DC 37, 6 OCB2d 24 (BCB 2013)

(IP) (Docket No. BCB-3000-12)

Summary of Decision: The Union claimed that the City violated the NYCCBL by promulgating revised job specifications that contained new qualifications of continuing employment and new duties that have a practical impact on safety. The Union further claimed that the City revised the job specifications in retaliation for the Union's filing several out-of-title grievances, interfered with employees' rights, and repudiated the parties' contract. The City argued that the claims were untimely, that it had a management right to revise the job specifications, and that the Union failed to demonstrate a practical impact on safety. The City also argued that there was no retaliation because it did not take any adverse employment action against the Union's members and had legitimate business reasons for revising the job specifications. The Board found that the City did not violate the duty to bargain by revising job specifications, repudiate the contract, retaliate against Union members, or otherwise interfere with the exercise of their rights. However, the Board found that the City did violate the NYCCBL by applying a new licensing requirement to certain incumbents without bargaining. Accordingly, the petition was granted, in part, and denied, in part. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
on behalf of its affiliated LOCALS 1322 & 376,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

DECISION AND ORDER

On February 14, 2012, District Council 37, AFSCME, AFL-CIO, on behalf of its affiliated Locals 1322 and 376 (collectively, "DC 37" or "Union") filed a verified improper practice petition

against the City of New York ("City") and the New York City Department of Environmental Protection ("DEP" or "Agency").[1] The Union claims that the City and DEP violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by promulgating revised job specifications that contain licensing requirements and a medical requirement that establish new qualifications of employment applicable to incumbent employees. The Union further claims that the job specifications contain new duties that are not appropriate to the employees' title have a practical impact on employee safety. Additionally, it claims that the City and DEP promulgated the revised job specifications in retaliation for Union members' filing several meritorious out-of-title grievances, in violation of NYCCBL § 12-306(a)(1) and (3) and, in so doing, repudiated the 2005-2008 Blue Collar Agreement ("Agreement").[2]

The City argues that many of the Union's claims are untimely and that it nevertheless has an unfettered management right to revise the job specifications. The City further argues that the Union has failed to demonstrate the existence of a practical impact on safety resulting from the changes. Lastly, the City argues that it had a legitimate business reason for revising the job specifications and that its actions do not constitute a repudiation of the Agreement.

This Board finds that, with the exception of applying a new licensing requirement to

[1] The Union filed an amended petition on March 2, 2012.

[2] As relief, the Union requests that the Board order the City and DEP to: cease and desist from implementing the revised job specifications; engage in good faith bargaining over the qualifications, license and medical requirements, and typical tasks included in the revised job specifications; rescind any disciplinary or adverse action taken against the Union's members as a result of the revised job specifications; and post appropriate notices, including by electronic means. The Union additionally requests that the Board order any such other and further relief as may be just and proper. The Union in its Petition states that the revised job specifications also create an increased workload. We note, however, that this allegation is not addressed in either party's post-hearing brief. For the reasons set forth in the Discussion section we find that, to the extent this is an allegation included within the Petition, it is without merit.

certain incumbent employees without bargaining, the City and DEP did not violate its duty to bargain by unilaterally promulgating revised job specifications that contain licensing and medical requirements. This Board further finds that the record does not establish a practical impact on employee safety as of this time, as the revised job specifications have not resulted in a practical impact on employee safety. Additionally, this Board finds that the City and DEP did not repudiate the Agreement, retaliate against the Union's members, or interfere with the Union's members' statutory rights by promulgating the revised job specifications. Accordingly, the petition is granted, in part, and denied, in part.

BACKGROUND

The Trial Examiner held four days of hearing, at which seventeen witnesses provided testimony, and found that the totality of the record established the following relevant facts.

DEP is a City agency that manages and conserves the City's water supply. The Union represents DEP employees in the titles Supervisor (Watershed Maintenance) ("SWM") and Watershed Maintainer ("WM").[3] The City and the Union are parties to the Agreement, which provides that a "claimed assignment of Employees to duties substantially different from those stated in their job specifications" is subject to the parties' grievance procedure. (Joint Ex. 1) The Union's improper practice claims all arise from the City's unilateral revision of the job specifications for these titles.

Generally, SWMs supervise WMs, who perform broad duties related to the operation, maintenance, repair, and inspection of facilities, roads, bridges, equipment, and lands in the watershed areas, including reservoirs, aqueducts, and groundwater, water and wastewater

[3] Local 1322 represents SWMs; Local 376 represents WMs.

treatment systems. These employees work in DEP's Bureau of Water Supply in geographically and/or functionally divided units known as the Western Operations Division ("Western Operations"), the Eastern Operations Division ("Eastern Operations"), and the Wastewater Operations Division ("Wastewater Operations").

In November 2009, DEP began meeting with the Department of Citywide Administrative Services ("DCAS") to revise the SWM and WM job specifications to better meet the agency's operational needs. On July 26, 2011, DCAS informed the Union by letter that the City planned to adopt changes to the job specifications for the SWM and WM titles. DCAS provided copies of draft job specifications, which it alleged "reflect the current duties and qualification requirements for these titles." By letters dated September 6 and 8, 2011, the Union objected to the proposed changes and requested to negotiate. The City refused, by letter dated September 13, 2011, stating that it had no duty to bargain. Ultimately, on February 29, 2012, the changes to the job specifications were implemented.

Qualifications of Employment

The Union's claims that the City and DEP unilaterally added new qualifications of employment to the job specifications for WMs and SWMs are set forth below.

Licensing Requirements

The revised job specifications, which apply to both new and incumbent WMs and SWMs, state that "[a]ll candidates shall be required to obtain and maintain any licenses, certifications or endorsements that the Agency deems necessary to perform the duties of the position." The former job specification for WMs states that "[a]ll candidates shall be required to obtain and maintain any license or licenses necessary to perform the duties of the position." The former job specification for SWMs did not contain any such requirement.

Several WMs and SWMs testified that, over the years, DEP has required them, as incumbents, to obtain various drinking water and wastewater treatment certifications that were not previously required by their job specifications. The requirements for obtaining and maintaining these certifications are mandated by government bodies and change periodically. For example, SWMs and WMs who serve as operators of wastewater treatment facilities are required by the New York State Department of Environmental Conservation to possess wastewater treatment plant operator certifications in varying grades. According to the Union, SWMs have obtained and maintained these certifications under protest because they are not listed in the SWM job specification and the Blue Collar Agreement provides significant pay differentials to WMs for having these same certifications. As a result, the Union filed grievances in 2007, 2010 and 2012 challenging these requirements for SWMs. There is no evidence in the record that, prior to the revision of the job specifications, WMs and SWMs were required to possess any licenses, certifications, or endorsements other than these various water treatment certifications and a valid New York State Motor Vehicle Driver's License.

