

OSA, 2 OCB2d 42 (BCB 2009)

(IP) (Docket No. BCB-2631-07).

Summary of Decision: The Union alleges that the New York City Health and Hospitals Corporation violated NYCCBL § 12-306(a)(1) by changing the title of 13 employees from Senior Management Consultant to non-represented titles to deprive the Union of members and the employees of their right to collective bargaining. After an evidentiary hearing, the Board found that the Union failed to establish that HHC's actions were improperly motivated. Accordingly, the petition was dismissed. ***(Official Decision Follows.)***

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Petition

-between-

THE ORGANIZATION OF STAFF ANALYSTS,

Petitioner,

-and-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

DECISION AND ORDER

On July 6, 2007, the Organization of Staff Analysts ("Union" or "OSA") filed a verified improper practice petition against the New York City Health and Hospitals Corporation ("HHC") alleging that HHC violated rights granted in § 12-305 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by changing the civil service title of 13 employees who were Senior Management Consultants ("SMC") in order to deny the Union of members and the employees of their right to collective bargaining in violation of

NYCCBL § 12-306(a)(1). The petition also alleged that HHC violated NYCCBL § 12-306(a)(1), (a)(4) and (c)(4) when it failed to provide information about the title changes. On December 17, 2008, this Board issued an interim decision, *OSA*, 1 OCB2d 45 (BCB 2008) (“Interim Decision”), in which we found that HHC had violated NYCCBL § 12-306(a)(1), (a)(4) and (c)(4) by failing to provide current job descriptions for two employees. In the Interim Decision, we did not reach the issue of the title changes but ordered HHC to produce to the Union the current job descriptions, if any exist, for the two employees. In compliance with the Interim Decision, HHC averred that there are no current job descriptions for the two employees. The Union submitted a letter in response on February 13, 2009, arguing that the lack of current job descriptions for the two employees supported its NYCCBL § 12-306(a)(1) claim. We now proceed to address the Union’s claim that the title changes violated NYCCBL § 12-306(a)(1), and find that the Union has failed to meet its burden to establish that HHC’s actions were improperly motivated and, therefore, failed to prove that HHC violated NYCCBL § 12-306(a)(1). Accordingly, we dismiss the petition.

BACKGROUND

After seven days of hearings, the Trial Examiner found the totality of the record established the relevant background facts to be as follows.¹

On March 24, 2006, after a certification proceeding, the Board of Certification (“BOC”) added HHC employees in the civil service title SMC (Business Organization and Methods), Levels

¹ Familiarity with the findings of facts and conclusions of law set forth by the Board in the Interim Decision is presumed and, as in this opinion we address only the merits of the Union’s claim that HHC violated NYCCBL § 12-306(a)(1) by changing the civil service titles of 13 employees, only background relevant to that claim is provided.

I and II (Title Codes 983711 and 983712), to the Union's bargaining certificate, Certification No. 3-88 ("SMC certification proceeding"). *OSA*, 78 OCB 1 (BOC 2006). Based upon the number of employees identified as SMCs during the SMC certification proceeding, the Union expected to represent 252 SMCs. However, when the Union's Executive Director, Sheila Gorsky, compared her records to the list of SMCs placed in the Welfare Fund as of September 1, 2006, she noticed that several employees identified as SMCs during the SMC certification proceeding did not appear on the September 1st Welfare Fund list. The Union investigated and determined that some SMCs had retired or resigned; however, because it could not determine the status of others, it requested information from HHC. After reviewing the material produced by HHC, Gorsky concluded that there were SMCs who should not have had their title's changed. By the close of the hearing in the instant matter, the Union had narrowed its claim to 13 former Level I SMCs ("Former SMCs").

While Gorsky, the Union's only witness, never held the title SMC, she is familiar with it through her involvement in the SMC certification proceeding and her work experience, both as the Union's Executive Director and as a former employee of the New York City Human Resources Administration ("HRA").² Gorsky's testimony regarding the Former SMCs is based upon her review of available documents, including surveys that were created by eight of the Former SMCs during the SMC certification proceedings in which they described their duties and responsibilities as SMCs ("SMC Surveys"). In preparation for her testimony, Gorsky reviewed the available Former SMCs' job descriptions.

² Gorsky's last title at HRA was Associate Staff Analyst, which she became in 1978. Gorsky testified that Staff Analysts tasks are similar to those of a SMCs. Gorsky has worked at the Union since 1990.

Two types of job descriptions were discussed in the hearings. The first, known as a “position description,” is also called a “corporate job description,” and is created by HHC’s Human Resource (“HR”) Department for each civil service title. The civil service title is also referred to as the corporate title. Position descriptions for six civil service titles, including SMC, were introduced into evidence. The second type of job description is the “functional job description,” which is created for each employee by the area in which they work and is tailored to their specific job. The employee’s title on the functional job description is known as their office or in-house title. Functional job descriptions for the new in-house titles for eight of the Former SMCs were introduced into evidence, as well as the SMC functional job descriptions for three Former SMCs. HHC has averred that no current functional job descriptions exist for two Former SMCs (Lehrfeld and Prabhaker).

A third document, known as a “justification,” also describes job duties. HHC creates a justification when an individual changes title, such as those due to promotions or transfers. A justification is effectively the functional job description for the position the employee will assume should the title change be approved. The relevant distinction between a justification and a functional job description is that a justification is created as part of the process of an employee moving into a new position, while a functional job description documents the position an employee currently occupies. Justifications for the new titles for three Former SMCs were introduced into evidence.

The Former SMCs.

The title changes for the Former SMCs all occurred between June and December 2006, after the BOC issued *OSA*, 78 OCB 1, on March 24, 2006. HHC avers that 12 of the Former SMCs were promoted and one (Lehrfeld) was listed as a SMC in error and that her title change was merely a

record correction. The Union argues that the duties and responsibilities of the new positions still fell within the SMC title such that HHC could have promoted them to SMC Level II. Also, for those for whom salary information was provided, their salaries in their new positions remained within the salary range for a SMC and most of the Former SMCs reported to the same supervisor or remained in the same HHC department after their title change.³

1. Sarah Marie Lehrfeld

Sarah Marie Lehrfeld's civil service title was changed from SMC to Associate Director, Hospitals, in October 2006. Lehrfeld had been a SMC at Coler-Goldwater Hospital ("Coler") when she was hired as Associate Director at Queens Hospital Center ("Queens") in July 2004. HHC averred that no current job description exists for Lehrfeld and that when Lehrfeld was hired by Queens, payroll incorrectly recorded her as a SMC. This error was corrected in October 2006 when her civil service title was changed to Associate Director.

Lehrfeld testified that when she applied for the position at Queens in June 2004, "all the paperwork[] that I filled out was for associate director." (Tr. 385-6). The paperwork consisted of an employment application and a conditions of employment form. The employment application lists the "position applying for" as "Assoc. Director" and the conditions of employment form lists her position at Queens as "Associate Director." (HHC Exs. C & D). Carol White, the Associate Executive Director for HR for the Queens Health Network ("QHN"), who is the highest ranking employee in HR for the QHN, explained the relevant paperwork, basing her testimony on her own experience and upon discussions with the HR employees involved in preparing the actual

³ The salary range for an SMC Level I as of February 2007 is \$45,499 to \$99,934; for SMC Level II it is \$50,124 to \$107,268. (OSA Ex. 5).

documentation.⁴ White testified that the position listed on these forms indicates the civil service title, not the in-house title, and that, therefore, it was a clerical error for Lehrfeld to have been classified as a SMC.

Lehrfeld testified that she only became aware that she was classified as a SMC at Queens in late 2006 when a bill that she had submitted to the management benefit fund was denied. When she investigated, HR informed her that she was classified as a SMC with the in-house title of Associate Director. Lehrfeld testified that she currently has no recollection of holding the civil service title SMC and that “Associate Director has always been my title.” (Tr. 377).

The Union introduced into evidence an excerpt from Lehrfeld’s June 11, 2004, testimony in the SMC certification proceeding in which she testified that she became a SMC at Coler in October 2001 with the office title of Associate Director. After reviewing the transcript, Lehrfeld testified that, while she did not dispute its accuracy, her only recollection of the SMC certification proceeding was being asked about her salary and that she did not know what her civil service title was at the time she transferred to Queens. Lehrfeld testified that she is not familiar with, and does not understand the distinctions between, civil service and office titles, but admitted that her current duties at Queens are similar to those she had when she was at Coler.

HHC provided to the Union four Personnel Action Forms (“PAF”), two from July 2004 and two from October 2006, all from Queens. Gorsky testified that she did not “understand the [PAF] form itself” but noted that the “Job assignment information” on one of them listed Lehrfeld’s title as “Associate Director . . . hospitals.” (Tr. 103) (reading from OSA Ex. 15).

⁴ QHN consists of Queens and Elmhurst Hospital Center (“Elmhurst”).

White reviewed the PAFs and explained that the two from 2004 concerned Lehrfeld's initial hiring. One was completed by the Department of Nursing ("Nursing Dept. 2004 PAF"); the other by Queens' HR ("HR 2004 PAF"). According to White, the Nursing Dept. 2004 PAF establishes that "[Queens] intended to hire Ms. Lehrfeld as an associate director, and [had] . . . the approval of the Executive Director for such action." (Tr. 622). The "title" box of the "Employee Identification" section is filled in "Associate Director" and the "title" box of the "to" line in the "Transfer, Promotion or Salary Change" section is filled in "Assoc. Dir." (OSA Ex. 15, at §§ 1 & 4).⁵ The Nursing Dept. 2004 PAF form has boxes to indicate transfer or promotion. White explained that the promotion box would only be checked when an employee is promoted within a facility while "[t]ransfers can be in from facility to facility in the same title or it could be a promotion." (Tr. 659). The box for transfer is checked on the Nursing Dept. 2004 PAF, indicating that Lehrfeld transferred from one facility (Coler) to another (Queens).

