L. 1757, DC 37 & Parris v. City & DCAS, 67 OCB 10 (BCB 2001) [Decision No. B-10-2001]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceeding
Between

LOCAL 1757, DISTRICT COUNCIL 37, AFSCME,
AFL-CIO, and JOHN PARRIS, as
President of LOCAL 1757,

Petitioners,

DECISION NO. B-10-2001
--and-- DOCKET NO. BCB-2069-99

CITY OF NEW YORK and DEPARTMENT OF
CITYWIDE ADMINISTRATIVE SERVICES,

Respondents.
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DECISION AND ORDER

On June 23, 1999, Local 1757, District Council 37, AFSCME, AFL-CIO, ("Union" and "Petitioner") and John Parris ("Parris" and "Petitioner"), individually and as President of Local 1757, filed a verified improper practice petition against the City of New York and the Department of Citywide Administrative Services ("City" and "Respondents") alleging violation of § 12-306a(1), (3) and (4) of the New York City Collective Bargaining Law ("NYCCBL").[1]

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[1] Section 12-306a of the NYCCBL provides, in pertinent part, as follows:
Improper practices; good faith bargaining.
a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
* * *
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;
(4) to refuse to bargain collectively in good faith on matters within the scope of

Specifically, Petitioners allege the City failed to bargain over the "downgrading" of wages for employees in the title of City Assessor in retaliation for the filing of out-of-level grievances.

Following requests for extension of time, the City's answer was filed on July 15, 1999, and the Petitioners' reply was filed on December 8, 1999. The City filed a sur-reply on March 17, 2000.

Background

By Resolution No. 82-38, dated December 1, 1982, the Civil Service titles of Assessor and Senior Assessor were broadbanded into the title of City Assessor in the Department of Finance with three assignment levels. The title was revised later to add a fourth level.[2] Each level represented varying degrees of difficulty in work assignments and varying levels of pay corresponding to the degree of difficulty of the assignment level.

D.C. 37 has been the duly certified collective bargaining representative for all City employees holding the Civil Service title of City Assessor. The Union assigned internal jurisdiction over these employees to its constituent Local 1757. The City and the Union are parties to a unit agreement ("Real Estate Agreement" and "agreement") for the period from April 1, 1995, through March 31, 2000. The City Assessor's job specifications are not incorporated

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collective bargaining with certified or designated representatives of its public employees. . . .

[2] In 1987, the position of Deputy to the Assessor-in-Charge of Real Property Assessment Office in each borough was instituted as a fourth level of the City Assessor title. In 1993, one additional fourth level position, Deputy to the Director of Appraisal and Audit of the Tax Commission, was also instituted.

into that agreement. The wage scale for employees in all four levels of the title is specified in Article III (Salaries). Also referenced are provisions regarding, *inter alia*, general wage increases (Section 3), rates for incumbents and new hires (Section 4), advancement increases (Section 7), assignment level increases (Section 8), longevity increments (Section 9), longevity differentials (Section 10), and assignment differentials for individuals assigned on a regular and continuing basis to perform duties "above the routine level in an 'in charge capacity . . .'" (Section 11).[3]

In 1993, the Tax Commission began to employ a number of City Assessors, Level III. In addition, the Law Department began to employ City Assessors to help defend against lawsuits by property owners whose claims were rejected by the Tax Commission. Starting that year also, a number of out-of-title grievances, including group grievances, were filed against the City pursuant to Article VI, § 1(c) of the Real Estate Agreement. As a result of settlement discussions concerning these out-of-title grievances, the City and Union agreed to the creation of a new level, denominated IIIb, between Levels III (renamed IIIa) and IV.[4]

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[3] The contract also specifies that Level II consists of internal levels "a" and "b."

[4] In *Rubenstein, et al.* (A-5267-94), Level I City Assessors in the Department of Finance alleged they were assigned Level II duties. Petitioner Parris was among the grievants in this case. In *Patel, et al*. (A-5359-94), Level I and II Assessors alleged they were assigned Level III duties. At the time the instant petition was filed, hearings had been completed in these group grievances and decisions were pending.

