

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,

NOTICE OF MOTION

Petitioners,

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

Index No. 1822/09

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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PLEASE TAKE NOTICE, that upon the annexed affirmation of Mary J. O'Connell, dated
February 9, 2010, the Affidavit of James Tucciarelli, sworn to February 9, 2010, the exhibits
thereto, the memorandum of law submitted herewith and upon all prior pleadings and
proceedings heretofore had herein, the undersigned will move this Court at the Courthouse, 27
Madison Avenue, New York, New York, on the 25th day of February, 2010, at 10:00 a.m. in
the forenoon of that day or as soon thereafter as counsel may be heard, for an order vacating

petitioners statutory stay pursuant to CPLR 5519(c) pending the hearing and determination of the appeal.

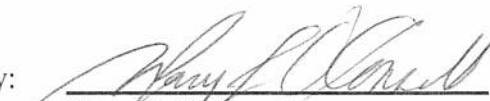
PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214 (b) answering affidavits, if any, shall be served by February 23, 2010.

Dated: New York, New York
February 11, 2010

Respectfully,

MARY J. O'CONNELL
General Counsel
DISTRICT COUNCIL 37
AFSCME, AFL-CIO
Attorney for Respondents Roberts
and Tucciarelli
125 Barclay Street
New York, New York 10007
(212) 815-1450

By:


Mary J. O'Connell

GREENBERG, BURZICHELLI,
& GREENBERG, P.C.
3000 Marcus Avenue, Suite 1W7
Lake Success, New York 11042
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TO: Michael Cardozo, Esq.
Corporation Counsel of the
City of New York
Attorney for Petitioners
100 Church Street
New York, New York 10007
(212) 788-0303
Attn: Larry R. Martinez
Assistant Corporation Counsel

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

-----X
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,

Petitioners,

AFFIDAVIT
Index No. 1822/09

For a Judgment Pursuant of Article 78 of the CPLR
Annuling 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,
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ROBERTS, As Executive Director of District Council 37;
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Practice Law and Rules

-----X
STATE OF NEW YORK)
COUNTY OF NEW YORK)SS.:

JAMES TUCCIARELLI, being duly sworn, hereby deposes and says:

1. I am the President of Local 1320, DC37, New York City Sewage Treatment Workers and Senior Sewage Treatment Workers. I have been honored to hold this position since 1983. In this capacity, I am fully familiar with the facts and circumstances of this matter. I submit this affidavit in support of this motion to

vacate the stay and require the City to pay my members the rate of pay as determined by the Comptroller of the City of New York pending the City's appeal. Alternatively, I respectfully request that the court issue an order expediting the appeal.

2. Local 1320 has approximately 850 members who perform some of the dirtiest and most dangerous work in the City. They work at the City's fourteen wastewater treatment plants and collection facilities. They perform the operations work necessary to ensure that the plants which process 1.3 billion gallons of raw sewage each and every day keep running. We also maintain the plants to ensure their efficient operation and their environmental safety. The job is also a dangerous one. In addition to daily exposure to bacterial toxins, caustic chemical and flammable material, Local 1320 members work with dangerous machinery. Only last year, Local 1320 member Gennaro Montello was killed on the job when he was crushed by machinery.
3. Sewage Treatment Workers (STWs) and Senior Sewage Treatment Workers (SSTWs) are covered by Section 220 of the New York State Labor Law. As I am sure the Court is aware, if the union representing the employees and the employer cannot reach an agreement as to their wages and supplements, the union may file a complaint with the fiscal officer (in our case, with the New York City Comptroller), asking that an investigation be conducted and a determination made as to the prevailing rate of wages and supplements for the employees.
4. To give the court just an overview of our situation, the City made an offer to the union to cover the period of July 1, 2002 though June 30, 2004. However, that offer was voted down by the members, and the union requested that the

EXHIBIT A



Constantine P. Kokkoris
COUNSEL

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WILLIAM C. THOMPSON, JR.
COMPTROLLER

November 23, 2009



NOTICE OF FILING
/ Fax and Certified Mail

Dayra E. Bell, Esq.
New York City Office of Labor Relations
100 Rector Street, 4th Floor
New York, NY 10006

Re: Sewage Treatment Workers & Senior Sewage Treatment Workers
Oath Index No. 1522/09

Dear Ms. Bell,

Please find enclosed a copy of the final Order and Determination issued by the Office of the Comptroller in the above-referenced matter.

Please note that this decision is final within the Office of the Comptroller. Review, however, may be sought pursuant to C.P.L.R. Article 78 as more fully described in Article Eight, 220(8) of the New York State Labor Law.

