District No. 1, PCD, MEBA, ILA, **3 OCB2d 4 (BCB 2010)**
(IP) (Docket No. BCB-2773-09).

Summary of Decision: Petitioner alleged that DOT violated NYCCBL § 12-306(a)(1) and (4) by unilaterally issuing a regulation that dictated that an employee who took three or more consecutive sick leave days had to provide specific medical documentation in order to return to work. The City maintained that this regulation merely clarified the existing sick leave provision and that this regulation ensured the public employer's compliance with existing federal statutes and safety regulations. Alternatively, the City argued that any change to the existing sick leave provisions was *de minimis* and overridden by the strong public policy to protect the safety of the public by ensuring that DOT's employees are able to perform their duties. The Board found that the issuance of this regulation violated the NYCCBL because DOT failed to bargain concerning 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-

DISTRICT NO. 1, PACIFIC COAST DIVISION, MARINE ENGINEERS BENEVOLENT ASSOCIATION,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On June 10, 2009, District No. 1, Pacific Coast Division, Marine Engineers Benevolent Association ("MEBA" or "Union") 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 failure to bargain and a change in a mandatory subject of bargaining. 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 parties' collective bargaining agreement. 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 the sick leave policy applicable to these employees, which is a mandatory subject of bargaining. Accordingly, we grant the Union's petition.

BACKGROUND

DOT is responsible for all 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. ¶ 8). 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. ¶ 9).

MEBA represents DOT employees in the "Ferryboat Titles (Licensed)," which include Captain, Assistant Captain, Mate, Chief Marine Engineer, Marine Engineer, Chief Marine Engineer (DC), Marine Engineer (DC), and Mate (DC). (Rep., Ex. C). According to the City, all of these titles are considered by DOT to be "safety sensitive" and "physically taxing" positions. The parties' collective bargaining agreement covering these titles for the period from 2008-2010 ("Agreement") sets forth the sick leave provisions applicable to these employees in Article XIV § 2(e)(1) and (2) and states:

> a. A verifying statement from the Licensed Officer'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 Licensed Officer 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.

(Rep., Ex. C).

According to the City, the issuance of SMS Alert No. 94 arises from 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 letter which closely tracked the language of [the SMS Alert]," and since its issuance "has been used by employees and accepted by DOT as valid." (Ans. ¶ 40). 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).

(Ans., Ex. 6). 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. 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. ¶ 41).

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'." (Ans. ¶ 44). However, according to the Union, and more specifically its medical expert, the term "fit for duty" connotes a more encompassing, stringent, and detailed medical obligation that was not contemplated by DOT when it issued the SMS Alert.

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. ¶ 56). The City asserts that DOT was empowered to issue the SMS Alert under the New York City Charter § 2903 and 46 CFR Part 10. 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).

Additionally, according to the City, DOT was authorized to issue by the SMS Alert because "46 CFR Part 10 outlines the physical requirement for merchant seamen [and] DOT falls within these regulations."[1] (Ans. ¶ 59). However, according to the Union, the provision cited by the City is not applicable to the instant matter. Specifically, the Union contends that the only remotely applicable sections of 46 CFR Part 10 are the following: 46 CFR § 10.215(a)(1), which provides that all captains and assistant captains serving as pilots are required to take and pass "annual physical examinations certifying that they are physically capable of performing their duties without restriction," and 46 CFR § 10.209, which states that all other licensed officers "are required to undergo a physical and be certified as capable of performing their duties without restriction when they upgrade or renew their licenses."[2]

In addition to citing to New York City Charter § 2903 and 46 CFR Part 10, the City further asserts that DOT was empowered to issue the SMS Alert due to a pair of federal maritime

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[1] This general reference to 46 CFR Part 10 in ¶ 59 of the Answer is the only citation to this federal regulation throughout the City's pleadings.

[2] Under 46 CFR § 10.205, all licenses "must be renewed every 5 years." (Rep. ¶ 3).

regulations. The United States Department of Transportation ("USDOT") 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)." (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 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, USDOT and the United States Coast Guard also issued Navigation and Vessel Inspection Circular No. 02-98 ("NVIC 02-98"), which is a ten page document. 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). This policy sets forth 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

"neurological." (*Id.*). NVIC 02-98 also states that its purpose "is to provide guidelines for evaluating the physical condition of an applicant for a merchant marine license or document." (*Id.*). According to the City, CG-719K and NVIC 02-98 are designed to ensure that all crew members are "physically fit and free from debilitating illness and injury," and are the basis for the issuance of the SMS Alert. (*Id.*).

