

**Roberts v Health & Hosps. Corp.**

2010 NY Slip Op 33319(U)

November 24, 2010

Supreme Court, New York County

Docket Number: 112247/10

Judge: Alice Schlesinger

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

PRESENT: Alice Schlesinger  
Justice

IA PART 16  
PART 10

Roberts, Lillian

INDEX NO. 112247/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

NYC  
Health Hosp. Corp.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Art 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 proceeding is granted in accordance with the accompanying memorandum decision.

NOV 24 2010

Dated: November 24, 2010

Alice Schlesinger  
ALICE SCHLESINGER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

This judgment is subject to the review of the Appellate Division and notice of appeal must be filed within the time prescribed by the Rules of the Appellate Division. The Clerk of the Appellate Division may be contacted at the Appellate Division, 11th Floor, 100 West Street, New York, NY 10038. For more information, please call (212) 312-1000. **appear in person at the Justice Clerk's Desk (Room 1413)**

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

-----X  
LILLIAN ROBERTS, as Executive Director of  
District Council 37, American Federation of State,  
County and Municipal Employees, AFL-CIO and  
CARMEN CHARLES, as President of Local 420  
of District Council 37, and KYLE SIMMONS, as  
President of Local 924 of District Council 37,

Petitioners,

For a Judgment and Order Pursuant to Article 78  
of the Civil Practice Law and Rules,

-against-

Index No. 112247/10  
Motion Seq. No. 001

HEALTH AND HOSPITALS CORPORATION and  
ALAN AVILES, as President,

Respondents.  
-----X

In the Matter of the Application of  
SEAN FITZPATRICK, as Business Representative  
and on behalf of Local Union No. 3, I.B.E.W, AFL-  
CIO; Local Union No. 3, I.B.E.W., AFL-CIO; and  
RODNEY DOWNES, WILLIAM LAROSA, and  
BILL LECOMPLES, individually, and on behalf  
of those similarly situated,

Petitioners,

For an Order and Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules,

-against-

Index No. 112249/10  
Motion Seq. No. 001

HEALTH AND HOSPITALS CORPORATION, and  
ALAN AVILES, as President,

Respondents.  
-----X

HONORABLE DANIEL DROMM, NEW YORK CITY  
COUNCIL MEMBER, DISTRICT 25; HONORABLE  
KAREN E. KOSLOWITZ, NEW YORK CITY  
COUNCIL MEMBER DISTRICT 29; HONORABLE  
JULISSA FERRERAS, NEW YORK CITY COUNCIL  
MEMBER, DISTRICT 21; and FRANK SPENCER, in  
his capacity as SUPERVISOR OF THE NEW YORK  
CITY DISTRICT COUNCIL OF CARPENTERS,  
UNITED BROTHERHOOD OF CARPENTERS AND  
JOINERS OF AMERICA,

Petitioners,

For a Judgment and Order Pursuant to Article 78  
of the Civil Practice Law and Rules,

-against-

Index No. 112284/10  
Motion Seq. No. 001

THE NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION,

Respondent.  
-----X

**INDEXED AGREEMENT**  
This judgment has not been entered by the Court and  
no party has obtained entry. Counsel for all parties must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

**SCHLESINGER, J.:**

The background for these Article 78 proceedings, consolidated for disposition, is set out in this Court's October 8, 2010 interim order which confirmed the petitioners' standing to proceed and directed a hearing to further explore the relevant issues. Briefly stated, the petitioners in these cases seek to annul the decision by respondent Health and Hospitals Corporation (HHC) to lay off one-third of the carpentry staff, nearly one-third of the electricians, and approximately half the laborers employed in the various HHC facilities located throughout the City of New York. They assert that HHC's decision is arbitrary and capricious and in violation of various laws and regulations in that the decision-making process was flawed and the drastic staff reductions will allow the facilities to deteriorate and thereby threaten the health and safety of the patients, staff, and remaining workers. HHC responds that layoffs are necessary in light of budget constraints and that the particular layoffs at issue here were decided upon after HHC's considered evaluation of various alternatives and its conclusion that the reduced staff could adequately maintain the facilities.

Pursuant to the October 8 order, this Court held hearings on October 18, 19, 21, 22 and 25 of 2010. The carpenters began by offering the testimony of Sean Treanor, Supervisor Carpenter at North Central Bronx Hospital (NCB), John Scicutella, Supervisor Carpenter at Elmhurst Hospital Center, and Lateff Qadar, Supervisor Carpenter at Harlem Hospital Center. Together they explained in significant detail the work of HHC's carpentry staff, which includes the performance of legally required inspections, repairs and preventive maintenance intended to insure each facility's compliance with fire and infection control standards. The carpenters not only insure that fire and smoke doors are appropriately rated and properly functioning, but they also inspect and repair ceilings,

floors, and walls to insure that all penetrations, including those created by private contractors performing construction work, are adequately sealed so as to prevent the spread of smoke, fire, or infection.

