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TESTIMONY OF THE ORGANIZATION OF STAFF ANALYSTS, SUBMITTED BY LEONARD A. SHRIER, GENERAL COUNSEL, OSA, AT THE PUBLIC HEARING HELD BY THE COMMISSIONER OF CITYWIDE ADMINISTRATIVE SERVICES,

DECEMBER 16, 2008

**TESTIMONY OF THE ORGANIZATION OF STAFF ANALYSTS, SUBMITTED BY
LEONARD A. SHRIER, GENERAL COUNSEL, OSA, AT THE PUBLIC HEARING
HELD BY THE COMMISSIONER OF CITYWIDE ADMINISTRATIVE SERVICES,
DECEMBER 16, 2008**

We submit this testimony on behalf of the Organization of Staff Analysts ("OSA" or "Union"). As you know from OSA's many years of engagement with the New York City Department of Citywide Administrative Services ("DCAS") and other agencies of the City of New York ("City"), OSA is the Union which as a result of numerous determinations issued by the Board of Certification of the New York City Office of Collective Bargaining ("the Board") holds collective bargaining rights under the New York City Collective Bargaining Law ("NYCCBL") for approximately 4,600 employees, including employees in the title of Staff Analyst, Associate Staff Analyst, and Administrative Staff Analyst (Non-Managerial). We are testifying in opposition to DCAS's proposed plan to reduce the number of provisional employees in the City by creating new titles in the non-competitive and exempt class of the civil service and by reclassifying competitive class titles. Specifically, with regard to the hearing DCAS is holding today, we object to DCAS's proposals: (a) to create a non-competitive class title of Confidential Strategy Planner, for up to 1,500 positions

citywide; (b) to create an Exempt Class title of Strategic Initiative Specialist, for up to 1,500 positions citywide; and (3) to classify an Exempt class "managerial" level title of Executive Program Specialist, with "two to three positions allocated per agency", for a maximum of 240 positions Citywide. (Memorandum from Sherry Schultz to James G. Hein, dated November 18, 2008) ("Schultz Memorandum"). (Exhibit 1, hereto).

DCAS has neither scheduled evidentiary hearings to justify its conclusions that the three proposed titles are either confidential in nature or require untestable skills. Based upon the limited information DCAS has made public with regard to these three titles, OSA objects to the creation of the proposed titles for the following reasons: (1) by DCAS's own admission as submitted to the New York State Civil Service Commission ("SCSC"), the creation of these three titles would not reduce the citywide provisional headcount by one employee (Appendix C to DCAS submission to SCSC, August 8, 2008), and, instead, would increase the number of patronage positions on the City payroll by 3,240 employees; (2) OSA already represents employees in the three competitive class titles which it appears DCAS intends to supplant - Staff Analyst, Associate Staff Analyst and Administrative Staff Analyst (Non-Managerial) - without any showing that it is either not practicable to test candidates for

these titles or that employees in these titles are confidential. To the contrary, in representation hearings at the City's Office of Collective Bargaining, on numerous occasions the Board has granted OSA representation rights to employees in those three titles after the Board made findings that these employees were neither managerial or confidential as defined in the Civil Service Law ("CSL") and the NYCCBL; and (3) DCAS's proposed amendment to the City civil service classification system for these three titles is intended to interfere with the rights of OSA and the employees it represents by eroding the bargaining unit represented by OSA through the creation of these titles.

The DCAS Proposal to Create these Three Titles, although Presented as Part of the Five Year Plan to Reduce Provisional Headcount will not Reduce the Number of Provisional Appointments and will Increase Patronage Appointments.

