nature of the job being sought.

- The nexus review determination must be documented.
  - Explain how the above factors, and any others considered, resulted in your conclusion that exclusion is or is not warranted based on whether the candidate's criminal history is job-related and consistent with business necessity.

- Questions regarding AO #1 (2013) may be directed to the CMS Deputy General Counsel for Personnel.

Recap

- The Rutan hiring process is designed to ensure compliance with U.S. Supreme Court decisions and Constitutional rights and to provide necessary legal documentation.
- The process is designed to elicit the best candidate for the position based on pre-established, job-related hiring criteria and interview questions.
- There are permissible flexibilities inherent in the process to allow agencies to create the structured interview process necessary to select the most qualified candidate for the position given the agency's operating needs and business necessity and the specific job-related requirements of a particular position.
- Violations of the Rutan process can result in personal and professional liability.
- At any point in the process, preferably as early on in the process as possible, any questions regarding policy, procedures and/or agency/position specific requirements may be addressed to CMS Bureau of Personnel and CMS Legal.

Questions?

Contact Information

- CMS Bureau of Personnel: 217-524-8773
- CMS Training: 217-558-4847
- CMS Legal/Personnel: 217-782-9669
- CMS Government Affairs: 217-785-1941

OFFICE OF THE GOVERNOR

MANDATORY ETHICS TRAINING FOR EXECUTIVE LEVEL STAFF

(October 2014)

OUR DUTY

- Set the Ethical Tone
- Stewards of public trust & public funds
- First Duty – Preserve both

OUR GOALS

- Lead by example – Abide by the highest ethical standards
- Know and follow the rules
- Know what you don’t know (and who to call for the answers – Your General Counsel and/or Ethics Officer)

SOURCES OF ETHICS RULES

- State Ethics Act (5 ILCS 430)
  - Laws are minimum standards of conduct
- Agency Personnel Manuals
- Common Sense & Good Judgment

COMMON ETHICS ISSUES

- Use of State Property
- Gift Ban
- Prohibited Political Activities

USE OF STATE PROPERTY

- **General Rule**: Personal use of government property **<u>prohibited</u>** (phones, fax, computer, copiers, PDAs)

- **Computer Policy**: "This system is for authorized users and official business only." [Employees have **<u>no</u>** expectation of privacy with computers.]

- **Phone Policy**: "State telephones shall be used for State business. Staff must reimburse the State for all personal calls made on State phones, whether land or cellular."

GIFT BAN: BASIC PROHIBITION 5 ILCS 430/10-10

- Gift ban. Except as otherwise provided in this Article, no officer, member, or State employee shall intentionally solicit or accept any gift **from any prohibited source** or in violation of any federal or State statute, rule, or regulation. **This ban applies to and includes the spouse of and immediate family living with the officer, member, or State employee.** No prohibited source shall intentionally offer or make a gift that violates this Section.

DEFINITION OF GIFT
5 ILCS 430/1-5

- "Gift" means **<u>any</u>** gratuity, discount, entertainment, hospitality, loan, forbearance, or **<u>other tangible or intangible item having monetary value</u>** including, but not limited to, cash, food and drink, and honoraria for speaking engagements related to or attributable to government employment or the official position of an employee, member, or officer.

DEFINITION OF PROHIBITED SOURCE
5 ILCS 430/1-5

- "Prohibited source" means any person or entity who:
  (1) is seeking official action
  (2) seeks to do business with the State
  (3) is regulated by the State
  (4) has substantial interests that may be affected by the State
  (5) is a registered lobbyist
  (6) an agent, spouse of, or immediate family member living with a prohibited source

THRESHOLD GIFT BAN QUESTION: IS IT FROM A PROHBITED SOURCE?

- If not a prohibited source, gift is permitted
- If prohibited source, exception may apply
- Note, your agency may have policies on gifts stricter than the Gift Ban Act

GIFT BAN EXEMPTIONS
5 ILCS 430/10-15

- Items or services available to the general public;
- Anything you pay full value for;
- Travel expenses to conduct state business;
- Gifts from relatives;
- Gifts on basis of personal friendship;
- Food and beverages up to $75 per day;
- Gifts from other government officials;
- Gifts up to $100 cumulative value from a prohibited source in a calendar year.

PROHIBITED POLITICAL ACTIVITIES
5 ILCS 430/5-15

- State employees shall not intentionally perform any prohibited political activity during any compensated time (other than vacation, personal, or compensatory time off).

- State employees shall not intentionally misappropriate any State property or resources by engaging in any prohibited political activity for the benefit of any campaign for elective office or any political organization.

USE OF STATE PROPERTY
5 ILCS 430/5-15(a)

- At NO TIME can state property be used for political activity.

- It does not matter if you are on personal, vacation, etc., you cannot ever use state email systems, computers, phones, PDAs or anything else the State of Illinois owns or pays for in furtherance of political activity.

DEFINITION OF PROHIBITED POLITICAL ACTIVITY 5 ILCS 430/1-5

(1) Preparing for, organizing, or participating in any political meeting, political rally, political demonstration, or other political event

(2) Soliciting contributions

(3) Polling/working the polls

(4) Petition work

(5) Campaign work

(6) Working a recount

POLITICAL ACTIVITY

- Can political work be required of state employees?

NO!

5 ILCS 430/5-15(c)

ASKING QUESTIONS / REPORTING CONCERNS

- Duty to Report: Employees have a duty to report Ethics Act violations to Ethics Officer, OEIG or both.

- The Ethics Officer shall provide guidance to employees in the interpretation and implementation of [the State Officials and Employees Ethics] Act, which the officer or employee may in good faith rely upon. 5 ILCS 430/20-23(3).

QUESTIONS?