SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of the Application of

THE CITY OF NEW YORK; THE NEW YORK CITY MAYOR'S OFFICE OF LABOR RELATIONS; and, JAMES F. HANLEY, as Commissioner of The New York City Mayor's Office of Labor Relations,

REPLY AFFIRMATION
Index No. 1822/09

Petitioners,

For a Judgment Pursuant of Article 78 of the CPLR Annulling a Determination of

WILLIAM C. THOMPSON, JR., as THE COMPTROLLER OF THE CITY OF NEW YORK (on Complaint of LOCAL 1320 of District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO); LILLIAN ROBERTS, As Executive Director of District Council 37; LOCAL 1320 of District Council 37; JAMES TUCCIARELLI, As President of Local 1320 of District Council 37,

Respondents.

Fixing the Compensation of Sewage Treatment Workers and Senior Sewage Treatment Workers as Employees of the City of New York at the Prevailing Rate of Wages Pursuant To New York State Labor Law Section 220, et seq, and For a Judgment and Order Pursuant to Article 78 of the Civil Practice Law and Rules

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MARY J. O'CONNELL, an attorney duly admitted to practice before the courts of the State of New York affirms the following to be true under penalty of perjury.

1. I am the General Counsel to District Council 37, American Federation of State County and Municipal Employees, AFL-CIO, attorney for respondents Tucciarelli and Roberts herein. In this capacity, I am fully familiar with the facts and

circumstances of this case. I respectfully submit this affirmation in reply to the petitioners' opposition to the motion.

2. Contrary to petitioners' assertions, this case is one which calls out for the exercise of the Court's equitable powers to vacate the stay, or alternatively, to shorten the time in which petitioners may submit their brief. It is important to remember that the members of Local 1320, workers responsible for the processing of over one billion gallons of New York City's sewage each day, have been with no salary increase since 2002. After an exhaustive process, a determination was made as to the appropriate rate of wages for this title. To manipulate the return date of the appeal of this matter, as petitioners have done, is unconscionable.

3. Petitioners oppose the vacatur of the stay on the grounds that, if the wage levels set by the Comptroller were implemented, the retroactive adjustment would be approximately $233 million through fiscal year 2010. The union believes this number to be inflated. The accuracy of the City's calculation notwithstanding, as noted in our earlier papers, Labor Law Section 220.8-c requires that the employer pay interest on the judgment at a rate of 6% if the wages are not paid within 60 days of the Comptroller's determination. Therefore, the proverbial "meter is ticking." It is costing the City additional funds for every day that they do not pay the back pay and rate. Therefore, while the members of Local 1320 should see additional interest at the end of this appeal, the City taxpayers, on the other hand, are certainly not served by needlessly delaying the appeal of the Comptroller's Determination.

4. Petitioners cite *DeLury v. New York,* 48 AD2d 405 (1st Dept., 1975) in support of its argument that no grounds exist upon which to vacate the statutory stay. *DeLury,* however, dealt with a very different set of facts and circumstances. That case involved the layoff of New York City employees, and stands for the proposition that an injunction is not appropriate when the harm may be remedied by monetary damages. Since *DeLury*, however, the courts have recognized that the loss of a job may entail other forms of harm which cry out for the court's intervention. See eg. *Gibouleau v. Society of Women Engineers,* 127 AD2d 740 (2d Dept., 1987), *Kimm v. Blue Cross and Blue Shield,* 160 Misc. 2d 97 (Sup. Ct. N.Y. Co., 1993), *International Union of Operating Engineers v. City of Niagara Falls,* (Sup. Ct., Niagara County, 2002). Thus, the courts' analysis of circumstances requiring equitable relief had evolved since *DeLury.*
5. This case is certainly one which calls for such relief. The motion presently before the court – while citing the harm to members of Local 1320 – also calls into question petitioners' actions in this matter. As noted in our earlier papers, the Article 78 proceeding was an expression of the legislature that matters of administrative review be conducted promptly. Certainly that purpose has been thwarted herein.
6. Moreover, a review of the provisions of Section 220 of the Labor Law, specifically those related to the time frames for interest and enforcement, further evince a concern by the Legislature that the workers for whom a prevailing wage determination has been made be paid promptly.

7. Further, while the record is substantial, it is not oppressive, and petitioners are not writing on a clean slate. First, the matter was thoroughly briefed by counsel for the City's Office of Labor Relations for the judge in the OATH hearing. Moreover, "substantial evidence" questions, I would respectfully submit, are ones which the City's Law Department has addressed in the past. Thus, while I am mindful of counsel's workload, I would respectfully submit that such a reason is insufficient to require almost 1,000 workers who have already waited almost eight years for a fair wage to wait any longer than absolutely necessary.

WHEREFORE, Respondents Roberts and Tucciarelli respectfully request that the relief requested herein be granted, and that this Court order that the stay pursuant to CPLR Section 5519(a) be vacated. Alternatively, the respondents would respectfully request this Court to place this matter for an earlier term of the Court.

Dated: New York, New York
February 24, 2010

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Mary J. O'Connell