Melish v Health & Hosps. Corp.
2011 NY Slip Op 34276(U)
July 19, 2011
Supreme Court, New York County
Docket Number: 100624/2011
Judge: Carol R. Edmead
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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STEPHEN MELISH, as President and on behalf of Local Union no. 1969, CIVIL SERVICE EMPLOYEES, DISTRICT COUNCIL 9, I.U.P.A.T., AFL-CIO, JAMES MARKEY and STEVEN SICCA, individually and on behalf of those similarly situated,

Index No. 100624/2011

Petitioners,

-against-

DECISION/ORDER

HEALTH AND HOSPITALS CORPORATION and ALAN AVILES, as President,

Respondents.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

This Article 78 proceeding challenges the decision by respondent Health and Hospitals Corporation ("HHC") to lay off 44 Painters, Supervisor Painters, and Glaziers (collectively referred to as "Painters" or "Petitioners") on September 17, 2010.[1]

Factual Background[2]

HHC provides medical, mental health and substance abuse services through its 11 acute care hospitals, four skilled nursing facilities, six large diagnostic and treatment centers and more than 80 community-based clinics (Petition, ¶14).

Petitioner Stephen Melish is the President of Local Union No. 1969 ("Local 1969," or "the Union"), which is the exclusive bargaining representative for Painters employed by HHC.

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[1] Respondent Alan Aviles is the President of the New York City Health and Hospital Corporation.

[2] The Factual Background is taken, in large part, from the petition and memorandum of law in support of the petition.

[* 2]

Petitioner James Markey ("Markey") is the Vice President of the Union and was employed by HHC at Queens Hospital as a permanent Painter until he was laid off on September 17, 2010. Petitioner Steven Sicca ("Sicca") is currently a Supervisor Painter employed by HHC at Elmhurst Hospital.

Prior to the layoffs, HHC engaged Deloitte Consulting LLC ("Deloitte") to restructure HHC in a manner that would reduce the costs of operation while providing sufficient access to care. Based on Deloitte's report, HHC decided to lay off electricians, carpenters, laborers and those in related titles at HHC, in addition to the Painters who are the subject of this proceeding.

In response, the unions of electricians, carpenters, laborers and related employees filed three separate special proceedings seeking a Temporary Restraining Order and permanent injunction, enjoining HHC from laying off members of their respective unions. By Decision and Judgment dated November 24, 2010, the Court (Schlesinger, J.) granted the petitions and annulled HHC's decision to lay off the affected trade staff since "the proposed drastic cuts [were] arrived at in [an] irrational manner" and HHC's determination regarding the reduction of the trade staff was arbitrary and capricious.[3]

In support of the instant petition, petitioners contend that HHC's determination to lay off the 44 Painters is arbitrary and capricious pursuant to CPLR 7803(3). Petitioners argue first, that the determination contravenes New York Unconsolidated Laws ("UL") §§ 7382 and 7385(7),

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[3] Petitioners assert that the Union members subject to this action are similarly situated to the employees represented in the three above-referenced actions in the matter decided by Justice Schlesinger. The facts and circumstances in the instant action are similar and the processes utilized by HHC are identical to those which affected the layoffs of the Local 1969 layoffs. Petitioners contends that since the same process was utilized by HHC to determine which members of the Union should be laid off, Justice Schlesinger's ruling should be followed. (Petition, ¶¶53-55). In light of the Appellate Division's determination, the Court is disinclined to follow petitioners' suggestion that it follow Judge Schlesinger's decision.

which require HHC to "operate, manage, superintend, []control, . . . repair, maintain and otherwise keep up" their facilities, and deliver "comprehensive care and treatment" through the operation and construction of hospitals and other health facilities. By reducing the current levels of Painters, the remaining Paint staff is ill-equipped to handle day-to-day operations, thereby jeopardizing the remaining painters, staff and the public. Second, the determination was not made in good faith, but rather to circumvent the requirements of the merit and fitness clause of the New York State ("NYS") Constitution (NY Const, Art V, §6). The unexamined private contractors HHC seeks to use do not constitute an "equally meritorious" alternative. Third, the determination contravenes UL §§ 7382 and 7385(7), as well as New York Public Health Laws ("PHL") 2800 and 2803 and New York Code of Rules and Regulation ("NYCRR") § 702.1, requiring HHC to properly maintain their health facilities and physical plants. Fourth, HHC's determination has been made in haste and without proper prior evaluation, assessment or consideration of the grave and imminent dangers that will be posed to the remaining Painters who have not been laid off, other staff members, patients, and the public when the positions in question were abolished in violation of 10 NYCRR § 405.24 which requires HHC to maintain the grounds and physical plants in a manner to "assure a safe and suitable environment."