The carpentry witnesses further testified that their respective facilities generate hundreds of carpentry work orders monthly, many of which remain outstanding for significant periods of time due to the already insufficient number of carpenters on staff. Through testimony and documentary evidence, the carpenters established that a large number of work orders remained outstanding at each of the HHC facilities at the time of the hearings, even though many of the managers had recently authorized substantial overtime hours to enable the carpenters to keep up with the steady stream of work.<sup>1</sup> Each witness then opined, based on years of experience and first-hand knowledge of the conditions at the HHC facilities, that it would be impossible to safely and properly maintain the facilities in compliance with law if HHC were to reduce the carpentry staff to the extent proposed because there simply would not be enough hands to get all the work done.

The electricians then offered evidence to support their assertion that the proposed layoff of their tradespeople, if implemented, would result in immediate, irreparable harm to the patients, staff, and remaining electricians. The witnesses who testified on behalf of the electricians were Bill Lecomplex, a Supervisor Electrician at Bellevue, and Peter Folino, an electrician scheduled for layoff from Woodhull Hospital. They both explained the significant role that electricity plays in the functioning of a healthcare facility and the important work performed by the electrical staff.

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<sup>1</sup> At the Court's request, both sides submitted post-hearing statements confirming via a detailed breakdown that HHC authorized a substantial number of overtime hours for the various trades in the weeks preceding the hearing.

According to the electrician witnesses, HHC electricians install, maintain, alter and repair the electrical systems in the facilities. In addition, they share responsibility with other personnel and outside inspectors for conducting inspections to confirm the proper working of the electrical systems. Particularly important among these duties from a health and safety perspective is the regularly scheduled preventive maintenance performed on emergency generators and emergency egress lighting. And while they are not charged with maintaining medical equipment, the electrical staff must insure the uninterrupted supply of electricity for the functioning of those machines.

The electrician witnesses went on to explain, based on their years of training and experience, how the proposed layoffs would jeopardize the health and safety of the patients, staff and remaining workers at the healthcare facilities. For example, Mr. Lecomplex testified in no uncertain terms that he would not be able to carry out the preventive maintenance program and maintain the electrical supply at Bellevue should the proposed layoffs be implemented. He further indicated that the five electricians slated to remain after the layoffs could not run the eight generators that power Bellevue in an emergency; according to Lecomplex, ten to twelve electricians would be needed for that purpose.

Mr. Folino then explained the potential impact of the proposed reduction in electricians at Woodhull Hospital from seven to two. He addressed not only the substantial amount of work the HHC electricians have to complete, but also particular staffing needs, such as the need for two electricians to be present whenever high voltage work is being performed. Further, because the Woodhull electricians are also responsible for the Cumberland facilities located about one and a half miles away, along with 14 off-site clinics, at least two electricians are at another location three days out of each week. By

reducing the number of electricians on staff at Woodhull to two as proposed, HHC would leave the facilities drastically understaffed and thereby allow the facilities to deteriorate, Folino testified.

While some facilities have the ability to "borrow" tradespeople from other facilities in their network, Woodhull cannot as it is not part of any network. Neither the outside contractors nor the stationary engineers have sufficient familiarity with the facilities and the necessary training and experience to serve as substitutes for the electricians, the witnesses explained. Further, like the carpenters, the electricians testified that even with their present staff they have a backlog of work, leading HHC to authorize a considerable amount of overtime work in the weeks before the hearing. By laying off 45 electricians as proposed, much work would necessarily remain undone.

The last group of petitioners to present evidence was the City laborers. Their witnesses included City laborers Victor Maduro and George Caironi. Maduro is employed at Metropolitan Hospital. Before the layoff announcement, Metropolitan had 19 laborers on staff. Two have retired, and HHC has proposed laying off another nine, including Maduro, leaving eight on staff to service a 17-story building spanning from 96<sup>th</sup> Street to 99<sup>th</sup> Street and from First Avenue to Second Avenue. Citywide, HHC has proposed laying off approximately 50% of the laborers.

According to Maduro, the laborers at his facility are assigned to different skilled trades shops, such as the mason shop, the plumbing shop, and the electrical shop. The laborers assist the skilled trades by cleaning and securing job sites in compliance with infection control standards, penetrating walls so the trades can access pipes and wiring, and sealing penetrations in compliance with fire and infection control standards. These workers receive training from HHC and elsewhere regarding fire stopping and infection

control and are certified by outside vendors. No job performed by a skilled trade is considered complete until the laborer has completed work to seal the penetration using adequate fire stopping and infection control materials and techniques, Maduro explained. Laborers also assist in remedying defects found upon inspection in preparation for the Joint Commission inspection. Maduro further testified that the amount of work was so substantial that HHC had offered the laborers overtime Monday through Friday and on Saturdays working in the Dialysis Unit during the last two weeks of September.