Sincerely yours,

Constantine P. Kokkoris
Counsel
Bureau of Labor Law

CPK/mm
Enclosure



THE COMPTROLLER OF THE CITY OF NEW YORK

In the Matter of

OATH Index No. 1522/09

COMPTROLLER, Ex Rel. LOCAL 1320,
DISTRICT COUNCIL 37, AFSCME, AFL-CIO

-against-

OFFICE OF LABOR RELATIONS

ORDER AND DETERMINATION

WHEREAS:

Proceedings were brought by the Comptroller's Bureau of Labor Law ("Petitioner") pursuant to Labor Law § 220(8-d), in response to a complaint of Local 1320, an affiliate of District Council 37 AFSCME, AFL-CIO (the "Union"), for a determination of the prevailing rate of wages and supplemental benefits to be paid by the City of New York Department of Environmental Protection ("DEP") to employees in the titles sewage treatment worker ("STW") and senior sewage treatment worker ("SSTW") during the period from July 1, 2002 through June 28, 2008. The City of New York (the "City") was represented by the Office of Labor Relations ("OLR").

A hearing was held over the course of nine days between April 6, 2009 and May 14, 2009, before the Honorable Alessandra F. Zoragniotti, Administrative Law Judge ("ALJ") of the Office of Administrative Trials and Hearings ("OATH"), with the record closed on July 31, 2009 with the submission of post-hearing briefs. ALJ Zoragniotti issued a Report and Recommendation dated September 10, 2009, recommending that the Comptroller's preliminary determination that STWs and SSTWs should be paid commensurate with the wages and supplements set forth in the collective bargaining agreements between Con Edison Company of New York ("Con Ed") and the Utility Workers Union of America, AFL-CIO, Local No. 1-2 ("Local No. 1-2") for workers in the titles of Operating Mechanic A and Plant Operators (Petitioner's Exhibits 18A and 18B, introduced during the hearing on April 6, 2009 (the "Con Ed/Local No. 1-2 CBAs")), should be affirmed.

Both the Union and OLR requested that the Comptroller set uniform hourly rates as prevailing wage rates for STWs and SSTWs. Following a review of the ALJ's Report and Recommendation, the transcript of the hearings and the exhibits introduced at the hearing, and employment data from the City of New York's Payroll Management System ("PMS"), the Comptroller's Bureau of Labor Law issued a letter dated October 20, 2009, a copy of which is annexed hereto, which enclosed a Summary of Prevailing Wage Rates and Summary of Prevailing Wage Benefits containing proposed hourly wage rates and supplemental benefit provisions for STWs and SSTWs (the "October 20 Wage and Benefit Rates"), and also provided the parties with an opportunity to present written comments on the proposed prevailing wage and supplemental benefit rates.

The Union, by letter dated November 5, 2009, from its counsel, Greenberg Burzichelli Greenberg PC, provided its comments; OLR, by letter dated November 6, 2009, from its General Counsel, Mayra E. Bell, provided its comments.

NOW:

After reviewing the ALJ's Report and Recommendation, the transcript of the hearings, the exhibits thereto and the post-hearing briefs, as well as the proposed prevailing wage and supplemental benefit rates set forth in the Comptroller's October 20, 2009 letter and the written comments by the City and the Union addressing same, and due deliberation having been had thereon, pursuant to the powers and duties vested in me by the Comptroller under Labor Law § 220 et seq., I make the following Order and Determination, adopting the ALJ's Recommendation set forth in the Report and Recommendation dated September 10, 2009, a copy of which is annexed hereto and incorporated by reference herein, and the proposed prevailing wage and supplemental benefit rates set forth in the Bureau of Labor Law's October 20, 2009 letter.

IT IS HEREBY DETERMINED THAT:

1. The prevailing rates of wages and supplemental benefits to be paid to City employees in the titles STW and SSTW during the period July 1, 2002 to June 28, 2008 are those that the Comptroller's Bureau of Labor Law calculated based on the wages and supplements set

Office of the Comptroller, ex rel. Local 1320
v. Office of Labor Relations
OATH Index No. 1522/09 (Sept. 10, 2009)

Comptroller's preliminary determination that sewage treatment workers and senior sewage treatment workers be paid commensurate with wages and supplemental benefits of Consolidated Edison's Operating Mechanic A and Plant Operator titles should be affirmed.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**COMPTROLLER, EX REL. LOCAL 1320,
DISTRICT COUNCIL 37, AFSCME, AFL-CIO**
Petitioner
-against-
OFFICE OF LABOR RELATIONS
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

Petitioner, the City of New York Office of the Comptroller ("Comptroller"), brought this proceeding pursuant to section 220(8-d) of the Labor Law on behalf of Local 1320, an affiliate of District Council 37, AFSCME, AFL-CIO ("Union" or "Local 1320"). Petitioner seeks a determination of the prevailing wages and supplemental benefits to be paid by the City of New York Department of Environmental Protection ("DEP") to sewage treatment workers ("STWs") and senior sewage treatment workers ("SSTWs") (collectively "complainants") from July 1, 2002, through June 28, 2008. Petitioner urges this tribunal to uphold its preliminary determination that STWs and SSTWs be paid commensurate with the wages and supplements set forth in the collective bargaining agreements between Consolidated Edison Company of New York ("Con Ed") and the Utility Workers' Union of America, AFL-CIO, Local No. 1-2 ("Local No. 1-2") for workers in the titles of Operating Mechanic A and Plant Operators.