In a 2008 decision, an arbitrator found that the term "license" in the former job specification for WMs encompassed a Grade IIB water treatment operator certification. In so ruling, the arbitrator found that, under the circumstances, there was "no substantive distinction between a 'certification' and a 'license.'" The arbitrator explained that the provision in the former job specification "clearly puts . . . incumbents on notice that if a third party requires any kind of formal authorization to perform some or all of the duties of the position, compliance will be required." Similarly, the Chief of Eastern Operations testified that the terms license and certification are interchangeable, as the wastewater treatment plant operator certification was termed a license prior to being designated a certification.

DEP also added the following qualification to the job specifications for WMs and SWMs: "[f]or appointment to certain positions, a Class A Commercial Driver's License [("CDL")] valid in the State of New York may be required. If required, this license must be maintained for the duration of employment." The former job specifications for WMs and SWMs only required a valid New York State Motor Vehicle Driver's License. There is no evidence that DEP ever required WMs and SWMs to possess a CDL prior to the revision of the job specifications.

The requirement to obtain a CDL applies to new employees and to incumbent employees who apply for new positions that require a CDL. Nevertheless, after the job specifications were revised and the instant petition was filed, the Chief of Eastern Operations required incumbent WMs, who did not apply for new positions requiring a CDL, to obtain a CDL. CDLs were required of these WMs "because we needed additional people to drive [new equipment]." (Tr. 496-97)

Medical Requirement

The revised job specifications state that WMs and SWMs:

> may be required to wear a respirator while performing the essential functions of [the] job. Employees must be physically able to wear a respirator. [Occupational Safety and Health Administration ("OSHA")] regulations have established medical guidelines for wearing a respirator. Therefore, applicants and employees will be required to have a pre-appointment and periodic post-appointment medical examinations to demonstrate that they meet applicable OSHA standards and to monitor their medical status. Once hired, employees must continue to satisfy OSHA regulations for the duration of their employment.

The former job specifications did not include this language or any other medical requirements. The DCAS Deputy Director testified that the provision above does not apply to all WMs and SWMs. Rather, she explained that the language was added because certain positions require the use of a respirator and there are statutory requirements with which DEP must comply.

The Chief of Eastern Operations testified that the requirement that employees be physically fit to wear a respirator became a qualification of employment in 2003 when DEP implemented its Respiratory Protection Program in order to comply with OSHA regulations.[4] The Respiratory Protection Program "applies whenever DEP employees are required to wear respiratory protection as part of their job duties" and specifically requires WMs and SWMs to be physically able to wear a respirator when assigned to tasks that require the use of such equipment.[5]

WMs and SWMs are medically evaluated to determine their eligibility to wear a respirator and have been subject to these examinations for years. The Deputy Chief of Compliance and Procurement for Western Operations testified that DEP requires employees who do not don respirators to be medically examined because "[i]t allows [DEP] to have some operational flexibility, if a task comes up that requires respiratory protection, we have staff that are trained and qualified to use the respirators." (Tr. 385)

The Union's witnesses testified that, prior to the issuance of the revised job specifications, when a SWM did not receive clearance to wear a respirator, he had to turn in his respirator and was

[4] Although the Respiratory Protection Program was not implemented until 2003, the Chief of Eastern Operations testified that, since 1985, he has required WMs and SWMs to wear a respirator when performing certain duties.

[5] Respirator use is required by third-party regulations, such as OSHA standards, or DEP policy. The Respiratory Protection Program sets forth a procedure for hazard identification and evaluation in order to determine appropriate protections when respiratory hazards are identified. Generally, employees have been required to wear a respirator if their "job assignment would be to work in an area where the atmospheric hazards are above permissible exposure limits . . . ." (Tr. 326) Thus, the Respiratory Protection Program states that "[w]ork assignments requiring respirator protection range from a continuing aspect of normal work (e.g., asbestos removal) to specific periodic or occasional tasks (sanding, spraying, chlorine cylinder/container change out, etc.) to emergencies (chemical or dust/fiber releases, etc.)." DEP has required WMs and SWMs to wear respirators for certain tasks, such as making or breaking chlorine connections, or when inhalation protection is needed for the use of particular water treatment chemicals. WMs and SWMs also donned respirators during an emergency when high mercury levels were detected in aquifer shafts at certain watershed facilities.

not allowed to perform duties requiring one. He received a letter to this effect; however, there were no other consequences. Similarly, WMs who failed medical examinations were relieved of their duties that required the use of a respirator, but did not face any other consequences.[6]

New Duties: Alleged Practical Impact, Repudiation, and Retaliation

The Union claims that the changes to the job specifications also added several new duties that have a practical impact on the safety of WMs and SWMs. The Union alleges that the City and DEP added these duties in retaliation for Union members' filing several meritorious out-of-title grievances, and, in so doing, repudiated the Agreement.

Confined Space Entry Duties

The revised job specification for WM added as a typical task: "Performs confined space entry duties." The revised job specification for SWM similarly added as a typical task: "May serve as the confined space entry supervisor." The former job specifications did not specifically include confined space entry duties; however, some equipment referenced in the former job specifications that WMs maintain and repair is located in confined spaces.[7]

In compliance with OSHA regulations, since 2003 DEP has had a Confined Space Entry Program to protect employees from the hazards of entering and working in confined spaces.[8] For

[6] Because the revised job specifications now require SWMs and WMs to be physically fit to wear a respirator, SWMs and WMs are concerned that, if they are unable to pass the medical exam, they could be terminated or reassigned to distant work locations. Depending on the nature of the reassignment, they could also lose considerable pay in night differentials and overtime.

[7] DEP's Confined Space Entry Program states that a confined space is any space that: (1) is "large enough and so configured that an employee can bodily enter and perform assigned work[;]" (2) "[h]as limited or restricted means for entry or exit[;]" and (3) "[i]s not designed for continuous employee occupancy." Employees perform confined space entry duties when they are required to enter a confined space to carry out maintenance and repairs.

[8] Although OSHA regulations apply only to permit-required confined spaces, DEP's Confined Space Entry Program applies to both permit-required and non-permit required confined spaces.

example, one WM testified that such work "could result in death" due to "[l]ack of oxygen in the confined space, engulfment, flooding, collapse, entrapment." (Tr. 86) Pursuant to the Confined Space Entry Program, SWMs and WMs receive training on planning and supervising entry into confined spaces as well as the associated hazards and proper use of confined space equipment. The training includes precautions that should be taken when working in confined spaces, such as air monitoring, signaling for help, and emergency procedures to be followed. DEP's Director of Compliance testified that there have not been "any recordable injuries associated with confined space entry."[9] (Tr. 323)

On May 10, 2010, an arbitrator ruled that the entry supervisor and attendant duties of SWMs assigned to DEP's Confined Space Entry Rescue Team ("CSERT") were "substantially different" from and "bear no discernible relationship" to the duties detailed in the former job specification. Accordingly, the arbitrator directed DEP to cease and desist from making such assignments to SWMs. In so ruling, the arbitrator noted that the "CSERT work SWMs are trained to perform requires that they be prepared to enter a confined space, at potential risk to their own lives, when a hazardous condition prevents an entrant from returning to the surface on his/her own." Since the issuance of this award, SWMs and WMs have not served as entry supervisors and attendants; however, they have continued to serve as entrants at confined spaces.