Although DCAS has submitted to the SCSC, March 28, 2008, a proposed five-year plan to reduce provisional headcount in the City ("the DCAS Plan"), the creation of non-competitive and exempt analyst titles does not provide a rational means of reducing the number of provisional employees presently serving in the City of New York. ¹

¹ The proposal as set forth in the Schultz Memorandum deviates from the Plan submitted to the SCSC in several

To begin with, OSA opposes the creation of the three titles at issue today because the creation of these non-competitive and exempt titles, as much of the DCAS Plan in general, violates the intent of Article V, Section 6 of the New York Constitution: that the selection of employees to fill positions in the Civil Service should be based upon an evaluation of an applicant's merit and fitness as determined by competitive testing. The mandate of Article V, Section 6 had been ignored by New York City to the point where provisional hires had swelled to more than 30,000 employees. The State Legislature enacted Section 65(5) of the Civil Service Law ("CSL") with the express purpose of holding New York City accountable for reducing this staggering number and replacing the current patronage system of provisional hiring with a system of fair and competitive testing.

Though at first glance, the DCAS plan fulfills the mandate of the Legislature by reducing the number of provisional employees to 5% of the City's work force over a five-year

respects. First, in its Plan DCAS proposed creating a non-competitive title of "Strategic Analyst" (Plan, Section 2.4.1) encompassing "up to 1,000 such positions citywide." *Id.* Apparently, DCAS felt the title "analyst" suggested too closely, the competitive title DCAS proposes to supplant, Staff Analyst. Also, DCAS must have felt that 1,000 Strategic Analysts would be insufficient for the City's needs as it now proposes to create 1,500 Confidential Strategy Planners citywide (Schultz

period, the means proposed by DCAS to achieve this target actually perpetuates a system of cronyism and invites corruption. DCAS has taken the legislative mandate of CSL §65(5): to reduce provisionals, and, instead, created a Trojan horse into which it has concealed the effective reclassification of Competitive Class positions, particularly those in the Staff Analyst title series represented by OSA.

Thus, as a threshold matter, DCAS's proposal to create 240 positions citywide in a new Exempt Class title of Executive Program Specialist,² its intention to create the proposed Exempt Class title of Strategic Initiative Specialist encompassing 1,500 positions, and its intention to create a non-competitive title of Confidential Strategy Planner now comprising 1500 positions is not authorized by Section 65(5) of the Civil Service Law, the express purpose of which is to *reduce* the number of provisional employees in the City. According to the supplemental information supplied by DCAS to the SCSC in its "Appendix C: Calendar for Reclassification Actions," DCAS's creation of these three new titles does not address *any* provisional employees (see, Appendix C, p. 4). DCAS's proposed

Memorandum).

² In the Plan submitted to the SCSC, DCAS proposed to create "between 160 and 240 positions citywide in a new Exempt Class

creation of 3240 new Exempt Class or non-competitive positions will not reduce the number of provisional employees by even one employee (*Id.*).

These three proposed titles, none of which addresses provisional reduction, are the only three new titles DCAS proposes to create under its Plan. DCAS has not proposed to create these three titles to reduce the City's provisional count; DCAS intends to divert 3,240 positions out of the Competitive Class Analyst title series, Staff Analyst titles which OSA represents. Thus, the DCAS Plan, insofar as it proposes to create these new Exempt and Non-Competitive Class Analyst titles is not authorized by CSL Section 65(5). In proposing to permit the City to make an *additional* 3,240 discretionary hires, DCAS has perverted the expressed intent of the statute.

That DCAS's intention with regard to the Analyst titles is not to reduce provisional employment but to eliminate Competitive Class appointments is made patent by the fact that DCAS proposed to create its new Exempt or Non-Competitive Analyst positions in the first month of its Plan. Indeed, DCAS has scheduled this hearing as the first hearing under its so-called provisional reduction plan. Thus, although DCAS sets

title of Executive Program Specialist" (DCAS Plan § 2.4.2.)

forth in its Calendar submitted to the SCSC that it will begin its restructuring of the City's Civil Service system in February of Year 1 of its Plan, the earliest action DCAS proposed to the Commission (Appendix C, p. 4), it is ironic that DCAS proposed to create these thousands of new Exempt or Non-Competitive analyst positions before it begins to reduce the number of provisional employees who are currently employed in Competitive Class Analyst titles. DCAS does not propose to hold an examination for Associate Staff Analyst until November of Year 2 of its Plan (Appendix D, p. 11). It does not propose to hold an examination for Administrative Staff Analyst until October of Year 3 of its Plan (*Id.*). DCAS does not propose another test for Staff Analyst until November of Year 4 (Appendix D, p. 12). Clearly, these actions are not in compliance with the legislative intent of CSL § 65 to reduce provisional head count.

Not only is DCAS's proposal to create new Exempt Class and Non-Competitive analyst titles, without regard to diminution of provisional employment, a clear violation of the mandate of Section 65 of the CSL, the number of positions DCAS proposes to create is staggering. For example, DCAS proposes to permit the City to hire 1500 Exempt Class Strategic Initiative Specialists, a title for which it published only a six-line job description, without any qualifications:

Under the direction of agency executives, with wide latitude for independent judgment, coordinates new and strategic projects or programs during their initial phases. Utilizes expertise gained from the past professional experience to develop and direct a new agency program or policy area, or to evaluate and make recommendations for the improvement of existing city programs or policy areas. Specialists may provide expert guidance and training to City employees related to the new policy, project or program areas. Performs related work. These positions will have a four-year maximum tenure.

Exhibit 2.

DCAS in its Plan indicated that this title was intended to be one which "agency heads can use to fill strategic staff positions." Plan, p. 19. Indeed, that is the purpose of the Exempt class: to permit a *limited* number of positions at each agency, answerable only to the officers of the agency responsible for making appointments and who serve at such officer's pleasure. The SCSC implementing the strictures of CSL § 41, **Exempt Class**, in its *State Personnel Management Manual* notes that such extraordinary positions are not tenure bearing. *Manual*, § 0620.130. The *Manual* also sets forth that *only one* position in a particular title in an agency can be in the Exempt Class unless specifically authorized by the Commission. Further, the Commission maintains a list of each Exempt Class position in Appendix 1 of the *Manual* (*Manual*, § 0620.133). Moreover, when a vacancy occurs in an Exempt Class position, the Commission is

required to study and evaluate the vacant position before such Exempt Class position can be filled (*Manual* § 0620.134). Thus, DCAS's assertion in its Plan, that it has "carefully studied the classification system that the State has used" (DCAS Plan, p. 13) and that DCAS's Plan, "reflect[s] the State's approach to create a *limited* pool of positions that are designed to facilitate appropriate flexibility in the design and implementation of important policy initiatives" is manifestly untrue. (*Id.*)(Emphasis added).

OSA has not found one Exempt Class title in the State service or in the City civil service which has anywhere near the number of positions proposed to be created by DCAS. In fact, only the title of Assistant Attorney General at the State's Law Department has more than 200 exempt positions: the Commission has designated 633 Exempt Class Assistant AG's. Similarly in the City, as DCAS noted in its Plan (p. 17) the Law Department has 484 Exempt Class positions of Assistant Corporation Counsel. Each of those appointees, however, had to pass a competitive bar examination in order to establish his or her fitness to practice law. DCAS proposes to permit the hire of almost two thousand additional Exempt Class political appointees without any examination of merit or fitness. This blunderbuss approach to discretionary appointments is arbitrary, capricious and in

violation of the Constitutional mandate of testing for merit and fitness as well as Section 65(5) of the Civil Service Law.

DCAS has failed to set forth any evidence that the Exempt Class Titles of Executive Program Specialist and Strategic Initiative Specialist are Confidential in Nature or that Competitive Examination would not be practicable, or that Competitive Examination is Impracticable for the Non-Competitive Class Title of Confidential Strategy Planner.

Pursuant to CSL § 41 the Exempt Class shall include "offices or positions for which the Civil Service Commission has determined it is not practicable to fill by competitive or non-competitive examination." Pursuant to CSL § 42 the non-competitive class shall include:

all positions that are not in the exempt class or the labor class and for which it is found by the commission having jurisdiction to be not practicable to ascertain the merit and fitness of applicants by competitive examination. Appointments to positions in the non-competitive class shall be made after such non-competitive examination as is prescribed by the state civil service commission or municipal commission having jurisdiction.

The determination to place a position in the noncompetitive or exempt class must be based upon objective evidence. See, e.g. Shafer v. Regan, 171 A.D.2d 311 (3rd Dep't 1991); Condell v. Jorling, 151 A.D.2d 88 (3rd Dep't 1989).

In the instant proceeding, DCAS has failed to set forth any

evidence that it would be impracticable to test for the proposed non-competitive position of Confidential Strategy Planner or the Exempt positions of Executive Program Specialist or Strategic Initiative Specialist. To the contrary, it is apparent from the job description for Confidential Strategy Planner that employees in that position will be performing the same duties and have the same responsibilities as are performed by employees in the competitive class title of Staff Analyst. For example, the Confidential Strategy Planner is a class of position which "encompasses professional and responsible consultative and/or administrative work." The Planner may recommend "new procedures and/or revise current ones; proposes and substantiates the need for new and revised agency standards and guidelines." (See Job Description annexed hereto, Exhibit 3). The Staff Analyst, too, is a class of positions which "encompasses professional and supervisory work .. in the preparation and administration of agency budget, ... administrative and procedural and operational studies and analyses concerning the agency's organization and operations." (Job Description for Staff Analyst, Exhibit 4). Moreover, the Master List of Tasks and Standards, Staff Analyst, Title Code 126260 sets forth among the many tasks typical of the Staff Analyst:

Develops/constructs evaluation instruments
by analyzing program objectives, researching

alternative evaluation formats and pre testing designs where possible, in order to measure the performance of agency programs and contracted services.

(See Exhibit 5, hereto, Task 9).

Not only do the duties and typical tasks of the Confidential Strategy Planner and Staff Analyst overlap, the qualifications for both titles are the same: a baccalaureate degree and two years of full-time professional experience or related experience. The Staff Analyst may also sit for examination with a master's degree in designated fields and no prior professional experience.

The City has conducted competitive examinations for Staff Analyst as recently as 2004. Consequently, DCAS reported in its August 8, 2008 submission to the SCSC that there were only 32 provisionals in that position. There are still 132 names on the list for Staff Analyst, but the list is due to expire in January, 2009. OSA has requested that DCAS extend the list for several months so that agencies who have provisional Staff Analysts serving provisionally in higher Analyst titles can reach employees in their agencies to appoint them. In that way those employees would be eligible to sit for examination for the higher titles of Associate Staff Analyst and Administrative Staff Analyst and reduce the provisional head count in those titles. To date, OSA has not had a response from DCAS to this

request which would decrease the number of provisional Analysts citywide. (Copy of letter from Sheila Gorsky to DCAS, annexed hereto as Exhibit 6).

Likewise, the proposed Exempt Class title of Strategic Initiative Specialist has duties and responsibilities similar to those of the Competitive Class title of Associate Staff Analyst. The Associate Staff Analyst, like the proposed Strategic Initiative Specialist works under direction "with wide latitude for independent initiative and judgment." Compare, Associate Staff Analyst Job Description, Exhibit 7, hereto, with the Strategic Initiative Specialist, Duties Statement, Exhibit 2. The Associate Staff Analyst may "serve as a principal assistant to a high level agency executive..." (Exhibit 7). Further, both the Strategic Initiative Specialist and the Associate Staff Analyst may be called upon to provide guidance and training to staff related to new projects or program areas.

The last examination for Associate Staff Analyst was given in May, 2007. The list was established in July 2008. Because DCAS established the list as an agency promotional list, it is no longer viable in some agencies. Consequently, OSA has requested that DCAS promulgate a citywide list for the title so that current provisional employees could receive permanent appointment in agencies other than the one in which they

provisionally serve. To date, DCAS has not issued such Citywide list.

Finally, the proposed Exempt Class Title of Executive Program Specialist which is defined as a "management class of positions" (Executive Program Specialist Duties Statement, Exhibit 8 hereto) has duties and responsibilities similar to those of the Administrative Staff Analyst, a competitive class title represented by OSA which is also defined as a "management class of positions with several assignment levels." (See, job description, Administrative Staff Analyst, Exhibit 9, hereto).

Just as the Executive Program Specialist works under "the executive direction of an agency official, with the widest latitude for independent initiative and judgment," the Administrative Staff Analyst works under "varying levels of managerial or executive direction with varying degrees of latitude for independent initiative judgment and decision making." Compare, Exhibit 9 and Exhibit 10. Moreover, as can be seen from a recent Job Vacancy Notice for Administrative Staff Analyst (Exhibit 10 hereto) employees in this title represented by OSA work under "managerial and executive direction" and "may be in full charge of the agency's research activities ensuring that all pertinent groundwork for projects and initiatives are provided."

Unlike the Executive Program Specialist, for whom no qualifications are set forth, the Administrative Staff Analyst must possess a masters degree and two years of full time professional experience in various designated policy areas in order to sit for examination for appointment to the title. The last examination for Administrative Staff Analyst was given in 2005. There is presently a list for Administrative Staff Analyst which was established in May 2006. More than 840 Administrative Analysts were appointed from the list which originally had only 872 eligibles. It is clear, therefor, that the last test for Administrative Staff Analyst measured applicants' merit and fitness to perform the duties of the title. In fact, DCAS has recognized in its plan that it can test competitively for employees in the Staff Analyst title series up to the highest managerial levels:

... the Staff Analyst title series includes hundreds of City employees who serve in administrative capacities up to Commissioner levels of responsibility... . Examinations in these titles would be staggered over the five-year period [of the Plan] to ensure the continuity of City services while the number of provisional appointments is reduced.

Plan, § 2.1.1.

DCAS has, thus, failed to show that it cannot successfully test for the Analyst Title series through the title of

Administrative Staff Analyst. Further, it has failed to show that any City agency has raised concerns that appointees to the present Competitive Class Analyst title series, which the newly proposed titles appear to supplant, cannot continue to perform the critical work their titles entail. The proposed creation of a parallel non-competitive and Exempt Class title series is a pretext to circumvent the strictures of the Civil Service Law.

The DCAS Plan Creating the Non-Competitive and Exempt Titles of Confidential Strategy Planner, Strategic Initiative Specialist and Executive Program Specialist is Intended to Deny OSA and the Staff Analysts it Represents the Representational Rights they Won Over the Past Twenty Years.

Section 12-305 of the NYCCBL ensures that public employees shall have the right to self-organization, to be able to form and join public employee organizations, and to bargain collectively through employee organizations of their own choosing:

§ 12-305. Rights of public employees and certified employee organizations.

Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. However neither managerial nor confidential employees shall constitute or be included in any bargaining

unit, nor shall they have the right to bargain collectively; provided however, that public employees shall be presumed eligible for the rights set forth in this section, and no employee shall be deprived of these rights unless, as to such employee, a determination of managerial or confidential status has been rendered by the board of certification;

OSA first won collective bargaining rights for employees in the Staff Analyst title series in 1985 when the New York State Public Employment Relations Board ("PERB") granted OSA's petition to represent employees in the title of Staff Analyst and Associate Staff Analyst at the New York City Board of Education, then a non-mayoral agency. In 1988, the Board, despite vigorous objection from the City that these employees were managerial and/or confidential under the NYCCBL, granted OSA's petition for representation rights for Staff Analysts and Associate Staff Analysts in the City and its related public employers. Certification Decision No. 3-88.

In 2001, after days of hearings over a period of several years, during which the City again vigorously opposed its petition, OSA gained representational rights for employees in the title of Administrative Staff Analyst when the City finally agreed to the certification of OSA as the bargaining agent for employees in the title to be designated "Administrative Staff Analyst (Non-Managerial)." Certification Decision No. 1-2001.