Following a nine-day hearing, with each party producing witnesses and documentary evidence, the record closed on July 31, 2009, with the submission of post-trial briefs. For the reasons below, I find that the Comptroller's preliminary determination should be affirmed.

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BACKGROUND

Statutory Framework

Section 220 of the New York State Labor Law ("Labor Law 220") requires the City of New York ("City") to pay "laborers, workmen, or mechanics" in its employ the prevailing rate of wages and supplemental benefits paid in the private sector "for a day's work in the same trade or occupation in the locality" where the work is performed. Labor Law § 220(3) (Lexis 2009). Although the statute refers to the rates paid in the "same" trade or occupation, courts have recognized that a comparison may be made to workers doing similar jobs. *See Smith v. Joseph*, 275 A.D. 201 (1st Dep't), *aff'd*, 300 N.Y. 516 (1949) (fixing prevailing wages of persons in "comparable" positions); *Flannery v. Joseph*, 300 N.Y. 149, 152 (1949) (Comptroller was obligated to determine the prevailing rate of wages paid to those workers whose trade or occupation was "comparable" to city-employed maintenance workers).

The statute also requires that bargained rates paid in the private sector be deemed prevailing, providing that the collective bargaining agreements cover at least thirty percent of the "workers, laborers or mechanics in the same trade or occupation in the locality." Labor Law § 220(5)(a). Only when there are less than thirty percent of private sector unionized employees within the same trade or occupation is the prevailing wage determined by reference to non-unionized workers. In that case, "the average wage" paid to non-unionized workers within the same trade or occupation is found to be prevailing. Labor Law § 220(5)(a).

The City and public employee organizations are required to negotiate in "good faith" and enter into a written agreement as to the rate of wages and supplemental benefits to be paid prevailing wage employees. If negotiations break down, the union is authorized to file a complaint on behalf of these employees with the Comptroller. The Comptroller is then mandated to conduct an investigation to determine the prevailing rate of wages and supplemental benefits due the workers, and to hold a hearing in the matter after conducting its investigation, but prior to making any order or determination. Labor Law §§ 220(8-d); 220(8). Prevailing wage hearings are held at this tribunal pursuant to the Comptroller's rules. 44 RCNY § 2-02(d).

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Procedural History

Com: Following unsuccessful negotiations with the City's Office of Labor Relations ("OLR"), the Union filed complaints with the Comptroller on May 21, 2002, and June 14, 2007, seeking an investigation and determination of the prevailing rate for STWs and SSTWs from 2002 through

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008 (Pet. Exs. 1, 3). A prior consent decree established the prevailing rates from April 1, 2000, through June 30, 2002 (Pet. Ex. 2).

On August 9, 2007, the Comptroller issued a preliminary determination (Pet. Ex. 19) finding that the contract between Con Ed and Local No. 1-2 covers "the predominant number of comparable private-sector workers," that Local No. 1-2 constitutes the prevailing union, and that utility workers in that union "constitute the best private sector analog for the complainants." The Comptroller also found that the work performed by complainants should be classified as operations and maintenance and that STWs and SSTWs should be matched with specific Con Ed employees who work in operations and maintenance. The Union and OLR engaged in further collective bargaining but were unable to reach an agreement.

On November 10, 2008, the Comptroller filed the instant petition on behalf of the Union (ALJ Ex. 1). Both the Union and OLR filed answers objecting to the Comptroller's August 9, 2007, preliminary determination and in particular to the decision to split the titles into operations and maintenance (ALJ Exs. 2, 3). The Comptroller subsequently modified its preliminary determination on March 31, 2008 (Pet. Ex. 20), and again on April 3, 2009 (ALJ Ex. 4). The hearing began on April 6, 2009. At the conclusion of the hearing, petitioner indicated that it wished to recall a witness and revise its preliminary determination. The request was granted (Tr. 960-61). On May 14, 2009, the Comptroller agreed that complainants should not be classified as operations and maintenance and issued a new preliminary determination that STWS should be matched to the Con Ed Operating Mechanic A title and SSTWs should be matched to the Con Ed Plant Operator title (Tr. 980-82). It is this preliminary determination which is at issue here.

The Proof

The proof at the hearing focused on four areas: the sewage treatment process; the work performed by STWs and SSTWs; the work performed by utility workers at Con Ed's steam plants; and the Comptroller's investigation.

The Comptroller presented the testimony of Wasył Kinach, the Director of Classifications of the Comptroller's Bureau of Labor Law, who conducted the investigation, and Jan Van Daatselaar, the Operations Trainer at Con Ed's East River steam plant. In addition, the Comptroller submitted documents related to the investigation, which included investigator notes, the job specifications, evaluation forms, notices of examination for STWs and SSTWs,

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photographs of STWs and SSTWs working at DEP, DEP daily work sheets, prevailing wage schedules, the relevant Local No. 1-2 contracts, and various documents provided by Con Ed.

The City presented the testimony of James Petito, the Director of Facilities Operations for the DEP's Bureau of Wastewater Treatment, and documentary evidence related to various DEP activities and the job duties of STWs and SSTWs.