HVAC Duties and Requisition of Materials, Labor, Supplies, and Equipment

The revised job specification for WMs also added as a typical task: "Maintains and repairs plumbing, heating, ventilating and air conditioning [("HVAC")] equipment contained within Agency facilities." Similarly, the revised job specification for SWM added as typical tasks:

> Supervises the maintenance and repair of plumbing, heating,

[9] Recordable injuries are those injuries that meet certain criteria established by the New York State Department of Labor Public Employees Safety and Health ("PESH").

> ventilating and air conditioning equipment contained within Agency facilities[; and]
>
> Makes estimates of and requisitions materials, labor, supplies and equipment required in maintenance work; schedules the use of heavy equipment and assures that labor requirements will be met by assigning crews according to the needs of the service.

The former job specifications for WMs and SWMs did not contain these duties; however, the Chief of Western Operations testified that WMs and SWMs have long maintained and repaired HVAC equipment in his division.

On July 12, 2010, an arbitrator ruled that a SWM's supervision of a crew assigned to maintain buildings, including the responsibility for all "heating and air condition systems, doors, windows and plumbing," and development of contract specifications for outside contractors was substantially different than the duties specified in the former job specification. In so ruling, the arbitrator found that "[t]here is no hint that [SWMs] at the first level are responsible to troubleshoot structural issues, perform or oversee skilled trades work, assess labor and materials needs, or develop specifications for outside contractors and oversee their work."

An SWM testified that HVAC work implicates safety concerns because it requires certain licenses and years of experience to know how to properly work on these systems. Examples of safety concerns include working with refrigerants under pressure, high voltage electricity, and various steam pressure levels in boilers.

Construction Duties

The revised job specification for WM added earthmoving equipment to the existing task: "Operates, services, and maintains various types of motorized vehicles and equipment, including specialized mounted equipment, towed or portable power equipment and attachments." Moreover, the revised job specification for WM added bridges and dams to the existing task:

"Maintains and repairs the lands, roads, structures and equipment in the watershed areas and aqueduct and reservoir systems . . . ." The revised job specification for SWM added the following new typical tasks:

> Supervises the maintenance and repair of the lands, roads, bridges, dams and other structures and equipment in the watershed areas and aqueduct, groundwater and reservoir systems[; and]
>
> May inspect, operate, service and maintain various types of motor-powered equipment, including cranes and hoists, a wide variety of heavy duty equipment, specialized mounted equipment, earthmoving equipment and towed or portable power equipment and attachments.

According to the City, these duties were added to the SWM job specification in order to reflect the fact that SWMs supervise WMs who have long been required to maintain and repair structures and operate equipment that is used for such tasks.

DEP has also had a crane and hoist safety policies and procedures manual ("Crane and Hoist Policy") since at least 2006 that "applies to all DEP operations that involve the use of cranes and hoists that are stationary . . . portable or truck-mounted and to all DEP employees . . . who use such devices." The purpose of the Crane and Hoist Policy "is to ensure the proper maintenance and safe operation of all cranes, hoists, and rigging devices used by DEP employees for lifting and moving materials." Consistent with the Crane and Hoist Policy, DEP's Chief of Western Operations explained that SWMs and WMs "have received training on how to operate bridge cranes and hoists. . . on how to inspect bridge cranes and hoists and identify problems, and . . . on performing checks of bridge cranes and hoists before operation."

DEP has had an excavation and trenching policies and procedures manual ("Excavation and Trenching Policy") since at least 2003 that applies "[w]henever excavation or trenching activities are performed by DEP employees . . . ." (City Ex. 6) The purpose of the Excavation

and Trenching Policy "is to ensure that each DEP employee involved in excavation can recognize and avoid unsafe conditions." (*Id*.) Accordingly, DEP provides awareness training for employees who may work in the vicinity of an excavation as well as more specialized training for employees who are considered competent persons. Awareness training helps make employees aware of the hazards associated with excavations so that they do not inadvertently put themselves in unsafe conditions. Competent person training educates employees on identifying hazards and the methods for performing excavation and trenching work safely.

On June 23, 2010, an arbitrator found that the heavy-duty industrial vehicles and/or equipment used by WMs to construct a temporary bypass road—dump trucks, bulldozers, motorized excavators, and CAT vehicles—were not the type of vehicles and/or equipment typically used by WMs to perform their duties. In so finding, the arbitrator rejected the City's argument that WMs may use all motorized vehicles without limitation, explaining that "[n]o mention is made of heavy-duty industrial vehicles and/or equipment in the [WM] position description."

In addition to the equipment at issue in the arbitration proceeding, WMs and SWMs operated various types of cranes for material handling purposes prior to the revision of the job specifications. The operation of cranes, hoists, and other such industrial equipment could result in an injury "during a roll-over, during an accident on site." (Tr. 88) Similarly, there are various road hazards and conditions inherent in driving certain vehicles like ten-wheel trucks that create safety hazards. A WM further explained that "you're working around other maintainers within close vicinities, you better know what you're doing. You could potentially hurt somebody. Sometimes you're on edges of banks, cliffs, you know, on edgy surfaces." (Tr. 201) Safety concerns may also arise due to the possible failure of a crane and the falling of heavy material,

including thousand pound pumps and flood gates. Therefore, the operator of a crane needs to be in control of the load.

WMs and SWMs receive on-the-job training on the use and operation of the various types of construction equipment as well as new equipment training from vendors. Additionally, DEP provides WMs and SWMs with personal protective equipment, such as visibility vests, steel-toed shoes, and hard hats, and designates work safety zones.[10]

Impetus for Changes to Job Specifications

As noted above, the revised job specifications added several tasks that the Union has challenged and/or is currently challenging through the parties' grievance and arbitration process. Consequently, Union witnesses testified that the impetus for revising the job specifications was to address past, present, and future out-of-title grievances. WMs and SWMs testified, in essence, that the job specifications were revised in response to the grievances that they filed.