Petitioners seek reinstatement of all laid off Painters because HHC's determination will result in irreparable injury to patients, staff (including the remaining Painters) and the public, who make use of the affected health facilities. Patients, staff and the public continue to be exposed to the serious and unacceptable risks posed by understaffing in this trade that patches, paints, coats, prepares, fills, spackles, tapes, plasters, and primes patients' rooms, fire stops, hallways, and hospital wards. Painters argue that they play a critical role in both infectious

control and fire prevention and containment. Painters make rooms habitable again for patients after a fire in a particular area of the hospital, perform essential functions to ensure the safety of patients, staff members, and the public related to both asbestos abatement and lead paint clean up and removal. Painters must be able to identify asbestos and recognize when work should be stopped to allow for the asbestos crew to come in to secure the area. If these areas of the hospitals are not properly monitored, and maintained, serious injury and death could result through spread of fire, infection, and exposure to asbestos or lead paint, along with various related injuries from unskilled preparation, installation and maintenance.

Further, petitioners argue that HHC relied on a flawed and wholly arbitrary and capricious decision-making process to determine which facilities would suffer reductions to their Paint shops and which titles, positions, and employees would be laid off.

Therefore, petitioners seek a judgment (1) adjudging and declaring respondents' actions to be arbitrary, capricious, and in violation of New York Unconsolidated Laws §§ 7382 and 7385(7), New York Public Health Laws §§ 2800 and 2803, and NYS Health Department Regulations, including 10 NYCRR §§ 405.24(a) and 702.1; (2) preliminarily and permanently restraining and enjoining respondents, their officials, agents, employees and all other persons in active concert or participation with them, from continuing any order that, directly or indirectly, abolishes the 44 Painters, Supervisor Painters, and Glazier positions specified above; (3) directing that respondents, their officials, agents, employees, and all other persons in active concert or participation with them, reinstate the affected petitioners to their respective positions, with full back-pay and benefits and that they be made whole in every way; (4) ordering respondents, their officials, agents, employees, and all other persons in active concert or

participation with them, to comply with the provisions of New York Unconsolidated Laws §§ 7382 and 7385(7), New York Public Health Laws §§ 2800 and 2803 and NYS Health Department Regulations, including 10 NYCRR §§ 405.24(a) and 702.1, requiring respondents (a) to operate, manage, superintend, control, repair, maintain and otherwise keep up their health facilities, (b) to maintain their health facilities' physical plant in a manner to assure a safe and suitable environment for patients, and (c) to maintain, in particular, patient areas including rooms, corridors, and hospital wards; and (5) granting costs and disbursements of this proceeding, including attorneys' fees incurred by them in connection with this action.

In response, HHC cross moves to dismiss the petition pursuant to CPLR 7804(f), 404(a), 2133(a)(2) and 3211 (a)(7) on the grounds that (1) petitioners lack standing, (2) petitioners' claims are nonjusticiable, (3) petitioners are not entitled to injunctive relief under Public Health Law, and (4) petitioners fail to state a claim for violation of the merit and fitness clause of the NYS Constitution.[4] In support of their standing defense, respondents argue that the alleged injuries are too speculative, and thus, petitioners have not suffered an injury in fact. Further, the alleged injuries do not fall within the zone of danger protected by the statute invoked, and petitioners failed to show that they would suffer an injury different from that of the public. HHC also argues that the petition presents a nonjusticiable controversy, in that HHC's decision to order priorities and allocate resources by laying off staff is judicially unreviewable. Decisions on matters regarding the allocation of scarce resources are entrusted to the Executive Branch and are nonjusticiable absent extraordinary or emergency circumstances, which have not been

[4] Respondents also sought, in the alternative, a stay of the instant proceeding pending the resolution of the appeal of the three aforementioned proceedings, which this Court granted in the interim of this proceeding.

[* 6]

demonstrated. Further, as petitioners only allege that the layoffs threaten to violate the Public Health Law, and no violations have since occurred, they have failed to state a claim for injunctive relief pursuant to Public Health Law 2801-c. Finally, caselaw provides that municipal subdivisions are free to contract with private industry for the rendition of work and there is no requirement in the New York State Constitution that all services provided to such a subdivision be performed by persons directly employed by it.

Petitioners reply that they have standing, the issues raised are justiciable and subject to the emergency exception in any event, that HHC has violated the Public Health Law, and that HHC has violated the merit and fitness clause of the NYS Constitution.

HHC reiterates its bases for dismissal, and seeks leave to interpose an Answer in the event dismissal is denied.

Discussion

Since the petition was filed, the Appellate Division decided the appeal of the three cases decided by the Court (Schlesinger, J.) and reversed the Court's determination.