However, based upon the record in the instant matter, it is clear that NVIC 02-98 is no longer in effect because it was replaced by a more recent policy. USDOT and the United States Coast Guard issued Navigation Vessel Inspection Circular No. 04-08 ("NVIC 04-08") due to "developments and advancements in modern medical practices." (Rep., Ex. E). This approximately 75-page document states that its purpose is to provide "guidance for evaluating the physical and medical conditions of applicants for merchant mariner's documents . . ., licenses, certificates of registry and STWC endorsements, collectively referred to as 'credentials'" and applies only "to applicants for original, renewal and raise in grade credentials." (*Id.*). This policy also requires a much wider scope of examinations, including those performed on a patient's head, neck and scalp, mouth and throat, ears, eyes, lung and chest, heart, abdomen, viscera and anus, skin, as well as the vascular, genital-urinary, musculoskeletal, lymphatic, neurological, and endocrine systems.

According to the affidavit submitted by MEBA's medical expert, Kenneth B. Miller, M.D.,[3] who participated in the committee that authored NVIC 04-08 and is proferred herein as an expert in the field of occupational medicine concerning the maritime industry, the term "fit for duty" utilized

[3] Dr. Miller is board certified in occupational medicine, has taught at several medical schools, including John Hopkins School of Medicine, "coordinated the largest study of the essential job functions and physical requirements of US merchant seafarers," and "has personally been involved in the determination of fitness for sea duty for thousands of seafarers." (Rep., Ex. E).

by DOT in the SMS Alert was not intended to possess the exact and specific meaning this term of art has in the context of the maritime industry. According to Dr. Miller, in order for a seafarer, such as the employees in the titles represented by MEBA, to be considered "fit for duty," a full medical examination, including blood, laboratory, and radiological tests, is required to be performed by a doctor who is familiar with the physical requirements imposed upon seafarers by their normal duties and with all maritime regulations, policies and procedures, including CG-719K and NVIC 04-08. (*See* Rep. ¶¶ 15 and 17). Further according to Dr. Miller, most physicians are not trained to properly determine whether an employee is "fit for duty"; as such, MEBA members, in order to comply with the SMS Alert, must visit an appropriate doctor, which would result in additional costs for that person and could result in a delay in that person's return to work. (*See* Rep. ¶ 18).

Citing a specific example, the Union alleges that Chief Engineer Sean McDermott was negatively impacted by the new requirements contained in the SMS Alert. According to the Union, McDermott was involved in a car accident on June 29, 2009 that required him to go to Winthrop Hospital, where he was treated by Adam Fiterstein, M.D. That same day, upon McDermott's discharge, Dr. Fiterstein issued a "work release" note that indicated that McDermott would be able to "return to work in 8 days." (Rep., Ex. D). On July 6, 2009, the day on which McDermott was scheduled to return, he submitted this note to DOT, but was informed by DOT that this note was not sufficient and was given the form letter drafted by DOT in connection with the SMS Alert. McDermott took this form letter to Dr. Fiterstein, who refused to complete this document. McDermott then contacted a physician who had treated him in the past and was informed that by this other physician that he "would sign off on the required language." (*Id.*). The next available appointment for this doctor was not until July 8, 2009, and on that date, McDermott went to that

physician who examined him and completed DOT's form letter. After using four sick leave days and missing 16 hours of overtime, McDermott returned to work on his next scheduled day, July 10, 2009.[4]

As a result of DOT's issuance of the SMS Alert and the incident involving McDermott, MEBA filed the instant improper practice petition claiming that DOT violated NYCCBL § 12-306(a)(1) and (4). The Union claims that the SMS Alert constituted a failure to bargain over a mandatory subject of bargaining because this regulation heightened 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 that 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 an order rescinding the SMS Alert and ordering DOT to bargain over these proposed changes.

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 MEBA.[5] Sick leave and the policies and procedures governing this topic are

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[4] The Union has filed a grievance, pursuant to the Agreement, as a result of this incident.