The Director of Classification and Compensation ("DCAS Director") testified that the original request to revise the job specifications was made "because we were opening a new water treatment plant that involved UV technology and they wanted to make some revisions to the job to

[10] In addition to the above duties, the revised job specifications contain additional duties that the Union alleges to be new. For example, the revised job specification for SWM requires SWMs to supervise the maintenance calibration of equipment. Additionally, the revised job specification for WM added the task of "[m]aintain[ing] and repair[ing] mowers, tractors and related equipment." The Union also contends that the revised job specification for WM adds more sophisticated and difficult testing duties because the City eliminated the language "performs tests of a simple nature" from the former job specification and added "performs pH, chlorine and fluoride analyses, water quality and other required tests." Lastly, the Union alleges that the addition of "and other facilities" to the existing task of "inspect[ing] sanitary facilities, landfill dumps, water and wastewater plans during construction or operation" illustrates the City's objective to greatly expand the duties of WMs. While these duties may be new, the Union does not provide any legal basis for challenging them. Therefore, we do not discuss these allegedly new duties in greater detail or address them in the discussion.

include the duties that people would be performing at this UV plant."[11] (Tr. 604) The DCAS Director testified that, when revising the job specifications at issue, the out-of-title grievances were "definitely not" part of the analysis. (Tr. 616) She further testified that, in revising the job specifications, she spoke with DEP personnel; however, she was not informed of the Union's grievances. The DCAS Director testified that the duties added to the revised job specifications "were appropriate and better describe[ed] the job of [WM] and [SWM] as of today." (Tr. 607)

The Chief of Western Operations testified that in 2009 and 2010 "there were questions as to what was in the title" because "there had been some grievances." (Tr. 589) He testified that the grievances were the impetus for clarifying the job duties of WMs and SWMs because the grievances raised issues about what tasks WMs and SWMs could be assigned. For example, the Chief explained that the task of maintaining and repairing HVAC equipment was added to the job specifications because WMs and SWMs performed HVAC work prior to the issuance of the out-of-title arbitration award.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that DEP violated the NYCCBL by making several changes to qualifications of employment for incumbent employees. First, the Union argues that the requirement of a CDL for appointment to certain positions is new and explicitly applies to incumbent employees. Second, the Union asserts that the requirement that all candidates obtain and maintain any licenses, certifications, or endorsements that the Agency deems necessary is new and does not exempt incumbent employees. Third, the Union avers that the requirement that all

[11] The DCAS Director served as Deputy Director of Classification and Compensation during the events preceding the filing of the Petition.

employees be physically fit to wear a respirator and pass periodic medical examinations is new and explicitly applies to incumbents. The Union contends that, if the City intends to exempt incumbents from these new qualifications, then it must make that explicit in the job specifications.

The Union argues that the City is also obligated to bargain over the practical impact that the revised job specifications have on the safety of WMs and SWMs due to the inclusion of certain duties. The Union contends that the existence of a threat to employee safety is clear because, after a full evidentiary hearing, an arbitrator found that the task of entering a confined space is at the potential risk to one's life when a hazardous condition prevents an entrant from returning to the surface on his or her own. The Union also contends that the assignment of SWMs and WMs to heavy-duty construction projects impacts employee safety because earthmoving equipment, cranes, and hoists require skill, safety precautions, and training to operate safely.

The Union maintains that management's right to amend and revise job specifications is not limitless, as the changes must not "alter the essential duties and functions, and the related incidental tasks, of particular employment categories or positions." (Pet. Brief, p. 28-29) Because the revised job specifications include duties that arbitrators have determined to be substantially different from the duties codified in the former job specifications, the Union submits that these substantially different duties cannot be duties appropriate to their titles.

The Union also argues that DEP's management right to revise job specifications should be circumscribed because the City has repudiated the Agreement by systematically disregarding the provision prohibiting out-of-title assignments**.** According to the Union, such conduct amounts to a failure to bargain in good faith when it is designed to frustrate rights that are provided in a collective bargaining agreement. The Union argues that the parties' negotiated provision prohibiting out-of-title assignments would be rendered meaningless if, after losing at arbitration,

the City simply amended a job specification to add the task deemed out-of-title so that it could assign the task prospectively.

Additionally, the Union argues that DEP discriminated against the Union's members in violation of NYCCBL § 12-306(a)(3) by amending the job specifications to include duties that arbitrators have found to be substantially different from the duties set forth in their job specifications. The Union contends that DEP had knowledge of employees' union activity of filing out-of-title grievances and took the adverse action of revising their job specifications in direct response to their asserting their rights under the Agreement.

Lastly, the Union argues that, if DEP's actions are permitted, it would frustrate the Union's representation of its members and have a chilling effect on their right to engage in union activity.

City's Position

The City argues that most of the Union's claims are untimely because the revised job specifications represent the codification of longstanding duties and requirements and, therefore, do not represent changes to the terms and conditions of employment for WMs and SWMs. Notwithstanding its timeliness defense, the City maintains that the Union has failed to establish a violation of NYCCBL § 12-306(a)(4) because it has no duty to bargain over the revisions that it made to the job specifications of WMs and SWMs. Pursuant to NYCCBL § 12-307(b), the City contends that it has an unfettered management right to determine the content of job specifications.[12] The City asserts that this right has not been limited by agreement of the parties.

First, the City maintains that it has a management right to implement the CDL requirement because it only applies to new employees and for certain positions. While the City acknowledges that the Chief of Eastern Operations sent incumbent WMs to receive training for the CDL exam,

[12] NYCCBL § 12-307(b) provides that "[i]t is the right of the city, or any other public employer, acting through its agencies, to . . . determine the content of job classifications . . . ."

the City contends that he acted without the authorization of DEP's labor relations department. Second, the City asserts that the "any licenses, certifications or endorsements" requirement is not a new condition of employment because the former job specification for WM contained similar language and there is no substantive distinction between these three types of accreditation. Moreover, an arbitrator considered the language of the former job specifications and found that the term "license" encompassed a Grade IIB water treatment operator certification. Third, the City maintains that the medical requirement is not a new condition of employment even though it was not an explicit requirement in the former job specifications. According to the City, DEP has long required WMs and SWMs to wear a respirator when performing certain duties and has had a Respiratory Protection Program since 2003, the requirements of which have not changed.

The City further argues that it also has no duty to bargain over any alleged practical impact resulting from the changes to the job specifications because the Board has not made any finding of practical impact. Therefore, the City contends that the Union's failure to bargain claim is premature and should be dismissed. Nevertheless, the City avers that the Union has failed to demonstrate the existence of a practical impact on safety as a result of the alleged changes.[13]

The City maintains that the Union did not offer any specific testimony regarding how confined space entry work presents a risk to employee safety. Although one witness made a conclusory allegation that confined space entry work could lead to death due to engulfment, flooding, collapse, entrapment, or lack of oxygen, he did not articulate how these scenarios could lead to death and admitted that there have been no such deaths. Furthermore, the arbitration award cited by the Union only concerned rescue team work at permit-required confined spaces.

[13] To the extent that the Union alleges that the changes to the job specifications also have a practical impact on the workload of WMs and SWMs, the City contends that the Union has not made a sufficient showing.