The testimony of George Caironi, a laborer at Jacobi Hospital, was similar. Jacobi consists of eight buildings on 64 acres. Laborers are assigned to three departments — moving, grounds, and engineering — and are involved in matters ranging from snow removal to construction projects. In the weeks preceding the hearing, the laborers clocked thousands of hours of overtime on various projects, yet HHC has proposed reducing the number of laborers from twenty to four. Caironi is presently the only laborer trained in asbestos removal. In sum, the laborers, like the other tradespeople, testified that the proposed staff reductions would cause much of the work to be left undone, thereby compromising fire safety and infection control standards at the various healthcare facilities.

The primary witness presented by HHC in its defense was Frank Cirillo, HHC's Chief Restructuring Officer.<sup>2</sup> According to Cirillo, HHC is facing a \$1.2 billion budget deficit, and its Capital Improvements budget has been cut by 30%. To address these financial issues, HHC created a Restructuring Steering Committee comprised of the

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<sup>2</sup> Alfonse Pistone, Assistant Vice President for the HHC Office of Facilities Development, also testified. He disputed petitioners' claim that all the work orders attached to their pleadings remained undone, focusing on a select number only.

leaders of the various facility networks and other members of HHC's executive staff. HHC retained the services of Deloitte Consulting LLP, a consulting firm experienced in the restructuring of public hospitals, to assist the Committee in developing a strategic plan.

Cirillo explained that Deloitte spent nine months reviewing HHC's operation and meeting with people, including specialized experts within HHC and beyond. In addition, Deloitte reviewed HHC's Capital Plan to determine what amount of construction activity would be necessary going forward for the completion of capital improvements. In his testimony, Cirillo discounted the probative value of the outstanding work orders testified to by petitioners, opining that walking around the facility and speaking with management about conditions (which Deloitte allegedly did) was far more informative.

According to Cirillo, the mandate that HHC gave Deloitte was to propose options consistent with HHC's mission to serve all, regardless of ability to pay, and provide the highest quality of care possible, given the financial constraints. Further, a preference was urged for administrative, rather than medical, cuts. The result was the issuance of the Deloitte report, a huge binder of materials with about 100 cost-cutting options.<sup>3</sup> HHC's Steering Committee reviewed and discussed the options during a two-day conference and then selected 39 of those options. One of the options selected was the option to reduce the number of tradespeople based on Deloitte's assertion that HHC's expenditures in this area were "abnormally high when compared to similarly situated hospitals and health systems ... across the country."

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<sup>3</sup> Deloitte's report is apparently incorporated into the binder introduced as Respondent's Exhibit B in evidence. The title page reads "New York City Health and Hospitals Corporation (HHC) *Enterprise Restructuring: The Road Ahead.*" The top of each page in the binder reads "DRAFT: For Discussion Purposes Only, Not to be Reproduced or Redistributed."

The Steering Committee rejected Deloitte's proposed \$160 million cut in this category as "too deep," Cirillo testified. Regarding tradespeople such as stationary engineers and oilers who must be onsite 24/7, their numbers were left intact. However, with respect to the remaining trades, roughly 800 employees covering 21 trades, the Steering Committee proposed an approximate 50% reduction in staff, amounting to a 30% reduction in cost.

Cirillo explained that key people at each facility were asked to determine whether they "could live with" the staff reductions proposed by the Committee. Whereas some facilities accepted the proposed layoffs, others responded that the cuts were too drastic in one trade or another or overall, and still others proposed even deeper cuts. Thereafter, the Committee decided on the final numbers, some of which were in keeping with the facility's recommendation and others not, resulting in a final layoff number of 350 people, about 70 less than originally proposed. A budget with those numbers was presented to and approved by the City Council. Cirillo further testified that if the layoffs are not implemented as proposed, HHC may well need to consider reductions "on the medical side of the house."

In his testimony, Cirillo also disagreed with the petitioners' assertion that the proposed layoffs would jeopardize fire safety and infection control at the facilities. He opined that the facilities could compensate for reduction in workforce by taking advantage of existing practices, such as the facility's ability to borrow a tradesperson from another facility in its network. Also, HHC has in place certain "requirements contracts" with outside vendors for project-specific services on an as-needed basis, as Mr. Pistone discussed at length in his affidavit submitted with HHC's answer. Further, procedures are in place to address emergencies. Finally, HHC claims that the large number of overtime hours

recently clocked by the various tradespeople is misleading; rather than suggesting an extraordinary amount of work, the overtime reflects work on specific projects that have for the most been completed and management's decision that certain work should be completed outside the typical 9 to 5 workday to avoid a disruption in healthcare services.