[5] NYCCBL § 12-306(a) provides in pertinent part:
It shall be an improper practice for a public employer or its agents:

(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, the Union 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." (Rep., Ex. C).

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. Based upon this heightened criteria, 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 and incur additional costs. Moreover, the blanket and misguided adoption of the term "fit for duty" by DOT invokes a number of unintended consequences not contemplated by

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

DOT when drafting the SMS Alert. More precisely, this terms connotes that an extensive medical examination was performed by a physician fully familiar with the duties connected with these particular sets of maritime employees, who attests to the viability and efficacy of the physiological systems of an employee's body.

In response to the City's argument that the SMS Alert is merely a clarification of the existing sick leave policy or, alternatively, constitutes *de minimis* change, MEBA contends that, prior to the issuance of the SMS Alert, employees were allowed to provide "a verifying statement" from one's physician and that statement could be submitted to DOT "as soon as possible after the period of absence" was over, but no employee was ever prevented from returning to work. However, since the issuance of the SMS Alert, McDermott, a DOT employee represented by the Union, was prohibited from returning to work and forced to take 4 additional sick leave days, and lost 16 hours of overtime compensation. Due to the SMS Alert's issuance, 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. On its face, the SMS Alert is not a clarification of the existing sick leave policies. Rather, this new policy constitutes a change of the sick leave that is significantly more than *de minimis*, as evidenced by the incident involving McDermott.

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. First, 46 CFR Part 10, which is generally referenced by the City, makes no mention of employees who are in titles represented by MEBA being required to obtain a completed "fit for duty"form when they return from any type of sick leave. Also, neither CG-719K nor NVIC 02-98 addresses sick

leave policies or returning to work by employees who have utilized certain amount of sick leave. Further, DOT completely ignored the fact that NVIC 04-08 superceded NVIC 02-98, which is no longer in effect. Additionally, it is incongruous that, while the Ferryboat Incident that allegedly gave rise DOT's issuance of the SMS Alert occurred in 2003, NVIC 02-98 was issued in 1998, CG-719K was last revised in 2002, and NVIC 04-08 was issued in 2008, DOT decided nearly six years after the Ferryboat Incident to invoke these various regulations to issue this newly revised sick leave policy. Moreover, Dr. Miller asserts that the three day absence period, which invokes the SMS Alert, is never referenced anywhere in any known maritime regulation, policy or procedure dealing with medical issues.

Finally, the Union argues that the timing of the issuance of the SMS Alert is surprising because, since the Ferryboat Incident, the parties have collectively bargained three contracts, the most recent being executed on March 2009. At no time during these negotiations did DOT ever raise the issue of any regulation evenly remotely resembling the requirement set forth in the SMS Alert. Accordingly, DOT, even when given the opportunity to bargain over this subject, failed to do so, and instead chose to unilaterally issue this regulation that clearly involved a mandatory subject of bargaining. As such, by DOT's failure to raise this issue during the period of time between the Ferryboat Incident and the issuance of the SMS Alert, the City's position that this incident was the impetus for such regulation should be disregarded.

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 MEBA 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 that 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. ¶ 38).

The City further contends that 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*. 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. ¶ 51). 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* that the issuance of the SMS Alert was a unilateral change of DOT's sick leave policy governing the members of MEBA, 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. ¶ 57). 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. ¶ 58).

Taken in conjunction, 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. ¶ 67). 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. ¶ 70). The maritime industry standards dictate that employees, such as those represented by MEBA in the instant matter, "be medically cleared before returning from an extended sick leave." (Ans. ¶ 72; 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. ¶ 74).

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. ¶ 80). Although there is a strong public policy in favor of collective bargaining, the Courts, New York Public Employment Relations Board, 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. ¶ 91), outweighs the "negligible intrusiveness of requiring sick employee to be medically cleared to return to work." (Ans. ¶ 92).

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.[6] 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." (Ans. ¶ 95). Thus, the strong public policy, which

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[6] 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 . . . .

"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. ¶ 94).

Finally, the City contends that the Union's claim that DOT interfered with, restrained and coerced its members statutory rights under § 12-305 of the NYCCBL is unsupported by the record in the instant matter. MEBA has proffered no facts independent of those alleged in support of their claim under § 12-306(a)(4) that would support a claim under § 12-306(a)(1). Moreover, since MEBA 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 no derivative violation of § 12-306(a)(1).

