DC 37, L. 2906, 4 OCB2d 62 (BCB 2011)

(IP) (Docket No. BCB-2863-10).

Summary of Decision: The Unions alleged that DEP refused to bargain in violation of NYCCBL § 12-306(a)(1) and (4) over a unilateral change in a condition of employment for Captains when DEP decided to cease contracting-out the shipment of sludge to a facility in New Jersey and instead use DEP boats, which required DEP Captains to obtain an additional pilot license for the waters surrounding the New Jersey facility. DEP argued that the Petition is untimely and that DEP has a right to require its Captains to acquire additional pilot licenses. The Board found that the Petition was timely and that, on these facts, the additional pilot license was a new qualification for continued employment for Captains who were hired before DEP decided to use its own boats and personnel to ship the sludge to the New Jersey facility and, thus, constituted a unilateral change in a condition of employment as to such employees. Accordingly, the Petition was granted. ***(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,
and its affiliate, LOCAL 2906,

Petitioners,

-and-

THE NEW YORK CITY OFFICE OF LABOR RELATIONS and THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

DECISION AND ORDER

On June 1, 2010, District Council 37, AFSCME, AFL-CIO ("DC 37"), and its affiliate, Local 2906 ("Local 2906") (collectively, the "Unions"), filed a Verified Improper Practice Petition against the New York City Office of Labor Relations ("OLR") and the New York City Department

of Environmental Protection ("DEP") (collectively, the "City") alleging that DEP violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Unions claim that the City refused to bargain over a unilateral change in a condition of employment for Captains of DEP Sludge Boats when DEP decided to cease using a contract barge service to send sludge to the Passaic Valley Sewage Commission ("PVSC") and decided instead to use DEP's own vessels and personnel which required Captains to obtain an additional pilot license for the waters surrounding the PVSC.[1] The City argues that the Petition is untimely and that DEP has a right to require its Captains to acquire additional pilot licenses. The Board finds that the Petition is timely and that, on these facts, the requirement for an additional pilot license for the waters surrounding the PVSC created a new qualification for continued employment for those Captains who were hired before DEP decided to use its own boats and personnel to ship the sludge to the PVSC and, thus, constituted a unilateral change in a condition of employment as to such employees. Accordingly, we grant the Petition.

BACKGROUND

Local 2906 represents DEP employees in the title of Captain (Sludge Boat). Sludge boats are DEP vessels that transport sludge from waste water treatment facilities. The job specification for Captain (Sludge Boat) lists as a task "[p]ilots the sludge vessel" and requires, as a qualification for employment, that all Captains "obtain a valid First Class Pilot's License on all waters sailed by

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[1] The Improper Practice Petition also alleges that DEP refused to bargain over the practical impact of the introduction of a new, larger sludge boat. That issue was withdrawn by the Unions on September 28, 2011, and, thus, is no longer before the Board.

[DEP's] sludge boats within a year following appointment." (Pet, Ex. A). The Director of Classifications and Compensation for the Department of Citywide Administrative Services ("DCAS") submitted an affidavit stating that DCAS interprets the above qualification to mean that Captains have "an ongoing obligation to obtain a license to sail on all waters sailed by the [DEP]." (Ans., Ex. 5, ¶ 4). A pilot license is commonly referred to as "pilotage."

Among the locations that DEP sent sludge was the PVSC, and prior to 2009 it used a contract barge service, not its own sludge boats or Captains, to do so. In 2009, when DEP was preparing to bring into use a new sludge boat, DEP decided to use its own sludge boats and Captains to deliver sludge to the PVSC. On April 2, 2009, DEP issued Bureau Directive 09-04 ("BD 09-04") to Captains, stating, in pertinent part:

> The [DEP] has been sending sludge to [PVSC] for several years now. . . . Presently a contract barge service is used, but we intend on using our own vessels to go there.
>
> Taking a vessel to PVSC requires pilotage that some Captains may not have. . . . It was concluded that the Captains are required to get pilotage for waters they are directed to operate in based upon the following language in the job specification: "all candidates must obtain a valid First Class Pilots License on all waters sailed by [DEP's] sludge boats within a year following appointment."
>
> In order to facilitate transitioning to PVSC with Captains that don't have pilotage, a contracted harbor pilot with appropriate pilotage will be hired to go with the Captains on these trips.
>
> After completing the required number of trips, the Captains must apply for and take the necessary tests to obtain pilotage endorsements to pilot the sludge vessels to the PVSC facility.

(Pet., Ex. B).