Petitioners' joint rebuttal witness Kurt Hahn responded to Cirillo's claim that the layoffs would not compromise fire safety and infection control at the HHC facilities. Mr. Hahn has extensive experience with fire safety and staffing needs at public hospitals. He works as a firefighter, EMT, fire inspector, and hazardous material technician at a 1.1 million square foot Veterans' Administration facility known as the Hudson Valley Health Care System. At the Montrose and Castle Point campuses, Mr. Hahn is charged with the duty of ensuring compliance with all fire safety requirements, including those pertaining to fire and smoke doors and barriers, and for identifying conditions affecting infection control, such as damage to ceiling tiles and partitions.

In his expert opinion, for example, a staff of at least one carpenter for every 42,333 square feet of space is needed to maintain a public healthcare facility. HHC presently employs one carpenter for every 100,196 square feet, a number lower than it was in 2005. According to Hahn, the proposed reduction of the carpentry staff by one-third would leave on average only one carpenter for almost 150,000 square feet, a number wholly insufficient to achieve compliance with life safety standards and infection control, particularly considering the complexities regarding means of egress for hospital patients. Limiting capital projects or relying on private contractors will not correct the deficiency, as in-house carpenters are best equipped to address emergencies and efficiently complete all work based on their familiarity with the facilities, as the various carpentry witnesses had also explained.

Petitioners also offered on their rebuttal case the expert testimony of Dr. John C. Shershow.<sup>4</sup> Dr. Shershow has extensive experience in hospital administration, having served as the medical director of several large hospitals, including Kings County Hospital from 1994 to 1996.<sup>5</sup> His experience with hospital safety includes work as an inspector for the Joint Commission that determines compliance by healthcare facilities with health and safety requirements, as well as work consulting with hospitals preparing for Joint Commission surveys.

Dr. Shershow directly addressed HHC's evidence that it had determined the number of layoffs so as to "right size" the staff based on the amount of work at each facility. He explained that to determine "right size," HHC needed to conduct a careful and methodical review of data regarding maintenance deficiencies and the amount of time needed for the various tradespeople to properly correct those deficiencies, asking questions such as "Is our surveillance program working? And are we getting the deficiencies fixed in a timely fashion?". He further indicated that the Joint Commission requires that hospitals perform a risk analysis to ensure that staffing changes do not compromise the facility's duty to maintain a safe environment. That analysis, Dr. Shershow explained, should be made by an "Environmental Care Committee, consisting of administrators, doctors and nurses who should solicit input from the supervisors of each trade.

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<sup>4</sup> Counsel for HHC had objected to petitioners' request to call Mr. Hahn and Dr. Shershow on rebuttal, rather than on the direct case. However, as their testimony directly responded to HHC's proffer as to its ability to maintain the facilities after the layoffs, the Court held that the testimony qualified as rebuttal evidence.

<sup>5</sup> He had been asked to serve as Kings County medical director after his service on the Joint Commission as it was felt he had gotten to know the hospital, its strengths and weaknesses, so well during that service.

Based on his firsthand experience with the Joint Commission, Dr. Shershow discussed at length the significance of the annual inspection and Statement of Conditions (SOC) generated by the Commission to report the inspection findings. He directly rebutted HHC's implication that a facility's work was effectively done once the tradespeople had corrected the deficiencies noted in the SOC. According to Dr. Shershow, maintenance is an ongoing process, and the SOC is intended to be a living document, constantly requiring the care and attention of the tradespeople. Conditions should not be corrected at the last minute in anticipation of a Joint Commission inspection; rather, routine maintenance and repairs should occur on a daily basis to maintain a safe and sanitary environment at the healthcare facilities.

In the opinion of Dr. Shershow, HHC had failed to conduct a proper analysis before deciding to lay off hundreds of tradespeople. HHC's Restructuring Committee relied too heavily on the report prepared by Deloitte, the private consulting firm it retained, despite the obvious flaws in Deloitte's analysis. For example, and as confirmed by the testimony of HHC witness Frank Cirillo and the Deloitte study itself, Deloitte did not study the function of each trade, how much work was being performed by each trade at each facility, and whether it was necessary to preserve the existing number of tradespeople to maintain the safety of patients and staff. Further, and quite significantly, the Deloitte report contains no evidence that the preparers reviewed and considered the SOC's issued by the Joint Commission for each facility and the extent to which the noted deficiencies had been corrected or were still outstanding.

HHC cannot reasonably dispute that such an analysis should have been conducted before the layoffs were proposed to insure that the remaining staff could properly maintain the facilities. Indeed, Deloitte in its report highlighted the significance of the issue, warning

HHC that staff reductions could negatively impact conditions "without appropriate planning and process." According to Dr. Shershow, HHC failed to meet that standard.

