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

PRESENT: Hon. BARBARA R. KAPNICK Justice PART 12

Communications Workers of America, Local 1180

- v -

City of New York

INDEX NO. 109849/01

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits

Replying Affidavits

SCANNED

APR 03 2002

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: 3/26/02

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

BARBARA R. KAPNICK
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12

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LOCAL 1180, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioner,

For a judgment Pursuant to Article 75 of the Civil Practice Law and Rules,

- against -

THE CITY OF NEW YORK and THE HUMAN RESOURCES ADMINISTRATION OF THE CITY OF NEW YORK,

Respondents.

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DECISION/ORDER
Index No. 109849/01
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

Motion sequence nos. 001, 002, and 003 are consolidated for disposition.

In motion sequence no. 001, petitioner Local 1180, Communications Workers of America, AFL-CIO ("Local 1180") moves, pursuant to CPLR 7502(c), for a preliminary injunction barring respondents City of New York (the "City") and The Human Resources Administration of the City of New York ("HRA") from implementing a reorganization of job titles in HRA's income maintenance centers (now renamed "Job Centers"), pending the conclusion of an arbitration proceeding in which Local 1180 is challenging that reorganization. In motion sequence no. 002, Local 371, District Council 37 ("Local 371") moves, pursuant to CPLR 1013(a) and (b),

for leave to intervene in this proceeding.[1] In motion sequence no. 003, petitioner moves to have the respondents held in contempt for having continued to transfer employees to the new job titles, despite this court's temporary restraining order dated May 18, 2001, restraining them from implementing the new title.

Backsround

Petitioner Local 1180 is the certified collection bargaining organization representing approximately 6,000 employees of the City in various agencies, including HRA. Among the titles represented by Local 1180 is the title Principal Administrative Associates ("PAA").

Respondent HRA is the agency of the City which provides food stamps, Medicaid, child support enforcement, welfare and employment services for the city. The HRA employs approximately 1970 CWA members in the PAA title.

On or about October 10, 2000, the City informed representatives of Local 1180 and other unions representing City employees that it was intending to re-organize the Income Support Units in the Family Independence Administration. In the process, it plans to unify the income support and employment service sections of the Income Support Centers or Job Centers. The plan also includes the creation of several new job titles - "Job

[1] This motion was previously granted on the record.

Opportunity Specialist" ("JOS") and "Associate Job Opportunity Specialist" I, II and II ("AJOS").

The City apparently intends to fill the AJOS positions with employees currently in existing job titles in HRA - Supervisor I, II and III and PAA I, II and 111. Specifically, the AJOS I title will be filled by PAA I incumbents or Supervisor I incumbents; the AJOS II title, with PAA II and Supervisor II titles, and the AJOS III title, with PAA III and Supervisor III titles.

The creation of the new titles requires that the New York City Office of Collective Bargaining ("OCB") certify the bargaining representative for those titles. Local 1180, which represents the PAAs, and Local 371, which represents the Supervisors, seek to become the bargaining representative of the AJOS as well.

In the underlying arbitration, Local 1180 contends that the job duties of the various AJOS levels are substantially the same as those of the corresponding PAA levels, and that, accordingly, the appointment of Supervisors to AJOS positions violates Appendix C of the PAA contract, which requires that:

> [i]n an Income Support unit ..., any vacancy for which the job duties have remained substantially unchanged, which was formerly held by an employee in the [PAA] or predecessor title and which the Employer decides to fill shall be filled by an Employee in the [PAA] or predecessor title.

Local 1180 also contends that HRA's plan to transfer those PAAs who

do not apply to be, or who are not selected as AJOSs, to work sites other than the income support units, violates Article X, Section 2(a)(ii) of the PAA contract, which provides, in relevant part, that:

> [p]rior to filling through promotion, appointment or reassignment, vacant positions in the titles of [PAA]... or any title represented by Local 1180 which has assignment levels, the agency shall consult its Transfer and Reassignment Request File and give due consideration for transfer or reassignment to all qualified applicants, including their seniority, whose requests are contained in said file.

Respondent HRA contends that its core mission and focus has evolved over the last several years, and it has realized the need to take the formerly separate functions of eligibility determination, employment services and social service monitoring and incorporate them into a single title series-namely the new JOS. HRA claims that until the creation of the JOS title series there was no one person who counseled clients, assessed their barriers to employment, helped them identify day care, resolve transportation issues, benefit problems, attendance problems and other related issues. Nor was there any one person dedicated to assisting clients in making the transition from welfare to work. The JOS title was allegedly designed to address this situation.