In the third case, *Arigo et al*. (A-6515-97), filed in March, 1996, eight Level III City Assessors alleged they were assigned the duties of the Level IV position at the Tax Commission. According to one of the terms of the settlement in this case, Level III would be reclassified to Level IIIa and a Level IIIb would be created simultaneously. Grievants at the Tax Commission would be reclassified to Level IIIb. The parties also agreed to the minimum salary for the new Level IIIb. Upon drafting the revised job specification, counsel for the City faxed a copy to counsel for the Union on June 4, 1998.

In a fourth case, *Timothy Sheares* (A-7176-97), filed in February, 1997, a Level II City Assessor in the Law Department alleged he was assigned Level III duties. At the time the instant

On July 8, 1998, the City signed the agreement in the *Arigo* out-of-title case. The Union and the grievants signed the next day. The Union stressed that, by agreeing to a minimum base annual salary for employees in the newly-established Level IIIb, other than the named grievants, the Union was not indicating agreement with the contents of the job specifications for which revisions were proposed at that time.[5]

The Union asserts that, on August 10, 1998, Irving Baron, Director of the Union's professional division, wrote Corinne Dickey, Director of Employee Relations, Department of Finance, requesting a meeting to discuss possible changes in the City Assessor job specification. The Union asserts that Dickey wrote back on September 11, 1998, that the Mayor's Office of Labor Relations told her not to meet because the specification was under review at the time. The Union further asserts that it did not hear from Respondents before November 9, 1998.

By letter dated November 9, 1998, counsel for OLR notified counsel for the Union that the revised job specification would be submitted to the Department of Citywide Administrative Services ("DCAS") by early December so that the grievants in *Arigo* could be reclassified

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petition was filed, the hearing in that arbitration had been completed and a decision was pending.

[5] Paragraph 3 of the stipulation, which is dated July 14, 1998, states:
The City will establish City Assessor Levels IIIa and IIIb in a revised job specification for Title Code 40202: the minimum base annual salary for Level IIIa will remain the same as that specified in the Pay Authorization dated March 3, 1997, issued pursuant to the 1995 Municipal Coalition Memorandum of Economic Agreement ("MCMC Deputy to the Assessor in Charge of Real Property Assessment Office ("MCMEA") as adjusted by any subsequent contractual increases; effective upon the issuance of a revised job specification, the minimum base annual salary for Level IIIb will be established at $1,800.00 above the minimum annual salary for Level IIIa. The maximum base annual salary of City Assessors Level IIIa and IIIb will remain at the amount specified for Level III in the MCMEA, as adjusted by any subsequent contractual increases.

according to Paragraph Four of the stipulation.[6] On February 24, 1999, the City adopted Resolution No. 99-3, amending the four levels in the City Assessors' job specification. A job specification was promulgated also for the new level.[7]

The Union asserts the City notified Petitioners of the changes by letter dated March 12, 1999. The City generally denies the assertion but contends the Union was aware that a revised job specification was being submitted to DCAS for approval.

Positions of the Parties

Petitioners' Position

Petitioners contend that Respondents have violated a duty to bargain over changes in wages paid to employees serving in the various assignment levels of the City Assessor title by promulgating Resolution No. 99-3 and the job specification for Level IIIb. By requiring employees to perform duties which have been "redefined back to lower [assignment] levels[,]" the Union asserts, employees "are being deprived, and will be deprived in the future, of the salaries negotiated by Petitioners for the performance of these duties."

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[6] That paragraph provides, "The City will reclassify the [*Arigo*] grievants, who are now City Assessors, Level III, to City Assessor, Level IIIb, effective upon the issuance of a revised job specification for the City Assessor title."