Dr. Shershow further opined that HHC had erred in relying on Deloitte's comparison of HHC facilities to the national "benchmark" without taking into account the unique aspects of HHC facilities, including the use of unionized labor in a region where the prevailing wage is higher than it is in other areas. In addition, he explained, the HHC Steering Committee had erred in asking its facility managers to "vet" its proposed 50% cut in its skilled trades staff, when several of those managers had participated in developing that proposal in the first instance. A conflict of interest further compromised the managers' ability to reject the proposed cuts, as they may have viewed their jobs as being on the line.

A glaring defect in the decision-making process was the Steering Committee's failure to develop a methodology or to otherwise set uniform guidelines for the facility managers to use in making their determinations about the proposed layoffs. It is wholly inappropriate to assume that each manager conducted a reasoned analysis when HHC failed to offer the testimony of even one manager, or any other concrete evidence demonstrating how each facility manager reached his or her decision. If anything, the evidence strongly suggests that the decision-making "process" followed by at least some of the managers was completely illogical. For example, so illogical was the decision by the facility manager at Lincoln to retain no laborers at all, when the Steering Committee had recommended keeping six, that even the Steering Committee promptly rejected the decision and ultimately decided to keep seven laborers. In sum, Dr. Shershow testified that both the Deloitte report and the Steering Committee's analysis lacked the type of scrutiny and reasoned analysis that was needed under these circumstances to avoid jeopardizing fire safety and infection control at the facilities.

## Discussion

The three criteria for a preliminary injunction are well-established: (1) likelihood of success on the merits; (2) the danger of irreparable injury if no injunction is granted; and (3) the balancing of the equities in the applicant's favor. *See, e.g., W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 (1981). As all parties have submitted their pleadings and fully briefed the merits, the Court will also address the ultimate question, whether HHC's decision to lay off the hundreds of tradespeople represented by petitioners' unions is "arbitrary and capricious" within the meaning of CPLR Article 78. While the Court cannot simply substitute its judgment for that of HHC when reaching its determination, it must carefully assess the evidence with a focus on two questions: (1) was the methodology employed and the analysis performed by HHC careful, complete and well-considered; and (2) is HHC's decision rationally based on an adequate set of facts when viewed in the framework of the governing law.

After considering all the evidence adduced at five days of hearings, this Court finds that HHC's decision to lay off hundreds of tradespeople represented by petitioners was arbitrary and capricious. While on its face HHC's analysis might appear reasonable, a closer look at the evidence adduced at the hearings and in the affidavits submitted by the parties reveals that HHC failed to employ a sound methodology designed to gather and evaluate all the relevant facts and assess the potential impact of the proposed layoffs on the health and safety of the patients, staff, and remaining tradespeople.

The problem begins with the Deloitte study. Deloitte was charged with the mission of developing cost-cutting options for HHC to consider. It devised 100, and HHC chose 39 of those options to consider further. Mr. Cirillo offered no detailed explanation as to why HHC chose some of those options and rejected others, and what factors were considered

by the Steering Committee in making that choice, other than the general desire to avoid medical cuts if possible. One must question, as well, how in-depth the Committee's review and discussion of the various reports could have been at that point; Deloitte spent nine months preparing a binder several inches thick to explain the 100 options it proposed, and the Steering Committee reviewed the materials and selected 39 of the options in a matter of days. HHC offered no evidence whatsoever demonstrating that a rational set of criteria was used to select 39 options and reject 61 others.

To the extent any explanation was offered as to why Deloitte recommended laying off tradespeople, the explanation was based on a flawed assumption. Deloitte recommended layoffs because HHC's per square foot expenditures on trades personnel were "abnormally high when compared to similarly situated hospitals and health systems ... across the country." Deloitte classified a facility as "similarly situated" based on square footage and patient discharge rates. However, as petitioners note and as Deloitte itself recognized was possible<sup>6</sup>, few health systems are truly "similarly situated" to HHC due to the high real estate costs and prevailing wage requirements in New York City. The Deloitte analysis simply confirmed that the cost of doing business in New York is high.

As Mr. Cirillo acknowledged in his testimony, Deloitte did not perform any work flow and risk analysis to determine how many tradespeople in each category were required to properly maintain each facility. Nor did it make any recommendations as to how HHC could fulfill its mission of providing quality care in a safe and sanitary environment with the reduced staff. HHC did not dispute the persuasive expert testimony of Dr. Shershow discussed above that established the guiding force of the Joint Commission's Statement

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<sup>6</sup>.Deloitte noted: "Geographical or market-specific dynamics and pay rates may lead to a higher cost per unit of service."

of Conditions when determining the workforce needed to properly maintain a healthcare facility. Indeed, Dr. Shershow described the SOC as a "living document" that the facility should review on a regular basis as part of its plan to properly maintain the facility. Despite the import of the SOC, HHC failed to offer a scintilla of evidence confirming that it reviewed and relied upon the SOC when making its determination about the layoffs.