The HR 2004 PAF was created by HR for the Payroll Department and, although it indicates Lehrfeld's payroll status, it left blank her title and title code.⁶ White testified that, in her opinion, "the individual who completed the form in HR made a mistake." (Tr. 603). Specifically, the HR 2004 PAF should have included the Associate Director, Hospitals, title. As a result of this omission, "the employee's previous payroll status is picked up as no change from Coler to Queens." (Tr. 609). White explained that "by leaving the fields blank, HR thought that the [SMC] title was the title and

⁵ No title code for Lehrfeld's position at Coler appears on the Nursing Dept. 2004 PAF, and it lists the title code for Queens as "99999." (OSA Ex. 15). The SMC title codes are 983711 (Level I) or 983712 (Level II). (OSA Ex. 1). We take administrative notice of the HHC's October 2006 Corporate Plan of Titles which indicates that no title had been assigned the title code 99999.

⁶ The "position no." is listed as "99999." (OSA Ex. 15).

moved it to payroll [which] is different than the requested and approved title of Associate Director from the [Nursing Dept. 2004 PAF].” (Tr. 609). White explained that the two PAFs from Queens from 2006 were created to correct this mistake and change Lehrfeld’s civil service title from SMC to Associate Director. (*see* Tr. 610 & 619).

2. Sanjay Peters

Sanjay Peters had his civil service title changed from SMC to Associate Director, Hospitals. Peters works at Woodhull Hospital, part of the North Brooklyn Health Network, and has held the in-house title of Director of Health Analytics since 2004. In September 2006, Peters’ civil service title was changed to Associate Director. His salary increased but his in-house title did not change.⁷

Peters testified that in August 2006, he created a seven page presentation requesting a promotion to Associate Director. Prior to this request, Peters’ superiors decided to reorganize Health Analytics and Peters was asked to suggest changes that he believed would be necessary. Most of Peters’ suggestions, including his promotion request, were adopted.

Peters testified that his duties and responsibilities as an Associate Director differed from those he performed as a SMC, as now he is “preparing the department to go into the future in terms of how we should be reporting our analytics to the network. . . . developing new systems within the department electronically and such that we can disseminate information . . . [in] real time to our management.” (Tr. 503). Also, as an Associate Director, Peters attends meetings where he “represents the department to the hospital.” (Tr. 502). Further, he now does less data reporting and programming than he did as a SMC because now he no longer has the time to do the actual programming.

⁷ Director is the highest in-house title in Peters’ department.

3. Josephine Prabhaker

In August 2006, Josephine Prabhaker had her civil service title changed from SMC to Associate Director, Hospitals. The Union introduced Prabhaker's SMC functional job description and her SMC Survey, in which Prabhaker wrote that she supervised five employees (an Assistant Coordinating Manager, two Administrative Assistants, and two Word Processors), hired temporary agency staff, and assisted in the preparation of eight departmental budgets. The SMC Survey described Prabhaker's involvement in labor relations as "[m]aintain[ing] confidential files and records of personnel" and her involvement in policy formation as "[r]eporting policies and procedures status at [] meetings." (OSA Ex. 22, at p. 5& 9).

Gorsky testified she never received any document from HHC indicating that Prabhaker's duties had changed from those set forth in her SMC functional job description, which reads, in pertinent part:

1. Preparation of Monthly Network Report for Regulatory Affairs/Quality Management Departments network wide.
 - * Collect data and gather information . . .
2. Office Management of Regulatory Affairs Department. . . .
 - * Coordinate with Office Staff in [] office functions.
 - * Supervise the temporary personnel.
 - * Review . . . Prepare [] Cost Center Report . . .
 - * Process the Purchase Requisition as necessary. . . .
3. Revision of Administrative Policy and Procedure Manual. . .
 - * Coordinate with [] facilities in the revision of . . . Manual and develop them for [] implementation. . . .
4. Preparation of JCAHO related reports.
 - * Coordinate and gather data . . .
5. Assignment of "Special Projects[.]"
 - * Schedule, notify membership, prepare agenda, . . .
6. Participate in Performance Improvement activities.
7. Attend all the mandatory training/safety training [sic] given by the department[.]

(OSA Ex. 20). HHC avers that there is no current functional job description for Prabhaker. The position description for the Associate Director, Hospitals, title was introduced.⁸ It states that the “Purpose of the Position” is to “provides assistance in the administration . . . and supervision of activities . . . within the health care facility. Responsible for several departments and manages the technical, managerial, ancillary, clerical and support staff of these departments.” (HHC Ex. J). It lists the following typical tasks:

1. Directs and supervises the staff and support departments, coordinates special services and coordinates activities of related support and professional service departments.
2. Prepares operating plans . . . , policies, programs and procedures. Implements improved systems and procedures, monitors systems, and controls and audits programs.
3. Makes studies of adequacy and effectiveness of general administrative and support services and makes recommendations.
4. Prepares data for budget preparations, operating and statistical reports, analysis and makes recommendations.
5. Monitors requisitioning . . . Requisitions . . . material . . . for administrative, professional and support service activities.
6. Prepares studies on patient care standards, makes analysis and prepares recommendations.
7. Attends management staff meetings, conferences and consults with Medical and Support Services departments.
8. May represent hospital administration in hospital functions and programs.
9. Assists in grant proposal writing and in submitting revenue and expenditure reports for special funded programs.

(HHC Ex. J).

4. Roger Conway

In August 2006, Roger Conway had his civil service title changed from SMC to Associate

⁸ This position description was not provided to the Union prior to Gorsky’s testimony. The Union was given the opportunity to recall Gorsky, but did not do so.

Director. Conway now works in the QHN's Emergency Department of Information Services at Elmhurst. Both HHC and the Union rely on a comparison of Conway's SMC Survey and his Associate Director functional job description.

As a SMC, Conway worked at Elmhurst in the Healthcare Information Systems Department with the office title of Clinical System Analyst. Conway listed four duties in his SMC Survey:

- [1] Application Maintenance—make modifications and additions to Patient 1 database tables, QA, update documentation
- [2] Application Development and Implementation—assist with development, workflow analysis, QA, documentation, training and GO-LIVE
- [3] Training—instruct end users (all disciplines) on the use of the Patient 1 Clinical System
- [4] Help Desk Support—assist users with questions and problems with Patient 1 software. Occasional Hardware [*sic*]

(OSA Ex. 28).

Conway's Associate Director functional job description states that he "is responsible for application development, implementation and maintenance of the Emergency Department Information Systems." (OSA Ex. 27). It lists six duties and responsibilities:

- 1. Work directly with QHN and HHC staff on all levels to define the information system to meet clinical, departmental and organizational needs.
- 2. Build and maintain application database.
- 3. Testing of system changes and enhancements.
- 4. Work closely with personnel from ancillary departments, MIS and HIS, on information system integration, operability, and integrity.
- 5. Ongoing support of the information system and its end users which may include some evenings, nights, weekends and holidays.
- 6. Maintain system user accounts and securities.

(*Id.*).

Gorsky testified that skills listed on Conway's Associate Director functional job description were "consistent with analyst's skills." (Tr. 136). Gorsky opined that "analyst tasks [] fit into the [SMC] job description." (Tr. 80). Gorsky did not opine whether these skills would be inappropriate for an Associate Director. (*Id.*).

5 & 6. Linda Chiu and Maria Liliana Rodriguez

Linda Chiu and Maria Liliana Rodriguez were promoted together, had their civil service title changed from SMC to Assistant Director in December 2006, and received the same salary increases with the title change.⁹ They work for Associate Executive Director Laura Zabriskie, the supervisor who recommended their title changes, in the Finance Department at Bellevue Hospital ("Bellevue"). No documentation, other than the SMC position description, was introduced regarding their duties and responsibilities as SMCs.

Zabriskie testified as to Chiu's and Rodriguez's duties and responsibilities as SMCs.¹⁰ As a SMC, Chui was "more of a technical person," maintaining the productivity database, creating documents related to payments to affiliates, validating data, and monitoring procedures and policies related to data sets. (Tr. 464). Chui "would do the reports. [Zabriskie] would do the analysis." (Tr. 473-74). As a SMC, Chui did not meet with department heads on substantive matters unless she was with Zabriskie as "[s]he was not at that level yet." (Tr. 477). Chui and Rodriguez both attended

⁹ Earlier in 2006, they both had been promoted from Coordinating Managers to SMCs. In its Brief, the Union notes that the promotion of Chiu and Rodriguez to SMC from Coordinating Manager occurred "at the time the [BOC] issued Decision 73 OCB 3, in May 2006, which granted [C]oordinating [M]anagers union rights." (Union Brief at 9).

¹⁰ Chiu's and Rodriguez's title changes were recommended by Zabriskie but "sign[ed] off" by Chief Financial Officer ("CFO") Aaron Cohen and HR. (Tr. 457). Zabriskie testified "I am not the one that decided on the titles or whatever. HR was working with my boss." (Tr. 468).

meetings with Zabriskie, but in a support function, taking notes. Rodriguez sat in with Zabriskie on contract negotiations with affiliates “but she was not . . . an active participant.” (Tr. 441). Like Chui, as a SMC, Rodriguez’s duties included validating data and monitoring data sets.

