***United Marine Division, Local 333, ILA*, 2 OCB2d 44 (BCB 2009)**
(IP) (Docket No. BCB-2771-09).

Summary of Decision: Petitioner alleged that DOT violated NYCCBL § 12-306(a)(1) and (4) by unilaterally issuing a regulation that dictated that any employee who took three or more consecutive sick leave days had to provide specific medical documentation in order to return to work. The Union further contends that since this regulation involved a mandatory subject of bargaining and no bargaining occurred in relation to this regulation, the employer violated the NYCCBL as well as the parties' collective bargaining agreement. The City maintained that this regulation merely clarified the existing sick leave provision. Furthermore, the City contended that this regulation ensured the public employer's compliance with existing federal statutes and safety regulations, and that any change to the existing sick leave provision is *de minimis* and was overridden by the strong public policy to protect the safety of the public by ensuring that DOT's employees are sufficiently healthy. The Board found that the employer failed to bargain over the issuance over the new regulation which unilaterally changed a mandatory subject of bargaining. Therefore, the Union's petition was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

UNITED MARINE DIVISION, LOCAL 333, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondents.

DECISION AND ORDER

On June 5, 2009, United Marine Division, Local 333, International Longshoremen Association, AFL-CIO ("Union" or "Local 333"), filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Transportation ("DOT") alleging that DOT violated the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (4). The Union claims that DOT's issuance of SMS Alert No. 94, which requires certain employees involved in specific seafaring titles who are absent from work due to injury or illness for three or more consecutive days to obtain a specific type of medical note from a doctor to return to duty, constitutes a change in a mandatory subject of bargaining. Further, the Union contends that this regulation contradicts the sick leave provisions contained in the parties' collective bargaining agreement, covering the period from April 27, 2008 to April 26, 2010 ("Agreement"). The City argues that DOT's issuance of SMS Alert No. 94 does not violate the NYCCBL because this regulation merely clarifies the existing sick leave provisions in the Agreement and does not contradict these provisions. Also, the City maintains that this regulation was issued in order to ensure DOT's compliance with existing federal statutes, regulations, and maritime industry standards, and such compliance is designed to protect the public utilizing DOT's ferry system, which is an overwhelmingly important public policy. Finally, the City argues that, assuming *arguendo*, that SMS Alert No. 94 changes a mandatory subject of bargaining, any change is *de minimis*. The Board finds that DOT violated the NYCCBL when it issued this new regulation without bargaining because this new regulation altered these employees' sick leave policy, which is a mandatory subject of bargaining. Accordingly, we grant the Union's petition.

BACKGROUND

DOT is responsible for all the functions and operations of the transportation systems throughout the City of New York including the maintenance and operation of the Staten Island Ferry. One of its primary missions "is to provide for the safe, efficient, and environmentally responsible movement of people and goods in the City of New York." (Ans. ¶ 17). In furtherance of this mission, DOT "is committed to providing a safe working environment for its employees, and to ensure the safety of the public that it serves." (Ans. ¶ 18).

Local 333 represents DOT employees who are members in the marine consolidated job titles, including Deckhand, Ferry Terminal Supervisor, Dockmaster, Ferry Agent, and Marine Oiler, which have been characterized by DOT as "safety sensitive" and "physically taxing" positions. (Ans. ¶ 22). In accordance with the Article IV-A § 10(b)(4) of the Agreement, which memorializes the sick leave provision governing employees in these titles, states:

> a. A verifying statement from the Employee's doctor shall not be required by the Employer for sick day claims of two (2) days or less.
> b. For claims of more than two (2) working days, the Employee must secure a verifying statement from his doctor to support his claim. This statement should be sent in as soon as possible after the period of absence is over.

(Pet., Ex. A).

According to the City, the issuance of the SMS Alert No. 94 has its origins in the Staten Island Ferry accident involving the *Andrew J. Barberi* ferry that occurred on October 15, 2003 ("Ferry Incident"). As a result of the Ferry Incident, the subsequent investigations, and the related criminal and civil actions, DOT decided to re-examine its sick leave policies as this event was caused, in part, by a DOT employee who had "passed out" as a result of taking "painkillers the night before because of a bad back and was too exhausted to work." (Ans., Ex. 4). Furthermore, in April

2004, DOT hired James DeSimone as DOT's Chief Operations Officer because of his extensive experience in the private and public maritime industries. One of COO DeSimone's primary responsibilities when accepting this position was to ensure that all DOT regulations complied with the existing federal laws and maritime industry standards.

According to COO DeSimone, who submitted an affidavit on behalf of the City, he immediately began reviewing "all DOT policies and procedures with regard to ferry operations," in order to ensure that they "comport with general maritime law, applicable federal regulations, and maritime industry standards." (Ans., Ex. 1). Upon reviewing DOT's sick leave policies, he determined that DOT did not meet the requisite standards. On March 6, 2009, DOT issued SMS Alert No. 94 ("SMS Alert") which states, in pertinent part:

> Employees in safety sensitive or physically taxing positions who are absent for three or more consecutive days due to injury or illness must meet the following requirements before being allowed to return to work:
> a. The employee must submit a full "fit for duty" from their physician.
> b. The "fit for duty" must state: "I have been advised that (employee's name) performs safety sensitive and/or physically taxing work and attest that he/she can perform his/her duties without any restrictions."

(Pet., Ex. B).