The arbitrator did not find that non-rescue, non-permit required confined space entry work poses a threat to employee safety. The City also asserts that the Union has failed to allege any facts supporting its contention that using earthmoving equipment, cranes, and hoists results in a threat to employee safety. According to the City, WMs and SWMs used such equipment prior to the revision of their job specifications, have received training and instructions from skilled operators and manufacturers, and have been provided with visibility vests, steel-toe shoes, and hard hats.

The City argues that the Union has also failed to establish a *prima facie* claim of retaliation because there is no evidence of anti-union animus and no adverse employment action has been taken against any Union members. Assuming, *arguendo*, that the Union has established a *prima facie* claim, the City maintains that it had legitimate business reasons for revising the job specifications and would have done so in the absence of any protected activity.

Finally, the City argues that the Union's interference claim under NYCCBL § 12-306(a)(1) must be dismissed because the City's actions were not "inherently destructive" of Union members' NYCCBL § 12-305 rights.

DISCUSSION

As a preliminary matter, we must first consider the City's defense that the Union's claims are untimely. *See Rondinella*, 5 OCB2d 13, at 14 (BCB 2012); *Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (explaining that timeliness is a threshold question). A "petition alleging that a public employer . . . has engaged in or is engaging in an improper practice . . . may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence." NYCCBL § 12-306(e); *see also* OCB Rules § 1-07(b)(4). The statute of limitations "precludes this Board from ruling on the substantive merits of the [changes] that occurred prior to the

applicable four month period." *DC 37*, 1 OCB2d 5, at 50 (BCB 2008).

The statute of limitations period does not necessarily begin to run on the date a party announces an intended change; rather, it begins to run "after the intended action is actually implemented and the charging party is injured thereby." *DC 37, L. 1508*, 79 OCB 21, at 19 (BCB 2007). Here, the Union filed its petition approximately two weeks prior to the implementation of the revised job specifications and then amended its petition two days after the revised job specifications were implemented on February 29, 2012. Since a petition is timely if filed within four months of the implementation of an action alleged to constitute an improper practice, we find that the petition in this matter was timely filed.

Failure to Bargain Claims: Qualifications of Continuing Employment

NYCCBL § 12-307(a) requires public employers and employee organizations to bargain in good faith over wages, hours, and working conditions, as well as "any subject with a significant or material relationship to a condition of employment." *Municipal Highway Inspectors L. Union 1042*, 2 OCB2d 12, at 7 (BCB 2009); *see also NYSNA*, 51 OCB 37, at 8 (BCB 1993). Pursuant to NYCCBL § 12-306(a)(4), a public employer commits an improper practice if it fails or refuses to bargain over matters that are within the scope of mandatory bargaining. *See DC 37, L. 1457*, 1 OCB2d 32, at 26 (BCB 2008). A unilateral change to a mandatory subject of bargaining amounts to a refusal to bargain in good faith and, therefore, constitutes an improper practice.[14] *See DC 37, L. 1457*, 77 OCB 26, at 12 (BCB 2006).

As we explained in *DC 37, L. 3631*, 4 OCB2d 34, at 11 (BCB 2011):

> When a petitioner asserts that an employer's refusal to bargain in

[14] A violation of NYCCBL § 12-306(a)(4) is also a violation of NYCCBL § 12-306(a)(1) because this provision forbids an employer from interfering with employees' rights to bargain collectively. *Municipal Highway Inspectors L. Union 1042*, 2 OCB2d 12, at 7; *DC 37, L. 2021*, 51 OCB 36, at 17.

> good faith has resulted in a unilateral change in a term or condition of employment, the petitioner must first demonstrate that the matter over which it seeks to negotiate is or relates to a mandatory subject of bargaining. *See UFOA*, 1 OCB2d 17, at 9 (BCB 2008). The petitioner must then demonstrate the existence of a change from the existing policy or practice. *Id.* If a unilateral change is found to have occurred in a term or condition of employment which is determined to be a mandatory subject, then the Board will find the change to constitute a refusal to bargain in good faith and, therefore, an improper practice.

It is well-settled that terms and conditions of employment are a mandatory subject of bargaining, but that "qualifications for initial employment or for promotion [are] not a mandatory subject of bargaining."[15] *UFOA*, 71 OCB 6, at 7 (BCB 2003) (finding that a requirement that new applicants for promotion complete certain educational requirements was the sort of qualification that the employer may unilaterally impose on its employees). A bargaining obligation arises when new qualifications of employment are applied to incumbent employees because they constitute new terms and conditions of employment. *See CIR*, 37 OCB 38 (BCB 1986). Qualifications of continuing employment that may require bargaining include appropriate licensure. *See DC 37, L. 2906*, 4 OCB2d 62, at 8-11 (BCB 2011) (finding that DEP's requirement that sludge boat captains have pilotage for certain waters was a new qualification for continued employment subject to mandatory bargaining); *CWA, L.1182*, 57 OCB 26, at 18-19 (BCB 1996); *DC 37*, 43 OCB 26, at 11-12; *CIR*, 37 OCB 38, at 14.

Licensing Requirements

Applying the above standard, we find that the City did not violate NYCCBL § 12-306(a)(1) and (4) by including in the revised job specification for WMs the additional requirement that WMs

[15] Qualifications of employment for prospective employees are "preconditions, not conditions of employment. They define a level of achievement or a special status deemed necessary for optimum on-the-job performance." *CIR*, 37 OCB 38, at 13 (quoting *West Irondequoit Bd. of Education*, 4 PERB ¶ 4511, *affd. in part and modified in part*, 4 PERB ¶ 3070 (1971), *affd. on other grounds sub nom., West Irondequoit Teachers Assn. v. Helsby*, 35 N.Y.2d 46 (1974)).

obtain and maintain "certifications or endorsements." The former job specification for WMs provided that "[a]ll candidates shall be required to obtain and maintain any license or licenses necessary to perform the duties of the position." The evidence establishes that WMs have long been required to obtain and maintain various water treatment certifications, some of which were previously referred to as licenses. There is no evidence that there is any substantive difference between a certification and a license. Given these facts, and consistent with the arbitrator's finding in 2008 that, under the former WM job specification, there was "no substantive distinction between a 'certification' and a 'license,'" we find that the addition of certifications and endorsements to the license requirement section of the revised WM job specification did not constitute a material change to this provision of the job specification. Moreover, we note that that there is no evidence that the inclusion of this language in the revised WM job specification resulted in an actual change to the qualifications of continuing employment for incumbent WMs.

We also find that the City did not violate NYCCBL § 12-306(a)(1) and (4) by including the language "that the agency deems necessary" in the license requirement section of the revised WM job specification. We are not persuaded that the addition of this language has materially changed the license requirement. On the evidence before us, it is evident that the licenses, certifications, and endorsements needed to perform the duties of the WM position are those determined by DEP to be necessary. Therefore, we do not find that there is any legally cognizable difference between the distinctions in phrasing. *See DC 37*, 77 OCB 34, at 17 (BCB 2006); *PBA*, 73 OCB 12, at 26.

