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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. Justice PART 10

Index Number : 100222/2010
AYZENBERG, ANNA
VS.
MATTINGLY, JOHN B.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/29/10

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

In the Matter of the Application of
Anna Ayzenberg, Frida Bogomolnik,
Alisa Gerasimenko, Marina Grinman,
Elizabeth Kun, Nina Stolshteyn,
Anna Ustin and Melissa Abram,

Petitioners,

Decision/Order

For a Judgment Under Article 78 of the
Civil Practice Law and Rules,

Index# 100222/10
Mot. Seq. # 001

-against-

John Mattingly, Commissioner of the New York City Administration for Children's Services, Martha K. Hirst, as Commissioner of the Department of Citywide Administrative Services and the City of New York,

Respondents.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this (these) motion(s):

PAPERS	**NUMBERED**
Notice of Verified Petition, exhibits	1
Verified Answer, exhibits	2
Verified Reply	3

Hon. Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

This Article 78 proceeding challenges the determination by respondents to lay off each of the named petitioners from the position of either Child Protective Specialist ("CPS") or Child Welfare Specialist ("CWS") which each petitioner held with the New York City Administration for Children's Services ("ACS") prior to September 29, 2009.

Collaterally, petitioners seek discovery to further establish their claim.

It is undisputed that the positions of CPS and CWS were created by respondent, Department of Citywide Administrative Services ("DCAS") on or about November 12, 1998. Petitioners, prior to the creation of the new positions, were all permanently-appointed caseworkers. In September 2009 mass layoffs were made of persons holding the position of either CPS or CWS, which included layoffs of the petitioners herein. The gravamen of the underlying claim is that respondents' decision to lay off CPS and CWS workers and to ultimately abolish these positions, was made in bad faith and was in violation of the Civil Services Law ("CSL") §§ 80 and 81.

An Article 78 proceeding is a special proceeding. It may be summarily determined upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised. CPLR § 409 [b]; CPLR §§ 7801, 7804 (h). Thus, much like a motion for summary judgment, the court should decide the issues raised on the papers presented and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial. CPLR § 7804 [h]; York v. McGuire 1984, 99 A.D.2d 1023 *aff'd* 63 N.Y.2d 760 (1984); Battaglia v. Schumer, 60 A.D.2d 759 (4th Dept 1977). Discovery is permitted only in limited circumstances and by order of the Court.

The applicable standard of review for a proceeding brought under Article 78 is whether the challenged administrative decision was: [1] made in violation of lawful procedure; [2] affected by an error of law; or [3] arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion. CPLR § 7803 (3). An agency abuses its exercise of discretion if its administrative orders lack a rational basis. "[T]he proper test is whether there is a rational basis for the administrative

orders, the review not being of determinations made after quasi-judicial hearings required by statute or law." Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Co., 34 NY2d 222, 231 (1974); see also: Matter of Colton v. Berman, 21 NY2d 322, 329 (1967).

A public employer may abolish civil service positions for the purpose of economy for efficiency, as long as it acts in good faith and without fraud or collusion. CSL §80[1]; Matter of Aldazabla v. Carey, 44 NY 2d 787 (1978); Matter of Della Vecchia v. Town of Hempstead, 207 AD2d 484 (2nd dept. 1994) lv to app den 84 NY2d 1018 (1995). The party challenging the validity of such decisions bears the burden to show that the decision was made in bad faith or that it was done to circumvent the Civil Services Law. Matter of Aldazabla v. Carey, *supra*; O'Donnell v. Kirby, 112 AD2d 936 (2nd dept. 1985).

Several preliminary issues need to be addressed and disposed of before the Court reaches the central issue about whether there was a rational basis for respondent's decision to target workers in the positions of CPS and CWS for layoffs and/or whether it violated the Civil Services Law. First, the court rejects respondents' position that since most of the petitioners were re-hired as caseworkers after this proceeding was brought, the matter is moot as to them. While the remedy of reinstatement to a comparable position is no longer an issue for those petitioners, their request for retroactive pay and benefits for the period they were out of work means they still have viable disputes that need to be resolved by the Court in this proceeding.

Second, petitioners claim that in or around 1998 they were forced to take the position of CPS or CWS or risk losing their jobs. Respondents claim that the move to

these positions from the position of case worker was voluntary. The court need not resolve this collateral factual dispute, because the time to have challenged the change in position would have been at or about the time they occurred in 1998. See: Alfred Condominium v. The City of New York, 9/14/10 NYLJ 34 (col. 1). Having failed to mount a challenge at that time, petitioners are precluded from arguing that they were not legitimately holding the positions of either CPS or CWS at the time of their layoffs.

Turning to the central dispute, petitioners claim that the decision to lay them off was made in bad faith because they were fired with nearly 15 years of service, while respondents were hiring or maintaining less experienced workers with the title of "caseworker." They also claim bad faith is shown by the creation of the new titles which permitted respondents to hire provisional workers, with substantially less working experience than each of the petitioners. Petitioners argue that when respondents determined which workers they would lay off, they should have, but did not consider, that petitioners had all been permanent caseworkers before being assigned as either a CPS or CWS.