In furtherance of the SMS Alert, DOT issued "a form for Local 333 members to provide their treating physicians" in order to ensure that its employees were in compliance with the SMS Alert. (Pet. ¶ 7). This form, on DOT letterhead, provides spaces for the treating physician's name, the physician's signature and the date such signature was affixed thereto, and substantively reads as follows:

> I have been advised that my patient, _____, performs safety sensitive and/or physically taxing work and attest that he/she is fit for duty and can perform his/her duties without any restrictions effective _____ (date).

(Pet., Ex. C). However, according to the City, although DOT issued this "form letter" in relation to the SMS Alert, this form letter was only distributed for guidance and DOT also has accepted doctor's notes "which track[] the language suggested by the [SMS] Alert" that appear on the doctor's own letterhead. (Ans. ¶ 51).

In addition, according to the City, DOT was merely mirroring the language contained in the applicable and relevant federal regulations and maritime industry standards when it used the term "fit for duty." Thus, in furtherance of this less than stringent incorporation of the term "fit for duty," DOT has also accepted doctor's notes "which [do] not use the language of the [SMS] Alert at all, but states that an employee can return to work 'with no limitations or restrictions'" and do not use the term "fit for duty." (Ans. ¶ 54).

As stated above, according to the City, DOT issued the SMS Alert so that its sick leave policies would be in compliance with the existing "federal safety regulations and industry standards." (Ans. ¶ 66). For example, the United States Department of Transportation and the United States Coast Guard promulgated "Merchant Marine Physical Examination Report," CG-719K. This regulation applies when an employee is applying for an "Original License and/or Qualified Rating Document," a "Renewal of License and/or Qualified Rating Document," or "Raise-In-Grade (Licenses)."[1] (Ans., Ex. 11). This regulation, which is limited to the application for or renewal of a particular type of licensing document, states that "the U.S. Coast Guard requires a physical examination/certification be completed to ensure that all holders of Licenses and Merchant Marine Documents are physically fit and free of debilitating illness and injury." (*Id.*). Also, physicians who

[1] Further, according to the City, this regulation applies to most, but not all, of the job titles who are governed by the SMS Alert.

examine employees to which this rule applies "should ensure that employees "are of sound health," "have no physical limitations that would hinder or prevent performance of duties," "are physically and mentally able to stay alert for 4 to 6 hour shifts," and "are free from any medical conditions that pose a risk of sudden incapacitation, which would affect operating, or working on vessels." (*Id.*). CG-719K further provides the reason for compliance with this regulation, citing, among other things, "working in cramped spaces," "maintaining balance on moving deck," "opening and closing watertight doors that may weigh up to 56 pounds," and "climbing steep stairs or vertical ladders without assistance." (*Id.*).

In conjunction with and cited by CG-719K, the United Stated Department of Transportation and the United States Coast Guard also issued Navigation and Vessel Inspection Circular No. 02-98 ("NVIC 02-98").[2] According to NVIC 02-98, federal regulations "require individuals to be physically qualified to hold certain merchant mariner's licenses and documents." (Ans., Ex. 12). As such, CG-719K and NVIC 02-98 are designed to ensure that all crew members are "physically fit and free from debilitating illness and injury." (*Id.*). NVIC 02-98 goes on to detail reasons for these requirements, citing the "arduous, often hazardous" working conditions and "the minimal availability of medical assistance and/or treatment." (*Id.*). This regulation continues by detailing the various maladies that would disqualify an employee in these seafaring job titles from effective performance of their duties in areas, such as "visual acuity," "hearing," "orthopedic," and

[2] Based upon the review of the pleadings submitted before this Board in connection with the improper practice petition docketed as BCB-2773-09 involving District No. 1, Pacific Coast Division, Marine Engineers Benevolent Association and DOT, we take administrative notice that NVIC 02-98 has been superceded by a more recent policy, which is the Navigation and Vessel Inspection Circular No. 04-08. Even though this updated policy is the one currently in effect, it does not bear on the outcome of the instant matter.

"neurological." (*Id.*). Finally, NVIC 02-98 states that its purpose "is to provide guidelines for evaluating the physical condition of an applicant for a merchant marine license or document." (*Id.*).

Pursuant to CG-719K and NVIC 02-98, the City contends that DOT was empowered to issue the SMS Alert under the New York City Charter § 2903. According to the City, DOT's Commissioner is authorized to issue regulations and policies that further DOT's core mission to provide a safe environment for the public utilizing the ferry system. In pertinent part, § 2903(c) of the New York City Charter states:

> Ferries and related facilities. The commissioner shall:
> (1) maintain and operate the ferries of the city;
> (2) be responsible for constructing, acquiring, operating, maintaining or controlling all ferry boats, ferry houses, ferry terminals and equipment thereof and all wharf property and marginal roads adjacent to such wharfs, ferry houses and terminals necessary for the operation of the ferries and related facilities . . .;
> (3) have charge and control of all marine operations within the city and the power to regulate public and private ferry operations originating or terminating within the city;
> (4) establish tours of ferry facilities and their related operations . . .;
> (5) issue permits for the control of television and photography activities within or upon ferries and related facilities; and
> (6) construct, operate and maintain marinas and public boat launching ramps and related facilities of ferry property and collect fees for the use thereof . . . .

(Ans., Ex. 10).

