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

PRESENT: _____ PART _____

Index Number : 402934/2006

NEW YORK CITY HEALTH &

vs

BRD OF CERTIFICATION FOR THE

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 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 has been consolidated with motion sequence 002 and decided in accordance with the accompanying memorandum decision.

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

Dated: 4/23/07

4
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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In the Matter of the Application of
THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

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

Index No. 402934/06

-against-

THE BOARD OF CERTIFICATION OF THE CITY OF NEW YORK; MARLENE GOLD, as Chair of the Board of Certification of the City of New York; DISTRICT COUNCIL 37, AFSCME, AFL-CIO; VERONICA MONTGOMERY-COSTA, as President of District Council 37, AFSCME, AFL-CIO; LOCAL 1180, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; ARTHUR CIIELIOTES, as President of Local 1180, Communications Workers of America, AFL-CIO; ORGANIZATION OF STAFF ANALYSTS, and ROBERT CROGHAN, as President of the Organization of Staff Analysts,

Respondents.

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TOLUB, J.:

In this Article 78 proceeding, motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence 001, petitioner the New York City Health and Hospitals Corporation (HHC) seeks a judgment pursuant to CPLR § 7803, annulling the determination of the Board of Certification of the City of New York (the Board), Decision No. 5-2006, dated June 22, 2006. The respondents in this proceeding are the Board; Marlene Gold, as Chair of the Board; District Council 37, AFSCME, AFL-CIO (DC 37); Veronica Montgomery-Costa, as President of DC 37;

Local 1180, Communications Workers of America, AFL-CIO (Local 1180); Arthur Cheliotes, as President of Local 1180; Organization of Staff Analysts (OSA); and Robert Croghan, as President of OSA.

In Motion Sequence 002, the Board and Gold seek a judgment pursuant to CPLR § 7804 (f), dismissing the petition and upholding the Board's determination.

FACTS

On October 16, 2003, OSA filed a petition for certification seeking to represent employees in the titles of Enrollment Sales Representative Levels I, II, and III (ESR). ESRs are employed at MetroPlus Health Plan, Incorporated (MetroPlus), a subsidiary of HHC. They work in the following divisions of MetroPlus: marketing, customer service and community relations, medical management, corporate affairs, and MIS. Within those divisions, they serve in a variety of functional titles, including marketing representative, customer service representative, quality assurance representative, and provider relations representative.

MetroPlus is a health maintenance organization that offers MetroPlus Gold, a product for HHC employees. It also offers several New York State-sponsored health insurance programs, including Medicaid Managed Care, Child Health Plus, Family Health Plus, and Partnership in Care, an HIV special needs plan.

On January 29, 2004, DC 37 filed a motion to intervene, seeking to add the ESR titles to its bargaining unit. On April 26, 2004, Local 1180 filed a motion to intervene, seeking to add the ESR titles to its bargaining unit. After a hearing was held, the Board found that ESRs were eligible for collective bargaining, and it ordered an election concerning unit placement.

HHC contends that the Board's determination was affected by an error of law because

ESRs are excluded from the definition of public employees under Civil Service Law § 201 (7) (a) as a result of their exposure to confidential proprietary marketing information, and as such are ineligible for collective bargaining. HHC also contends that respondents' representation of ESRs would cause an inherent conflict of interest "inimical to the bargaining process." They further contend that the Board's determination, which compels the unionization of employees that cannot be represented under a collective bargaining agreement, violates public policy.

Respondents OSA and Croghan argue that HHC is not entitled to an annulment of the Board's determination because it was made in conformity with all applicable laws, rules, and regulations. They further argue that HHC has failed to articulate any countervailing public policy arguments to the Taylor Law, a law that gives public employees the right of self-organization. OSA and Croghan assert that the petition, in essence, claims that the Board's determination was not supported by substantial evidence, and thus this proceeding should be transferred from this court to the Appellate Division for disposition as required under CPLR 7804 (g). OSA and Croghan further assert that this proceeding is frivolous and, consequently, they seek an award of costs and sanctions pursuant to Section 130-1.1 of the Rules of the Chief Administrator of the courts.