The Union presented the testimony of representatives from Con Ed, DEP, and Local 1320 including: Henry Gutierrez, a material analyst and former Mechanic B at Con Ed; Steven Green, a Mechanic A at Con Ed; Timothy Hunter, an Operating Mechanic A at Con Ed; James Tucciarelli, a SSTW and the President of Local 1320; James Pynn, DEP's Plant Superintendent and Plant Chief at Newtown Creek; and John Quinn, a SSTW. In addition, the Union submitted into evidence 138 photographs, and other documentary evidence including brochures, equipment lists, DEP logs, and various memoranda and reports.

With the exception of Mr. Gutierrez, all of the witnesses were credible. In particular, I found Mr. Van Daatselaar, Mr. Petito, and Mr. Tucciarelli to be very knowledgeable about their areas of expertise and I believe their testimony to be reliable.

The Sewage Treatment Process

DEP has 14 water pollution control plants ("WPCP") and various dewatering facilities and pumping stations throughout the five boroughs. Approximately 1.3 billion gallons of wastewater are discharged in New York City each day and processed at DEP's plants. Wastewater includes rain water and melting snow which is collected in catch basins and everything that is flushed down toilets and drains. The combined wastewater is conveyed through a complex series of pipes and pumping stations. In the event of an overflow due to a severe storm, untreated water flows directly into the City's waterways. A series of tide gates control the flow into the local waterways (Union Ex. 139). WPCPs are in operation 24-hours a day, seven days a week ("24/7") and have three shifts per day (Petito: Tr. 593).

When wastewater reaches a WPCP, pollutants are removed and the water is treated through a series of physical and biological processes and then released into the surrounding waterways. Wastewater undergoes five major processes: preliminary treatment, primary treatment, secondary treatment, disinfection, and finally sludge treatment. Preliminary treatment involves screening out large pieces of debris. The screened wastewater is pumped into primary settling tanks to allow heavy solids to settle to the bottom and lighter materials to float to the top.

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Plant Operators perform the same duties as Operating Mechanic As, but must be qualified in six posts, rather than two. Plant Operators are not hired from the general public but are promoted from the Operating Mechanic A title upon completing the requisite courses and passing a written examination. Plant Operators are more advanced in their knowledge and can be utilized anywhere in the plant. While the Plant Operator does not supervise the Operating Mechanic, a Plant Operator can help a junior member on the job when a specific problem arises (Van Daatselaar: Tr. 967-59). A Shift Supervisor can also send a Plant Operator to a post where an Operating Mechanic A is having a problem in order to correct the problem or explain how to resolve it (Van Daatselaar: Tr. 976). Although the Plant Operator and Operating Mechanic A perform the same functions, the Plant Operator title is a more experienced and more flexible than the Operating Mechanic title (Van Daatselaar: Tr. 973-74).

Mechanic Bs repair and maintain the equipment in the steam plant, like centrifugal pumps, positive displacement pumps, motors, regulators, pipes, fans, blowers, feed water heaters, and heat exchangers. They also perform preventive maintenance, such as repacking of pumps and replacing seal links (Van Daatselaar: Tr. 468-69; 471). They perform rigging and hoisting of machinery and stationary screens, perform pipefitting and plumbing, and burn bolts off flanges to replace sections of pipe (Van Daatselaar: Tr. 470, 513-14, 524). They cannot perform welding, which requires special training, since they work in a high-pressure steam facility (Van Daatselaar: Tr. 470). In order to perform complex mechanical alignment, welding or electrical work, Mechanic Bs must be promoted to Mechanic A, after they have received specialized training in one of these fields (Van Daatselaar: Tr. 473-74; Pet. Ex. 25B). Mechanic As perform the repair work on the major machinery (Van Daatselaar: Tr. 474; 488).

The Comptroller's Investigation

Mr. Kinach testified that he started his investigation in July 2005 (Tr. 62). He began with the STWs and SSTWs civil service job descriptions. He also conducted site visits to several WPCPs, pumping stations and collections facilities, reviewed relevant DEP documentation, and spoke with various DEP personnel and Mr. Tucciarelli, the Local 1320 President.

After understanding the work performed by STWs and SSTWs, Mr. Kinach considered various private sector employers including beer breweries and the Domino Sugar factory. These industries were rejected because many no longer exist and none were operating on a large scale. At the suggestion of the Union, Mr. Kinach looked at Con Ed natural gas facilities (Kinach: Tr.

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120, 126-27). Eventually Mr. Kinach settled upon the Con Ed steam generation plant as the private sector facility most similar to the WPCP because it involved a large-scale water processing operation (Kinach Tr. 122). Mr. Kinach performed a site visit to the East River steam plant at 14th Street in Manhattan with Mr. Tucciarelli and Mr. Petito. On the visit Mr. Kinach observed equipment that was similar to equipment found in WPCPs and also saw Con Ed workers performing many of the same tasks and duties as the complainants. He spoke with Con Ed management and was provided with various documents (Kinach: Tr. 123, 132; Pet. Exs. 18A, 18B). Mr. Kinach subsequently designated Local No. 1-2 utility workers as the private sector trade or occupation comparable to complainants. The key criterion considered was that the different skills employed by utility workers were used with an eye to operating and maintaining Con Ed's water treatment plants (Tr. 191-92).