Acquiring pilotage for the waters surrounding the PVSC takes at least 46 hours, including two examinations and 12 round trips. In a letter dated May 21, 2009, DC 37 requested

bargaining, stating "that the requirement to obtain new pilotage for the waters around [PVSC] is a unilateral change in the conditions of employment and has a practical impact on the duties Captains currently perform." (Pet., Ex. C).

On February 1, 2010, DEP issued a directive to Captains stating, in pertinent part: "in accordance with the job description . . . all Captains must obtain a valid First Class Pilot's License on all waters sailed by [DEP's] sludge boats within a year following appointment. This includes travel to [PVSC]. You are directed to obtain this pilotage within one year of the date of this letter." (Pet., Ex. D). The Unions and OLR met on March 8, 2010, to discuss this issue. OLR reiterated its position that obtaining pilotage for waters surrounding the PVSC was covered under the Captains' job specification and that it was not a new term or condition of employment but, rather, a required qualification for the title. On May 26, 2010, DC 37 wrote to OLR that "[t]o date, no Captains hired prior to 2010 have been required to obtain the [PVSC] pilotage. Once again the Union objects to DEP's unilateral implementation of this requirement for current employees." (Pet, Ex. E). DC 37 requested that DEP rescind the February 1, 2010 directive and bargain over the new pilotage requirement.

On June 1, 2010, the Unions filed the instant Petition, seeking a declaration that the Respondents violated the NYCCBL by refusing to bargain over the additional pilotage requirement, a unilateral change in the conditions of employment for Captains hired before the additional pilotage requirement, stemming from DEP's decision to use its own sludge boats and personnel to ship sludge to the PVSC. The Unions request that the Board order the Respondents to bargain over the additional pilotage requirement, post appropriate notices; and that the Board order any other relief it deems just and proper. In July 2011, DEP brought charges against a

Captain, but OLR has represented to the Trial Examiner that DEP will hold proceedings on those charges in abeyance until the resolution of the instant Improper Practice Petition.

POSITIONS OF THE PARTIES

Unions' Position

The Unions argue that the Petition is timely because it was filed within four months of the February 1, 2010 directive, which is the earliest date that the requirement of obtaining a pilot license for the waters surrounding the PVSC came into effect. The issuance of BD 09-04 on April 2, 2009, did not start the statute of limitations period because BD 09-04 did not indicate when the pilotage requirement would come into effect. Additionally, it is undisputed that the parties met several times thereafter to try and resolve this matter, with the last meeting being on March 8, 2010, which is within four months of the filing of the instant Petition.

The Unions argue that, by requiring bargaining unit members to obtain pilotage for the waters surrounding the PVSC, DEP made a unilateral change in the conditions of employment for Captains hired prior to the requirement to obtain this new pilotage. By refusing to bargain over this new requirement, the Respondents have violated NYCCBL § 12-306(a)(1) and (4). While management has a right to establish qualifications for employment, new qualifications for existing employees are a mandatory subject of bargaining. Prior to April 2009, DEP did not require its Captains to sail the waters surrounding the PVSC; thus, pilotage for that area is a new requirement. The Unions argue that Labor Law § 220 does not divest the Board of jurisdiction because the Unions' argument that there has been a unilateral change in a term and condition of employment exists separate and apart from the any demand for wages and supplements. Further, this matter

should not be deferred to arbitration.

City's Position

The City argues that the instant Petition is untimely. The Unions were informed in April 2009 that Captains who lacked pilotage for waters surrounding the PVSC must obtain it. The instant Petition was filed in June 2010, after the four month statute of limitations had lapsed. Further, the City argues that the Union is seeking additional compensation. The Board, however, lacks jurisdiction over wages and supplements because the employees at issue are covered by Labor Law § 220. Thus, the Petition should be dismissed.

The City argues that the Unions have failed to establish a violation of NYCCBL § 12-306(a)(4). The job specification for Captains states that they must obtain valid pilotage for all waters sailed by DEP. Thus, there is an obligation upon all Captains to obtain pilotage for the waters surrounding the PVSC, and DEP's requiring such pilotage is a valid exercise of its managerial authority under NYCCBL § 12-307(b). As there is no violation of NYCCBL § 12-306(a)(4), there is no derivative violation of NYCCBL § 12-306(a)(1).

Finally, the City argues that this matter turns on the application and interpretation of the parties' collective bargaining agreement. Thus, the Petition should be deferred to arbitration.