Respondent DC 37 asserts that HHC is not entitled to vacatur of the Board's determination because its decision was made in conformity with all applicable laws, rules, and regulations, and was neither arbitrary, capricious, nor an abuse of discretion. DC 37 further asserts that HHC's position ignores the unequivocal public policy of this state which seeks to encourage and protect the right of public employees to organize and bargain collectively.

DISCUSSION

The petition is dismissed. There was a rational basis for the Board's determination and the action complained of was neither arbitrary or capricious (*see Matter of County of Nassau v Nassau County Pub. Empl. Relations Bd.*, 283 AD2d 428 [2d Dept 2001]). In addition, the petition fails to assert a substantial evidence argument as grounds to annul the Board's determination, and hence this court remains the proper venue to dispose of the issues addressed within this proceeding.

As a preliminary matter, OSA and Croghan assert that although the petition raises issues such as public policy and errors of law, the petition in essence claims that the Board's determination was not supported by substantial evidence. Thus, they assert that this proceeding should be transferred to the Appellate Division for disposition as required under CPLR § 7804 (g).

CPLR 7804 (g) provides:

> Where the substantial evidence issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. Where such an issue is raised, the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations, and res judicata, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced.

The statute specifies that, "where the substantial evidence issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of

the issues in the proceeding" (CPLR 7804 [g]). Here, the petition raises issues involving public policy and errors of law. It fails to assert a substantial evidence argument as grounds to vacate the Board's determination. Therefore, judicial review of the Board's administrative determination is limited to the grounds invoked by HIIC in its petition (*see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Serv.*, 77 NY2d 753, 758 [1991]).

However, respondents OSA and Croghan assert that this case is subject to being transferred to the Appellate Division because the Board's determination was made as a result of a hearing held, at which time evidence was taken, by direction of law, thereby bringing into question whether said determination was supported by substantial evidence.

The scope of review in this proceeding is not whether there was substantial evidence in support of the Board's determination (*see* CPLR 7803 [4]), but rather, whether the determination had a rational basis, and was not arbitrary or capricious (CPLR 7803 [3]; *see Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v New York State Pub. Empl. Relations Bd.*, 34 AD3d 884, 885 [3d Dept 2006]).

OSA and Croghan err in characterizing the Board's hearing as one at which evidence was taken pursuant to direction of law, on the entire record, and unsupported by substantial evidence. Where, as here, a public employer submits an application that seeks a designation by the Board to classify certain individuals as managerial or confidential employees, the Board has the power and duty to adopt rules and regulations for the conduct of its business which include rules relating to the standards for the determination of bargaining units (New York City Administrative Code § 12-309 [b] [6]). That incorporates the power to hold hearings (Administrative Code § 12-309 [b] [5]). Here, the Board's granting of a hearing to determine an ESR's representation status is

merely discretionary, and it is not pursuant to direction by law (*id.*). Therefore, if an agency does not have a nondiscretionary duty to provide a petitioner with a hearing, the petitioner need only be given an opportunity to be heard and to submit whatever evidence he or she chooses (*see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Serv.*, 77 NY2d 753, *supra*). Moreover, that agency may consider whatever evidence is at hand, whether said evidence is obtained through a hearing or otherwise (*id.*).

Turning now to this court's review of the Board's determination, the Civil Service Law empowers New York City to administer its provisions through whatever form of administration it chooses to prescribe in its city charter (Civil Service Law §15 [1] [a]; [4]). The New York City Charter, in turn, has established the Office of Collective Bargaining, the Board of Collective Bargaining, and the Board of Certification with powers and duties with respect to labor relations and collective bargaining (New York City Charter § 1173). It is the Board of Certification that has the power and duty to determine whether specified public employees are managerial or confidential under Civil Service Law § 201 (7), and thus ineligible for collective bargaining (Administrative Code § 12-309 [b] [4]). Civil Service Law § 201 (7) (a) provides in part:

> Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii)."