A preliminary determination designating Local No. 1-2 as the prevailing trade or occupation for the complainants was issued on August 9, 2007. The determination classified STWs as Production Workers and Operating Mechanic Bs when performing operations; and as General Utility Workers and Mechanic Bs when performing maintenance. SSTWs were classified as Operating Mechanic As when performing operations, and as Mechanic As when performing maintenance (Pet. Ex. 19). The Comptroller revised its preliminary determination twice in response to feedback received from the Union (Tr. 135-38; Pet. Ex. 20). When the Union and OLR failed to reach an agreement, the matter was scheduled for hearing. Mr. Kinach met with Mr. Van Daatselaar who provided more information about Local No. 1-2 job titles that was used to finalize the Comptroller's position at the hearing (Tr. 141-42). Following the hearing, the Comptroller issued the May 14, 2009, preliminary determination that STWS should be matched to the Operating Mechanic A title and that SSTWs should be matched to the Plant Operator title.

Positions of the Parties

Petitioner contends that STWs and SSTWs should be paid wages and supplemental benefits commensurate with those set forth in the contract between Con Ed and Local No. 1-2 from 2002 through 2008. Specifically, petitioner contends that STWs and SSTWs should be paid commensurate with the wages and supplements for workers in the titles of Operating Mechanic A and Plant Operators, respectively, because they do comparable work.

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The Union argues that STWs and SSTWs routinely perform comparable work with private sector trades including machinists, plumbers, pipe fitters, carpenters, welders as part of their regular job duties and when they perform outside work for DEP. Under *Kelly v. Beame*, 15 N.Y.2d 103 (1965), they should be paid wages based on the work actually performed. In essence, the Union contends that if an STW is performing work that involves plumbing, millwright or carpentry skills, the STW should be paid the prevailing rate that has been established by the Comptroller for those titles for the amount of time the work is performed. In the alternative, the Con Ed Plant Operator is the appropriate match for the STW so long as the rate is set at the maximum. The Union argues against matching the SSTW to the Plant Operator because the Plant Operator does not have any supervisory functions. Moreover, the Union asserts that the Con Ed pay progression plan is inconsistent with Labor Law 220.

OLR does not dispute that the contract between Con Ed and Local No. 1-2 is an adequate match for the STW title. However, OLR asserts that a new survey needs to be conducted for the SSTW title. Moreover, OLR contends that it is inappropriate to match all STWs to the Operating Mechanic A title because a significant part of their duties involve maintenance work. Rather, a composite hourly rate should be established for STWs based on the Operating Mechanic A and Mechanic B titles. OLR also disputes the Comptroller's inclusion of the longevity and merit wage increases from the Con Ed and Local No. 1-2 contract in the determination because the increases are discretionary.

In its reply, petitioner contends that the parties' arguments on wage and benefit rates are outside the scope of this proceeding and are unsupported by any legal authority.

ANALYSIS

As set forth above, Labor Law 220(3) requires that workers employed on public works be paid the prevailing rate of wages. The prevailing rate is defined as:

[T]he rate of wage paid in the locality . . . by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed.

labor Law § 220 (5)(a). The "locality" is defined by reference to the collective bargaining agreement for the relevant trade or occupation. Labor Law § 220 (5)(d). The "locality" must

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include the place in which the work in question is performed - here, the City of New York, where all of the WPCPs, pumping stations and collections facilities are located.

Because there are no private sector employers in the City of New York that operate wastewater treatment plants comparable in size and scale to WPCPs, it is not possible to identify the same trade or occupation in the private sector. The Comptroller's conclusion that Local No. 1-2 utility workers in Con Ed's steam plants comprise 30 percent or more of workers in the "same trade or occupation" was unrebutted. OLR agreed with the Comptroller's match to the extent it covers STWs and failed to advance any other collectively bargained group as comparable to the SSTWs. The Union argued that complainants should be paid multiple rates based on the work performed, or, in the alternative, that STWs be matched to Plant Operators.

As a preliminary matter, *Kelly v. Beame*, does not provide for the setting of multiple wage rates based on work performed and is, therefore, inapplicable to this matter. In *Kelly*, there was one civil service title of laborer, but employees in that title were regularly assigned to perform distinct functions such as highway maintenance, special services, water repair and sewers. In setting the rate, and in order to reflect these specialized assignments, the Comptroller determined that laborers should be classified into groups A through E. The Comptroller then fixed an "average" prevailing rate to be applied to all laborers regardless of the group a particular laborer was assigned. *Kelly*, 15 N.Y.2d at 108. The question presented was whether the employees in each group, were engaged in the "same trade or occupation" for the purpose of Labor Law 220 and, therefore, entitled to a single prevailing rate. The Court held that each group was so distinct that they represented separate trades and occupations. As a result, the Comptroller was ordered to fix a separate prevailing rate for each group based on the work actually performed within the civil service title. *Id.* at 110. In reaching its decision, the Court recognized that there was little, if any, shifting of a laborer's department or duties. *Id.*