On March 16, 2009, the Union sent DOT a letter stating it that the "SMS Alert . . . materially altered the terms and conditions of employment and that this constituted an improper practice"; and Local 333 demanded "that DOT rescind the policy and bargain in good faith over any proposed changes relating to sick leave." (Pet. ¶ 8). To date, the City has not responded to the Union's demand to bargain over the issuance of the SMS Alert or Local 333's request to rescind this policy.

As a result of DOT's failure to respond to Local 333's demand to bargain, on June 9, 2009, the Union filed the instant improper practice petition claiming that DOT violated NYCCBL § 12-

306(a)(1) and (4) by issuing the SMS Alert. Local 333 contended that the SMS Alert contradicted the sick leave policy that is memorialized in the Agreement, by heightening the requirement of DOT employees who take three or more consecutive days of sick leave. According to the petition, these employees, in order for them to report back to work, must secure from their respective treating physicians a doctor's note indicating that these employees were subjected to a physical examination which resulted in the doctor's determination that they were physically fit to return to work at their positions in a safety sensitive and/or physically taxing job. Remedially, the Union sought a declaration by this Board that DOT violated the NYCCBL, the posting of notices indicating the same, and an order making all employees of DOT whole.

POSITION OF THE PARTIES

Union's Position

The Union contends that DOT violated NYCCBL § 12-306(a)(1) and (4) when it issued the SMS Alert because this new regulation changed the existing sick leave policy which governed job titles represented by Local 333.[3] Sick leave and the policies and procedures governing this topic are

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[3] NYCCBL § 12-306(a) provides in pertinent part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
* * *
(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees; . . .

Further, § 12-305 of the NYCCBL provides, in pertinent part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee
(continued...)

mandatory subjects of bargaining, and any unilateral change to these subjects constitutes a refusal to bargain in good faith, thereby violating the NYCCBL. Prior to the issuance of the SMS Alert, Local 333 members who had taken three or more consecutive days of sick leave were required to "secure a verifying statement from his doctor to support his claim [of illness and that statement] should be sent in [to DOT] as soon as possible after the period of absence is over." (Pet., Ex. A).

However, after the issuance of the SMS Alert, employees in the Union who took three or more consecutive days of sick leave have to meet a heightened requirement. Specifically, employees are now required to notify DOT that their respective treating physicians are aware that the respective employees perform safety sensitive and/or physically taxing job duties, and that these respective employees are "fit for duty" and clear to return to work without restriction. Extrapolating from these new requirements, if an employee who had taken three or more consecutive days of sick leave returns to work without the required declaration from his/her treating physician, then that employee would be barred from working, and arguably be required to use additional leave to account for the missed time at work. Accordingly, DOT, by issuing the SMS Alert, violated NYCCBL § 12-306(a)(4) because it refused to bargain over a unilateral change to a mandatory subject of bargaining.

The Union further contends that the issuance of the SMS Alert "interfered, restrained and coerced" the exercising of the statutory rights guaranteed by NYCCBL § 12-305 of its members. (Pet. ¶ 13). DOT undercut the Union's ability to represent the interests of its members, since DOT unilaterally imposed new terms and conditions of employment by requiring that employees who are returning from three or more consecutive days of sick leave must meet a heightened requirement to

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[3](...continued)
organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . .

return to work; a requirement which is inconsistent with the terms set forth in the Agreement, over which the parties collectively bargained. Therefore, by foregoing good faith bargaining and unilaterally changing a terms and condition of employment that is a mandatory subject of bargaining, DOT "interfered with the effectiveness of the Union" to represent its members. (Am. Rep. Memorandum of Law, p. 26).[4]

In response to the City's argument that the SMS Alert is merely a clarification of the existing sick leave policy governing the Union's members, Local 333 contends that, prior to the issuance of the SMS Alert, "there was absolutely no practice of preventing employees from returning to work if they did not produce a doctor's letter on the same day" they returned to work after using three or more consecutive sick leave days. (Am. Rep. Memorandum of Law, p. 7). Furthermore, the SMS Alert imposed heightened requirements on the Local 333 members because, now, these effected employees must have their treating physicians declare that the doctor is aware that an employee is engaged in safety sensitive and/or physically taxing job duties, and represent that this particular employee is fit to perform such duties without restrictions. In contrast, the sick leave policy memorialized in the Agreement simply required the Union member to secure a doctor's note that verified that the employee had, in fact, been ill. Moreover, any attempt by the City to characterize the SMS Alert as a *de minimis* change to the existing sick leave policy contained in the Agreement is disingenuous because the procedures by which the employee returns to work is altered and, if not complied with, could prevent the employee from returning to work, thereby resulting in a reduction of leave time or docking of pay.

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[4] Counsel for the Union submitted a Reply Memorandum of Law on September 3, 2009. The following day, upon consent from Counsel for the City, an Amended Reply Memorandum of Law was submitted.

Additionally, the Union argues that the City's attempt to couch the SMS Alert as a managerial prerogative is inaccurate. Since the policies and procedures related to sick leave are mandatory subjects of bargaining and the SMS Alert is a clear alteration of the existing sick leave policy as set forth in the Agreement. Any attempt by the City to couch this regulation as a means by which DOT maintains the efficiency of governmental operations or executes complete control and discretion over its organization is unfounded.