Similarly, we find that the City did not violate NYCCBL § 12-306(a)(1) and (4) by including in the revised SWM job specification the requirement that SWMs "obtain and maintain any licenses, certifications or endorsements that the Agency deems necessary to perform the duties of the position." Although, the former job specification for SWMs did not contain any provisions

setting forth a general obligation to obtain and maintain licenses, certifications, or endorsements, we find that SWMs have long been required to possess certain water treatment certifications. Despite the new language in the revised SWM job specification, there is neither any evidence nor allegation that SWMs have been required to obtain any new licenses, certifications, or endorsements since the revised job specifications were implemented. Therefore, we find that the revised SWM job specification did not change the qualifications of continuing employment for incumbent SWMs.

We further find that the City and DEP did not violate NYCCBL § 12-306(a)(1) and (4) by including in both revised job specifications the qualification that, "[f]or appointment to certain positions, a Class A Commercial Driver's License valid in the State of New York may be required." We find that this provision does not apply to all incumbent employees. Instead, the City contends, and we agree, that the requirement is only applicable to incumbents who apply for promotion to certain positions. Therefore, to the extent that this requirement is only applied to new hires and incumbent employees who are promoted to certain positions, it is not a mandatory subject of bargaining.[16] *See UFOA*, 71 OCB 6, at 7; *CIR*, 37 OCB 38, at 15 (finding no bargaining obligation because the terms of a new medical licensing requirement did not apply to incumbent Chief Residents).

We find, however, that DEP violated NYCCBL § 12-306(a)(1) and (4) by requiring incumbent WMs who were not promoted to new positions to obtain CDL licenses. DEP's Chief of Eastern Operations testified that, after the job specifications were revised, he required certain

[16] While PERB has held that an employer may not unilaterally impose a county driver's license requirement upon incumbent employees, the instant matter is distinguishable. *See County of Montgomery*, 18 PERB ¶ 4589, *affd.*, 18 PERB ¶ 3077 (1985). In *County of Montgomery*, the driver's license requirement at issue was applied universally to all county employees who operated county-owned vehicles. Here, the CDL requirement only applies to a limited number of employees who are appointed to positions requiring the use of a CDL.

WMs to obtain a CDL. There is no evidence that these WMs were appointed to new positions following the revision of the job specifications. It is undisputed that, prior to the revision of the job specifications, a CDL was not a qualification of employment for WMs. Consequently, we find that DEP unilaterally imposed a new qualification of continuing employment upon these particular employees in violation of NYCCBL § 12-306(a)(1) and (4). Accordingly, we direct the City and DEP to cease and desist from imposing the CDL requirement upon these particular WMs unless and until the City and DEP bargain with the Union over a CDL requirement for incumbent employees who are not promoted to new positions.

Medical Requirement

We find that the City did not violate NYCCBL § 12-306(a)(1) and (4) by including in both revised job specifications the new medical requirement section because the addition of this section did not change the terms and conditions of employment for WMs and SWMs.

The medical requirement section of the revised job specifications contains three related requirements: that WMs and SWMs be physically able to wear a respirator; that they participate in medical examinations to determine such fitness; and that they satisfy OSHA regulations. The former job specifications did not contain any such requirements. However, since 2003, the Respiratory Protection Program has required employees who are assigned to tasks that require the use of a respirator to be physically able to perform their duties while wearing one. Likewise, the Respiratory Protection Program has required these employees to participate in medical examinations to determine respirator fitness. The requirements of the Respiratory Protection Program are in compliance with OSHA regulations.

First, we find that the requirement that "[e]mployees must be physically able to wear a respirator" does not constitute at change to the qualifications of employment for incumbent WMs

and SWMs because the Respiratory Protection Program has long required employees who perform tasks requiring the use of a respirator to be physically able to wear one.[17] In the context of the entire medical requirement section of the revised job specifications, and in accordance with the City's assertions, we find that the record establishes that this physical fitness requirement applies to only those WMs and SWMs who perform duties requiring the use of a respirator. Therefore, despite the new language in both revised job specifications concerning physical fitness to wear a respirator, there is no evidence that a new qualification of continuing employment is being applied to WMs and SWMs.

Second, we find that DEP did not violate the NYCCBL by including in the revised job specifications the requirement that applicants and employees have "pre-appointment and periodic post-appointment medical examinations to demonstrate that they meet applicable OSHA standards and to monitor their medical status." The record establishes that WMs and SWMs have long participated in medical examinations to determine their fitness to wear a respirator and that such examinations have included WMs and SWMs who do not wear respirators in the course of performing their duties. Furthermore, there is no evidence or allegation that the revised job specifications changed DEP's existing medical examination process. Therefore, we find that this requirement does not represent a change in terms and conditions of employment for incumbent employees and bargaining is not required. *See City of Syracuse*, 30 PERB ¶ 4684 (1997) (ALJ), *affd.*, 31 PERB ¶ 3025 (1998) (dismissing an improper practice charge because there was no change to an existing respirator testing practice).

[17] The requirement that employees be physically able to wear a respirator is a qualification of employment because it mandates a level of physical fitness that DEP has deemed necessary to perform the duties of the WM and SWM titles. *See City of Lockport*, 26 PERB ¶ 4563 (1993) (ALJ) (explaining that respirator fitness is a qualification of employment); *City of Buffalo (Police Department)*, 23 PERB ¶ 4569 (1990) (ALJ) (explaining that mental fitness for regular police duty is a job qualification).

Third, we find that DEP did not violate the NYCCBL by revising the job specifications to include the requirement that "employees must . . . satisfy OSHA regulations for the duration of their employment." The Respiratory Protection Program has been effective since 2003, and, pursuant to this program, WMs and SWMs have been required to satisfy OSHA regulations. There is no evidence that any OSHA regulations have changed or that there are any new requirements mandated by OSHA. Therefore, at this time, bargaining is not required over the procedures for achieving statutory compliance. *See DC 37*, 43 OCB 26, at 15.

Failure to Bargain Claims: Practical Impact on Workload and Safety

Workload

We find that the addition of certain duties to the revised job specifications does not result in any bargaining obligation. Contrary to the Union's assertion that certain duties are inappropriate because arbitrators found them to be out-of-title based on the former job specifications, an employer's statutory right to revise job specifications is not restricted by the nature of the duties being assigned. *See DC 37*, 43 OCB 26, at 18-19 (BCB 1989); *SBA*, 41 OCB 56, at 16-18 (BCB 1988). To the extent that the Union also alleges that the inclusion of certain tasks in the revised job specifications added duties that create an unreasonably excessive or unduly burdensome workload, the record does not support such a finding of practical impact.

Safety

It is well-established that an employer is required to negotiate over the alleviation of a practical impact on employee safety that is the result of a managerial action. *See* NYCCBL § 12-307(b); *UFA, L. 94*, 5 OCB2d 2, at 22 (BCB 2012); *EMS SOA*, 79 OCB 7, at 30; *UFA*, 43 OCB 70, at 342. However, "it is not enough to allege a threat to employee safety . . . it is incumbent upon the Union to demonstrate that the alleged safety impact results from a management decision

or action . . . ." *UFA*, 37 OCB 43, at 17-18 (BCB 1986); *see also UFA*, 43 OCB 4, at 48 (BCB 1989), *affd., Matter of Uniformed Firefighters Assn. v. Office of Collective Bargaining*, Index No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *affd.*, 163 A.D.2d 251 (1st Dept. 1990).

To establish a practical impact on safety, a union "must demonstrate that the exercise of a management right has created a 'clear and present or future threat to employee safety.'" *UFOA*, 3 OCB2d 50 (BCB 2010) (quoting *UPOA*, 39 OCB 37, at 5-6 (BCB 1987)); *see also UFA, L. 854*, 49 OCB 39, at 37 (BCB 1992). Thus, a union "must substantiate, with more than conclusory statements, the existence of a threat to safety before we will require the employer to bargain." *EMS SOA*, 79 OCB 7, at 30; *see LEEBA*, 3 OCB2d 29, at 44 (BCB 2010); *SEIU, L. 621*, 51 OCB 34, at 9 (BCB 1993). However, a union does not need to "show that injuries have actually resulted from management's action in order to demonstrate a practical impact on safety." *EMS SOA*, 79 OCB 7, at 31.

Here, we find that the Union has not established a practical impact on the safety of WMs and SWMs as a result of the City's decision to include certain duties in the revised job specifications. Although we recognize the hazards associated with confined space entry duties and assignments requiring the operation of earthmoving equipment, cranes, and hoists, there is no evidence that the City's promulgation of the revised job specifications has resulted in an increased threat to the safety of WMs and SWMs. *See L. 1182, CWA*, 5 OCB2d 41, at 10 (BCB 2012).

Indeed, we find that the City's decision to revise the job specifications has not resulted in any actual changes to the types of industrial equipment operated by WMs and SWMs or to the confined space entry duties performed by employees in these titles. The record establishes that WMs and SWMs have long operated various types of industrial equipment, including cranes and hoists, prior to the revision of the job specifications. Similarly, the record establishes that WMs

and SWMs have long performed duties as entrants in permit-required and non-permit required confined spaces and continue to serve in this role.

Arguably, the revised job specifications are broad enough to include the assignment of WMs and SWMs to the confined space entry rescue team and attendant and entry supervisor roles at permit-required confined spaces. The record establishes that WMs and SWMs have not served as attendants, entry supervisors, or members of the confined space entry rescue team since an arbitrator found such assignments to be out-of-title based on the former job specifications. Nevertheless, DEP has provided and continues to provide all of its employees performing such functions with specialized training and equipment for these assignments. Although we agree with the arbitrator's determination that such assignments can be dangerous, we are not persuaded that the arbitrator's statement alone in the context of an out-of-title grievance proceeding is sufficient to establish a practical impact on safety under the NYCCBL. Critically, there is no evidence that a safety impact exists after the required training and equipment has been provided. Therefore, we do not find a safety impact at this time. To the extent that, in the future, DEP assigns WMs and SWMs to the confined space entry rescue team or attendant and entry supervisor roles at permit-required confined spaces and new safety concerns arise, the Union may file a scope of bargaining petition at that time. *See UFA*, 47 OCB 49, at 28-29 (BCB 1991); *UFA*, 43 OCB 70, at 8 (BCB 1989), *affd., Matter of Uniformed Firefighters Assn. v. Office of Collective Bargaining*, Index No. 1065/90 (Sup. Ct. N.Y. Co. Nov. 26, 1990).

Repudiation Claim

We find that the revision of the job specifications does not meet the standard required to demonstrate the repudiation of a collective bargaining agreement. In order for such a violation to be found, there must be "an ongoing course of behavior that essentially *de facto* carves out a

provision of a collective bargaining agreement for willful non-enforcement." *SSEU, L. 371*, 77 OCB 35, at 21-22 (BCB 2006) (finding repudiation where employer violated a stipulation entered into during the course of an arbitration proceeding and thereby subverted the arbitration process). Thus, we have explained that "systematically disregarding a quintessential aspect of the parties' collective bargaining agreement, such as the grievance procedure, constitutes a deliberate interference with employees[']rights and amounts to a failure to bargain in good faith." *Id*. at 21. Such a violation of the duty to bargain in good faith includes actions "designed to set at naught and systematically frustrate" rights provided in a collective bargaining agreement. *Id*. at 21-22.

Although the job specifications were revised for WMs and SWMs after the Union filed several meritorious grievances, the plain language of Article VI, § 1(c), of the Agreement does not limit DEP's statutory right to revise job specifications. Further, DEP can seek to have job specifications revised for legitimate business reasons. Accordingly, we find that the revision of the job specifications does not rise to the level of a wholesale subversion of this portion of the parties' agreement. *See D'Onofrio*, 1 OCB2d 38, at 8 (BCB 2008); *compare DC 37, L. 1549*, 5 OCB2d 37, at 8 n. 8 (BCB 2012) (finding no repudiation where employer unilaterally implemented new work schedules allegedly in violation of a contractual provision limiting the employer's right to schedule its employees) *with DC 37*, 5 OCB2d 1 (BCB 2012) (finding repudiation where employer notified employees of layoffs prior to informing the union in violation of a contractual provision).

Retaliation and Interference Claims

The Union further argues that, in response to its members' filing out-of-title grievances, DEP retaliated against its members in violation of NYCCBL § 12-306(a)(3) by amending their job specifications to include duties that arbitrators have found to be "substantially different" from the

duties set forth in their former job specifications. To determine if an employer's action constitutes retaliation under NYCCBL § 12-306(a)(3), the Board first requires a petitioner to establish a *prima facie* case by demonstrating that:

> 1. The employer's agent responsible for the alleged discriminatory action had knowledge of the employee[s'] union activity; and
>
> 2. The employee[s'] union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19 (1987) (adopting test from *City of Salamanca*, 18 PERB ¶ 3012 (1985)); *see also Colella*, 79 OCB 27, at 53 (BCB 2007). If the petitioner establishes a *prima facie* case, then the employer "may attempt to refute this showing on one or both elements or demonstrate that legitimate business reasons would have caused the employer to take the action complained of even in the absence of protected conduct." *DC 37, L. 1113*, 77 OCB 33, at 25 (BCB 2006).

This Board has held that the filing of contractual grievances constitutes activity that is protected under the NYCCBL. *See Local 621, SEIU*, 5 OCB2d 38 (BCB 2012); *Colella*, 79 OCB 27; *Fabbricante*, 61 OCB 38 (BCB 1998). An employer's knowledge of such activity can be sufficiently established by its participation in those proceedings. *See Colella*, 79 OCB 27, at 53. Here, it is undisputed that DEP had knowledge of the Union's out-of-title grievances; indeed, it was a party to those proceedings. Therefore, the first prong of the *City of Salamanca* test is satisfied.