The instant case is distinguishable from *Kelly* for several reasons. Although there is no dispute that complainants perform a variety of tasks consistent with other trades, there are no separate and distinct groups of workers within the STW and SSTW titles. To the contrary, the record shows that STWs and SSTWs are not specialized in one particular area or trade but are versatile enough that they can be called upon to do any of the tasks set forth in their job specifications. Moreover, the Union is not seeking different prevailing rates for distinct groups of STWs or SSTWs; rather, it is seeking to have complainants paid the prevailing rates of other titles such as plumbers, carpenters and machinists, when performing work that involves these

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1087 v. *Office of Labor Relations*, OATH Index No. 2451/08 (Apr. 6, 2009) adopted in full, Comptroller's Order and Determination (June 26, 2009) (similarities in the type of work performed by the maintenance engineers and radio repair mechanics, and the skill sets needed to repair, maintain, and install the various electronics communications equipment found sufficient to support a finding that the two jobs are comparable).

As a legal matter, the controlling issue is the "actual work" performed by the two groups of workers being compared. See *Flannery*, 300 N.Y. at 154 (the "critical" factor, in determining whether private employees are in the same trade or occupation as publicly employed workers, is whether "their work differs substantially"); *Kelly*, 15 N.Y.2d at 110 (prevailing wages must be fixed "based on the work actually performed"). Thus, workers who are in two distinct fields but who perform "similar" work may still be in the same "trade or occupation" for purposes of the prevailing wage law. *Watson*, 286 N.Y. at 53 (persons engaged in different "fields" but performing "similar" work could still be in the "same trade or occupation"; differences in the nature of their activities could differentiate the "trade" in which the employees worked, but only if the differentiation is "based upon a substantial ground"). See also *Comptroller's Office, ex. rel. Local 621 v. Office of Labor Relations*, OATH Index No. 1398/97 at 19 (Nov. 5, 1997), adopted in full, Comptroller's Order and Determination (Apr. 1, 1998), Commissioner's Supplemental Order and Determination (Apr. 29, 1998), *aff'd*, 253 A.D.2d 596 (1st Dep't 1998) (master mechanics responsible for keeping construction machinery operational and supervising workers in a variety of trades found comparable to city workers who supervise the repair and maintenance of different types of equipment, including sewage treatment equipment, even though building construction and sewage treatment are different fields).

At the hearing, competent evidence was adduced on six job titles - all of them contained in the Local No. 1-2 collective bargaining agreement: Production Worker, General Utility Worker, Operating Mechanic A, Plant Operator, Mechanic B and Mechanic A. Thus, the question is which, if any, of these titles is comparable to complaints?

It was uncontroverted that Operating Mechanic B has not been an active title for at least 20 years and that Operating Mechanic Bs are now Operating Mechanic As (Tr. 464; 556). Because the Operating Mechanic B title was not active during the period at issue here, it cannot be considered in the comparability determination. Moreover, the entry-level Production Worker and General Utility Worker titles are not appropriate for comparison because they are training titles. See *Local 363, International Brotherhood of Electrical Workers v. New York State Dep't*

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of Labor, 230 A.D.2d 440 (3rd Dep't 1997). The Mechanic A title is also not a viable option because that title performs complex mechanical alignments, welding, or electrical work, which is not comparable to the work performed by complainants. This leaves only three titles to consider: Operating Mechanic A, Mechanic B, and Plant Operator.

The evidence established that the Operating Mechanic A title is comparable to the STW title. Both titles work around the clock to process and treat large volumes of water under a SPEDES permit. At Con Ed, Operating Mechanic As are treating city water to remove sand, minerals and other contaminants before it is converted into steam. They also screen debris from river water which is used to cool down machinery and is later returned to the river. At DEP, STWs are screening and treating wastewater to remove pollutants before the water is returned to the local waterways. In processing the water, both titles work with similar equipment and machinery, including screens, tide gates, filters, pumps, tanks, piping, motors, fans, blowers, centrifuges, boilers, compressors, heat exchangers, valves, meters, rigging and hoisting equipment, safety equipment, and barges. Moreover, both titles perform preventative maintenance on the equipment such as changing filters, checking oil levels, and tightening valves, and both "tag out" equipment that needs repair. Operating Mechanic As and STWs also perform similar operation functions in that they monitor, test, and treat the water with heat and chemicals and keep related records. The fact that the overall purpose of the steam generation plant is different from that of the wastewater treatment plant or that some of the equipment is unique to the process is irrelevant because the actual work performed in both plants is the same or similar. *Watson*, 286 N.Y. at 53-55; *Flannery*, 300 N.Y. at 153-54.