HHC did acknowledge, however, that the proper maintenance of a healthcare facility on an ongoing basis involved a substantial amount of work. Particularly telling on this point was the detailed evidence that HHC submitted at the conclusion of the hearings at the Court's request confirming the substantial number of overtime hours logged by the various tradespeople in the weeks before the hearing. While HHC may discount some of those hours as being attributable to short-term projects or work required to be completed after normal business hours to avoid disruptions in service, the number of hours is nevertheless remarkable and suggests the need to maintain existing staff levels.

Implicitly recognizing the extraordinary amount of work involved in maintaining the facilities (whether or not that amount is precisely reflected by outstanding work orders or overtime hours) and the inevitable impact of layoffs on the ability to timely complete that work, Deloitte did include a caveat to HHC in its report; that is, that "appropriate planning and process" were necessary to minimize the impact of the proposed staff reductions on repairs and maintenance at the healthcare facilities. The caveat is particularly key not only in light of HHC's mission to provide quality care, but also in light of the countless laws that require HHC to maintain its facilities in a safe and sanitary manner, and the countless governmental agencies, as well as the Joint Commission, that inspect the facilities on a regular basis to insure compliance. See, e.g., New York Unconsolidated Laws §§7382 and 7385(7), New York Public Health Law §§2800 and 2803, New York State Department of Health regulations NYCRR §§405.24, 702.1 -702.3, 711.2, and 711.4.

HHC argued that the Steering Committee filled that gaping hole by consulting with facility managers, but the evidence in fact showed otherwise. While Mr. Cirillo is a capable HHC executive who gave clear testimony on the process followed, there was little "process" at all, let alone one sound enough to provide a rational basis for HHC's decision to layoff hundreds of tradespeople. For example, Cirillo testified that, after reviewing the Deloitte report, the Steering Committee recommended a 50% staff reduction in certain trades and then asked key people at each facility whether they could "live with" that proposed cut. The Steering Committee did not give the facilities any methodology or guidelines to follow. The various facility managers therefore reached their decisions using whatever criteria they deemed appropriate, assigning whatever weight they chose to whatever factors they deemed relevant. Without guidelines, the Steering Committee could not evaluate the credibility of a particular manager's response or compare one response to another when making its final determination. Further, as Dr. Shershow noted, each manager had a vested interest in accepting a layoff number similar to that proposed by the Steering Committee, as some were actually members of the Steering Committee and some arguably stood to lose their jobs if they rejected the layoff number outright.

Conspicuously absent from HHC's evidence was the testimony of even a single facility manager. The record is devoid of any evidence that any individual facility manager provided to the Steering Committee a reasoned elaboration for his or her determination that a particular facility needed, for example, more carpenters but fewer laborers than suggested by the Steering Committee. Nor did Mr. Cirillo testify that he or another Committee member asked the managers to justify or even explain their decision regarding the number of workers needed in one trade over another.

HHC also failed to adduce evidence that the facilities considered relevant facts before making their decisions. HHC did not direct the facilities to review work orders,

reports of the Joint Commission, City agency inspection reports, overtime records, or other evidence of outstanding work or staffing needed to address the workflow. The Steering Committee did not mandate that the managers analyze the specific ramifications of the proposed staff reductions when measured against the need to maintain safe and sanitary facilities. Nor did it ask each facility to develop a plan to minimize the potential impacts of the layoffs so as to confirm that the layoffs would not jeopardize health and safety. Yet another glaring omission was the failure to consult the various tradespeople who are petitioners here. Involved in the day-to-day repair and maintenance work at the facilities, these workers have valuable insights into existing conditions and the number of people needed to complete particular jobs in a timely fashion.

Not surprisingly considering these deficiencies, what the Steering Committee received back from the facility managers was nothing more than numbers. In some cases, the facility responded that it could manage with a particular proposed cut, in other cases it said the cut was too drastic, and in other cases it proposed an even more drastic cut. As Mr. Cirillo confirmed, the numbers were offered typically in a telephone conversation or brief e-mail with no rhyme or reason provided or requested. In some cases, the responses bordered on the absurd. For example, the manager at Lincoln responded that it could maintain the facility with no laborers whatsoever, a response so illogical that, according to Mr. Cirillo's testimony, even the Steering Committee promptly rejected it. The Committee then decided to lay off one fewer laborer than originally proposed, leaving Lincoln with seven rather than six. No rationale was offered, if one even exists. Just as the Steering Committee failed to direct the facilities to employ a uniform methodology to evaluate the proposed layoffs, so the Steering Committee itself failed to employ a uniform methodology or specific guidelines when deciding whether to accept or reject a particular facility's response to the proposed layoff numbers.