DISCUSSION

We address timeliness as a threshold matter. *Nardiello*, 2 OCB2d 5, at 27-28 (BCB 2009); *OSA*, 1 OCB2d 45, at 13 (BCB 2008). An improper practice charge "must be filed no later then four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd. Matter of*

Raby v. Office of Collective Bargaining, Index No. 109481/03 (Sup. Ct. N.Y. Co. Oct. 8, 2003); *see also* NYCCBL § 12-306(e); OCB Rule § 1-07(b)(4); *Tucker*, 51 OCB 24, at 5 (BCB 1993).[2]

The City argues that the statute of limitations began to run with the issuance of BD 09-04 on April 2, 2009, as BD 09-04 explicitly states that "the Captains must apply for and take the necessary tests to obtain pilotage endorsements to pilot the sludge vessels to the PVSC facility." (Pet., Ex. B). However, "[w]e do not necessarily consider an action to have occurred on the date a party announces an intended change." *UFT*, 4 OCB2d 2, at 9 (BCB 2011). Rather, the "statute of limitations begins to run 'after the intended action is actually implemented and the charging party is injured thereby.'" *Id.* (quoting *DC 37, L. 1508*, 79 OCB 21, at 19 (BCB 2007)). BD 09-04 set no time limit for Captains to acquire the additional pilotage for waters surrounding the PVSC. DEP first set a date for when this requirement had to be satisfied in the February 1, 2010 directive. Thus, February 1, 2010, is the earliest date that the change can be found to have been implemented. The instant Request for Arbitration was filed four months later and, thus, is timely.

As to the City's argument regarding Labor Law § 220, we do not find ourselves divested of jurisdiction by virtue of the fact that the title Captain (Sludge Boat) is a prevailing rate title. The issue before us concerns a new condition of employment, not compensation, and thus not wages or

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[2] NYCCBL § 12-306(e) provides, in relevant part:

> A petition alleging that a public employer . . . has engaged in or is engaging in an improper practice in violation of this section 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. . . .

OCB Rule § 1-07(b)(4) provides, in relevant part, that "[t]he petition must be filed within four months of the alleged violation."

supplements. *See Local 1157*, 3 OCB2d 40, at 14-15 (BCB 2010) (Labor Law § 220 does not divest the Board of its exclusive non-delegable jurisdiction over improper public employer practices).[3]

As to the merits, the issue presented is whether DEP's decision to cease contracting out the shipment of sludge to PVSC and to start using its own vessels and personnel, thus requiring Captains to obtain new pilotage as a qualification for continued employment, is a mandatory subject of bargaining. It is an improper practice under NYCCBL § 12-306(a)(4) for a public employer "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees."

It is well-settled "that a term and condition of employment is a mandatory subject of bargaining, but that setting qualifications for initial employment or for promotion is not a mandatory subject of bargaining." *UFOA*, 71 OCB 6, at 7 (BCB 2003) (citing *Rensselaer City Sch. Dist.*, 13 PERB ¶ 3051 (1980), *affd.*, 15 PERB ¶ 7003, 87 A.D.2d 718 (3d Dept. 1982); *PBA*, 39 OCB 24 (1987), *affd.*, *Matter of Caruso v. Anderson*, 138 Misc. 2d 719 (Sup.Ct. N.Y. Co. 1987), *affd.*, 145 A.D.2d 1004 (1st Dept. 1988), *leave denied*, 73 N.Y.2d 709 (1989)); *see also 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). In *West Irondequoit Board of Education*, the New York State Public Employment Relations Board ("PERB") defined the term "qualifications" as "preconditions, not conditions of employment." *Id.*, 4 PERB ¶ 4511. Such initial qualifications can include appropriate licensure. *See CWA, L.1182*, 57 OCB 26, at 18-19 (BCB 1996).

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[3] If the City believes that any demand made by the Unions in bargaining is improper, it may file a scope of bargaining petition.

However, "we have held that 'what is a qualification in some situations may become a condition of employment in other circumstances.'" *DC 37*, 43 OCB 26, at 11 (BCB 1989) (quoting *CIR*, 37 OCB 38, at 14 (BCB 1986)).[4] Like the instant case, *DC 37* involved licensing. HHC paramedics are certified to practice by both New York State and the Medical Advisory Committee of the City of New York ("MAC Committee"). HHC was legally obligated to follow all requirements set forth by the MAC Committee. In June 1987, the MAC Committee required paramedics to perform three additional procedures. When HHC required its paramedics to become capable of performing these additional procedures, DC 37 filed an improper practice petition alleging a unilateral change in a condition of employment. We noted that "[a]lthough respondent attributes the necessity of imposing these requirements to the actions of a third party, *i.e.*, the MAC Committee, this fact does not shield HHC from the obligation to bargain when compliance has a direct effect upon a term or condition of employment." *DC 37*, 43 OCB 26, at 15; *see also CIR*, 49 OCB 22, at 17 (BCB 1992) ("the existence of an external statute, over which the employer arguably may have no control, is not a complete defense against a refusal to bargain charge."). We found that "the imposition of new qualifications for recertification on employees currently holding the job constitutes a unilateral change in a term and condition of their employment." *DC 37*, 43 OCB 26, at 14. Thus, we ordered HHC to bargain over the "effects of the application of the MAC Committee's new requirements to [paramedics] who had been hired in