Furthermore, the Union contends that the City's argument that DOT issued the SMS Alert in order to comply with existing federal regulations and maritime industry standards is misguided. DOT cannot point to any specific statutory or regulatory language that is considered "so unequivocal" that it leaves "no room for discretion," thereby preempting the overwhelming legislative intent in favor of collective bargaining. (Amended Reply Memorandum of Law, pp. 12-13). Rather, "where there is room for discretion with respect to policies and disciplinary consequences," then DOT has an obligation to bargain with the Union. (*Id.*). DOT, in support of its position, cites to CG-719K and NVIC 02-98 which do not specifically address sick leave policies or returning to work by employees who have utilized certain amount of sick leave. Moreover, certain titles within the Local 333 bargaining unit are not covered by CG-719K and NVIC 02-98, whereas all members of the Union are covered by the SMS Alert. Accordingly, the City's preemption argument fails.

Finally, the Union argues that the City's argument, premised on a public policy exception to collective bargaining, is inapplicable in the instant matter. Although the City contends that DOT is charged with the core mission of providing for safe movement for the public utilizing DOT facilities and modes of transportation, no where within DOT's statutory mandate in § 2903 of the New York

City Charter does this provision authorize DOT to dictate sick leave policies for its employees absent collective bargaining. Furthermore, the City fails to enunciate that DOT could not meet its organizational mandate of safely transporting people within the City of New York if it were required to collectively bargain over the sick leave policies covering the members of Local 333. Moreover, the City's argument that there is a general statutory language evincing a strong public policy in favor of allowing DOT to unilaterally change the existing sick leave policies for Union members is incorrect, as the case cited by the City in favor of this proposition was rejected by the New York State Public Employees Relations Board ("PERB"). As such, the City's argument that the SMS Alert was based upon a "strong, well-defined policy consideration embodied in constitutional, statutory or common law" must be rejected by this Board.

City's Position

The City contends that the Union's claim that DOT's issuance of the SMS Alert violated the NYCCBL lacks merit because Local 333 failed to establish that there was a unilateral change of a mandatory subject of bargaining. There was no change to DOT's sick leave policies which govern the members of the Union because the Agreement requires that an employee who uses more than two days of consecutive sick leave to provide medical documentation from his/her treating physician, while the SMS Alert requires similar medical documentation only when the employee uses three or more consecutive days of sick leave. So, in effect, the SMS Alert "is a less restrictive than the . . . Agreement . . . [because] an employee who is sick for two and a half days would fall within the confines of the [Agreement's] sick leave documentation requirement, but not within the confines of [the SMS Alert]." (Ans. ¶ 48).

The City further contends that, in practical terms, there is no unilateral change of DOT's sick

leave policies as it applies to the employees represented by Local 333. Since the issuance of the SMS Alert, DOT has accepted medical documentation from these employees that are not only on the forms promulgated by DOT, but are also on letterhead from a particular treating physician. In addition, since the SMS Alert merely adopted the term "fit for duty" in order to comply with the existing federal regulations and maritime industry standards, DOT has accepted medical documentation that appears on a treating physician's letterhead that does not track the language contained in the SMS Alert. In sum, the key factors of the SMS Alert are that the treating physician acknowledges that he/she is aware of the particular job duties of the employee, and that the treating physician affirms that this employee may return to work without restriction. Thus, practically speaking, there is no difference between the sick leave policies contained in the Agreement and the terms set forth in the SMS Alert.

Moreover, the City contends that, if any change to the existing sick leave policy for the employees of DOT who are represented by the Union has occurred as a result of the SMS Alert, any change is *de minimis*. Assuming *arguendo*, the changes brought about by the issuance of the SMS Alert "do not affect employees' procedural responsibilities," therefore there is no duty to bargain. (Ans. ¶ 58). Contrary to the Union's contention that the SMS Alert requires the employee's treating physician to conduct a "full blown medical examination which takes much longer than simply confirming a person is sick," the requirement imposed by the SMS Alert merely requires the employee's treating physician to indicate that this employee's claim of illness is medically supported and that the employee is now medically clear to return to work without restriction. (Ans. ¶ 60). The City highlights the various forms of medical documentation that have been accepted by DOT, pursuant to the SMS Alert. Accordingly, the Union's claim that a unilateral change has occurred is

unfounded.

The City also argues that, assuming *arguendo*, the issuance of the SMS Alert was a unilateral change of DOT's sick leave policy governing the members of Local 333, DOT issued this regulation in order to comply with federal safety regulations and maritime industry standards. "The obligation to bargain over terms and conditions of employment can be preempted in instances where an employer's actions are subject to a statutory mandate." (Ans. ¶ 67). DOT is subject to the statutory and regulatory mandate of CG-719K and NVIC 02-98 which are "unequivocal" directives that leave "no room for bargaining." (Ans. ¶ 68).

Taken in conjunction with each other, these two regulations require that employees in titles such as those represented by the Union are in sound health and have no physical limitation that would inhibit their physical ability to perform their duties. Furthermore, these two regulations dictate that the onus is on the employer to ensure that these vessels, including their crew and other appurtenances, "must be reasonably fit for the vessel" to be considered seaworthy. (Ans. ¶ 77). Therefore, issuing the SMS Alert was intended to ensure that DOT complied with CG-719K and NVIC 02-98 by requiring that its "crew members who have been out sick for a significant period of time are medically cleared to perform their tasks." (Ans. ¶ 80). The maritime industry standards dictate that employees, such as those represented by Local 333 in the instant matter, "be medically cleared before returning from an extended sick leave." (Ans. ¶ 82; Ans., Ex. 1). Thus, even though DOT failed to comply with these regulations and standards in the past, DOT's duty to comply with CG-719K and NVIC 02-98 are not obviated and thus, DOT "is under no obligation to negotiate over [the issuance of the SMS Alert]." (Ans. ¶ 84).