Petitioners' expert Dr. Shershow established through persuasive testimony based on first-hand experience that the Joint Commission requires hospitals to perform an in-depth risk analysis to evaluate the potential impact of proposed staffing changes. He further explained that good practice requires that input be obtained from administrators, medical personnel and supervisors of each trade. As demonstrated above, the record evidence proves that the required analysis simply was not performed here. Particularly absurd is HHC's argument that it sought petitioners' input by giving a copy of the Deloitte report marked "DRAFT" to the head of the unions' Municipal Committee and another to certain councilmembers. Without some explanation of HHC's overall goal and a specific invitation to join the planning process, the unions' receipt of the binder was meaningless. Such is particularly true in light of the complex relationship between the parties and the specific procedures set forth in the collective bargaining agreement governing the nature and manner of negotiations regarding staffing issues.

HHC argued mightily that the Court should reject the testimony of petitioners' witness Mr. Hahn regarding the impact of the proposed layoffs on health and safety. For example, they noted that his facility was far older than the average HHC facility and thus could not be serve as a basis for comparison<sup>7</sup>. Nevertheless, no one can reasonably dispute that the healthcare facilities must be properly repaired and maintained to guard against fire, smoke, and infection hazards. And despite its insistence that work orders are not always an accurate indicator of outstanding conditions of disrepair, HHC cannot reasonably deny that a significant amount of work remains to be done at each of the facilities. Were this not the case, HHC would not have authorized the substantial overtime

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<sup>7</sup> Also, Hahn's testimony was somewhat weakened by the fact that he never visited any of the HHC facilities. This is in contrast with Shershow who knew these hospitals well.

hours that it did in the weeks before the hearing. While some of the overtime may well be attributable to work that can only be completed outside business hours, that purported explanation goes to only a fraction of the rather extraordinary number of hours logged.

The question here is not whether HHC should lay off the number of carpenters, electricians or laborers that it has proposed. Rather, the narrow issue before this Court is whether HHC employed a sound methodology to gather and evaluate all relevant facts and reach a rational decision that insures that its facilities can be safely maintained as required by law. Particularly instructive regarding the standard of review is the First Department's decision in *Council of Trade Waste Associations, Inc. v City of New York*, 179 AD2d 413 (1992), *lv denied* 79 NY2d 755. There the appellate court reversed the lower court and granted Article 78 relief annulling a decision by the City Department of Consumer Affairs (DCA) that lowered the maximum rate that the petitioners (commercial waste carters) could charge their customers for the collection and removal of commercial refuse.

The lower court had found that DCA had "adequately directed its efforts and rate-setting methodologies towards fulfilling its mandate of fixing maximum rates for the removal of refuse by calculating a fair rate of return for waste haulers and protecting consumers from excessive or unreasonable fees." *Id* at 413. However, in the opinion of the appellate court, the court's inquiry needed to go beyond recognizing that the agency's overall goal was an appropriate one to critically examining the details of the analysis performed and the evidence adduced:

[The lower court's] finding glosses over the question of whether the rates ordered by DCA are rationally based and supported by substantial evidence. ... The record supports the conclusion that DCA relied upon assumptions about certain facts that are both contradictory and unrealistic. In addition, it employed inconsistent methodologies to calculate waste industry costs.

*Id* at 413 (citations omitted). The court then proceeded to scrutinize the methodology used by DCA and the conclusions reached, criticizing both as arbitrary and capricious. The Appellate Division then concluded as follows:

Thus, while respondent was not bound to use any single formula or combination of formulas in determining its rates, its use of inconsistent methodologies supports our decision to annul its rate-setting determination. ... While we cannot surmise or speculate as to how or why respondent reached a particular determination, its failure to adequately state a factual basis for many of its conclusions forecloses the possibility of fair judicial review. ... In sum, while judicial review of an administrative determination does not permit the court to substitute its judgment for that of the agency, an arbitrary and capricious action may be annulled when the decision is not based on substantial evidence. ... In the instant case, respondents' failure to produce substantial evidence in support of their rate-setting determination merits an annulment of such determination and a remand to respondent DCA for new rate-setting proceedings.

*Id* at 415-416 (citations omitted).

A similar analysis applies here. While this Court cannot determine whether HHC ultimately can proceed to lay off some or all of the petitioning tradespeople, it can and does determine that HHC failed to produce substantial evidence to support its determination and rebut petitioners' persuasive evidence in their favor. The flaws in HHC's decision-making process detailed above are numerous and profound. They begin with Deloitte, an outside consultant who recommended layoffs as one of 100 possible cost-cutting options, but then acknowledged that the assumptions underlying its cost comparison might be false due to the somewhat unique nature of business operations in New York City. Deloitte also dramatically tempered its proposal by warning HHC that it could not be implemented without "appropriate planning and process" due to the health and safety issues involved.

After only two days of review, HHC's Restructuring Committee rejected 61 options and selected the layoff option, without offering any reasoned elaboration for its decision. It

then reduced the number of layoffs proposed by Deloitte, apparently to minimize the impact on health and safety, but again offered no reasoned explanation as to how it arrived at the numbers it proposed to the facility managers. The Committee then asked the managers whether they could “live with” the proposal, knowing that many of them had helped to devise the proposal and some arguably risked losing their jobs if they voiced serious opposition. What is worse, in a dramatic failing similar to that criticized by the Appellate Division in the waste haulers case, the Steering Committee offered no methodology or guidelines for the facilities’ analysis, resulting in an inconsistent analysis of the relevant criteria such as outstanding work, time needed to complete specific tasks, and the all-important criterion of maintaining health and safety standards — if any analysis was performed at all. The facilities responded with a hodgepodge of numbers, some of which like Lincoln’s were completely nonsensical, and then tweaked them. The Committee did not demand that the facilities justify or even explain their numbers. Nor did HHC persuasively justify its final numbers to this Court with a plan to maintain fire safety and infection control with the reduced staff.

The petitioners established at the hearings that irreparable injury may well occur if the proposed layoffs proceed at this time. The carpenters, electricians and laborers perform vital functions in connection with fire and infection control at the facilities, and their already limited numbers have been working overtime to keep up with the workflow. HHC has not developed a considered plan as to how it will complete the substantial amount of work with the reduced staff. While the use of outside vendors and requirements contracts may fill some of the void, their work is not comprehensive enough to insure compliance with fire and infection control standards. As Alfonso Pistone explained in his affidavit in support of HHC’s answer, requirement contracts are “not for the specific purchase of labor, but for the completion of a specific task that includes labor as a component.” Thus, the

work is more project-based and must be requested in advance following specific procedures and cost limitations. The contacts thus have limited value in connection with routine repairs and maintenance or the typical daily emergency such as replacing wet ceiling tiles to avoid mold when the toilets in the psychiatric ward on the floor above are stuffed with paper and overflow.

The equities here balance in favor of the petitioners. As their testimony and that of their experts established, petitioners' continued employment until HHC develops a proper plan is critical to the maintenance of fire safety and infection control standards at the facilities and the health and safety of patients, staff, and the remaining workers. For example, absent a sufficient number of carpenters to maintain the fire doors in working order, fire or smoke could quickly spread through a facility and seriously injure the patients who cannot escape because they are attached to medical equipment or otherwise have limited mobility. Under the current plan, a crisis would exist during a power outage at Bellevue because HHC has proposed reducing the number of electricians below the number needed to run the emergency generators. And a MRSA infection could rapidly spread from room to room infecting patients without sufficient laborers to seal the penetrations created when piping or wiring is installed. The value of these lives cannot be overemphasized. In contrast, while HHC may be facing a budget deficit, keeping the petitioning workers on staff until an adequate health and safety plan has been developed will not determine the survival of HHC as a corporation.

The Health and Hospitals Corporation is an unique and extraordinary institution. Begun in 1982, it services 1.3 million patients a year in eleven acute facilities in seven networks throughout New York City. Frank Cirillo proudly describes its mission which includes providing quality care without discrimination to all those who enter its doors. So included in that 1.5 million are about 450,000 uninsured people, about half of whom are

undocumented. But Frank Cirillo proudly states that no one is denied care. Because of various issues, including the tremendous economic crisis it and the City is facing, it has become a major challenge to maintain that quality of care and HHC's reputation for providing it.

The last thing this Court wishes to do is to interfere in the administration of these facilities or to increase the challenges ahead. (Those were described in some detail by Mr. Cirillo). But fulfilling that mission to provide quality care certainly involves preserving a safe environment for those people who receive treatment, visit patients, and work there. That is ultimately what this controversy is all about. The Court certainly has no expertise in hospital administration. However, here it is a matter of common sense. The petitioners have credibly proved that these trades do vital work in keeping the hospitals safe and free of dangerous conditions, such as smoke, fire, infection, electrical and other crises, as well as keeping the facilities open and accessible to the public with proper snow removal, working elevators and the like. The petitioners have also proved that the proposed drastic cuts, arrived at in the irrational manner described, will very likely negatively tip the delicate balance now existing in these environments. The respondents' evidence was simply not reassuring on either prong.

Accordingly, it is hereby

ADJUDGED, that the three above-captioned Article 8 petitions are granted, the decision by HHC to lay off the petitioners at this time is annulled, and the matter is remanded to HHC for further evaluation consistent with the terms of this decision. In light of this decision, the request by the City Laborers in the companion Article 78 proceeding for an injunction in aid of arbitration (*Roberts v Aviles*, Index No. 11248/10) is denied as moot.

This constitutes the decision and judgment of the Court. Counsel may pick up their exhibits from the Courtroom 222 within twenty days of the date of this decision.

Dated: November 24, 2010

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J.S.C.  
**ALICE SCHLESINGER**

**UNFILED JUDGMENT**  
This Judgment does not become a part of the Court's records and is not to be used for any purpose. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1018).