[7] The City asserts that meetings were held throughout 1998 with representatives of the Mayor's Office of Labor Relations ("OLR"), the Office of Management and Budget ("OMB"), and DCAS. The purpose was to discuss differences in duties of City Assessors in the Department of Finance as compared with those in other City agencies. The Union denies knowledge and information sufficient to form a belief about the City's assertion with respect to the meetings. The City also asserts that, while those meetings were being held, OLR and DCAS learned that the City Assessor job description as it was constituted did not meet the tasks which the Law Department was assigning to employees in that title.

Specifically, the Union asserts the individuals who "have suffered" reduced wages are those who filed out-of-title grievances in *Patel*, *Rubenstein*, and *Sheares*.[8] The Union further contends that Respondents know who those employees are and how the wages have been diminished: "[I]t is Respondents who have been defending against the Union's out-of-title claims and it is Respondents who concede that they revised the job descriptions as a means of curtailing the filing of out-of-title grievances."

In addition, the Union contends the City's actions arguably "threaten to undermine the efficacy of the negotiated grievance-arbitration procedures to resolve out-of-title disputes." If the City can unilaterally respond to out-of-title grievances, arguably as here, by requiring additional duties to the grievants' classification without bargaining, then it has effectively nullified the union's contractually negotiated right to arbitration, the Union argues.

Petitioners further argue that the job description changes were carried out in retaliation for the filing of the out-of-title grievances several years before.[9] Petitioners support this argument by referring to the statement of Sherry Schultz, DCAS' Director of Classification and Compensation Division, in a memorandum of December 14, 1998, recommending that the revised specification for the City Assessor title be adopted, *inter alia*, to avoid future grievances. To the extent that the Union has filed out-of-title grievances to challenge respondents'

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[8] The Union also contends that those who "will be" assigned to perform these duties in the future will suffer reduced wages.

[9] The Union states, "They have taken such action as an improper means of thwarting the Union – and as a means of retaliating against it – for its lawful exercise of its rights to bargain the terms and conditions of its members' employment and to file grievances to protect those agreements."

assignment of employees to out-of-level work, the Union argues, the disputed changes in the job specifications represent an effort by the employer to circumvent Petitioners' arbitral claims, *i.e.*, that the work performed by Union members entitle them to higher pay. Thus, Petitioners argue, the City has also violated NYCCBL §§ 12-306a(1) and (3).

The Union argues that animus is not required to be shown for a claimed violation of § 12-306a(3), rather, only the existence of union activity, *i.e.*, the filing of more than a hundred contractual grievances, along with a motivation to avoid grievances in the future, and knowledge on the part of the employer that the grievances were filed.

The Union further argues that, by unilaterally revising the job description content to "undercut" pending arbitrations and in a manner which arguably reduces negotiated wages for duties performed, the City has improperly interfered with unit members' right to bargain over wages in violation of NYCCBL § 12-306a(1).

The Union disputes the City's characterization of the complaints as a practical impact case, asserting instead the improper practice charge is based on management's unilateral "change in wages" by revising the content of job descriptions.

The Union also denies that it seeks bargaining over the content of job descriptions. The Union stresses that its position is that the management right to change job descriptions cannot supersede management's obligation to negotiate over the mandatory subject of the wages to be paid for the performance of more difficult assignments. The Union further contends that, rather than supporting the City's position, Board precedent cited by the City actually supports the Union's position, *i.e.*, by including a job specification in a collective bargaining agreement, the

terms of that job specification constitute a mandatory subject of bargaining *and* the City is thus limited in its right to change the job specification's content unilaterally by entering into a contractual agreement with the Union.[10] Here, the Union says, Respondents have indeed agreed to tie pay levels to job classifications; so, it cannot unilaterally alter the terms of the job specification at issue without negotiating.[11]