The current Assistant Director functional job descriptions for Chiu and Rodriguez were introduced. Gorsky testified that Chui’s and Rodriguez’s Assistant Director functional job descriptions were similar and concluded that the duties and responsibilities listed therein were consistent with that of a SMC, opining that as Assistant Directors they were “doing the same job” they performed as SMCs and, therefore, could have remained SMCs. (Tr. 128 & 133). Gorsky, for example, noted that Rodriguez’s Assistant Director functional job description states that “[s]he did work in the department to develop and refine local procedures for monitoring, collection and auditing of performance indicator and other data and assist in day-to-day activities.” (Tr. 133). Comparatively, a SMC “prepares and supervises the preparation of reports on departmental organization and administration in the normal business operations.” (Tr. 133).¹¹

Zabriskie testified as to the reasons for Chui’s and Rodriguez’s title changes, explaining that she had been “grooming” Chui and Rodriguez for some time because of her approaching retirement at the end of 2009. (Tr. 426, 433). The duties of Chiu and Rodriguez had “evolved,” with them becoming more independent. (Tr. 427, 432). Among the higher level duties they had assumed was becoming “key players in contract negotiations” involving affiliates that are valued at over \$170 million dollars. (Tr. 436). Further, in the middle of 2006, Zabriskie’s unit lost an employee who

¹¹ The third task on the SMC position description reads: “Prepares or supervises the preparation of reports on departmental organization and administration of normal business operations in the light of study and analysis of surveys designed to secure optimum efficiency, economy and adequacy of public service and convenience.” (OSA Ex. 1).

was not replaced, and she “had to divide up the functions of that staff person.” (Tr. 433). Chiu and Rodriguez “received the functions that required more autonomy and independence on the performance indicators and working with department heads on that.” (*Id.*).

Zabriskie testified that, as an Associate Director, Chiu’s analysis is more sophisticated than when she was a SMC. Chui is now dealing with department heads directly. Zabriskie illustrated Chui’s increased responsibilities with reference to the doctor master committee which deals with billing issues with New York University (“NYU”). This “multi-disciplinary committee” includes the Directors of the medical staff office, patient accounts, and medical records. (Tr. 424). When Chui was a SMC, Zabriskie chaired the committee, while Chiu’s participation consisted largely of “taking the minutes.” (Tr. 427). As an Associate Director, Chiu now chairs the doctor master committee and Zabriskie no longer attends.

As for the evolving duties of Rodriguez, Zabriskie testified that she was grooming her to replace her after she retires. Rodriguez has “taken over as the finance representative on research” and now reports directly to Bellevue’s CFO. (Tr. 435-6). Similar to Chiu and the doctor master committee, Rodriguez had assumed more responsibility for the “joint oversight committee,” which deals with the NYU affiliation contract, and includes Bellevue’s Medical Director, Bellevue’s CFO, NYU’s Vice Dean for its School of Medicine, and NYU’s Vice President of Faculty Practices. In the past, Bellevue’s CFO ran the joint oversight committee in Zabriskie’s absence but since becoming an Assistant Director, Rodriguez takes it over when Zabriskie is not there.

Zabriskie also testified that she “needed [Chiu and Rodriguez] to be managers, because they are dealing with very high-level people, and whether it’s correct or not correct, people don’t look at a nonmanager in the same way as they look at a manager.” (Tr. 467-8). The Union asked if this

belief was why Zabriskie wanted them “in a nonunionized title.” (Tr. 471). Zabriskie replied:

It had nothing to do with being in a union or not being in a union, it had to do with their level of authority, responsibility and the managerial title and the additional responsibilities. The fact that I had lost an employee and lost her line and had to give them more responsibilities in addition to what they were doing, plus they had to become more autonomous.

(*Id.*). The Union asked if the employee she lost was a manager, and Zabriskie stated the employee had been in a unionized title.¹² Zabriskie was not aware there were two levels to the SMC title but was aware that the SMC title had become a union represented title prior to the change in title of Chiu and Rodriguez.

7. Franklin Duckett

Franklin Duckett works in the Information Technology (“IT”) Division of Jacobi Medical Center (“Jacobi”), part of the North Bronx Health Network (“NBHN”).¹³ His civil service title was changed from SMC to Director of Systems and Programming, with the in-house title of Associate Director of the Clinical Applications Department, sometime between September 18, 2006, and November 29, 2006. Duckett received a salary increase with his title change. No documentation, other than the SMC position description, was introduced regarding his duties as a SMC.

Freeda George, Duckett’s supervisor, testified as to his duties and responsibilities as a SMC. Duckett trained the clinical providers in the use of various computer software, including Windows, and helped create and update the training documents. He also monitored the systems to insure that the interfaces were up and running, maintained security procedures, and assisted in “go lives,” which

¹² The lost employee was a Coordinating Manager, a title that had become unionized prior to the departure of the employee in mid-2006.

¹³ NBHN consists of Jacobi and North Central Bronx Hospital (“Bronx”).

is when a system is first implemented into a department, answering questioning and ensuring the users understood the system.

Duckett's Director functional job description was introduced into evidence. George testified that it listed ten duties that Duckett had not performed as a SMC, including supervising the daily operations of the Clinical Applications Department, ensuring system compliance for regulatory standards, ensuring appropriate end-user participation, leading the development of new software enhancements, and developing staff workable schedules. George testified that she recommended Duckett for promotion because of his "[i]ncreased responsibilities and also as a backup for me." (Tr. 559).¹⁴ As a SMC, Duckett did not have supervisory duties or perform employee evaluations, but as a Director he now supervises and evaluates eight to ten employees. George learned about the unionization of the SMC title around the time that she recommended Duckett's promotion but was unaware that there were two levels within the SMC title. She did not know if Duckett was an SMC Level I or II at the time she recommended his title change.

Gorsky reviewed Duckett's Director functional job description and opined that many tasks listed thereon "are subsumed in the example[s] of typical tasks" on the SMC position description. (Tr. 99).¹⁵ Specifically, Gorsky argues that Duckett's the three new Director duties of supervising daily operations, ensuring system compliance for regulatory standards, and ensuring appropriate

¹⁴ Duckett's title change was recommended by George but approved by her superior, Chief Information Officer ("CIO") Craig Franklin. George has the same civil service title as Duckett, Director of Systems and Programming, but holds the higher in-house title of Director of Clinical Applications.

¹⁵ Gorsky was referring to OSA Ex. 12, which is the first page of the two page Director functional job description for Duckett. After Gorsky testified, HHC introduced into evidence HHC Ex. H, which is the full two page Director functional job description for Duckett. The Union had the opportunity to recall Gorsky but chose not to do so.

end-user participation are subsumed in the following typical task from the SMC position description: “Prepares or supervises the preparation of reports on departmental organization and administration of normal business operations in the light of study and analysis of surveys designed to secure optimum efficiency, economy and adequacy of public service.” (*Id.*) (reading OSA Ex. 1). Gorsky further opined that other unspecified tasks from Duckett’s Director functional job description are subsumed in the following typical task from the SMC position description: “general application in wide areas of departmental determinations and execution or achievement of management policies, objectives and goal.” (*Id.*) (reading from OSA Ex. 1).

8. Robert Witkowski

Robert Witkowski works in IT for the NBHN.¹⁶ His title changed from SMC to Director of Systems and Programing, effective sometime between September 21, 2006, and December 14, 2006. Witkowski received a salary increase with his title change and reports to the same supervisor in his new title that he did as a SMC. Both HHC and the Union rely on a comparison of Witkowski’s SMC Survey and his functional job descriptions.

In his SMC Survey, Witkowski listed two duties: “[1] Network Connectivity of all [Bronx] PC’s [2] Maintain Documentation.” (OSA Ex. 25). In his SMC Survey, Witkowski checked “no” for all questions in the “Budgetary Responsibility” section, indicating that, as a SMC, he had no budgetary responsibilities. (*Id.*). Additionally, Witkowski stated he supervised three employees but had no role in disciplining, hiring, promoting or evaluating employees.

Attached to his SMC Survey was his SMC functional job description, which described the

¹⁶ It is not clear where Witkowski works. On his SMC Survey, he lists Jacobi; on both his SMC and Director functional job descriptions he indicates Bronx; and the Personal Request Form for his title change lists both Jacobi and Bronx. (*Compare* OSA Exs. 23, 24 & 25).

“Purpose of Position” as “Manage multiple projects and computer operations/technical services. This position reports to the Deputy CIO.” (OSA Ex. 25). It states that Witkowski “[su]pervises employees who provide installation tasks” and “[w]orks with all members of IT staff and other departments as necessary.” (OSA Ex. 25). Witkowski’s SMC functional job description list one “Clinical” task: “Provide support for all Misys CPR/Patient 1 clinical and Utility (SMS) users.” (OSA Ex. 25). It lists seven “Administrative/Technical Support” tasks:

1. Manage technical services.
2. Participate and coordinate the maintenance of policies and procedures.
3. Develop staff by providing ongoing training.
4. Project management for multiple facility/department installations and relocations.
5. Conduct extensive walkthroughs with department supervisors to attain a functional location of computer equipment.
6. Manage cable installations within department.
7. Manage IP addresses and device databases.

(*Id.*).

Witkowski’s Director functional job description states the “Purpose of Position” as “[t]o manage and direct the day-to-day operations of the [IT] department and [Bronx], including the budget, staffing, and management of projects and systems.” (OSA Ex. 23). It lists eight tasks:

1. Recruits, selects, trains, evaluates, and disciplines staff as appropriate. Providing ongoing training and support staff development.
2. Manages and coordinates all IT projects and installations and delegates work assignments to staff.
3. Provides recommendations on IT projects based on cost effectiveness and efficiency.
4. Conducts extensive walk-thrus with department heads to attain location and equipment needed for systems.
5. Coordinate and prioritize in accordance with the overall installation plans of the facility, the cabling of installations throughout the facility.

7. Monitors the progress of the projects and takes necessary action to correct systematic deficiencies, slippages in scheduled completion dates or other conditions which could lead to cost overruns.
8. Prepares status reports of activities/projects underway and future projects and timeframes.

(Id.).

Gorsky compared Witkowski's Director functional job description with the SMC position description and testified that several of Witkowski's Director tasks "fit within the purpose of the position of the [SMC]." (Tr. 122). Specifically, she testified that tasks 2, 5, 7 and 8 on his Director functional job description fit within the following typical task from the SMC position description: "engage in research on business organization and methods to assist in the development and installation of methods and techniques of general application in wide areas of departmental determinations and execution or achievement of management policies, objectives and goal." (*Id.*; OSA Ex. 1). Gorsky also compared Witkowski's Director functional job description with his SMC Survey and opined "it is the same job," because Witkowski's SMC Survey states that his job duties were "network connectivity of all [Bronx] PC's and maintain documentation" and that is what "Witkowski is involved in" as a Director. (Tr. 125; OSA Ex. 25). Further, the fifth (walk-thrus with supervisors) and sixth (cabling installations) technical tasks on Witkowski's SMC functional job description are substantially the same as the fourth and fifth tasks on his Director functional job description. On cross-examination, Gorsky admitted that there are, in general, overlapping duties between different titles.

9. Pai-Tao Betty Chen

Pai-Tao Betty Chen's civil service title was changed from SMC to Senior

Consultant/Management Information Services (SC/MIS) in September 2006.¹⁷ The title change was retroactive to July 1, 2006, to coincide with the start of the fiscal year, although Chen did not receive a salary increase along with the title change. Chen works at HHC's Central Office in Debt Finance and Corporate Reimbursement Services.

Chen's SMC Survey describes her duties as a SMC as "analysis and programing." (OSA Ex. 34). Assistant Vice President ("AVP") David Menashy testified that, as a SMC, Chen did the following: programed reports for Corporate Reimbursement Services; coordinated the installation of new software packages; handled issues related to the Siemans systems, oversaw the updating of the Siemans database, and interfaced PC-based programs to the Siemans server-based system; and aided the Central Office, facility staff, and outside consultants in the preparation of appeals.

Menashy drafted the justification for Chen's title change to SC/MIS, which included all the tasks she performed as a SMC plus that she maintained and enhanced reports developed by former HHC employees. Chen's justification states as the reason for her title change her assumption of additional tasks in a number of critical areas and that she is now functioning at the level of a SC/MIS.

Gorsky compared Chen's justification with the SMC position description and opined that four of the seven tasks listed thereon (including maintaining and enhancing reports) "basically fall within the realm of the [SMC]." (Tr. 76). Therefore, Gorsky concluded Chen could have remained as a SMC.

¹⁷ Chen is one of four Former SMCs whose title was changed to SC/MIS. The Union argues that "HHC has used the SMC and SC/MIS title interchangeably, with no rationale other than that the title of SC/MIS is not an organized title." (Union Brief at 27). This argument was not raised in the petition or explored at the hearing.

Menashy explained the circumstances surrounding Chen's title change. In the summer of 2006, Chen's area lost two Senior Directors—one transferred, the other retired—one of whom Menashy, Chen, and a third employee, Nancy Jean-Jacques, had reported. To fill the resulting management vacuum, CFO and Senior Vice President Marlene Zurack promoted Menashy from Director to AVP; promoted Jean-Jacques from Assistant Director to Director; and promoted Chen from SMC to SC/MIS, with Chen now reporting to Jean-Jacques. Chen's former supervisor had a technical background, but Jean-Jacques does not; therefore, Chen "became more responsible for her own work, because there was nobody really easily able to review her work and critique it." (Tr. 336-37). Menashy further explained that Jean-Jacques' lower level of expertise in programming required Chen to "be more independent . . . and be able to do some quality assurance checking and review and monitoring . . . to make sure that the work she was producing was accurate." (Tr. 336-37). Additionally, Chen now "basically is responsible for all programming regarding data gathering for the department." (Tr. 330).

Menashy testified that he became aware of the SMC certification proceeding around the time of his own promotion, which was also around the time he recommended Chen for the title change. He was not aware at the time he prepared Chen's justification that the SC/MIS title is not a union-represented title, but he became aware of that fact prior to the approval of Chen's title change.

10. Jeruchem Fishman

In June 2006, Jeruchem Fishman had his civil service title changed from SMC to SC/MIS. Fishman works in Corporate Controller/Financial Reporting. Both HHC and the Union rely on a comparison of Fishman's SMC Survey and his SC/MIS functional job description. Fishman's SMC Survey lists nine job duties:

- [1] Writing programs to access and download inpatient and outpatient data.
- [2] Writing and maintaining programs so that others can prepare data for uploading into the system.
- [3] Writing programs for reporting of said data. Also spreadsheet creation and maintenance.
- [4] Assisting others in the execution of these programs.
- [5] Maintaining controls for data being input into system.
- [6] Serve as backup for payroll system security access.
- [7] Assisting and guiding others in the general use of software. Problem resolution.
- [8] Preparing and uploading data.
- [9] Preparatory work for annual financial audits.

(OSA Ex. 9). His SC/MIS functional job description states that Fishman:

serves as consultant and advisor on complex data processing problems. He participates broadly in design of existing computer based information under development with particular emphasis on the feasibility of additional projects, benefits to be derived from implementation, and with attention to the orderly development of particular programs, interfacing with other systems to accomplish an effective degree of integration.

(OSA Ex. 8). It lists eight duties:

- [1] Interface our PC based accounting system to the IBM mainframe based general ledger system. He creates and maintains the underlying programs and spreadsheets to generate monthly financial reports used by Corporate staff in preparing internal and external financial statements.
- [2] Provides Masterfile and Control File programming support for streamlining the maintenance of the general ledger.
- [3] Provides inter-departmental training and supervision in data preparation for interfacing to the general ledger system.
- [4] Researches, develops and prepares specialized analysis reports from the Sieman's Patient Accounting Systems for Financial Accounting Department.
- [5] Maintains and updates the documentation of the operating manual used for executing reports and programs.
- [6] Evaluates and resolves PC problems with existing software and equipment and the installation of new software and hardware as well as maintaining uniformity in their

- compatibility within the Corporate Comptroller's Office.
- [7] Ensures data quality, integrity and control prior to uploading to the general ledger.
- [8] Downloading and archiving general ledger master file data for appeals before data "drop off" the system.

(*Id.*).

After reviewing the above documents, Gorsky opined that Fishman, as a SC/MIS, is performing the same job he performed as a SMC: "A lot of these tasks [on Fishman's functional job description] are basically analyst tasks that fit into the job description for [the SMC]." (Tr. 80). HHC, however, avers that with his promotion, "Fishman was given greater responsibilities within the area of management information systems." (HHC Brief at 24).

11. Sharon Kemp

Sharon Kemp had her civil service title changed from SMC to SC/MIS. The exact date of the title change is unknown, but her SC/MIS functional job description was effective as of August 26, 2005. Both HHC and the Union rely on a comparison of Kemp's SMC Survey and her SC/MIS functional job description.

In her SMC Survey, Kemp listed three duties: software trainer (20 hours per week), project manager (10 hours per week), and technical support (5 hours per week). On her SMC Survey, Kemp checked "no" for all questions in the "Supervisory Functions" section. (OSA Ex. 11).

Kemp's SC/MIS functional job description reads, in pertinent part:

- [1] Directs and supervises all training staff. . . .
- [2] Provide direction to Project Management Team on Corporate as well as IT goals. Arrange for training to enable team to properly manage projects. . . .
- [3] Provide classroom style and one-to-one style and one-to-one training of clinical staff as need. . . .
- [4] Manage schedule of training. . . .

- [5] Track attendance at training for IT and HR. . . .
- [6] Recommend tools to assist in training staff. . . .

(OSA Ex. 10).

Gorsky noted that “[w]hen I read the [SC/MIS functional] job description and I matched it to [Kemp’s SMC] [S]urvey, I found that [Kemp] was a trainer in the new [SC/MIS functional] job description and a software . . . trainer in [her SMC] survey. She was doing the same job.” (Tr. 90). Therefore, “her job could have been kept as a [SMC].” (Tr. 90-91).

12. Jonathan Goldstein

In November 2006, Jonathan Goldstein had his title changed from SMC to SC/MIS. Goldstein works in the Office of Corporate Planning Services (“CPS”), part of the Division of Corporate Planning Community and Intergovernmental Relations. Goldstein received a salary increase with his title change. HHC provided the Union with the justification for Goldstein’s title change. Goldstein completed a SMC Survey and testified at the SMC certification proceeding.¹⁸

On his SMC Survey, Goldstein described his duties as “programing and analyzing . . . healthcare data . . . includ[ing] looking at various health care conditions that the President has made a priority to improve. . . . my data runs help determine the ‘right sizing’ of our . . . modernization projects.” (OSA Ex. 30).

HHC called Goldstein’s supervisor, Dona Green, Senior AVP of CPS, who testified that, as a SMC, Goldstein just responded to information requests. On cross-examination, counsel for the Union read from Goldstein’s testimony during the SMC certification proceeding but did not show

¹⁸ At the time Goldstein completed the survey and testified, he was in Corporate Planing and HIV Services, which was reorganized in mid-2005 into two groups—HIV Services and CPS.

the testimony to Green or enter it into evidence.¹⁹ Green was asked if she was aware that, as a SMC, Goldstein had attended a wide range of meetings, including some with high ranking officials. Green was able to confirm that Goldstein attended most of the meetings he testified about but noted that he was not there to participate, although he would provide information if requested. Green had him attend these meetings if they had “bearing on the data that he produced” because she wanted him to “hear it firsthand.” (Tr. 300).

In the SMC certification proceeding, Goldstein described himself as “the person that they go to to capture the data regarding patient visits, *et cetera*, out of the corporate database.” (CP Tr. 146). He testified that, as a SMC, “on a rare occasion I have actually had an opportunity to present data to Dr. Chu [the President of HHC] directly.” (CP Tr. 153). Goldstein further testified that, while he regularly attended the Capital subcommittee of HHC’s Board, he did so “[m]ostly as an observer, but if one of [his superiors] was not there and there was a question, I would be available to comment and have an answer.” (*Id.* at 158). Goldstein agreed with the characterization of him as “a resource person in that situation.” (*Id.*).

Green drafted Goldstein’s justification for his title change from SMC to SC/MIS, in which Green noted that “[o]ver the past year [CPS] has undergone considerable restructuring.” (OSA Ex. 29).²⁰ Green explained that CPS was formed out of the division in mid-2005 of the Corporate Planning and HIV Services Department into two groups—HIV Services and CPS. On Goldstein’s

¹⁹ We take administrative notice of Goldstein’s testimony in the SMC certification proceeding, and references herein to transcript thereof are designated “CP Tr.”

²⁰ Goldstein’s title change was recommended by Green to LeRay Brown, Senior Vice President of Corporate Planning, who formally requested it, and was then approved by Gloria Velez, Senior Director of Human Resources. (*See* OSA Ex. 29). Green has “no responsibilit[y] for determining a corporate job classification.” (Tr. 252).

justification, Green first described the “core responsibilities” of CPS as including “[a]nalytical and technical support to the Strategic Planning Committee of HHC’s Board of Directors [and] [s]trategic planning oversight/support for major projects.” (*Id.*). Goldstein’s justification then stated that CPS needed an employee for the following responsibilities:

- [1] Refining data and formatting final product data requests for internal/external sources
- [2] Performing routine programming assignments requiring knowledge of established programming procedures and data processing requirements in order to develop a set of reports that are valued by a large number of users
- [3] Managing multiple data projects simultaneously in a deadline-driven work environment
- [4] Understand/interpreting and communicating users technical needs in response to data requests
- [5] Provide pre-development documentation and utilization statistics for the facility major capital projects
- [6] Independently developing and maintaining good customer relations, communication and teamwork skills

(*Id.*). Green recommended Goldstein “based on [his] assumption of the aforementioned scope of additional work.” (*Id.*). Green was aware when she recommended Goldstein for promotion that the SC/MIS title was not unionized.

Gorsky compared Goldstein’s justification with his SMC Survey and noted that, since he was in the same department, he worked with the same computers as a SC/MIS as when he was a SMC. Since Goldstein participated in the general responsibilities of CPS of “analytical and technical support” and “strategic planning and consulting support to HHC facilities,” Gorsky opined his “job was well within the range of the [SMC].” (Tr. 140).

Green testified that in order to be considered for promotion in CPS, the employee “must first and foremost be taking on an additional body of work.” (Tr. 190-1). In addition, “the scope of their

intellectual engagement must increase.” (*Id.*). Regarding Goldstein, as a SC/MIS, “his intellectual engagement upped considerably from what he had to previously [as a SMC].” (Tr. 226). As a SC/MIS, Goldstein was meeting “with the facilities directly, not only providing data, but doing a lot more of the interpretation of the data.” (*Id.*). Goldstein is now “actually [] managing the consultants.” (*Id.*). Goldstein also now does work that was previously done by Green, dealing directly with the sources that provided the data to CPS: “The request could go straight to him. He was able to discuss it with the person, refine it, pull the data out, analyze it, and send it off.” (Tr. 231). Further, Goldstein is now responsible for “a much more sophisticated level of programming and much more sophisticated level of understanding how we work.” (Tr. 233).

Green provided several other grounds for Goldstein’s promotion. An update to HHC’s hardware created “the capacity to manage multiple data projects at the same time,” therefore, Goldstein had to “increase his project management skills [] to be able to meet deadlines on multiple projects.” (Tr. 234). Goldstein’s role in capital projects also increased; he “became part of the project team” where, as a SMC, “his role in capital projects was to produce trended data, period.” (Tr. 241). Goldstein began a major project in the summer of 2006—HHC’s corporate dashboard: “a series of indicators . . . [that] tell you how you are doing.” (Tr. 237). The President of HHC asked CPS to develop the dashboard, which was launched in 2007, and Goldstein is still with that project.

13. Victor Kim

Victor Kim had his civil service title changed from SMC to Assistant Director of Planning in November 2006. Like Goldstein, Kim works in CPS and reports to Green. Kim received a salary increase with his title change. HHC provided the Union with the justification for Kim’s title change.

Reviewing Kim’s justification, Gorsky concluded that the tasks Kim is now performing “fit

well into the tasks of the [SMC].” (Tr. 101). Gorsky compared Kim’s justification to the SMC position description and “found that the job descriptions were the same.” (*Id.*). Further, Gorsky noted that after his title change, Kim still worked in CPS.

Green explained that the restructuring that created CPS led to Kim taking on additional duties and performing at higher level, such that Green “recommended [Kim’s] promotion based on the additional work that he was going to continue to handle and how he had been performing.” (Tr. 194).²¹ Prior to the restructuring, as a SMC, Kim did not supervise external consultants, but as an Assistant Director he does. Kim is also involved in the actual contracting of the consultants. Kim assumed these supervisory duties several months before the title change. Similarly, Kim now manages staff as a project manager, which he had not done prior to the reorganization. When asked why Green believed Kim’s work was no longer appropriate for the SMC title, she replied that, in addition to his new supervision and contract responsibilities, Kim “had also taken on management of data capacity function in the office.” (Tr. 267).

Further, in addition to the above, Green described five new duties Kim now performs as an Assistant Director that he did not perform as a SMC. Kim now is responsible for “understanding all data systems used by CPS.” (OSA Ex. 14). Second, Kim “took on this sort of master/teacher role” by helping “the staff to collect and mine and share data [from] interfaces that are not always easy for people who don’t have a programming background.” (Tr. 199). Third, Kim took on additional supervisory responsibilities, including working more closely with Goldstein, as “the two of them together were great.” (Tr. 203). Fourth, Kim “volunteered for the role of office contract

²¹ Like Goldstein, Kim’s title change was recommended by Green to Brown, who formally requested it, and then was approved by Velez. (*See* OSA Ex. 14).

liaison,” which includes educating other staff members as to the nuances of the contracting rules, “to make everyone’s life easier.” (Tr. 203). Fifth, he created business plans for facilities and strategic planning. Additionally, Green also discussed, in detail, several successful projects Kim had worked on that contributed to the decision to promote him.

On cross-examination, Green admitted not being aware of the distinctions between SMC Level I and II. (Tr. 252). Green testified that consideration for Kim’s promotion began in early 2006, before the SMC title was unionized, and that she did not know if the Assistant Director title is unionized. Green stated that no SMCs in her area had supervisory responsibilities.

POSITIONS OF THE PARTIES

Union’s Position

The Union argues that HHC violated NYCCBL § 12-306(a)(1) when it changed the titles of the Former SMCs to unrepresented titles because it “was motivated by HHC’s interest in depriving OSA and the SMC’s of their right to collective bargaining.” (Union Brief at 2).²² By changing the Former SMCs’ titles, “HHC attempted to countermand the [BOC’s] determination which found that the SMCs were not managerial within the Taylor Law definitions.” (*Id.* at 11). That HHC managers recommended title changes after learning that the BOC “had given SMCs organizational rights . . . establishes *prima facie* evidence that HHC was motivated by an intent to frustrate the

²² NYCCBL § 12-306(a)(1) provides, in pertinent part, that “[i]t shall be an improper practice for a public employer or its agents . . . to interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter.” NYCCBL § 12-305 provides, in pertinent part, that “[p]ublic 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.”

organizational efforts of OSA.” (*Id.* at 14). The Union concludes that “[s]uch interference constitutes a violation of [NYCCBL] § 12-306(a)(1).” (*Id.* at 31).

Further, the Union argues that “HHC failed to meet its burden of establishing that its transfer of 13 employees to unrepresented titles was proper.” (*Id.* at 30). To the contrary, the title changes were “without any business justification.” (*Id.*). The Former SMCs’ duties in their new titles “are certainly within the corporate job description of [SMC] Level I or Level II.” (*Id.*). The Union argues that HHC did not consider “promoting the [Former SMCs] to level II within the SMC title,” nor was there any testimony that “the duties [currently] performed by the [Former SMCs] were more appropriate for the new title than the SMC title.” (*Id.* at 2).

The Union notes that Zabriskie “admitted that she recommended a title change from the now-unionized SMC title because she needs the employees to be perceived as ‘managers.’” (*Id.* at 3). Any argument by HHC that “it did not want union-represented SMCs to have important duties such as supervisory responsibilities and interactions with high-level employees, . . . will have a chilling effect on future organizing efforts of HHC employee.” (*Id.* at 31). Further, “when HHC reduces the duties and level of responsibility assigned to employees in union-represented titles, these employees suffer a loss of prestige and advancement opportunities. Such action will have a chilling effect on future organizing efforts by unions.” (*Id.* at 11).

In addition, the Union argues that HHC lacked a “compelling reason” for the title changes, “such as that salaries may have exceed the maximum range for the [SMC] title.” (*Id.* at 30-31). Several of the Former SMCs report to the same supervisor in their new position that they reported to when they were SMCs. Also, “the timing of these transfers—which all occurred at the time of the implementation of the [BOC’s] decision [OSA, 78 OCB 1]—warrant a finding that the transfers were

motivated by HHC's interest in depriving OSA and the SMCs of their rights to collective bargaining." (*Id.* at 31).

Finally, the Union argues that it is not challenging HHC's right to transfer employees, and that, therefore, the managerial rights clause of NYCCBL § 12-307(b) is not relevant here.²³ Rather, the Union argues that transferring employees to deny them Union representation is an improper practice. The Union argues that Board decisions and those of the Public Employment Relations Board ("PERB") "hold that interference with the rights granted under [§] 12-305 includes the erosion of a unit through reclassification of titles." (*Id.* at 4). Further, PERB has "established the principle that it was violative of the Taylor Law for a public employer to use reclassification as a means of avoiding a pending certification decision." (*Id.*).

HHC's Position

First, HHC argues that the petition must be dismissed because the title changes at issue were a legitimate exercise of its managerial rights pursuant to NYCCBL § 12-307(b). Further, the Board has held reclassifying employees is not a *per se* violation. The NYCCBL does not prescribe any proper or improper time for the exercise of management rights under § 12-307(b) and "does not

²³ NYCCBL § 12-307(b) provides, in pertinent part, that:

It is the right of . . . public employer . . . to determine the standards of selection for employment; direct its employees; . . . determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; . . . Decisions of the . . . public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

forbid an employer promoting employees out of union represented titles.” (HHC Brief at 5).

Second, HHC argues that the petition must be dismissed because the Union has failed to allege any facts that demonstrate that the title changes were improperly motivated. No NYCCBL § 12-306(a)(1) violation can be found as the Union has failed to allege any facts that demonstrate that HHC’s has interfered with any employee of their organization. The Union’s “entire case consists of speculation and conclusory allegations based on the testimony of one witness.” (*Id.* at 10). Since the title changes did not “have the far reaching effects or unavoidable consequences of destroying employees’ rights as required by the inherently destructive standard,” the Union must prove anti-union motivation to establish a NYCCBL § 12-306(a)(1) violation. (*Id.*) (citations and editing marks omitted). HHC argues that the *Bowman/Salamanca* test applies, that the Union has failed to satisfy it, and that HHC has demonstrated legitimate business reasons for all of the title changes.²⁴ The Union has not established that any of the Former SMCs were engaged in union activity or that any such activity was a motivating factor in HHC’s decisions. The Union’s argument “relies solely on the timing” of the title changes and “temporal proximity alone is insufficient to sustain its burden.” (*Id.* at 13). Further, “[k]nowledge of the SMC title being granted organizational rights and accreted into OSA is insufficient to prove anti-union animus” and “OSA’s suspicion is insufficient to shift the burden of proof to HHC.” (*Id.* at 15). Even presuming anti-union

²⁴ The *Bowman/Salamanca* test to determine whether an employer has violated NYCCBL 12-306(a)(3), and derivatively NYCCBL § 12-306(a)(1), requires a petitioner to demonstrate that: “1. The employer’s agent responsible for the alleged discriminatory action had knowledge of the employee’s union activity; and 2. The employee’s union activity was a motivating factor in the employer’s decision.” *Bowman*, 39 OCB 51, at 18-19 (BCB 1987), applying *City of Salamanca*, 18 PERB ¶ 3012 (1985). If a petitioner establishes a *prima facie* case, “the employer may attempt to refute petitioner’s showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action complained of even in the absence of protected conduct.” *DC 37*, 1 OCB2d 6, at 27-28 (BCB 2008)(quoting *SBA*, 75 OCB 22, at 22 (BCB 2005)).

motivation, HHC has demonstrated that the title changes would have occurred “based solely upon changes in each employee’s duties and responsibilities.” (*Id.* at 14). HHC notes that “[c]learly, this [p]etition was not brought on behalf of the [Former SMCs] or to protect employee rights” as “none of the employees named by OSA in its petition claim that they were interfered with, restrained or coerced in the exercise of their rights granted in [§] 12-305.” (*Id.* at 16). To the contrary, the Former SMCs who testified did so on behalf of HHC. The Union’s “argument that an employer cannot promote an employee within the same department without being guilty of an improper practice” is “meritless” (*Id.* at 24).

DISCUSSION

We find that the Union has failed to establish that HHC’s purpose in changing the titles was to interfere, restrain, or coerce employees’ exercise of their NYCCBL rights and, accordingly, dismiss the petition.²⁵ Although NYCCBL § 12-306(a)(1), unlike its state counterpart, Civil Service Law (“CSL”) § 209-a(1)(a), does not explicitly provide that impermissible motive is an element of a cause of action, we have held that proof of motive is a required element to find that a reclassification, such as a title change, is an independent violation of NYCCBL § 12-306(a)(1).²⁶ See *OSA*, 33 OCB 22 (BCB 1984), *rev’d in part*, *Org. of Staff Analysts v. Bd. of Collective Bargaining*, 18 PERB ¶ 3067 (1985) (“*OSA v. BCB*”) (remanded for hearing); see also *Dist. 1199*,

²⁵ As the instant case was pled as an independent NYCCBL § 12-306(a)(1) violation, we have analyzed it as such.

²⁶ The Taylor Law counterpart to NYCCBL § 12-306(a)(1), § 209-a(1)(a), reads: “It shall be an improper practice for a public employer or its agents *deliberately* (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in [§ 202] *for the purpose of depriving them of such rights.*” (emphasis added).

Nati'l Union of Hosp. and Health Care Empl., 29 OCB 40, at 6 (BCB 1982) (no NYCCBL § 12-306(a)(1) claim made out challenging the creation of a title that “may, as might a promotion, remove an employee from a bargaining unit” where the union “has not even addressed the issue of improper motivation.”).²⁷

In *OSA v. BCB*, PERB acknowledged our reasoning, consistent with its own decisions, stating that “[a]lthough not explicitly stated in the Administrative Code, the opinion of [the Board] before us, makes it clear that improper motivation is an element in the violation of [NYCCBL § 12 306(a)(1)].” *OSA v. BCB*, 18 PERB ¶ 3067, at 3144, n. 7. The same standard is applied by PERB to interference claims under the Taylor Law. In *Board of Education of the City School District of the City of New York v. Organization of Staff Analysts*, 18 PERB ¶ 3068, at 3148 (1985) (“*BOE v. OSA*”), PERB found a violation of CSL § 209-a(1) where an employer reclassified employees for the purpose of altering the outcome of a representation petition. However, PERB noted that it “would find no violation if the evidence should persuade us that the purpose of the [employer’s] actions has been to create an improved civil service classification structure.” *Id.* at n. 5; *see also Bd. of Educ. of the City School Dist. of the City of New York v. Org. of Staff Analysts*, 21 PERB ¶ 3056, at 3120 (1988) (“In finding a possible violation . . . purpose . . . is of the essence. Evaluation, reclassification and transfer are proper management tools if undertaken for legitimate operating purposes. They become improper if undertaken for the purpose of interfering with public

²⁷ We note, however, that we have recognized that not every claimed violation of § 12-306(a)(1) requires proof of improper motive. Certain employer actions have been found to be inherently destructive of employees’ protected rights, in which case no proof of improper motive is required. *SBA*, 75 OCB 32, at 9-10 (BCB 2005); *Local 1180, CWA*, 71 OCB 28, at 9-11 (BCB 2003); *see Security and Law Enforcement Empl.*, 18 PERB ¶ 3081 (1985). The decisions of this Board and PERB, cited above, hold that reclassification is not such an action.

employees' right of organization.”) (following and quoting *BOE v. OSA*, 18 PERB ¶ 3068) (quotation marks omitted). PERB also explicitly rejected the notion that it is “a *per se* violation for a public employer to reevaluate, reclassify or transfer positions during the course of a representation proceeding.” *OSA v. BCB*, 18 PERB ¶ 3067, at 3145.

In the instant case, in support of its claim of interference, the Union has highlighted the following as indicia of improper motive: temporal proximity of the title changes to the granting of representation rights; the overlap between the Former SMCs' duties when they were SMCs and their new duties in their current titles; that the Former SMCs could have been promoted to SMC Level II; that their salaries remained in the range for SMCs; and that the Former SMCs work in the same department or for the same supervisors that they worked for when they were SMCs. In the hearing, the Union failed to adduce persuasive evidence that any of the title changes were, in fact, improperly motivated. Unrefuted testimony established that eight of the title changes were not motivated by a desire to interfere, restrain, or coerce employees in the exercise of their NYCCBL rights. No testimony regarding motivation was produced for the remaining five, but documentation established changes in the duties and responsibilities of those five Former SMCs.

The removal of the Former SMCs from the bargaining unit is not, in and of itself, sufficient to establish a NYCCBL violation. *See Local 1407, DC 37, 23 OCB 4*, at 7-8; *Dist. 1199, Nat'l Union of Hosp. and Health Care Empl.*, 29 OCB 40, at 6 (BCB 1979).²⁸ The Union argues that

²⁸ In *Local 1407, DC 37, 23 OCB 4*, we dealt with the scenario here—where promotions removed employees from a bargaining unit. We noted that it “is obvious that the promotion of an employee from a unit title to a non-unit title . . . will remove the employee from the unit, deprive the union of dues check-off as to that employee, and may prevent the union from representing the employee for any purpose.” *Id.* at 7. We further noted that the promotion may itself “remove [the employee] from collective bargaining.” *Id.* at 8. Nevertheless, absent improper motivation, even “inefficient or misguided” reclassifications are not improper practices. *Id.* at 6.

HHC lacked a “compelling reason, such as salaries that may have exceeded the maximum for the title, or job duties that fall outside the SMC corporate job description.” (Union Brief at 31). However, HHC’s “mere failure to articulate a reason for its actions that is satisfactory to the Union, without more, does not constitute evidence sufficient to satisfy the [Union’s] burden of proving improper motive.” *Autorino*, 47 OCB 30, at 16 (BCB 1991). Nor is it determinative that the employee arguably could perform the duties of the new title as a SMC. *See Local 1407, DC 37*, 23 OCB 4, at 6 (“The mere fact of such a similarity between an existing title and a newly created one, where the exercise of management’s rights . . . has not been shown to be improperly motivated, is not the basis for a finding of improper practice.”); *Dist.1199, Nat’l Union of Hosp. and Health Care Empl.*, 29 OCB 40, at 6.²⁹ Moreover, the record does not establish that any of the Former SMCs are now in a title inappropriate for their current duties. In addition, documentation provided by the Union establishes not only the large salary range for the SMC title but also that the salary ranges for numerous other titles overlap with the salary range for the SMC title. (*See* OSA Ex. 5).

Rather than focus on any one factor, we are required to weigh the evidence to determine whether the employer had a proper motive, not a compelling reason, for its actions and the totality of the record does not persuade us that the purpose of HHC’s action was to interfere, restrain, or coerce employees in the exercise of their NYCCBL rights.

One Former SMC, Lehrfeld, arguably did not have her title changed but rather corrected. Documentation and unrefuted testimony established that Lehrfeld was hired into the civil service title Associate Director, Hospitals—a non-unionized title—but was erroneously recorded as a SMC—a

²⁹ We note that Gorsky acknowledged that the duties of various titles overlap. Indeed, the Union argued that Gorsky’s experience as an Associate Staff Analysts was relevant because Staff Analysts tasks are similar to those of SMCs.

unionized title. Her title change was, therefore, only a correction of HHC's records, not a substantive change in her rights under the NYCCBL. The Union focuses on the characterization of "Lehrfeld's entry into Queens [] as a transfer" arguing that "the documents [] indicate that Ms. Lehrfeld was transferring from her position of SMC from one location to another." (Union Brief at 22). However, White's unrefuted testimony established that the use of the term transfer on the pertinent documents can refer to promotions out of title when the employee changes locations—as in this case where Lehrfeld was a SMC at Coler and hired as an Associate Director, Hospitals, at Queens. (*See* Tr. 659). Further, the PAFs, and White's explanation thereof, established that the civil service title of the job Lehrfeld applied for, as well as the civil service title her hiring was approved for, at Queens was Associate Director, Hospitals.

It is undisputed that Lehrfeld, and not her superiors, initiated the process that led to her title change. Similarly, Peters, after nine years without a promotion, requested his promotion along with the restructuring of his department. Peters' unrefuted testimony is that his duties changed with his title, in that he now does much less programming and, instead, "represents [his] department to the hospital" and is "preparing the department to go into the future." (Tr. 502, 503). On these undisputed facts, we cannot find that the employer interfered, restrained or coerced Lehrfeld or Peters in the exercise of their NYCCBL rights.

As to the remaining Former SMCs, the record does not establish that HHC, or any of its agents, were motivated by a desire to interfere, restrain, or coerce employees in the exercise of their NYCCBL rights. The hearing did produce a statement by Zabriskie, who recommended title changes for two Former SMCs (Chiu and Rodriguez), that could be interpreted to imply that she may have harbored anti-union animus, but the record established that anti-union animus was not the motivating

factor behind the title changes.

The Union refers to Zabriskie's statement that she and her boss "needed [Chiu and Rodriguez] to be managers, because . . . whether it's correct or not correct, people don't look at a nonmanager in the same way as they look at a manager." (Tr. 467). It argues that "Zabriskie's responses reveal her belief that the Board decisions granting union rights degrade a person's status." (Union Brief at 10).³⁰ However, Zabriskie gave credible and unrefuted testimony regarding why she recommended the title changes, including her own impending retirement, the loss of staff, and the increase in the responsibilities Chiu and Rodriguez have assumed in preparation for her retirement, including chairing meetings and negotiating multi-million dollar affiliate contracts. Therefore, while Zabriskie's testimony may support the inference that she had animus towards the union, it also established that any anti-union animus she had was not the motivating factor for recommending the title changes. Furthermore, while Zabriskie recommended the title changes, her unrefuted testimony was that she was "not the one that decided on the titles or whatever. HR was working with my boss." (Tr. 468).

Regarding the remaining nine Former SMCs, for four of them (Chen, Duckett, Goldstein, and Kim) the record contains unrefuted testimony from their supervisors (Menashy, George, and Green) that their title changes were motivated by changes in their duties and responsibilities. Menashy testified that his superior promoted himself and Chen in response to a power vacuum created by the departure of two Senior Directors. Chen's responsibilities increased as her current immediate

³⁰ It is not clear that Zabriskie was using the terms manager and non-union interchangeably, as she described a title she knew to be unionized as managerial. Specifically, Zabriskie testified that the employee in the "managerial position" she lost was in a title she knew to be unionized—that of Coordinating Manager. (Tr. 471).

supervisor—unlike her former supervisor—lacked the technical background needed to review her work. Further, as a SC/MIS, Chen is now “responsible for all programming regarding data gathering for the department.” (Tr. 330). George, who recommended Duckett be promoted as a backup for her, testified that Duckett has several new responsibilities, including supervisory responsibilities for eight to ten employees, which he did not have as a SMC.

Green testified as to Goldstein and Kim. Regarding Goldstein, Green testified that, in addition to performing at a higher level, he was also performing work that he had not performed as a SMC, including work on major projects, such as HHC’s corporate dashboard and managing consultants. Regarding Kim, in addition to new supervisory duties and involvement in contract negotiations with consultants, Green identified five other new duties Kim now performs that he had not performed as a SMC, including taking on a “master/teacher role” to aid staff that lack a programming background and becoming the “office contract liaison” in educating staff members as to the nuances of the contracting rules. (Tr. 199, 203).

Therefore, for these four Former SMCs (Chen, Duckett, Goldstein, and Kim), there is no persuasive evidence of improper motivation. The evidence establishes that the title changes were motivated by changes in the duties and responsibilities of these four Former SMCs. Moreover, for three of the Former SMCs (Duckett, Chen, and Kim), the unrefuted testimony of their supervisors (Menashy, George, and Green) was that they were unaware of whether their new title was unionized. The undisputed fact that Menashy, George, and Green had no knowledge as to the union status of the new titles of Duckett, Chen, and Kim at the time that their respective recommendations were made defeats any claim that they were motivated by a desire to interfere with the employees’ NYCCBL rights because they did not know whether the title changes would change the Former

SMCs' representation status.

Regarding the remaining five Former SMCs (Conway, Prabhaker, Witkowski, Fishman, and Kemp), documentation clearly established that these Former SMCs are performing duties in their new titles that they did not perform as SMCs and/or performing similar duties at a higher level of responsibility. Further, no evidence was adduced as to the motive of any party responsible for the title changes, including what, if anything, they knew about the union status of the Former SMCs, the SMC title itself, or the new titles of the Former SMCs.

As a SMC, Conway was involved with "application maintenance" and would "assist with development." (OSA Ex. 28). As an Associate Director, he "define[s] the information system" and "[b]uild[s]" the application database. (OSA Ex. 27). Further, as a SMC, Conway worked in the Healthcare Information Systems Department at Elmhurst; his SMC Survey does not indicate he ever worked for or with anyone outside of his department. As an Associate Director, Conway still works at Elmhurst, but is now with QHN's Emergency Department of Information Services and his functional job description states that he works with "QHN and HHC staff on all levels," including "personnel from ancillary departments, MIS and HIS." (OSA Ex. 27, tasks 1 & 4).

As an Associate Director, Prabhaker is now responsible for representing the hospital administration and assisting in grant proposal writing. (See HHC Ex. J, tasks 4, 8 & 9). As a SMC, Prabhaker managed five temporary personnel. However, as an Associate Director, she is expected to "manage[] the technical, managerial, ancillary, clerical and support staff of [several] departments." (Compare OSA Exs. 20 & 22 with HHC Ex. J, Purpose of the Position section).

The Union argued that Witkowski's Director tasks "fit within the purpose of the position of the [SMC]." (Tr. 122). However, on his SMC Survey, Witkowski indicated that as a SMC he had

no budgetary responsibilities and no role in disciplining, hiring, promoting or evaluating employees. Budgetary responsibilities are stated in the “Purpose of Position” section of Witkowski’s Director functional job description and the first task therein states he “[r]ecruits, selects, trains, evaluates, and disciplines staff as appropriate.” (OSA Ex. 23).

As a SMC, Fishman was primarily “[w]riting programs”; as a SC/MIS, he now “design[s],” “evaluates,” and helps determine the “feasibility of additional projects.” (*Compare* OSA Ex. 9, tasks 1, 2 & 3, with OSA Ex. 8, Purpose of the Position section & tasks 4, 6 & 7). As a SMC, Fishman was “assisting,” as a SC/MIS, he is responsible for “inter-departmental training and supervision.” (*Compare* OSA Ex. 9, tasks 4 & 7, with OSA Ex. 8, task 3).

The Union argues that Kemp was a trainer as a SMC and is a trainer now as a SC/MIS. However, on her SMC Survey, Kemp indicated that she had no supervisory responsibility, while the first task on her SC/MIS functional job description states that she “[d]irects and supervises all training staff.” (OSA Ex. 10). Kemp went from being a trainer as a SMC to managing the training staff as a SC/MIS.

Therefore, the documentation indicates that for these five Former SMCs (Conway, Prabhaker, Witkowski, Fishman, and Kemp), the title changes correspond with changes in duties and responsibilities and, as such, on the record herein, we find no evidence of improper motivation on behalf of HHC.

The Union’s assertion that HHC attempted to countermand the Board’s determination in *OSA*, 1 OCB2d 45, that SMCs were not managerial within the Taylor Law definition is not supported

by the record. At issue in the instant case is only five percent of the SMCs.³¹ Moreover, the record establishes that individual supervisors (and, in two cases, the employees themselves) in different departments and hospitals initiated the title changes, with those title changes then formally requested by local senior supervisors and approved by HR. On these undisputed facts, the instant case cannot accurately be described as an attempt by HHC to countermand our decision in *OSA*, 1 OCB2d 45. Further, the Union has failed to establish that improper motive was the basis for any of the 13 title changes.