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[4] *CIR* concerned whether a new requirement of the New York City Health and Hospitals Corporation ("HHC") that Chief Residents possess a New York State medical license was bargainable. In *dicta*, we noted that requiring Chief Residents who were hired before this new license requirement to obtain the license would be a mandatory subject of negotiation. *See Id.*, 37 OCB 38, at 15; *see also UFOA*, 71 OCB 6, at 8 (explaining *CIR*). In *CIR*, there was no change in the duties of Chief Residents, nor was the new license requirement necessary for them to continue to perform their duties. That is, the license requirement in *CIR* reflected HHC's preference and not a legal requirement. Thus, *CIR* is distinguishable from the instant case.

that title prior to implementation" of the new requirements. *Id.* at 15.[5]

We similarly found in *Doctors Council*, 69 OCB 31 (BCB 2002), that an employer may have to bargain over aspects of implementing a legal obligation. *Doctors Council* concerned the determination by the New York City Conflicts of Interest Board that the New York City Conflicts of Interest Law set forth in Chapter 68 of the New York City Charter ("Chapter 68") was applicable to HHC. The union alleged that HHC violated the NYCCBL when it unilaterally revoked its Code of Ethics and unilaterally implemented Chapter 68. After noting that "a public employer may not insulate its actions from compliance with applicable requirements of the NYCCBL merely by demonstrating that its actions were in accord with statutory law," we stated that "[e]ven if management action is taken pursuant to another statute, certain obligations—for example, bargaining over mandatory subjects—may arise under our law." *Id.*, 69 OCB 31, at 10 (citations omitted). We then held that:

> Here, while the question whether HHC employees must comply with Chapter 68 is a matter of law that is not subject to collective bargaining, we acknowledge that the Union may make demands to bargain over procedures for implementation of the requirements of Chapter 68 which do not relate to questions of interpretation or application of the law. Although the Union has not specified precisely what procedures it seeks to bargain, it has shown that the implementation of Chapter 68 directly relates to the employees' terms and conditions of employment. Therefore, the Union has the right to request bargaining over the implementation of the requirements of Chapter 68 to the extent that such negotiations are

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[5] *DC 37*, in addition to *CIR*, 37 OCB 38, relied upon PERB decisions holding that an employer violates the duty to bargain in good faith when it unilaterally imposes a new qualification for continued employment. *See Id.*, 43 OCB 26, at 12, n. 18 & 19 (citing *City of Auburn CSEA*, 9 PERB ¶ 3085 (1979) (employer may not unilaterally impose a geographical residency requirement upon employees who were not hired subject to such a requirement); *Bd. of Educ. of the City of New York*, 13 PERB ¶ 3006 (1980) (same); *County of Montgomery*, 18 PERB ¶ 4589, *affd.*, 18 PERB ¶ 3077 (1985) (employer may not unilaterally impose a county driver's license requirement in addition to the previously required State driver's license).

not inconsistent with the statute.

Id.[6]

In the instant case, we find that DEP has the right to set qualifications for employment and promotion, and that DEP's requirement that all new Captains of sludge boats have pilotage for the waters surrounding the PVSC is non-mandatory subject of bargaining. However, it is undisputed that prior to February 1, 2010, Captains employed by DEP were not required to have pilotage for the waters surrounding the PVSC. Thus, on these facts, we find that the PVSC pilotage requirement is a new qualification for continued employment as to those employees, and the effects thereof are bargainable. Accordingly, we find that the City has violated NYCCBL § 12-306(a)(4) by failing to bargain over the subject prior to implementation and derivatively violated NYCCBL §12-306(a)(1). The instant Petition is granted and DEP is ordered to bargain with the Unions over the effects of the new pilotage requirement for the waters surrounding the PVSC on Captains (Sludge Boat) who had been hired in that title prior to the implementation of that requirement on February 1, 2010.