As for the test which the Board of Collective Bargaining ("Board") should use to determine the bargainability of the issue here, the Union urges that the test set forth by the Supreme Court of the United States in *Ford Motor Co. v. NLRB*,[12] and relied upon by the Board in Decision No. B-1-90,[13] is the appropriate test. Applying its view of that test to the facts of the instant case, the Union contends that the managerial right to determine the contents of job classifications must be measured against the City's obligation to negotiate on the mandatory subject of wage rates to be paid to employees performing more difficult tasks. The Union asserts that moving specified job duties to a lower title level and therefore a lower wage rate is

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[10] The City cites Decision No. B-43-86 (holding that the public employer may not be required to include Fire Marshal's job description in the collective bargaining agreement "in any way which would limit the City's right unilaterally to change the content of the ... classification at any time ....").

[11] Petitioners request that the Board take administrative notice that collective bargaining agreements "under its jurisdiction" "almost universally" tie salary differences to distinctions in job duties as reflected in the job descriptions." This "would be completely undermined," the Union argues, were the City permitted unilaterally to shift job duties from a higher classification to a lower one without bargaining over the wages which employees in the lower classification are to receive.

[12] 441 U.S. 488 (1979).

[13] *District Council 37, AFSCME, AFL-CIO, John E. Taylor, Zerlee Mack and Willie M. Lewis v. New York City Housing Authority*, Decision No. B-1-90.

effectively the same as keeping these duties in a higher level and reducing the wages to be paid to employees serving in that level. The Union argues that pay levels for types of duties performed "can never be considered to be a managerial decision lying at the core of entrepreneurial control." Instead, it continues, "the wage/job duty issue" lies at the core of the labor-management relationship and must be negotiated.

In short, the Union argues that neither the NYCCBL nor cases cited by the City relieve management of the obligation to bargain over wages to be paid to employees when those wages are tied to a job classification which has been altered. Moreover, the Union argues that pay differentials for performance of higher level or more difficult work assignments are also a mandatory subject of bargaining.

As relief, Petitioners seek rescission of Resolution No. 99-3 and the job specification promulgated February 24, 1999, for the title City Assessor in its entirety, "except to the extent that Respondents purport to create City Assessor Level IIIb to the extent agreed to in *Arigo*." Petitioners also seek an order directing the City to pay affected unit members "in accordance with the existing Local 1757 contract" and an order directing the City to bargain with the Union before making any changes in the wages of City Assessors.

Respondent's Position

The City denies the Union's allegations with respect to the claims that it retaliated against

unit members in violation of NYCCBL §§ 12-306a(1) and (3) and with respect to the claim that it violated a duty to bargain over the changed job specification and implementation of the stipulation of settlement in the *Arigo* case.

As for the Union's assertion of retaliation against unit members who took part in the related contractual grievances, the City contends no facts are alleged indicating any anti-union animus in the employer's interest in avoiding the filing of out-of-title grievances in the future. Avoiding contractual grievances is a legitimate business reason, in the City's view. Moreover, the City argues that the Union has alleged no facts establishing any interference in collective bargaining rights of unit members on the part of the employer or its agents.

The City also argues that it has the management right to establish job specifications.[14] It further argues that the Union has failed to allege facts supporting the assertion that the revised

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[14] **NYCCBL §12-307** provides, in relevant part:

Scope of collective bargaining, management rights.

a. Subject to the provisions of subdivision b of this section . . . , public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) working conditions...

* * *

b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

job specifications "downgraded" salaries, reduced wages, and reduced any contractual wage rate or changed the nature of the work. This argument, it contends, "suggest[s] ... 'practical impact' upon the salary and tasks of City Assessors." The City contends that, as the Board has issued no finding of practical impact, no duty to bargain arises on the City's part on this issue.

The City also denies the revised job description was adopted without prior notice. To the Union's assertion that the City notified Petitioners of the changes by letter dated March 12, 1999, Respondents contend Petitioners were sent drafts of the revised job specification on June 4, 1998. In addition to being sent a revised draft on November 9, 1998, Respondents aver the Union was notified that day that the draft was being submitted to DCAS for approval.