Unlike Operating Mechanic As, STWs are not limited to operations and preventive maintenance duties. STWs also perform repair and maintenance work, although for much less time than they spend on operations work. Examples of typical maintenance duties are: repacking auxiliary pumps, replacing seal links, repairing leaks, burning off bolts on flanges to replace sections of pipe, cleaning motors, non-structural welding, rigging and hoisting plant machinery and replacing components in order to keep plant equipment in operable condition. Confined space permits are sometimes required. In this regard, the STW title performs similar work to the Mechanic B title which is responsible for general maintenance and repairs to keep steam plants in operation. Mechanic Bs also repack pumps, fix leaks, burn off bolts, clean motors and perform tasks that require confined space permits. Mr. Gutierrez's testimony that a

- 17 -

Mechanic B is a helper who is incapable of working independently (Tr. 666-67, 671-72, 689) was contrary to the weight of the evidence.

There was no dispute that overall STWs generally spend approximately two-thirds of their time on operations and one-third on maintenance duties. Although STWs perform similar work to the titles of Mechanic B and Operating Mechanic A, the majority of work performed by the STWs is in operations, which includes preventive maintenance.

The Union also argues that to the extent STWs are comparable to Operating Mechanic As and Plant Operators, they should be compared to Plant Operators because STWs perform a greater range of duties than Operating Mechanic As and work in a more diverse and hazardous environment. This was not borne out by the evidence. The record supports a finding that STWs and Operating Mechanic As face similar hazards from chemicals, dangerous debris, confined spaces, high pressure tanks or gases, malfunctioning equipment, and barges, and that they are given extensive training to deal with these hazards. My impression is that both groups work under difficult conditions and that steam production and wastewater treatment require a broad range of similar training and skills.

The fact that Plant Operators are proficient on six posts as opposed to two for Operating Mechanic As and that STWs are proficient on all posts, while notable, is not sufficient reason to find STWs comparable to Plant Operators where so many parallels exist between STWs and Operating Mechanic As. In addition to performing similar work on comparable equipment, STWs and Operating Mechanic As start out as journeymen in similar fields, both groups have entry level training, and both must obtain various certifications and pass certain tests in order to perform their duties in compliance with state and federal law. Like STWs, the Operating Mechanic As are the first level workers in the hierarchy of the water treatment plant. In order to reach the higher levels of SSTW and Plant Operator, the STW and the Operating Mechanic A must gain new skills and pass additional tests. *See BA-CEE Division of Local Union No. 3, IBEW v. Office of Labor Relations, OATH Index No. 230/92 (Apr. 15, 1992), aff'd in relevant part, Comptroller's Decision (June 17, 1992) (pedigree and history should not be ignored when making comparability determination).* Therefore, the comparable title to STW is Operating Mechanic A.

With regard to the SSTW title, the Union and OLR object to comparing SSTWs to Plant Operators because they do not have supervisory functions whereas SSTWs do. SSTWs are working foremen who supervise and assist STWs in performing their duties. The evidence

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established that there is no working foreman title at the Con Ed steam plant and that utility workers are supervised by Shift Supervisors, a management title (Tr. 482-83). Since the Shift Supervisor title is not encompassed in a collective bargaining agreement, it cannot serve as a basis for classification in this proceeding. Labor Law § 220(5).

It was undisputed that SSTWs must be able to perform the same tasks as STWs and that Plant Operators must be able to perform the same jobs as Operating Mechanic As. Moreover, SSTWs and Plant Operators are higher ranking and more experienced than their junior counterparts. Since STWs have been found to do comparable work to Operating Mechanic As, it is, therefore, reasonable to conclude that SSTWs perform similar work to Plant Operators. In addition, Plant Operators are promoted from the Operating Mechanic A title after completing the requisite training and passing examinations. Likewise, SSTWs are promoted from the STW title after passing the SSTW civil service exam and completing the requisite training. While Plant Operators do not supervise Operating Mechanic As by giving them assignments or conducting performance evaluations, the senior worker can assist and direct the junior member with a problem. In this manner Plant Operators perform analogous work to SSTWs who also assist and direct STWs with their duties.

Although the Union and OLR argue that the STW and SSTW titles must be classified separately, neither provides alternative trades or occupations which they deem comparable to both titles. While it is unclear how much time SSTWs devote to supervisory functions as opposed to general operations and maintenance work, the Union and OLR argue that this additional duty is enough to distinguish them from STWs. Indeed, having both STWs and SSTWs in either the Operating Mechanic A or the Plant Operator titles would be inconsistent with Labor Law 220 because both titles would receive the same rate of pay. Given that this investigation was commenced in 2005, that all parties had an opportunity to participate in the process of identifying comparable titles, and that there are no other readily discernable trades in New York City besides Con Ed whose work comes close to the work performed at a WPCP, OLR's suggestion that an additional SSTW survey be conducted would only delay this matter further. Moreover, the Union's suggestion that SSTWs be compared to the supervisory rate of whatever trade they are engaged is not feasible for the reasons stated above.