[6] We noted in *Doctors Council* that our case law was "in line with the Court of Appeals in *Matter of City of Watertown v. State of New York Public Employment Relations Board*, 95 N.Y.2d 73 (2000)." *Id.*, 69 OCB 31, at 11. *Watertown* held that a municipality's initial determination of disability status under General Municipal Law § 207(c) was a non-mandatory subject of bargaining but that the procedures for challenging the determinations, as they affected terms and conditions of employment, had to be negotiated. Thus, in *Watertown*, "the Union was afforded the right to 'negotiate the forum–and procedures associated therewith–through which disputes related to such determinations are processed.'" *Id.* (quoting *Watertown*, 95 N.Y.2d at 76).

ORDER

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

DETERMINED, that the unilateral decision by the New York City Department of Environmental Protection to require additional pilotage, a new qualification for continued employment of employees in the title of Captain (Sludge Boat), for the waters surrounding the Passaic Valley Sewage Commission was a new term and condition of employment for individuals employed on or before February 1, 2010, in the title of Captain (Sludge Boat) and constitutes an improper public employer practice, in violation of Section 12-307(a)(1) and (4) of the New York City Collective Bargaining Law; and it is therefore

ORDERED, that the Improper Practice Petition filed by District Council 37, AFSCME, AFL-CIO, and its affiliate, Local 2906, docketed as BCB-2863-10, be and the same hereby is, granted, to the extent that it alleges a refusal to bargain with respect to the effects of the unilateral decision by the New York City Department of Environmental Protection to require Captains to obtain additional pilotage for the waters surrounding the Passaic Valley Sewage Commission on individuals employed on or before February 1, 2010, in the title of Captain (Sludge Boat); and it is further

ORDERED, that the New York City Department of Environmental Protection shall bargain in good faith with District Council 37, AFSCME, AFL-CIO, over the effects of its unilateral decision to require employees in the title of Captain (Sludge Boat) to obtain additional pilotage for the waters surrounding the Passaic Valley Sewage Commission on individuals employed on or before February 1, 2010, in the title of Captain (Sludge Boat); and it is further

DIRECTED, that the City of New York post the accompanying Notice of Decision and Order for no less than thirty (30) days at all locations used by the New York City Department of Environmental Protection for written communications with employees represented by District Council 37, AFSCME, AFL-CIO, and its affiliate, Local 2906.

Dated: New York, New York
December 20, 2011

MARLENE A. GOLD
CHAIR

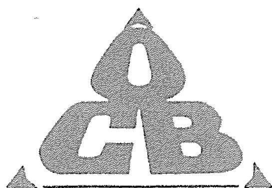
GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER



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NOTICE TO ALL EMPLOYEES PURSUANT TO THE DECISION AND ORDER OF THE BOARD OF COLLECTIVE BARGAINING OF THE CITY OF NEW YORK and in order to effectuate the policies of the NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 4 OCB2d 62 (BCB 2011), in final determination of the improper practice petition between District Council 37, AFSCME, AFL-CIO, and its affiliate, Local 2906, and the City of New York and the New York City Department of Environmental Protection.

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

DETERMINED, that the unilateral decision by the New York City Department of Environmental Protection to require additional pilotage, a new qualification for continued employment of employees in the title of Captain (Sludge Boat), for the waters surrounding the Passaic Valley Sewage Commission was a new term and condition of employment for individuals employed on or before February 1, 2010, in the title of Captain (Sludge Boat) and constitutes an improper public employer practice, in violation of Section 12-307(a)(1) and (4) of the New York City Collective Bargaining Law; and it is therefore

ORDERED, that the Improper Practice Petition filed by District Council 37, AFSCME, AFL-CIO, and its affiliate, Local 2906, docketed as BCB-2863-10, be and the same hereby is, granted, to the extent that it alleges a refusal to bargain with respect to the effects of the unilateral decision by the New York City Department of Environmental Protection to require Captains to obtain additional pilotage for the waters surrounding the Passaic Valley Sewage Commission on individuals employed on or before February 1, 2010, in the title of Captain (Sludge Boat); and it is further

ORDERED, that the New York City Department of Environmental Protection shall bargain in good faith with District Council 37, AFSCME, AFL-CIO, over the effects of its unilateral decision to require employees in the title of Captain (Sludge Boat) to obtain additional pilotage for the waters surrounding the Passaic Valley Sewage Commission on individuals employed on or before February 1, 2010, in the title of Captain (Sludge Boat); and it is further

DIRECTED, that the City of New York post this Notice of Decision and Order for no less than thirty (30) days at all locations used by the New York City Department of Environmental Protection for written communications with employees represented by District Council 37, AFSCME, AFL-CIO, and its affiliate, Local 2906.

The City of New York
New York City Department of Environmental Protection

Dated:_______________ ____

(Posted By)
(Title)

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