Relying on the affidavit of Anita Mullin, Director of Operations, Property Division, Department of Finance, the City denies that any employee in the title of City Assessor has suffered a reduction in salary as a result of the stipulation of settlement of the *Arigo* case or the issuance of the revised job specification. The City further asserts that employees in all four levels of the Assessor title have been paid in accordance with Article III of the applicable collective bargaining agreement.[15]

Although the City notes that the version of the job specification at issue in the arbitrations, revised on June 16, 1993, was different from the one at issue in the instant improper

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[15] For example, the City asserts, Petitioner Parris, who alleges he was paid Level I wages for Level II assignments, "is currently being paid an annual salary of $40,753.00," which the City asserts is within the contractual parameters of Level I. The City contends Petitioner Parris "has never been paid at the Assignment Level II rate" because he arguably "has continuously performed duties well within the parameters of Assignment Level I." In addition, the City argues, Petitioners have alleged no facts indicating Parris suffered any decrease in contractually provided wages.

practice proceeding, which was revised on February 24, 1999, nonetheless, the City urges deferral to arbitration of the pending claims, because, in its view, "the claims in both forums are identical: that the grievants are performing out of level work." Moreover, the City argues,"[T]he contractual arbitration procedure is not only nearing completion but also provides an appropriate means of resolving the matter." Moreover, the City argues that ruling in favor of Petitioners on the instant petition would "overrule one arbitrator and usurp the jurisdiction of two others."

The City argues that its surreply is warranted because of the Union's inclusion in its reply of asserted facts associated with the pending arbitration proceedings. The City notes, too, that Petitioners – "for the first time" – make "certain allegations about communications between Irving Baron and Corinne Dickey" referring to attachments not included in the reply.[16]

Discussion

As a preliminary matter, the City urges that the instant matter be deferred to pending arbitration. This Board has done so where the focus of an improper practice dispute and a question of arbitrability arise from and require interpretation of a collective bargaining agreement and where it appears that arbitration would resolve both the statutory and the contractual claims.[17] Such is not the case here where the improper practice claims are articulated as failure to bargain over the mandatory subject of wages and retaliation – and interference with collective

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[16] The lack of this attachment is not dispositive of any issue here.

[17] *See*, *e.g.*, *D.C. 37, AFSCME, AFL-CIO v. City of New York*, Decision No. B-31-85 (deferring to arbitration an improper practice claim concerning payment of longevity increases to grievants in a title restructured to include multiple levels).

bargaining rights – for pursuing contractual grievances. Therefore, we shall not defer the instant matter to arbitration.

There is a basic dispute between the parties in the instant proceeding as to whether the reclassification of levels in the City Assessor title has resulted in wage changes for the public employees working in that title. The Union contends their wages effectively have been decreased by the requirement that employees in lower levels of the title perform work previously required of employees in higher levels. The City contends its managerial right to determine the reclassification has not resulted in the loss of wages of any employee at issue.

Wages are a mandatory subject of bargaining.[18] Thus, a unilateral change in a negotiated wage rate for the employees at issue would require bargaining. But the instant case is not about changes in wage rates negotiated for the various levels in the City Assessor title. It primarily concerns the Union's objection to alleged changes in duties within those levels. The Union contends that under the revised job specification, certain duties formerly assigned to higher levels of the City Assessor title were reassigned to lower levels of that title. The City disputes this contention.

It is well settled that the determination of the content of a job classification is an express management right.[19] The Union here does not dispute that. The gravamen of the Union's

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[18] *See* n. 14, above. *See* also, *e.g.*, *District Council 37, AFSCME, AFL-CIO, Locals 2507 and 3621 v. City of New York and the New York City Fire Department*, Decision No. B-35-1999, n. 21 and cases cited therein.