HRA further contends that contrary to petitioner's assertions, the duties of the JOS titles are substantially different from the duties which are currently performed by the PAA and Supervisor Titles. Therefore, by its own terms, Appendix C to the PAA

contract does not apply, as it relates only to instances where "job duties have remained substantially unchanged."

Discussion

Petitioner's Motion for a Preliminary Injunction

CPLR 7502(c) provides, in relevant part, that:

> [t]he supreme court in the county in which an arbitration is pending, ... may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.

Petitioner argues that for the following five reasons, a preliminary injunction is required in order that an eventual award in petitioner's favor not be rendered ineffectual: (1) respondents are unlikely to reverse the transfer of hundreds of employees; (2) if OCB decides, prior to the issuance of an award, that a bargaining representative other than petitioner will represent incumbent AJOSs, petitioner will lose hundreds of members (and their union dues), and petitioner's ability to represent its remaining members will be prejudiced; (3) the ability of PAAs who become AJOSs to transfer to other job sites will be compromised because, although there will be many more PAA positions available throughout City agencies than there will be AJOS positions, those in the AJOS titles will be able to transfer only to another Job Center; (4) accordingly, PAAs who convert to the corresponding AJOS title will forego transfers and promotions to PAA titles in other

HRA locations or in other City agencies, as those become available; and (5) PAAs who are not selected for an AJOS position, and who, therefore, will be involuntarily transferred out of the Job Centers, will be unable to return to their former job sites because PAAs with greater seniority or better qualifications will have filled their former positions in the AJOS titles.

Respondents contend, however, and Stuart Eber, HRA Deputy Commissioner for Income Security Programs in the Medical Assistance Programs, and Project Director for the JOS Rollout avers, that the New York City Department of Citywide Administrative Services ("DCAS") has created alternate title codes such that for every HRA employee who moves to a JOS or an AJOS title, respondents will be able to identify the employee's former title, which union represents the employee, what benefit package the employee is to receive, and to what title the employee should be returned if the arbitrator so orders. The alternate title code will also be used in instances where the employee elects within the first six months not to continue in the new JOS or AJOS title, and where the employee fails the probationary period. Thus, although respondents acknowledge that to return all the PAA and Supervisor volunteers who move to an AJOS title to their former titles would be a complex task, they insist that it can be done, and, that if the arbitrator rules for the Local, it will be done. Petitioner has submitted no evidence to the contrary.

Mr. Eber further asserts that a PAA who moves to an AJOS title will not, thereby, lose the qualifications of a PAA, and that such an employee will, therefore, remain eligible for all transfers or promotions for which that employee would have been eligible had he or she not moved to the AJOS title.[2] As to these issues, too, petitioner has provided no evidence to the contrary.

HRA also contends that a loss to petitioner of those PAAs who become AJOSs would occur only if OCB certifies a union other than petitioner to represent the AJOSs, and such a loss would be relevant here only if the OCB certification precedes the issuance of any arbitration award. Even then, such a loss would be relevant here only with respect to the interval between the OCB certification and the issuance of an arbitral award.

In addition, while the loss of membership and dues to a union local which is facing important contract negotiations suffices to render a future arbitral award ineffectual (Fanarav. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 205 Misc 538 [Sup. Ct., Broome County 1954]), petitioner has produced no evidence that it will be involved in any contract negotiations in the near future. Accordingly, the prospective limited loss to petitioner of those **PAAS** who become **AJOSs** does not suffice to render an eventual award to petitioner ineffectual.

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[2] The transfer of an employee from a JOS title back to a PAA title, or to another title, would be accomplished pursuant to DCAS rule 6.1.9.

See, New York City Off-Track Betting Corp. v. New York Racing Assoc., Inc., 250 A.D.2d 437 (1st Dep't 1998) (loss of revenue alone would not render award ineffectual); compare, Matter of **H.I.G.** Capital Management., Inc. v, Ligator, 233 A.D.2d 270 (1st Dep't 1996) (preliminary injunction warranted to prevent uncontrolled disposal of assets subject to arbitration); Toal v. Brown, 181 A.D.2d 581 (1st Dep't 1992) (risk of death justifies injunctive relief); Suffolk Countv Patrolmen's Benevolent Assn. v. County of Suffolk, 150 A.D.2d 361 (2d Dep't 1989) (injunction warranted where effectiveness of petitioner's sole trustee might be undermined during pendency of his transfer).

Respondents acknowledge that those PAAs who do not volunteer to be, or who are not selected as, AJOSs will be transferred out of the Job Centers. In addition, although respondents insist that in the event of an arbitral award in favor of the Local, such PAAs as will have become AJOSs will be returned to their old titles, neither such PAAs, nor the PAAs who will have been transferred out of the Job Centers, may be able to return to their old job sites. However, the possible inability to return to one's former job site is not the claim that petitioner presses in the underlying arbitration. Rather, petitioner is claiming there that the transfer of those PAAs who do not become AJOs will prejudice the contractual rights of other PAAs, who might wish to be assigned to the PAA vacancies that will be filled, instead, by the transferred PAAs.

With regard to that claim, respondents contend, without factual contradiction, that all transfers will be effected in conformance with the applicable terms of the PAA contract. But even were such transfers not so effected, an arbitral award in favor of PAAs who were denied a contractually guaranteed chance to be considered for certain vacancies would not be rendered ineffectual by the inability of other PAAs, who were transferred into those positions, to return to their former job sites.

Finally, petitioner argues that, absent the grant of a preliminary injunction, respondents' continued shifting of PAAs and Supervisors into the AJOS titles will effectively prejudice the arbitrator in respondent's favor. However, there is no evidence that the arbitrator will be swayed by the continued implementation of the very practice that is being challenged in the arbitration. In any event, CPLR 7502(c) does not authorize the issuance of a preliminary injunction in order to advance the position that a petitioner has taken in the underlying arbitration.[3]

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[3] Even had petitioner shown that it is entitled to a preliminary injunction pursuant to CPLR 7502(c), its motion would be denied. In the past, the Appellate Division, First Department agreed with the position consistently taken by the Appellate Division, Second Department, that a party seeking injunctive relief pursuant to CPLR 7502(c) need only show that absent such relief an arbitral award may be rendered ineffectual. More recently, however, the Appellate Division, First Department, has held that such a party must also meet the traditional equitable requirements for injunctive relief pursuant to CPLR 6301. Cullman Ventures, Inc. v Conk, 252 AD2d 222 (1st Dept 1998). A party seeking injunctive relief pursuant to CPLR 6301 must demonstrate "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor. *(Grant Co. v. Srogi,* 52 N.Y.2d 496, 517)" Doe v Axelrod, 73 NY2d 748 (1988); Housing

Petitioner's Contempt Motion

In the original Order to Show Cause (#001) dated May 18, 2001, this court, after hearing oral argument, granted petitioner a temporary restraining order ("TRO"), which "temporarily stayed, enjoined and restrained [the respondents] from implementing the new [AJOS] titles ... in their Income Support Centers, or Job Centers, and reclassifying any Local 1180 members in those locations and transferring others." That very same day, respondents served a Notice of Appeal, purportedly appealing the order granting a preliminary injunction. The Order to Show Cause was made returnable on June 6, 2001, at which time this Court continued the TRO pending decision on the instant petition. It is undisputed that respondents nonetheless have continued to implement transfers to the AJOS titles, and that they have, thus, violated the terms of the May 18, 2001 TRO.

Respondents argue, however, that their service of a notice of appeal stayed the TRO pursuant to CPLR 5519(a)(1), and, citing Oppenheimer v. Oscar Shoes, Inc. (111 A.D.2d 28 [1st Dep't 1985]), that, in any event, they may not be punished for contempt absent evidence that respondents' actions "were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party to a civil proceeding." Id. at 29.

Works, Inc. v City of New York, 255 AD2d 209 (1st Dept 1998). Petitioner has shown neither that it will suffer irreparable harm absent injunctive relief, nor that the balance of equities tips in its favor.

Pursuant to Judiciary Law § 753(A), a court has the power to punish "a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded or prejudiced ... ." Accordingly, a movant seeking to hold another in civil contempt for violating an order of the court must show that such violation prejudiced the movant's rights. McCain v. Dinkins, 84 N.Y.2d 216 (1994); Goldsmith v. Goldsmith, 261 A.D.2d 576 (2d Dep't 1999); Cooper v. U.S. Petroleum Co., 180 A.D.2d 421 (1st Dep't 1992).

However, in light of this Court's denial of the motion for a preliminary injunction, petitioners cannot demonstrate that they were prejudiced or otherwise damaged by the violation of the TRO.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed without costs; and it is further

ORDERED that petitioner's motion to punish respondents for contempt is denied.

This constitutes the decision and judgment of the court.

Dated: March 26, 2002

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.