In interpreting that statute, courts and the Board have held that to be deemed

"confidential" within the meaning of Civil Service Law § 201 (7) (a) (ii), an employee must assist and act in a confidential capacity to a managerial employee who performs the statutorily enumerated labor relations responsibilities for managerial employees, including collective bargaining negotiations, contract administration, and personnel administration (*Matter of Lippman v Public Empl. Relations Bd.*, 263 AD2d 891, 902 [3d Dept 1999]). In addition, the designation of a worker as a confidential employee incorporates a two-part test and both prongs must be satisfied prior to a worker's denomination as confidential: (1) the employee to be designated must assist a Civil Service Law § 201 (7) (a) (ii) manager in the delivery of labor relations duties described in that subdivision; and (2) the employee assisting the section 201 (7) (a) (ii) manager must be acting in a confidential capacity to that manager (*id.*).

Here, the Board conducted a hearing and investigation over an 11-day time period. During that investigation, testimony was heard from several ESRs, their supervisors, and employees in titles represented by OSA and DC 37. After applying the standard set forth in both the Taylor Law and the New York City Charter, the Board determined that ESRs do not assist and act in a confidential capacity to a manager who directly assists in the preparation for and conduct of collective bargaining negotiations. The Board also determined that ESRs do not have a major role in the administration of collective bargaining agreements or personnel administration (Exhibit A to Verified Answer of DC 37, pages 39-45). Therefore, the record is sufficient to establish that the Board's decision was neither arbitrary or capricious (*Matter of Lippman v Public Empl. Relations Bd.*, 263 AD2d 891, *supra*).

HHC also argues that the subject employees' status should have been deemed confidential given their access to special marketing information, research, and strategies

employed to enroll HHC employees in health benefit plans. HHC also points to the fact that the unions who seek to represent ESRs are also on the board of MetroPlus's competitors, namely the Municipal Labor Committee (MLC), and that the members of MLC participate in the selection of health care plans offered to HHC employees, which results in a conflict of interest.

The evidence in the record establishes that marketing to HHC employees can occur once a year, during the designated transfer period, but that there is no evidence that ESRs in the Marketing Division assist and act in a confidential capacity to the Associate Director of Marketing (Exhibit A to Verified Answer of DC 37, pages 40-45). More importantly, the record is devoid of any evidence establishing that the Associate Executive Director of Marketing is involved in collective bargaining negotiations or plays a significant role in the administration of collective bargaining agreements or personnel administration (*id.*). Instead, the record demonstrates that the marketing research and enrollment strategy information to which some ESRs are privy is unrelated to labor relations where it involves marketing to the uninsured or Medicaid consumers who are found to be eligible for MetroPlus's New York State-sponsored health insurance programs (*id.*). Consequently, there was a rational basis for the Board's decision which determined that an ESR's access to personnel records in providing health coverage to employees were insufficient factors to merit a confidential designation.

HHC's public policy argument is unpersuasive. Courts have steadily held that the exclusion of managerial and confidential employees is an exception to the Taylor Law's strong policy of extending coverage to all public employees, and that exclusion is to be read narrowly, with all uncertainties resolved in favor of coverage (*Matter of Lippman v Public Empl. Relations Bd.*, 263 AD2d at 904). Furthermore, HHC failed to articulate any countervailing public policy

to the Taylor Law's protection.

Respondent OSA and Croghan's request for sanctions against HHC is denied. The power of the courts to impose sanctions is discretionary and a finding that conduct is frivolous is a prerequisite to the imposition of sanctions (22 NYCRR § 130-1.1[a]). Rule 130 defines conduct as frivolous if it is "completely without merit in law or and cannot be supported by a reasonable argument for an extension, motivation, or reversal of existing law; undertaken primarily to delay or prolong the resolution of the litigation; or it asserts material factual statements that are false" (22 NYCRR § 130-1.1). Here, the petition's allegations fail to satisfy this standard.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of this court.

Dated: 4/23/07

ENTER:

WALTER B. TOLUB J.S.C.

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).