[19] *See* n. 14, above. *See* also, *e.g.*, *City of New York v. Licensed Practical Nurses and Technicians of New York, Inc., Local 721, Service Employees International Union, AFL-CIO*, Decision No. B-59-89, n. 21 and cases cited therein.

argument is that the wage scale specified in the parties' collective bargaining agreement pertained to certain duties and responsibilities at the time the agreement was negotiated and that changes in those duties and responsibilities require changes in the wage scale implicating a duty to bargain over wages.[20]

The Union attempts to distinguish cases cited by the City.[21] The distinctions are based on factual differences between those cases and the instant one. One case in particular which was relied on cited by the Union fails to support its position that Respondents cannot unilaterally change the content of a job classification without bargaining over pay for the new duties.[22]

Rather, in that case, we determined that the City could be required to bargain over a demand to incorporate the existing job specification at issue into the collective bargaining

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[20] The Union does not characterize its argument as one for pay differentials.

[21] *Local 300, Service Employees International Union, AFL-CIO v. Department of General Services of the City of New York*, Decision No. B-36-90 (holding employer's determination to broadband title was within statutory managerial prerogative), *City of New York v. Licensed Practical Nurses and Technicians of New York, Inc., Local 721, Service Employees International Union, AFL-CIO*, Decision No. B-59-89 (concerning a union's attempt to remove duties entirely from a job specification), *Communications Workers of America, Local 1180, v. City of New York,* Decision No. B-47-89 (holding that an agreement to establish labor-management committee did not limit management's right to revise content of job specifications), *City of New York v. United Probation Officers Association*, Decision No. B-47-88 (concerning a written transfer policy and the relationship between management's right to act unilaterally and a contractual limitation on that right), *City of New York v. Uniformed Firefighters Association*, Interim Decision No. B-43-86 (concerning a union demand to include Fire Marshals' existing job description into the parties' collective bargaining agreement), *D.C. 37, AFSCME, AFL-CIO v. City of New York*, Decision No. B-3-69 (holding a demand to create new promotional opportunities by establishing new positions or new title was not mandatory subject of bargaining).

[22] *City of New York, v. Uniformed Firefighters Association*, Interim Decision No. B-43-86.

agreement, but only to the extent that the form of its inclusion did not in any way limit the City's right unilaterally to change the content of the Fire Marshal classification at any time, or otherwise limit the exercise of management's rights under NYCCBL § 12-306b (unless the parties were voluntarily to agree otherwise).

Moreover, we have never held that the inclusion of a pay scale, alone, in a collective bargaining agreement that does not also contain a corresponding job description is tantamount to inclusion of that job description. Since we have not found mandatorily bargainable the express inclusion of a job specification that would limit the exercise of management's statutory prerogatives, we could not sanction the indirect inclusion of such a limitation by mere inference.

Finally, we note that, although Petitioners cite Board precedent, in their reply brief, on the issue of pay differentials,[23] the pleadings do not raise the "differentials" argument. The Union has not alleged that it seeks pay differentials for the unit members at issue. Rather, it seeks to link the content of duties performed at the respective levels to specific gradations in the negotiated pay scale. By doing so, the Union seeks to control the content of the City Assessor job description. This, it cannot do without running afoul of the statutory management rights clause in our law.

In the case at bar, only the pay scales of the City Assessor title were incorporated into the Real Estate titles agreement, not the job specifications themselves. So, the cited case is factually distinguishable. The Union has offered no other support for its contention that the wage scale

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[23] *District Council 37, AFSCME, AFL-CIO v. City of New York*, Decision No. B-3-69, citing *City of New York v. Social Service Employees Union*, Decision No. B-11-68, and *New York State Nurses Association v. City of New York and New York City Health and Hospitals Corporation*, Decision No. B-2-73.

specified in the parties' collective bargaining agreement pertained to certain duties and responsibilities at the time the agreement was negotiated and that changes in those duties and responsibilities require changes in the wage scale which in turn requires bargaining. Accordingly, we find no change in the wage scale pertaining to levels within the City Assessor title and nothing bargainable on this issue. As for the new Level IIIb, the City and the Union reached agreement with respect to the pay scale commensurate with that level. No issue remains with respect to that matter.