DISCUSSION

In the instant matter, MEBA 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.[7] Accordingly, the City contends that the Union's claim must be dismissed because existing federal regulations and maritime

[7] We have already issued a decision regarding the SMS Alert as it relates to certain DOT employees who are represented by another union in *UMD, Local 333*, 2 OCB2d __ (BCB 2009) ("UMD Case") in which we found 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. We issue this separate decision pertaining to the SMS Alert because of the factual differences alleged in the parties' respective pleadings. Most notably, in the instant matter, a member of MEBA was prohibited from returning to work by DOT pursuant to the terms of the SMA Alert, a fact not contained in the UMD Case; and MEBA's demonstrated here that NVIC 02-98, relied upon by the City in the UMD Case as in the present one, was superceded by NVIC 04-08. Therefore, we are issuing separate opinions in these similar cases.

industry standards preempt the parties' duty to bargain in good faith. However, since the uncontested facts establish that the SMS Alert does not 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 04-08, we find that there is no preemption and 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 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. Empl. 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.[8] 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 Rating Document," or "Raise-In-Grade (Licenses)." (Ans., Ex. 11). As such, CG-719K neither addresses nor mentions employees returning from sick leave and is limited to instances involving licenses and/or rating documents. NVIC 02-98, which is cited by the City in support of its preemption argument, although it has been superceded by NVIC 04-08, 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. Furthermore, NVIC-04-08, which is the policy that is currently in effect, applies to employees who are either obtaining or renewing specific seafaring licenses and/or rating documents. However, these regulations fail to mention and/or reference an employee who is returning from a sick leave absence of any duration. Accordingly, as we similarly held in *United Marine Division, Local 333*, 2 OCB2d __ (BCB 2009), we find that the mandates contained in CG-719K, NVIC 02-98, and NVIC 04-08 lack the plain and

[8] 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.

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 any regulation alleged to have mandated its issuance, 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*)).[9]

Since CG-719K, NVIC 02-98, and NVIC 04-08 do not preempt bargaining over the issuance of the SMS Alert, we now turn to the substantive merits of MEBA's claim that DOT violated the NYCCBL by issuing the SMS Alert. 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

[9] 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 that 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.

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 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 XIV § 2(e) of the Agreement, when an employee is absent for two or less days on sick leave, no "verifying statement" was necessary. (Pet., Ex. C). 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." (*Id.*).

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 XIV § 2(e) 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. 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. However, 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 MEBA'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. The instance involving McDermott is a plain and real example of the application of the language of the SMS Alert and highlights the skewed outcome of the mandates set forth therein. 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. Additionally, based upon the record before this Board, the burden placed upon an employee to obtain a "fit for duty," as it is understood within the maritime industry, would be significant. 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); *cf. 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) (holding 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 MEBA through the promulgation of the SMS Alert in violation of NYCCBL § 12-306(a)(4), we further find a derivative 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 Fedn. of Teachers 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).

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. Employment 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 Fedn. 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.*, 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. *See 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*, 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 District No. 1, Pacific Coast Division, Marine Engineers Benevolent Association, docketed as BCB-2773-09 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.

ORDERED, that New York City Department of Transportation remove any and all references of Chief Engineer Sean McDermott having not complied with SMS Alert No. 94 or the fact that additional leave time had to be used to cover his missed subsequent to the absence following his June 29, 2009 car accident; and it is further

ORDERED, that New York City Department of Transportation restore any and all time leave

time of Chief Engineer Sean McDermott which he had utilized to address his noncompliance with SMS Alert No. 94.

Dated: New York, New York
January 25, 2010

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
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 3 OCB2d (BCB 2010), determining an improper practice petition between District Council 37, 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 District No. 1, Pacific Coast Division, Marine Engineers Benevolent Association, docketed as BCB-2773-09 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.

ORDERED, that New York City Department of Transportation remove any and all references of Chief Engineer Sean McDermott having not complied with SMS Alert No. 94 or the fact that additional leave time had to be used to cover his missed subsequent to the absence following his June 29, 2009 car accident; and it is further

ORDERED, that New York City Department of Transportation restore any and all time leave time of Chief Engineer Sean McDermott which he had utilized to address his noncompliance with SMS Alert No. 94.

The New York City Human Resources Administration
(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.