The second prong of the *City of Salamanca* test requires proof of a causal connection between the alleged improper act and the protected Union activity. *See SBA*, 75 OCB 22, at 22 (BCB 2005). The petitioner may carry its burden of proof "by deploying evidence of proximity in time, together with other relevant evidence." *CWA, L. 1180*, 77 OCB 20, at 14 (BCB 2006).

This proof must rely on "specific, probative facts rather than on conclusions based on surmise, conjecture or suspicion." *Feder*, 1 OCB2d 27, at 17 (BCB 2008).

The evidence establishes that the process of revising the job specifications coincided with the Union's protected activity. The Union filed three meritorious out-of-title grievances in May 2004, February 2009, and May 2009, and the resulting arbitration awards were issued on May 10, 2010, July 12, 2010, and June 30, 2010, respectively. The Union also filed other pending out-of-title grievances, which have not yet been resolved. DEP began meeting with DCAS regarding its desire to revise the job specifications in November 2009, which was six to eight months after two of the three meritorious grievances were filed and no more than three months after hearings were completed regarding the third grievance. In addition to this temporal proximity, the Chief of Western Operations testified that the Union's grievances were the impetus behind DEP's decision to revise the job specifications. Given these facts, the Board finds that the Union has established a *prima facie* case of retaliation.

Notwithstanding the above, we find that the City has demonstrated legitimate business reasons for its decision to revise the job specifications—the operational need to add duties that WMs and SWMs would be performing at the new UV water treatment plant and, more generally, the need to better describe the current duties of all employees in these titles. Although in 2009 and 2010 the Union grieved the assignment of certain duties to WMs and SWMs, we find that the DCAS Director who participated in the revision of the job specifications credibly testified that the out-of-title grievances were not considered when making the revisions.

We find that the record does not support a finding that the City's asserted legitimate business reasons were pretextual. Standing alone, the Chief of Western Operations' statement that the Union's grievances were the impetus behind DEP's decision to revise the job specifications

does not demonstrate that the grievances the only reason for the revisions. Indeed, in a prior matter, we found that the former DCAS Deputy Director's recommendation for the adoption of a revised job specification to avoid future grievances did not provide factual support of anti-union animus required to establish a claim of retaliation. *See L. 1757, DC 37*, 67 OCB 10, at 18 (2001); *State of New York (Office of Mental Retardation & Developmental Disabilities)*, 24 PERB ¶3036 (1991). Accordingly, we find that DEP did not violate NYCCBL § 12-306(a)(3). *See L. 621, SEIU*, 5 OCB2d 38 (BCB 2012) (finding that the City and DEP did not eliminate a certain longstanding practice in retaliation for the filing of a meritorious improper practice petition and grievance). For these same reasons, we find that DEP did not interfere with any rights protected by the NYCCBL. *See L. 1757, DC 37*, 67 OCB 10 (rejecting a union's argument that its right to arbitrate out-of-title grievances is undermined by not requiring an employer to bargain when it seeks to change job duties).

Accordingly, for the reasons stated above, we grant the Union's petition, in part, and deny it, in part.

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 verified improper practice petition filed by District Council 37, AFSCME, AFL-CIO, on behalf of its affiliated locals 1322 and 376, docketed as BCB-3000-12, is hereby granted to the extent that the New York City Department of Environmental Protection required incumbent employees in the Watershed Maintainer title who were not promoted to new positions to obtain a Class A Commercial Driver's License; and it is further

ORDERED, that the City of New York and the New York City Department of Environmental Protection cease and desist from imposing the requirement of a Class A Commercial Driver's License upon incumbent employees in the Watershed Maintainer title who were not promoted to new positions unless and until bargaining has occurred; and it is further

ORDERED, that remainder of the verified improper practice petition is denied.

Dated: September 23, 2013
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I dissent.

PETER B. PEPPER
MEMBER

I dissent.

GWYNNE A. WILCOX
MEMBER

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

ON BEHALF OF ITS AFFILIATED LOCALS 1322 & 376

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

(Docket No. BCB-3000-12)

We concur with the majority in finding of retaliation or interference against Union members by the City and DEP and that qualifications of initial employment are not mandatory subjects of bargaining. We also concur with the finding of a violation by requiring incumbent WMs not promoted to new positions to obtain CDL licenses. In our view, this standard should also relate to several of the other issues concerning incumbent employees.

As noted by the majority, NYCCBL 12-307 (a) requires public employers and employee organizations to bargain in good faith over wages, hours, and working conditions, as well as "any subject with a significant or material relationship to a condition of employment."

It is troublesome that in several areas, the decision suggests that changes in language are not violations. Although the majority states that "there is no evidence that there is any substantive difference between a certification and license" the lack of specific language is a concern here. It is also a concern that the inclusion of the language "that the agency deems necessary" in the license requirement section of the revised WM job specification might change the license requirement of the revised WM job specification at some point in time. It is also not difficult to see how this inclusion might allow DEP the ability to act unilaterally. Similarly, the inclusion of the revised SWM job specification of the requirement that SWMs "obtain and maintain any licenses, certifications or endorsements that the Agency deems necessary to perform the duties of the position" is also a concern. Although, at this time there is no evidence that this is not an added qualification, the potential is there. Finally, if the requirement that a valid New York State Class A

Commercial Driver's License is only meant to be applicable to certain promotions, this should be specifically stated. Since these changes could have significant or material relationship to the terms and conditions of employment of WMs and SWMs, we dissent from the majority's decision.

While we agree with the majority's finding that the physical fitness requirement applies only to those WMs and SWMs who actually perform duties requiring the use of a respirator, we have concerns as to the impact of the medical requirement in the revised job specification that now states, in part, that WMs and SWMs…"will be required to have a pre-appointment and periodic post-appointment medical examinations to demonstrate that they meet applicable OSHA standards and to monitor their medical status". Although the record established that WMs and SWMs have long participated in medical exams to determine their fitness to wear a respirator, the majority has not addressed the Union's argument as to what will be result of any failure to pass the new medical requirement that is now incorporated into the job specification. As noted by the Union, when a SWM was denied clearance to wear a respirator, he had to turn it in, and was not allowed to perform duties requiring respirators. A letter was then issued, but no other consequences were expected. We agree with the concern expressed by the Union, as to what will the result of any failure to pass the newly medical exam requirement.

It is unsettling to us that the City and DEP have been able to bypass its duty to bargain in these matters, and therefore we dissent on these specific issues and would grant the petition on these specific issues.

Dated: September 23, 2013
New York, New York

PETER B. PEPPER
MEMBER

GWYNNE A. WILCOX
MEMBER