In response to the petition, respondents set out the history of the decisions that first led to the creation of the positions of CPS and CWS and the more recent decision to phase those positions out. [1] They elaborate on the procedure they employed to lay

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[1]The court rejects petitioners argument that because the answer was verified by an attorney, it should not be considered as facts before the Court. The attorney verifying the answer is not the attorney representing respondents in this action. Rather he is Deputy General Counsel of Personnel Legal matters for DCAS. In this regard, he is the "client" with knowledge of most of the facts. In addition, many of the facts are contained in official governmental documents, which are annexed as exhibits to the answer.

off workers in CPS and CWS positions and the creation of seniority lists for rehiring those persons to comparable titles.

Briefly, the relevant history was as follows: ACS was created in 1996, with a mission to improve child protective services in the City. At that time the only Civil Service titles available to perform casework functions at ACS were caseworker and social worker. In order to have workers with more appropriate education and experience to perform ACS work, in 1998 respondents established the two new competitive class civil service titles of CPS and CWS. Caseworkers, who met the requirements for the new positions, were able to apply for a transfer. All of the petitioners were transferred from the position of caseworker to either CPS or CWS.

In March 2006, ACS embarked on a set of reforms to better the foster and preventative care systems, known as Improved Outcomes for Children ("IOC"). The reforms were set to phase in over a period of several years. The IOC calls for a family team conference model, which work directly with the family and coordinates services. In the previously existing model under which petitioners worked, there was a contract agency planner working directly with the family and the a case manager employed by ACS, responsible to approve decisions made by the planner, but without any direct contact with the family. It was estimated that implementation of the IOC program would phase out approximately 650 CWS positions associated with case management functions.

The IOC also anticipated that new positions would be filled by individuals with appropriate and more extensive training and experience. In 2008, DCAS established two new competitive class service titles known as Program Evaluator ("PE") and Child

and Family Specialist. ("CFS"). According to the published requirements, the education and experience qualifications for the new titles are significantly greater that those that were required for the CWS and CPS titles.

While the IOC program was being phased in, the economic crises forced respondents to otherwise reduce costs and address a funding shortfall forecasted for 2010. ACS was required to reduce its overall fiscal year 2010 budget by $52.5 million dollars. ACS decided that one cost cutting measure would be to lay off workers holding the CWS and CPS positions, which were already being phased out under the IOC initiative. Workers holding those particular job titles were laid off based on seniority.

DCAS then established a preferred list for the title of CWS and CPS, which would be used to fill vacancies, also by order of seniority, in the following order: [1] the same or similar position; [2] a position in a lower grade in line of promotion and [3] any comparable position. There were no vacancies (and none in the forseeable future) for categories [1] or [2]. DCAS, however, determined in or about November 2009, that the position of caseworker was a comparable position for CWS, thereby permitting DCAS to certify the list to fill vacancies and replace provisionally-appointed employees in the title of caseworker that were then serving city agencies. Beginning in November 2009 respondents offered appointments to CWS on the preferred list to replace the approximately 130 provisionally hired caseworkers. The offers were made on the basis of seniority. As of the time this petition was submitted to the Court, only petitioner Abram had not been rehired as a caseworker, because she had not yet been reached on the CWS-CPS preferred list.

CSL § 80[1] provides in pertinent part:

> "Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in a competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions, shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs. "

CSL § 81 provides in pertinent part:

> "It shall be the duty of such civil service department or commission. As the case may be, forthwith to place the name of such employee upon a preferred list, together with others who may have ben suspended or demoted from the same or similar positions in the same jurisdictional class, and to certify such list, as hereinafter provided, for filling vacancies in the same jurisdictional class: first, in the same or similar positions; second, in any position in a lower grade in line of promotion; and third, in any comparable position."

The court holds that petitioners have failed to prove that the lay offs were made in bad faith and that the petition must, therefore, be dismissed. While the new titles created (and hires made) under the IOC was a major factor in respondents' decision to lay off petitioners, there is no evidence that they did not serve a legitimate public purpose or that they were a pretext for some impermissible end. See: Penale v. County of Niagra, 170 AD2d 965 (4th dept. 1991). The new titles were developed under the IOC as reforms and improvements in the delivery of services to children and families. The new workers hired under the new titles (ACS and CFS) are required to have different and substantially more education and training than the title of workers who were laid off. (Compare Verified Answer exhibits A and G). Workers holding the titles of CPS and CWS who met the additional requirements of ACS and CFS were encouraged to apply for the new positions. The decision by respondents to hire

workers with different qualifications had a rational basis.

There is also no basis for concluding that in determining who to layoff, the agency was constrained to consider the pool as that of all caseworkers, rather than only those holding the positions of CSW and CPS. While CSW and CPS are considered "comparable" positions to caseworkers for the purpose of certifying a list for re-hire under CSL § 81, there is no similar requirement under CSL §80 that layoffs by seniority only be made among persons with comparable positions. The requirement under the Civil Service Law, that positions which are reduced in rank or abolished be made according to seniority, is limited to people holding the "same or similar" positions.

In addition, it is clear on this record that all petitioners were credited for years of service when they held the positions of caseworker in determining the order of seniority both for purposes of lay off and rehiring.

The court, therefore, holds that the determination to lay off petitioners was made in good faith, in accordance with the legal requirements of the Civil Services Law and was rationally based. The request for discovery is denied as moot.

In accordance herewith, it is hereby:

ORDERED and ADJUDGED that the petition is denied, and it is further

ORDERED and ADJUDGED that any requested relief not otherwise expressly granted herein is denied and that this constitutes the decision and order of the Court.

Dated: New York, NY
September 29, 2010.

SO ORDERED:

J.G. J.S.C.