In addition, the City argues that a strong public policy requires the issuance of the SMS Alert

because it directly addresses a core aspect of DOT's mission, which "is to provide for the safe, efficient and environmentally responsible movement of people and goods in the City of New York." (Ans. ¶ 90). Although there is a strong public policy in favor of collective bargaining, the Courts, PERB, and this Board have recognized exceptions. In the instant matter, the "strong public policy in favor of protecting its citizens as they move from one borough to another," (Ans. ¶ 100), outweighs the "negligible intrusiveness of requiring sick employee to be medically cleared to return to work." (Ans. ¶ 101).

Furthermore, the City contends that, in conjunction with this strong public policy, DOT is authorized by NYCCBL § 12-307(b) to issue the SMS Alert.[5] This clarification of the sick leave policy governing the members of the Union in the instant matter is an exercise by DOT of its right to determine the means and methods by which DOT operates. Additionally, DOT is empowered by § 2903 of the New York City Charter to issue the SMS Alert because this provision provides that DOT's Commissioner has the authority to control "all marine operation within the city and the power to regulate public and private ferry operations." Thus, the strong public policy, which "invariably involve[s] an important . . . statutory duty" to ensure the safety of the public utilizing DOT's ferries, overrides the public policy favoring the collective bargaining over mandatory subjects of bargaining. (Ans. ¶ 103).

Finally, the City contends that the Union's claim that DOT interfered with, restrained and

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[5] NYCCBL § 12-307(b) states, in pertinent part:
It is the right of the City, or any other public employer, acting through its agencies to determine the standards of service to be offered by its agencies; . . . direct its employees; take disciplinary action; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization . . . .

coerced its members statutory rights under § 12-305 of the NYCCBL is unsupported by the record in the instant matter. Local 333 has proffered no facts independent of those alleged in support of their claim under § 12-306(a)(4) which would support a claim under § 12-306(a)(1). Moreover, since Local 333 failed to establish that DOT failed to bargain in good faith over a mandatory subject of bargaining, in contravention of NYCCBL § 12-306(a)(4), there is not derivative violation of § 12-306(a)(1).

DISCUSSION

In the instant matter, Local 333 alleges that DOT violated NYCCBL § 12-306(a)(1) and (4) by unilaterally imposing the SMS Alert, while the City argues, among other things, that this regulation was issued in order for DOT to comply with CG-719K and NVIC 02-98. Accordingly, the City contends that the Union's claim must be dismissed because existing federal regulations and maritime industry standards preempt the parties' duty to bargain in good faith. However, since the uncontested facts establish that the SMS Alert does not identically track the applicable federal regulations and that the SMS Alert does not compel strict adherence to every specific and extensive aspect of CG-719K and NVIC 02-98, we find that this unilateral change to the sick leave policies applicable to the employees represented by the Union constitutes a violation of the duty to bargain. *See Matter of City of Watertown v. Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 79 (2000); *compare City of Schenectady*, 24 PERB ¶ 4545 (1991) (no duty to bargain attaches to such changes due to the preemption of a collectively bargained provision by operation of statutory or regulatory mandate).

In order for a statutory or regulatory mandate to preempt the strong and sweeping policy to bargain over terms and conditions of employment, there must be "plain and clear" language to

forestall bargaining over an otherwise mandatory subject. *See Matter of Webster Cent. Sch. Dist. v. Pub. Empl. Relations Bd.*, 75 N.Y.2d 619, 627 (1990); *City of Watertown*, 95 N.Y.2d at 78-79 and n. 1; *County of Chatauqua v. Civ. Serv. Employees Assn.*, 8 N.Y.3d 513, 518-519 (2007); *see also COBA*, 41 OCB 39, at 5-6 and 17 (BCB 1988).

A public employer may not insulate its actions from compliance with applicable requirements of the NYCCBL merely by demonstrating that its actions were in accord with statutory and/or regulatory law. *See COBA*, 43 OCB 72, at 11 (BCB 1989); *COBA*, 41 OCB 39, at 17. Even if management action is taken pursuant to another statute, certain obligations such as bargaining over mandatory subjects may arise under the NYCCBL. *DC 37,* 77 OCB 34, at 14-15 (BCB 2006) (procedures adopted pursuant to a federal mandate were nonetheless subject to bargaining where not specifically prescribed by statute). Absent clear evidence that a statute and/or regulation was designed to remove a particular subject from the ambit of mandatory collective bargaining, we refuse to apply the doctrine of preemption and will not contravene our own expressed statutory mandate. *DC 37, Local 2507 & Local 3621*, 73 OCB 7, at 16 (BCB 2004) (citing *City of Watertown*, 95 N.Y.2d at 79); *PBA*, 39 OCB 41, at 6 (BCB 1987); *see also Doctors Council,* 69 OCB 31, at 10-11 (BCB 2002) (finding that preemption does not remove from the ambit of collective bargaining mandatory subjects that are not inconsistent with the statute in question).

In the instant matter, the regulations cited by DOT bear little relation to the SMS Alert or the reason it was promulgated.[6] On its face, CG-719K applies only to employees who are applying for an "Original License and/or Qualified Rating Document," a "Renewal of License and/or Qualified

[6] The regulations in the instant matter are distinguishable from the indisputably applicable federal drug testing regulations relied upon by DOT in a pending case involving another DOT maritime union, Docket No. BCB-2734-08.

Rating Document," or "Raise-In-Grade (Licenses)." (Ans., Ex. 11). While the SMS Alert applies to employees in the titles of Deckhand, Ferry Terminal Supervisor, Dockmaster, Ferry Agent, and Marine Oiler, all of which are represented by Local 333, CG-719K does not apply to Deckhands and Marine Oilers. With regard to NVIC 02-98, this regulation generally applies to employees who hold certain merchant marine licenses and documents and is designed to ensure that all such holders are physically fit and free from debilitating illness and injury. However, the language of this regulation fails to mention and/or reference an employee who is returning from a sick leave absence of any duration. Accordingly, we find that the mandates contained in CG-719K and NVIC 02-98, which supposedly compelled DOT to issue the SMS Alert, lack the plain and clear language that would require this Board to allow preemption of a mandatory subject of bargaining. *See COBA*, 43 OCB 72, at 11 (BCB 1989); *see also DC 37, Local 2507 and Local 3621*, 73 OCB 7, at 17-18; *PBA*, 39 OCB 41, at 6 (BCB 1987). In short, since the SMS Alert sweeps more broadly than the regulations alleged to have mandated its issuance, both as to the scope of employees affected and the circumstances giving rise to the need to comply with it, we find that the SMS Alert cannot be deemed to be insulated from the "strong and sweeping policy favoring bargaining." *City of Watertown*, 95 N.Y.2d at 81-82; *see also DC 37, Local 1457*, 1 OCB2d 32, at 34 (citing *Matter of Park v. Kapica*, 8 N.Y.3d 302, 311 (2007) (reaffirming the holding in *City of Watertown*)).[7]

As CG-719K and NVIC 02-98 do not preclude bargaining, we now turn to the substantive

[7] Moreover, we note that although DOT asserted that it was required to issue the SMS Alert to be in strict compliance with the requirements of CG-719K and NVIC 02-98, DOT also admitted that it is willing to accept various forms of medical documentation which do not track the requirements in the SMS Alert. In other words, DOT's practice does not support its claim that the SMS Alert is required by the very same federal regulations DOT claims to be compelled to apply to these employees under these circumstances.

merits of Local 333's claim that DOT violated the NYCCBL by issuing the SMS Alert and by refusing the Union's request to bargain over the implementation of these new requirements. We have found that it "is an improper practice under NYCCBL § 12-306(a)(4) for a public employer or its agents to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees." *DC 37, Local 1457*, 1 OCB2d 32, at 26; *see also SSEU, Local 371*, 69 OCB 10, at 4 (BCB 2002). "Mandatory subjects of bargaining generally include wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *Id*., (citing, *inter alia*, *DC 37*, 63 OCB 35, at 12 (BCB 1999). "When a petitioner asserts that a unilateral change has occurred in a term and condition of employment which is determined to be a mandatory subject, then the petitioner must demonstrate the existence of such a change from the existing policy." *PBA*, 79 OCB 43, at 7 (BCB 2007); *see also DC 37, Local 376*, 73 OCB 12, at 17 (BCB 2004); *Town of Stony Point*, 26 PERB ¶ 4650 (1993).

We have previously held that the "obligation to negotiate on the provision of sick leave, which is clearly a mandatory subject, encompasses the duty to negotiate on the regulations and procedures governing its proper use." *COBA*, 69 OCB 26, at 7 (BCB 2002) (citing *MEBA, District No. 1, Pacific Coast District*, 15 OCB 3, at 17 (BCB 1975) (finding that the City's requirement of an employee, who was absent for more than two days, to provide a statement from a doctor to support a claim for sick leave was found to be a mandatory subject of bargaining)); *DC 37*, 77 OCB 34, at 15-16 (BCB 2006). Furthermore, we have "long held that regulations and procedures regarding the use of sick leave in fact constitute a mandatory subject of bargaining." *DC* 37, 77 OCB 34, at 15; *see also COBA*, 69 OCB 26, at 7; *COBA*, 27 OCB 16, at 102 (BCB 1981).

In the instant matter, we find that by issuing the SMS Alert, DOT failed to bargain in good faith. The parties, pursuant to the Agreement, established sick leave use procedures applicable for the members of Local 333 such as what instances required medical documentation, what type of documentation satisfied DOT, and when that documentation needed to be provided by the employee to DOT. According to Article IV-A § 10(b)(4) of the Agreement, when an employee is absent for two or less days on sick leave, no "verifying statement" was necessary. However, when a sick leave absence consisted of more than two days, an employee was required to "secure a verifying statement . . . to support his[/her] claim" and that statement "should be sent in as soon as possible after the period of absence is over." (Pet., Ex. A).

However, with the issuance of the SMS Alert, DOT altered the instances that required medical documentation, what type of documentation satisfied DOT, and when that documentation needed to be provided by the employee to DOT. Now, pursuant to the SMS Alert, an employee who is absent on sick leave for three or more consecutive days "must submit a full 'fit for duty' from their physician." (Pet., Ex. B) Also according to the SMS Alert, the "fit for duty" form submitted by the employee must state that the physician is aware that the employee in question "performs safety sensitive and/or physically taxing work," and the physician attests that the employee in question "can perform his/her duties without any restrictions." (*Id.*). Furthermore, the SMS Alert requires this new medical documentation must be submitted to DOT "before being allowed to return to work." (*Id.*).

Upon a comparison of Article IV-A § 10(b)(4) of the Agreement and the SMS Alert, we find that DOT has unilaterally changed the sick leave policies governing the employees represented by the Union. Whereas under the Agreement, members of the Union were requested to submit their respective medical documentation to DOT as soon as possible after the period of absence ended, now

under the SMS Alert, these same employees must submit their respective medical documentation prior to returning to work. Furthermore, the SMS Alert changes the nature and/or content of the medical documentation required of Local 333's members by now requiring these employees to submit medical documentation that not only verifies their claim of illness or injury, but also clears the employees to return to work without any limitation. Moreover, if this new type of medical documentation is not received by DOT upon an employee's return, that employee will be prohibited from performing his/her duties and thereby necessitating that employee's use of additional leave time. Where, as here, a newly issued regulation alters the nature of employee participation and has a discernible effect upon the terms and conditions of employment, it is sufficient to establish a change. *See DC 37, Local 1457*, 1 OCB2d 32, at 34-35.

Further, we find that the change described above cannot be dismissed as *de minimis*. The City argued that, although the expressed language of the SMS Alert requires specific language to be used in the medical documentation submitted by employees affected by this new regulation, DOT accepted various types of notes from employees, even some that did not track the enunciated language set forth in the SMS Alert. Also, the City asserted that employees affected by the SMS Alert would not be required to undergo any additional medical exams or to satisfy any additional procedural steps in order to comply with this regulation. These claims overlook the differences in the SMS alert and the sick leave procedures in the Agreement. Regardless of whether DOT is applying the stringent requirements set forth in the SMS Alert, the expressed language contained in this new regulation clearly institutes a new set of requirements by which these employees must abide. These new facets of the sick leave policy constitute a change in a mandatory subject of bargaining and are not *de minimis* changes or clarifications of the existing sick leave policies. *Cf. DC 37,*

AFSCME, 77 OCB 34, at 17 (finding that the change in the sick leave policies applicable to employees on extended FMLA-related leave constituted a violation of the NYCCBL, but also finding that a change in when an employee on FMLA leave needed to submit certain paperwork to the employer constituted a *de minimis* change); *contrast PBA*, 73 OCB 12, at 16-17 (BCB 2004), *aff'd, Patrolmen's Benevolent Assn. v. NYC Board of Collective Bargaining,* No. 112687/04 (Sup. Ct. N.Y. Co. Aug. 8, 2005), *aff'd,* 38 A.D.3d 482 (1st Dept. 2007) (where we held that a change in a policy's language regarding employees' participation in interviews was *de minimis*).

Since sick leave policies and procedures are mandatory subjects of bargaining and the failure to bargain over changes to these subjects violates NYCCBL § 12-306(a)(4), we find that DOT breached its duty to bargain in good faith when it issued the SMS Alert. In addition, having determined that DOT changed the sick leave procedures for the employees represented by Local 333 through the promulgation of the SMS Alert in violation of NYCCBL § 12-306(a)(4), we further find a violation of NYCCBL § 12-306(a)(1). *See DC 37, AFSCME*, 77 OCB 34, at 18; *see also DC 37*, 71 OCB 20, at 5-6 (BCB 2003) (when an employer violated its duty to bargain in good faith, there is a derivative violation of NYCCBL § 12-306(a)(1)).

Finally, we reject the City's argument that public policy requires this Board to find that the issuance of the SMS alert does not violate the NYCCBL. We have held that, where a statutory duty is contained in the NYCCBL, a public policy exception to that duty will be recognized in very limited instances. *See PBA*, 73 OCB 22, at 9 (BCB 2004) (rejecting the employer's contention that a public policy exception requires denial of the union's request for arbitration, despite the NYCCBL's expressed language encouraging arbitration of labor disputes); *see also United Fed'n of Teachers, Local 2 v. Bd. of Educ. of the City Sch. Dist. of the City of New York*, 1 N.Y.3d 72, 80

(2003) (the scope of the public policy exception is extremely narrow). Such exceptions must be based on "public policy considerations, embodied in statutory or decisional law, [and must] prohibit, *in an absolute sense*, particular matters being decided." *New York City Transit Auth. v. Transp. Workers Union of America, Local 100*, 99 N.Y.2d 1, 7 (2002) (emphasis in original); *see also Horn v. New York Times*, 100 N.Y.2d 85, 96 (2003) (declining to extend statutorily derived public policy to "at will" employment stemming from regulation of attorneys enunciated in *Weider v. Skala*, 80 N.Y.2d 628 (1992), to other classes of regulated professionals by "loosing *Weider* from its analytical moorings).

As the Court of Appeals has repeatedly stated, "we have never actually prohibited bargaining or invalidated a collective bargaining agreement on such a ground, and a public policy strong enough to require prohibition would almost invariably involve an important constitutional or statutory duty or responsibility." *City of Watertown*, 95 N.Y.2d at 79, n. 1 (quoting *Matter of Bd. of Educ. v. New York State Pub. Empl. Relations Bd.*, 75 N.Y.2d 660, 667-678 (1990) (editing marks omitted). Furthermore, "laws which bestow general powers and do not relate to specific delegations of duties, in an absolute sense," are not proper grounds for a public policy exception. *PBA*, 73 OCB 22, at 8 (citing *United Fed'n of Teachers*, 1 N.Y.3d at 80). Rather, "[p]ublic employers must [] be presumed to possess the broad powers needed to negotiate with employees as to all terms and conditions of employment. The presumption may, of course, be rebutted by showing statutory provisions which expressly prohibit collective bargaining as to a particular term or condition." *Matter of City of New York v. Patrolmen's Benevolent. Assn.*, 56 A.D.3d 70, 74 (1st Dept. 2008), *lv. granted other grounds*, 12 N.Y.3d 707 (2009) (quoting *Bd. of Educ. of Union Free Sch. Dist. No. 3 of Town of Huntington v. Associated Teachers of Huntington, Inc.*, 30 N.Y.2d 122, 130 (1972))(editing marks omitted).

The City cites to the New York City Charter § 2903 as the statutory provision that creates the asserted public policy exception and the legislative authority empowering DOT to disregard its statutory obligation to bargaining collectively over this mandatory subject of bargaining. However, this provision of the New York City Charter provides that DOT's Commissioner shall have the authority to:

> maintain and operate the ferries of the city; be responsible for constructing, acquiring, operating, maintaining or controlling all ferry boats . . .; have charge and control of all marine operations within the city . . .; establish tours of ferry facilities and their related operations . . .; issue permits for the control of television and photography activities within or upon ferries and related facilities; and construct, operate and maintain marinas and public boat launching ramps and related facilities of ferry property and collect fees for the use thereof . . .

(Ans., Ex. 10). There is no mention of the terms sick leave, medical documentation, fit for duty, or any other core term at the center of this dispute. Therefore, this provision, as a grant of general powers, does not provide a statutory basis for this Board to disregard the statutory mandate contained in NYCCBL § 12-307(a). *See New York City Dept. of Sanitation v. MacDonald*, 87 N.Y.2d 650, 656 (1996); *see also City of New York v. Unif. Fire Officers Assn., Local 854*, 95 N.Y.2d 273, 281 (2000). Nor has any decisional basis been drawn to the attention of this Board by the City, based upon which the presumption of negotiability could be said to have been overcome. *Matter of City of New York*, 56 A.D.3d at 74.

The duty to negotiate on mandatory subjects of bargaining includes the duty to negotiate until agreement is reached or the statutory impasse procedures are exhausted. Therefore, the City may not unilaterally implement a change in a mandatory subject of bargaining before bargaining on the subject has been exhausted. *See, e.g., DC 37, AFSCME*, 77 OCB 34, at 19; *COBA*, 63 OCB 26, at 9 (BCB 1999); *PBA,* 63 OCB 4, at 10 (BCB 1999). Accordingly, we order the City to rescind the

SMS Alert and its requirements for medical documentation, restore the medical documentation procedures that existed prior to the issuance of the SMS Alert, bargain in good faith with the Union before implementing any changes to the medical documentation procedures required by sick leave provisions in the Agreement, and post the attached notice detailing its violations of the NYCCBL.

However, nothing in this order should be construed as a limitation of DOT's authority, as a public employer, to maintain efficient operations or to determine the methods, means and personnel by which government operations are to be conducted. Accordingly, DOT retains the authority to assign or reassign affected employees to whatever duties it deems appropriate.

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 filed by United Marine Division, Local 333, International Longshoremen Association, AFL-CIO, docketed as BCB-2771-09 be, and the same hereby is, granted; and it is further

ORDERED, that the New York City Department of Transportation rescind the SMS Alert No. 94 and the requirements for medical documentation contained therein; and it is further

ORDERED, that the New York City Department of Transportation restore the documentation procedures that existed prior to the issuance of the SMS Alert No. 94; and it is further

ORDERED, that the New York City Department of Transportation bargain in good faith with the Union before implementing any changes to the documentation procedures required by sick leave provisions contained in the parties' collective bargaining agreement; and it is further

ORDERED that the New York City Department of Transportation post appropriate notices detailing the above-stated violations of the NYCCBL.

Dated: New York, New York
November 23, 2009

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 2 OCB2d 44 (BCB 2009), determining an improper practice petition between United Marine Division, Local 333, International Longshoremen Association, AFL-CIO, and the City of New York and the New York City Department of Transportation.

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 filed by United Marine Division, Local 333, International Longshoremen Association, AFL-CIO, docketed as BCB-2771-09 be, and the same hereby is, granted; and it is further

ORDERED, that the New York City Department of Transportation rescind the SMS Alert No. 94 and the requirements for medical documentation contained therein; and it is further

ORDERED, that the New York City Department of Transportation restore the documentation procedures that existed prior to the issuance of the SMS Alert No. 94; and it is further

ORDERED, that the New York City Department of Transportation bargain in good faith with the Union before implementing any changes to the documentation procedures required by sick leave provisions contained in the parties' collective bargaining agreement; and it is further

ORDERED that the New York City Department of Transportation post appropriate notices detailing the above-stated violations of the NYCCBL.

The New York City Department of Transportation
(Department)

Dated: _____
(Posted By)

(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.