A review of the Appellate Division's decision reveals that the same arguments and statutory claims made by petitioners herein were advanced and specifically addressed by the Appellate Division. Precisely, in a unanimous decision, the Appellate Division stated:

> The Dromm petitioners seek an order pursuant to CPLR 6301, 7803 and 7805, and Public Health Law (PHL) § 2801–c, preliminarily and permanently enjoining HHC from abolishing one-third of its carpentry staff. Petitioners argue that the decision to abolish these positions violates McKinney's Unconsolidated Laws of N.Y. §§ 7382 and 7385(7) (HHC Act 75[7], as amended), which require HHC to operate, manage, superintend, control, repair, maintain and otherwise keep up its health facilities. They also claim violations of PHL §§ 2800 and 2803, as well as specified Department of Health Regulations promulgated thereunder at 10 NYCRR 405.24, 702.1, 702.2, 702.3, 711.2 and 711.4. These regulations require HHC to maintain its health facilities in a manner so

as to assure a safe and suitable environment for patients. Petitioners argue that HHC's decision to reduce its maintenance staff will create an unsafe condition for patients and staff members who remain employed at the affected facilities. It is claimed that HHC's decision demonstrates a failure to perform a duty enjoined upon it by law-namely, the maintenance of its facilities in a safe condition-and thus brings the petition within the ambit of CPLR 7803(1) and (3).

*3 The Fitzpatrick petitioners claim that HHC's scheduled layoffs would threaten the safety of electricians who retained their jobs. They seek declaratory and injunctive relief on substantially the same grounds as alleged in Dromm. Additionally, they claim that the scheduled layoffs would violate the Merit and Fitness clause of the New York Constitution, article V, § 6, because HHC allegedly planned to hire private contractors to perform the work of laid-off HHC electricians. They also claim that HHC's layoff procedures violated its Personnel Rules and Regulations, Rule 7.6.3. (*Roberts v Health and Hospitals Corp.*, --- N.Y.S.2d ----, 2011 WL 2637696).

Petitioners herein allege identical claims.

The Appellate Division proceeded to address whether petitioners therein had standing, and whether the petition presented a justiciable controversy. The Court also addressed whether the decision to lay off the employees was arbitrary and capricious.

On the issue of standing, the Appellate Division stated that "petitioners' claim that the scheduled layoffs would leave HHC so short-staffed that HHC facilities would inevitably violate Public Health Law article 28, thus exposing them to 'imminent' risk from 'smoke, fire, bacterial, toxic and structural hazards,'" is speculative. Likewise here, the potential for "serious and unacceptable risks posed by understaffing" is speculative. Painters argue that they play a critical role in both infectious control and fire prevention and containment. There is no indication that injuries to the staff, patients and public are "imminent" or reasonably certain to occur as a result of the layoffs, and as respondents point out, petitioners cannot show a single incident that posed a risk to the remaining staff, patients, or public since the layoffs occurred months ago.

Additionally, the Appellate Division found that petitioners did not fall within the "zone of

interests or concerns sought to be promoted or protected by the statutory provisions under which HHC acted" (*5). Like the petitioners in the Appellate Division case, the Painters herein cite to provisions that benefit and protect patients in hospitals and other medical facilities (*i.e.*, 10 NYCRR 702.1 [regulating the manner in which ventilation, heating, air conditioning, and air changing systems are maintained];10 NYCRR 405.24 [a] ["Building and grounds. Facility grounds and physical plant shall be maintained in a manner to assure a safe and suitable environment for patients"]).[5] Any incidental benefits received by HHC staff is insufficient to confer standing upon petitioners.

As to the issue of justiciability, the Appellate Division, citing UL 7382, also held that the decision to lay off workers falls "squarely within HHC's executive function" and was not subject to judicial review.

Further, the Appellate Division held that even assuming petitioners had standing, HHC's decision to lay off workers was not arbitrary or capricious, but was "rational in light of the imperative to reduce costs in conjunction with its mandate to provide medical services to all." (*9). The report by Deloitte relied upon by HHC to lay off the Painters herein was the same report relied upon by HHC in deciding to lay off the workers who were the subject of the Appellate Division decision. HHC's use of Deloitte's services to reach its decision demonstrated that HHC's "staffing determination had a rational basis." (*10).

Therefore, this Court likewise finds that the petitioners lack standing, the petitioners raise a nonjusticiable controversy, and that in any event, HHC's decision to lay off the Painters is not

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[5] As the Appellate Division also stated, UL §§ 7382 and 7385(7) do not impose "enforceable legal duties upon HHC" and in any event, PHL §2801-c offers no basis for injunctive relief under the circumstances.

arbitrary or capricious.

Conclusion

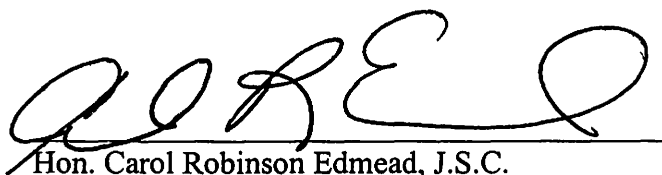
Based on the foregoing, it is hereby

ORDERED that the petition is denied; and it is further

ORDERED and ADJUDGED that the cross-motion to dismiss the petition is granted, and this proceeding is dismissed.

This constitutes the decision, order and judgment of the Court.

Dated: July 19, 2011



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD