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SCANNED ON 12/2/2010

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

PRESENT: MARCY S. FRIEDMAN Justice PART 57

SOCIAL SERVICE EMPLOYEES UNION,

- v -

CITY OF NEW YORK,

INDEX NO. 117885/09

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this motion to/for compel discovery

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED
DEC 01 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11-23-10

MARCY S. FRIEDMAN J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

In the Matter of the Application of

Index No.:117885/09

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, AFSCME, AFL-CIO, FARYCE B. MOORE, as President, and SHARON CARROLL, LENNOX CAMPBELL, JOYCE E. COLEMAN, TAMARA DALEY, ADEBA YO DWOSENI, LINDA JAMES GASKIN, PAULINE MOORE, TONI SHEPARD, KAREN SIMMONS, LORI WADE, REEVA WHITE, ALESIA YOYO, TOUSSAINT WEBB, PEDRO FORLONG, individually and on behalf of others similarly situated, employed by Respondents,

Petitioners,

- against -

CITY OF NEW YORK ADMINISTRATION FOR CHILDREN'S SERVICES, JOHN B. MATTINGLY, as Commissioner, CITY OF NEW YORK DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES (DCAS), and CITY OF NEW YORK,

Respondents.

In this Article 78 proceeding, petitioners challenge respondents' determination laying off petitioners from their Child Welfare Specialist (CWS) and Child Welfare Specialist Supervisor (CWSS) positions with the City of New York Administration for Children's Services (ACS). Petitioners are the President of the Social Service Employees Union, Local 371, and employees who held the titles of CWS or CWSS for at least 10 years. (Pet. ¶ 5.) Although there are only 14 employee petitioners, there were 287 layoffs from these titles. (Id., ¶ 16.) Petitioners move for

discovery.

This Article 78 proceeding arises out of the restructuring of ACS, the agency which provides foster care and preventive services to children and families. In December 2008, as part of the restructuring, the City created two new civil service titles, Program Evaluator (PE) and Child and Family Specialist (CFS). On or about September 14, 2009, respondents announced the layoffs of the 287 CWS and CWSS employees. (Pet., ¶ 16.) According to respondents, the written job descriptions and qualifications for the PE and CFS titles (see Ans. Ex.7) differ from the written job descriptions and qualifications for the CWS and CWSS titles. (See Ans. Ex. 6.) Respondents also claim that, in response to a City-wide mandate, ACS was required to reduce its overall budget and determined that "layoffs should target the positions which were already being eliminated as a result of the restructuring." (Ans., ¶¶ 83-84.) According to petitioners, on September 25, 2009, the positions of the nearly 300 CWS and CWSS employees who were laid off were eliminated, and their job duties were transferred to the PE and CFS titles. (Pet., ¶ 16.)

While respondents contend that they had a rational basis for the layoffs, petitioners allege, inter alia, that the City acted in "bad faith" in abolishing the CWS and CWSS positions and replacing them with the PE and CFS positions, as a means of avoiding the Civil Service Law "preference for appointments according to merit and fitness established by competitive examination." (Pet., ¶ 22.)[1]

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[1]The petition appears at times to challenge the abolition of the CWS and CWSS positions. (See Pet., ¶¶ 17-18.) It also appears to challenge the creation of new job titles or the failure to include a Table of Equivalencies" in the resolution that created the new titles. (Id., ¶ 15.) However, petitioners acknowledge on this motion that "Civil Service Law § 80 permits Respondents to abolish and change positions," but contend that "such actions, including the layoff procedure, may not, as here, be implemented arbitrarily and capriciously in bad faith and/or without regard to seniority." (Discovery Motion, Aff. In Support, ¶ 11.)

In the instant motion, petitioners seek discovery regarding the appointments made by ACS to the PE and CFS positions, and the job duties actually being performed by the appointees.[2] They claim, in effect, that discovery is necessary to enable them to establish their bad faith claim. (See Discovery Motion, Aff. In Support, ¶¶ 13-14.)

Disclosure in an Article 78 proceeding is available only by leave of court. (See CPLR 408.) A party seeking discovery must show that the discovery is "material and necessary to the prosecution" of the proceeding (Matter of Allocca v Kelly, 44 AD3d 308, 309 [1st Dept 2007]), or must demonstrate "ample need" for the disclosure. (See Matter of Shore, 109 AD2d 842 (2nd Dept 1985); Matter of Tivoli Stock LLC v. New York City Dept. of Hous. Preserv. & Dev., 14

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[2]Petitioners served the following discovery request:

"1. Provide a list of all PE and CFS appointments and terminations by date, since December 17, 2008 when these titles were established. Set forth whether the appointments were 'permanent' or 'provisional' and the qualifications of each appointed individual. Did each appointee (especially the 'provisionals') have the new greater requirements identified above? Were they hired off the street, from other agencies, or previously were they CWS or CWSS or other civil service employees? If they previously were CWS or CWSS or other civil service employees, set forth their prior seniority date to appointment.

3. State which CWS and CWSS employees either were transferred or appointed to PE or CFS positions.

5. What was the basis for the determination that the laid off CWS and CWSS would not be 'grandfathered' into the new PE and CFS titles as had been done when they were transferred pursuant to rule 6.1.9? [sic] to the CWS and CWSS titles from Caseworker and Supervisor titles?

6. What have been the actual job duties of the PEs and CFSs (not their job description listed duties)? How are the actual job duties the same or different from the CWS and CWSS employees formerly performing those or substantially equivalent job duties?

7. Identify the prior clinical and supervisory experience, extent of post-graduate experience, research statistical and/or methodology experience and education for each appointed permanent and provisional PE and CFS."

(Discovery Motion, Aff. In Support, Ex. A.) Petitioners have withdrawn items 2, 4, and 8 of the discovery request.

Dept 1985); Matter of Tivoli Stock LLC v. New York City Dept. of Hous. Preserv. & Dev., 14 Misc3d 1207[A] [Sup Ct New York County 2006] affd 50 AD3d 572 [1st Dept 2008].) In reviewing a discovery request the court has "broad discretion" in "balanc[ing] the needs of the party seeking discovery against such opposing interests as expedition and confidentiality." (Matter of Grossman v McMahon, 261 AD2d 54, 57 [3d Dept 1999] [internal quotation marks and citation omitted]. See also Matter of L & M Bus Corp. v New York City Dep. of Educ., 71 AD3d 127 [1st Dept 2009].)

Furthermore, discovery will be denied where the court finds that the petitioner is "not entitled to the relief it seeks" in the proceeding (see Stapleton Studios, LLC v City of New York, 7 AD3d 273, 275 [1st Dept 2004]) or where the respondent has made a showing sufficient to "credibly support" the agency's determination. (See Price v New York City Bd. of Educ., 51 AD3d 277, 293 [1st Dept 2008], lv denied 11 NY3d 702.)

It is well settled that "[a] public employer may abolish civil service positions for the purpose of economy or efficiency" (Matter of Civil Serv. Empls. Assn, Inc., Local 1000 v Rockland County Bd. Of Coop. Educ. Servs., 39 AD3d 641, 642 [2nd Dept 2007]), so long as it does not act "in bad faith." (See Matter of Aldazabal v Carey, 44 NY2d 787 [1978].) Indeed, the determination to abolish a position or to create new positions with differing duties is, in the absence of bad faith, an "undisputed management prerogative for the public's benefit," held by the public employer. (See Matter of County of Chautauqua v. Civil Serv. Empls Assn., Local 1000, 8 NY3d 513, 521 [2007] [internal quotation marks and citations omitted]; Aldazabal, 44 NY2d at 787.)

The party challenging the abolition of a title and subsequent layoffs bears the burden of proving bad faith. (See Aldazabal, 44 NY2d at 787; Matter of Hritz-Seifts v Town of

Poughkeepsie, 22 AD3d 493 [2nd Dept 2005].) Bad faith may be shown by proving that the action was undertaken to circumvent the protections of the Civil Service Law, or by "eliminat[ing] bona fide reasons for the elimination of [the petitioner's] position, [or] show[ing] that no savings were accomplished." (See Matter of Linney v City of Plattsburgh, 49 AD3d 1020, 1021 [3d Dept 2008] [internal quotation marks and citation omitted].) "Bad faith may [also] be demonstrated by evidence that a newly hired person performed substantially the same duties as the discharged employee." (Matter of Civil Serv. Empls. Assn. [Rockland County Bd.], 39 AD3d at 642-643[internal quotation marks and citations omitted]. See Wipfler v Klebes, 284 NY 248 [1940] [decided under predecessor Civil Service Law § 31-b].) The court's inquiry, in determining whether the duties of the newly created position were the same or substantially similar to the duties of the abolished position, is highly fact-specific. (See id.)

Here, petitioners demonstrate that discovery is material and necessary to their claim that the layoffs were made in bad faith. Respondents do not dispute that the job duties in the PE/CFS and CWS/CWSS positions are overlapping. Indeed, they argue that "the layoffs rationally targeted positions which had already been designated to be eliminated due to a restructuring of the way the city administers foster care and child welfare services that began in 2006." (Memo. Of Law In Support of Ans. at 5.) Moreover, as respondents do not dispute that provisional employees have been hired for the new positions, an issue exists as to whether they meet the eligibility requirements for permanent appointment.

While positions are not "the same or similar" when they have different certification requirements (see Matter of Civil Serv. Empls. Assn. [Rockland County Bd.], 39 AD3d at 642-643), information as to the qualifications actually possessed by the persons hired for the PE and

CFS positions is within respondents' exclusive knowledge, as is information as to the duties actually performed by such persons, and the extent to which those duties overlap with the duties required of employees in the CWS and CWSS positions.

Summary disposition of the petition should be held in abeyance until petitioners have had the opportunity to conduct limited discovery on these issues. (Cf. Integrated Logistics Consultants v Fidata Corp., 131 AD2d 338 [1st Dept 1987]; Simpson v Term Indus., Inc., 126 AD2d 484 [1st Dept 1987] [holding summary judgment motion in abeyance where facts necessary to oppose motion may exist but are within the exclusive knowledge or control of moving party].)

Respondents shall respond to petitioners' discovery requests numbered 1, 3, 6, and 7. Request number 5 is struck as irrelevant. In addition, petitioners submit no authority that they are entitled to discovery of the motivations of the agency or its internal deliberative processes.

It is accordingly hereby ORDERED that petitioners' motion for discovery is granted to the extent of directing respondents to provide petitioners with the discovery authorized above, within 30 days after service upon respondents of a copy of this order with notice of entry. Upon the completion of discovery, the parties shall telephone chambers to schedule further proceedings.

This constitutes the decision and order of the court

Dated: New York, New York
November 23, 2010

MARCY FRIEDMAN, J.S.C.