OSA presently is engaged with the City and its related public employers in a proceeding at the Board seeking representation rights for employees in the title of Administrative Staff Analyst at the M-2 and M-3 Levels. Although hearings in the proceeding are concluded, the matter will not be submitted for decision until early in 2009. Again, the City has aggressively opposed OSA's petition to bargain on behalf of these Administrative Staff Analysts who do not make policy or who are not confidential employees as defined in the NYCCBL.

It is submitted that DCAS's creation of a series of non-competitive and exempt analyst titles parallel to the competitive class titles represented by the Union is an attempt by the City to circumvent the collective bargaining rights of employees represented by OSA and the rights of the Union itself. As DCAS is well aware, OSA continues to vigorously enforce the collective bargaining rights of the employees it represents. DCAS's proposed amendment to the City civil service classification system creating the Non Competitive title of Confidential Strategy Planner, and the Exempt Class titles of Strategic Initiative Specialist and Executive Program Specialist is intended to interfere with the organizational and representational rights of OSA and the employees it represents.

Such acts constitute violations of the NYCCBL.

In conclusion, we urge DCAS to reconsider its attack on the Civil Service system exemplified by the proposals at issue in this hearing. Should DCAS not work with the representatives of the employees who perform its staff analyst duties to ensure that their statutory and constitutional rights are protected, it can expect years of administrative and court review of its unlawful proposals. The people of the City of New York and the employees who perform so ably for the City deserve better.

OSA QUESTIONS FOR DCAS RE: PROPOSED RECLASSIFICATION

Confidential Strategy Planner

1. What employees are currently performing the duties of the Confidential Strategy Planner?
2. Will the positions in this title be filled from new hires or current employees? If current employees, from which titles?
3. What studies has DCAS conducted to establish that it is impracticable to place this position in the competitive class?
4. What was the impetus for creating the title? Were there complaints from agency commissioners that the pool of available competitive class civil servants was unsatisfactory?
5. In the materials DCAS submitted to the SCSC in the summer of 2008, DCAS proposed creating up to 1,000 Planner positions citywide. (Plan, Section 2.4.1) Why did DCAS increase the number to 1,500?
6. Why is the term "confidential" used in the title? Is it consistent with the Taylor Law definition?
7. Is there an equivalent title in the state civil service system? If so, is it in the non-competitive class, and how many positions are delegated to the title?

Strategic Initiative Specialist

1. What employees are currently performing the duties of the Strategic Initiative Specialist?
2. Will the positions be filled from new hires or current employees? If current employees, from which titles?
3. What studies has DCAS conducted to show that it is impracticable to place this position in the competitive class?
4. What was the impetus for creating the title? Were there complaints from agency commissioners that the pool of

available competitive class civil servants was unsatisfactory?

5. In the materials DCAS submitted to the SCSC in the summer of 2008, this title was named "Strategic Initiative Analyst" (Plan, Appendix C). Why did DCAS change the name of the title from Analyst to Specialist?

6. Is there an equivalent title in the State Civil Service? If so, is it in the Exempt class, and how many positions are delegated to the title?

7. What are the qualifications for the position?

8. What is the salary range for the position?

9. Why is the duration of the position only four years? Why not one year, or five years?

10. Upon expiration of the duration of the appointment, what civil service tests will Strategic Initiative Specialists be eligible to take?

Executive Program Specialist

1. What employees are currently performing the duties of the executive program specialist?

2. Will the positions be filled from new hires or current employees? If current employees, from which titles?

3. What studies has DCAS conducted to show that it is impracticable to place this position in the competitive class?

4. What was the impetus for creating the title? Were there complaints from agency commissioners that the pool of available competitive class civil servants was unsatisfactory?

5. In the materials DCAS submitted to the SCSC in the summer of 2008, it had proposed creating up to 1,000 positions citywide. (Plan, Section 2.4.1) Why did DCAS increase the number to 1,500?

6. Is there an equivalent title in the State Civil Service? If so, is it in the Exempt class, and how many

positions are delegated to the title?

7. What are the qualifications for the position?
8. What is the salary range for the position?
9. Why does this title not have a duration of four years?
10. What is an issue expert?