As for the Union's argument that pay differentials for employees performing more difficult or higher level work constitute a mandatory subject of bargaining, the Union's citation of Board precedent does not support its argument in the instant case.[21] The *NYSNA* case concerns employees serving in a higher *title*, not a higher level of the same title. The *D.C. 37* case determined that creation of additional positions, whether in a new title or not, was a prerogative of management. The Board's statement, in *dicta*, that a union is not precluded from bargaining for pay differentials to compensate members for additional duties they are required to perform,

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[21] *New York State Nurses Association v. City of New York and New York City Health and Hospitals Corporation*, Decision No. B-2-73 (holding that bargaining for wage differentials based upon work assignments is mandatory and declaring that a union demand that "all nurses serving at a higher title be compensated as such" was a mandatory subject of bargaining and could be submitted to interest arbitration); *District Council 37, AFSCME, AFL-CIO v. City of New York*, Decision No. B-3-69 (holding that the creation of additional positions whether under a pre-existing title or a new title, fall within the managerial prerogative to determine the content of job classifications and to determine the methods, means and personnel by which governmental operations are to be conducted; however, a union is not precluded from bargaining for pay differentials to compensate members for additional duties they are required to perform), and *City of New York v. Social Service Employees Union*, Decision No. B-11-68 (determining the bargainability of various union demands [pay differentials are not specifically mentioned as such]).

cites the *SSEU* case, but pay differentials are not specifically mentioned in the *SSEU* case. Moreover, no authority is offered for the Union's argument in the instant case that the managerial right to determine the content of job classifications must be measured against an obligation on the part of the City to negotiate wage rates tied to more difficult tasks. In any event, if the parties herein intended in their collective bargaining agreement to establish pay differentials for members required to perform additional duties,[22] then, again, the resolution of any dispute over such matters lies in another forum, not here.

We similarly find the Union's retaliation argument unpersuasive. The Union argues that its right to arbitrate out-of-title grievances is undermined by not requiring an employer to bargain when the employer seeks job duty changes without commensurate salary changes and that its members suffer retaliation by pursing out-of-title grievances. The Board precedent cited by the Union for support is factually distinguishable from the instant case.[23] In the cited case, the union provided *prima facie* support for its position that it was induced by the employer to forbear from advancing an out-of-title claim to subsequent steps of the contractually provided grievance procedure. Here, there has been no forbearance on the part of the Union from advancing its out-of-title claims.

As for the merits of the retaliation argument, we find no claim has been stated with

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[22] Reference again is made to Section 11 (Assignment Differential) of Article III (Salaries).

[23] The Union cites *Communications Workers of America v. New York City Police Department, et al.*, Interim Decision No. B-20-86 (denying employer's motion to dismiss improper practice petition; underlying grievance concerned employer's unilateral promotion of at-issue employees to higher level of Principle Administrative Associate [PAA] title where collective bargaining agreement prescribed wage rates to be paid at each level of PAA title).

respect to the alleged violations of NYCCBL §§ 12-306a(1) and (3). The statement by DCAS' Sherry Schultz recommending adoption of the revised City Assessor job specification to avoid future grievances, without more, presents no factual support of anti-union animus. Therefore, we also dismiss the claims that these two sections of our statute were violated.

Finally, we note that where practical impact results from the exercise of a management prerogative, it gives rise to a duty to bargain pursuant to § 12-307b of the NYCCBL. However, on the record in this case, we do not reach that issue.

For all the reasons stated above, the instant improper practice petition is denied in its entirety.

ORDER

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

ORDERED, that the improper practice petition docketed as BCB-2069-99 be, and the same hereby is, dismissed in its entirety.

Dated: March 28, 2001
New York, NY

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER

EUGENE MITTELMAN
MEMBER

RICHARD A. WILSKER
MEMBER