Finally, as to the Union's reliance on *Niagara Frontier Transportation Authority v. Niagara Frontier Transportation Authority Public Safety Officers Benevolent Association*, 18 PERB ¶ 3083 (1985), we find that the holding of that case, dealing with a duty to bargain over the contracting-out of exclusive bargaining unit work, is not relevant to the issues presented in the instant case.

We find that the Union has failed to establish that HHC's purpose in changing the titles of the Former SMCs was to interfere, restrain, or coerce employees in the exercise of their rights under the NYCCBL. Accordingly, the petition is dismissed.

³¹ Thirteen Former SMCs are involved in the instant case, while 252 SMCs were accreted to the Union.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition, Docket No. BCB-2631-07, filed by the Organization of Staff Analysts against the New York City Health and Hospitals Corporation, be, and the same hereby is, dismissed.

Dated: November 23, 2009
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

I dissent.

CHARLES G. MOERDLER
MEMBER

Dissenting Opinion of Charles G. Moerdler

The Organization of Staff Analysts and The NYC Health and Hospitals Corp. (BCB -2631-07)

The majority opinion turns upon the holding (or, as the majority would have it, its reaffirmed holding) that: "...proof of motive is a required element to find that a reclassification, such as a title change, is an independent violation of NYCCBL § 12-306(a)(1)." (Opinion p.).¹ Thus posited, the majority dismisses the Petition, concluding that "...we find no evidence of improper motivation on behalf of the HHC." I dissent and urge remand for rehearing upon a properly framed issue.

The statute upon which this Board's holding is predicated and which guides our determination on the merits omits to make motivation a dispositive factor. *See* NYCCBL § 12-306(a)(1). Indeed, the majority acknowledges that: "... the NYCCBL § 12-306(a)(1), unlike its state counterpart, Civil Service Law ("CSL") § 209-a(1)(a), does *not* explicitly provide that impermissible motive is an element of a cause of action." (Emphasis added). As later noted, the proviso not only omits motivation explicitly, it cannot be implied.

The majority seeks to circumvent that studied omission in the law by maintaining that the void can be filled based upon prior Board holdings that suggest that motivation is an essential element of proof in order to state a claim under NYCCBL § 12-306(a)(1).² The Board even cites

¹ The majority states the issue as being a claimed violation of NYCCBL § 12-306(a)(1) based upon allegations " that HHC violated rights granted in § 12-305 of the New York City Collective Bargaining Law (New York City Administrative code, Title 12, Chapter 3) ("NYCCBL") by changing the civil service title of 13 employees who were Senior Management Consultants ("SMC") in order to deny the Union of members and the employees of their right to collective bargaining in violation of NYCCBL § 12-306(a)(1)."

² *See, e.g., Dist.1199, Nat'l Union of Hosp. And Health Care Employees*, 29 OCB 40, at 6 (BCB 1982).

to a holding by PERB that seemingly supports that view.³ However, in my view neither this Board nor PERB have the power to fill the statutory void, particularly where the appropriate legislative body has studiously omitted to act to fill that void in well over a decade since the void was first commented upon by the Board.

The starting point for analysis is the facial disparity between the Taylor Law and the NYCCBL. The Taylor Law counterpart to the local statutory provision at issue here, NYCCBL § 12-306(a)(1), is § 209-a(1)(a) N.Y. Civ. Serv. Law § 209-a(1)(a), (McKinney 1999), which provides in pertinent part:

It shall be an improper practice for a public employer or its agents *deliberately* (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in [§ 202] *for the purpose of depriving them of such rights*’ (emphasis added).

The quoted Taylor Law proviso has been said by PERB to require a showing of ill motive as an essential element of a claim. See, *Matter of Organization of Staff Analysts v. Board of Collective Bargaining*, 18 PERB P 3067 (Sept. 2, 1985).⁴ However, as the majority opinion candidly

³ As noted in footnote 4, *infra*, minimal weight should be given to PERB opinion in *Matter of Organization of Staff Analysts v. Board of Collective Bargaining*, 18 PERB ¶ 3067 (Sept. 2, 1985)..

⁴ The above-noted PERB Opinion is, to say the very least, troublesome in its treatment of Local Law. In text, it compares relevant provisions of the NYC Administrative Code with those of the Taylor Law (“[w]e therefore set forth the relevant provisions of the two statutes, side by side”) and concludes that the “side-by-side comparison “... indicates that they are substantively consistent” Only when one goes to footnote 7 of the PERB Opinion does one find that the textual paraphrase of the Administrative Code”statute” is inaccurately stated and the inaccuracy is only then explained as follows:

Although not explicitly stated in the Administrative Code, the opinion of BCB before us makes it clear that improper motivation is an element in the violation of §1173-4.2A (1).”

PERB’s statement in the side-by-side analysis was misleading. The statute was not as represented in the text. The Administrative Code Section at issue in that instance (and now) did not (and does not) contain supportive language for the proposition that motivation is an essential element of the claim (specifically, the language italicized in the text above is excluded).

One possible explanation for PERB’s over-reaching is a desire to sustain the Administrative Code proviso. For, if the

acknowledges, NYCCBL § 12-306(a)(1) is not the same as the Taylor Law counterpart in that the NYCCBL proviso does not “ provide that impermissible motive is an element of a cause of action,” much less an essential element of the claim. To the contrary, the language emphasized in the above quotation from the Taylor Law proviso is omitted from the NYCCBL..

It is hornbook law that “...A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit” McKinney’s Cons. Laws of NY, Book 1, Statutes, § 74 (19). *See also, Pajak v. Pajak*, 56 NY 2d 394, 397 (1982) (“The failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended ...” [Citation omitted]. Indeed, this Board previously made the point:

If the drafters of the law had intended to impose temporal restrictions on the exercise of management rights, they could have included such a limitation in the statute. The statute’s silence on the subject precludes our finding [otherwise]

Matter of Staff Analysts and City of New York, 33 OCB 22 (BCB 1984) *rev’d in part Matter of Organization of Staff Analysts v. Board of Collective Bargaining, supra.* ⁵

The majority opinion is replete with conclusional references to the improper motivation standard and it, like the record on which it is based, compel the conclusion that the decision turned upon the application of a standard – a required showing of ill-motivation – that is not legislatively

relevant provisions of Local Law (the Administrative Code) is not “substantively consistent” with or essentially the equivalent of the Taylor Law, then the Local Law proviso cannot stand. N.Y. Civ. Serv. Law § 212(1); See, Dissenting opinion in *Matter of Uniformed Firefighter Association*, Decision No. B-39-2006, (IP)(Docket No. BCB-2531-06)

⁵ In the interest of completeness, we note that the foregoing quotation comes from the very same BCB Decision that holds that ill motive (though not specified in the NYCCBL) is a prerequisite to stating cause of action.

authorized in New York City. For that reason alone, reversal and remand are mandated. ⁶

Respectfully, on remand it is suggested that careful attention be paid to facts that seem not to have been properly regarded or stressed here: e.g., whether promotion in fact was achieved (both in terms of added remuneration and responsibility over and above that permissible in the SMC title), its purpose and outcome and the considerations that went into the determination.

It is unsurprising that those “promoted” would not come forward to state whether, in reality, they have thereby assumed greater responsibilities or added duties (much less what the circumstances or purpose of that promotion was). They obviously prefer the promotion and would not readily risk jeopardizing it. Neither is it surprising that the supervisors who were responsible for that “promotion” would seek to justify it. What is surprising, however, is that this record (a) reflects that in reclassifying the employees at issue not one of the supervisor witnesses first analyzed other corporate job descriptions or specific responsibilities that could alternatively have been warranted, (b) gave any consideration to promotions within the unionized SMC title, i.e., from grade I to grade II, or (c) considered that if promotion was the real purpose, it and attendant salary increases and responsibilities, could readily be achieved within the SMC unionized title (e.g., by a promotion to SMC grade II). Indeed, the omissions illustrated above are emphasized by references or summaries in the majority opinion. Thus, the majority cites to the testimony of Ms. George who recommended that an employee named Duckett be promoted “as a backup to her” and that he had now been given “supervisory responsibilities.” (Opinion p. 39). However, it appears from the record that Mr. Duckett was authorized to exercise supervisory responsibility either in his then current title or in

⁶ It merits emphasis that this dissent focuses on the majority view that proof of ill-motivation is a “required element” of the claim. It is not, however, the writers view that motivation lacks relevance or bearing. As an integral part of a case it certainly is a factor and merits consideration. However, it is not properly the *sine qua non* of a successful claim.

SMC grade II. Moreover, it appears that Ms. George was apparently unaware whether Mr. Duckett was a grade I or grade II SMC or even that there were two grades. Indeed, it appears that Ms. George who supervised Mr. Duckett currently shared the same title as Mr. Duckett.

Still another instance bears brief note. Sarah Lehrfeld, an SMC, testified that she held the title of “associate director” since 1998 and held that title when she transferred from Coler Goldwater Hospital to Queens Hospital. Various documents in the record reflect that it was simply a transfer and that the associate director title was noted in the documentary record. She testified that that was both her office and civil service title as far as she knew. Yet her “promotion” was to just that position (Associate Director) and there was little if anything to show that what she did before or after the promotion out of the SMC unionized title was materially different. To cite further like illustrations from the record would unduly burden this dissent (especially in view of the fact that a threshold legal issue exists that mandates reversal and remand—the challenged notion that ill-motivation is a prerequisite to the statement of a claim).

Both as a matter of law and upon the factual record taken as a whole, I would reverse and remand.

November 23, 2009

CHARLES G. MOERDLER .