The fact that there is no comparable working foreman title at Con Ed or elsewhere cannot thwart the statutory mandate to determine a prevailing rate for the SSTW. *Watson*, 286 N.Y. at 53-55; *Flannery*, 300 N.Y. at 153-54; *Austin*, 258 N.Y. at 117; see also *Bucci v. Village of Port*


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Chester, 22 N.Y.2d 195, 201 (1968) ("We are here required to give effect to a unique statutory scheme, one that has as its entire aim the protection of workmen against being induced, or obliged, to accept wages below the prevailing rate from a public employer. This court has more than once noted that section 220 must be construed with the liberality needed to carry out its beneficent purposes"). Because SSTWs perform similar work to Plant Operators, have similar promotional paths, and can assist junior workers with complex tasks, they are comparable to Plant Operators.

To the extent the Union and OLR raise issues concerning the establishment of wages and supplements to be paid to STWs and SSTWs based on the progressive rates in the Local No. 1-2 contracts, these questions are not properly before me. This matter was referred to this tribunal to hold an evidentiary hearing to determine which private sector trade or occupation is comparable to STWs and SSTWs. Petitioner indicated on numerous occasions that once the comparability determination was made, it would use that determination to set the appropriate rates. If there are disputes as to the establishment of the wages and supplements to be paid, they must be raised at a subsequent hearing, if necessary. See *Office of the Comptroller, ex rel. Local 108*, OATH 2451/08, at 3; *BA-CEE Division of Local Union No. 3, IBEW v. Office of Labor Relations*, OATH Index No. 230/92 (Apr. 15, 1992), *aff'd in relevant part*, Comptroller's Decision (June 17, 1992); *Comptroller v. Office of Labor Relations (Elevator Mechanics)*, OATH Index No. 616/98 (May 18, 1998), *aff'd*, Comptroller's Decision (Aug. 10, 1998), *aff'd sub nom. Local 237 v. Comptroller of the City of New York*, 259 A.D.2d 314 (1st Dep't 1999).

RECOMMENDATION

The Comptroller's May 14, 2009, preliminary determination that STWs and SSTWs should be paid commensurate with the wages and supplements set forth in the collective bargaining agreements between Con Ed and Local No. 1-2 for workers in the titles of Operating Mechanic A and Plant Operators should be affirmed.


Alessandra F. Zorzi
Administrative Law Judge

September 10, 2009

Summary of Prevailing Wage Rates

<u>Effective Date</u>	<u>Sewage Treatment Worker</u>	<u>Senior Sewage Treatment Worker</u>
6/27/2002	\$29.66	\$32.67
6/27/2003	\$30.54	\$33.65
6/27/2004	\$31.46	\$34.66
1/2/2005	\$31.62	\$34.83
6/26/2005	\$32.72	\$36.05
6/25/2006	\$33.86	\$37.31
6/24/2007	\$34.97	\$38.52

SUMMARY OF PREVAILING WAGE BENEFITS

- Benefits Include: Pensions and Other Retirement Benefits, Group Life Insurance, Hospital Plan, Group Health Insurance, Prescription Drug Plans, Comprehensive Medical Plan, Employee & Dependents Dental Plans, Employee & Weekly Vision Care Plans, Health Maintenance Organizations, Long Term Disability, Employee Occupational/Accidental Death, Flexible Benefits, Adoption Benefit Plan, Excess Workers' Compensation, Employee Counseling Service, Welfare Lung & Hearing/Med Screening, Elder Care Referral, Work Home Wellness, Child Care Consulting, Emergency Child Care, Tuition Aid Program, Employee Stock Plans, Thrift Savings Plans.

Effective Date	Benefit Rate(Percent of Base Wage)
6/30/2002	25.73%
6/29/2003	26.33%
6/27/2004	25.71%
1/2/2005	26.07%
6/26/2005	26.07%
6/25/2006	22.82%
6/24/2007	29.66%

- Holiday: 11 paid holidays

- Vacation:

Years of Service Completed As of December 31	Weeks of Vacation
Less Than One (1) Year:	
If Employed After Aug. 31	1
If Employed Before Aug. 31	2
1 to 2 Years Inclusive	2
3 Years	2 + 1 Day
4 Years	2 + 2 Days
5 to 11 Years Inclusive	3 + 1 Day
12 Years	3 + 2 Days
13 Years	3 + 3 Days
14 Years	3 + 4 Days
15 to 21 Years Inclusive	4 + 1 Days
22 Years	4 + 2 Days
23 Years	4 + 3 Days
24 Years	4 + 4 Days
25 Years	5

- Personal Holiday: Regular employees who have completed two (2) years of continuous service on any December 31, shall be entitled to designate one (1) scheduled working day as a personal holiday to be taken in the following calendar year. (see page 19 of the CBAs)

- Sick Leave: Regular employees absent from work on account of non-occupational illness or injury and/or occupational illness or injury may receive in any fifty-two (52) consecutive weeks a Company Sick Allowance which shall consists of not more than one (1) week's straight-time pay for each year of continuous service, with an allowance of to one (1) week's straight-time pay after a minimum of three (3) months' service, followed by an allowance of eighty percent (80%) of straight-time pay for up to twenty-six (26) additional weeks. (see page 40 of the CBAs)

EXHIBIT B

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

----- x
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,

Petitioners,

NOTICE OF PETITION

- against -

Index Number:

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

Volume I of VI

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); 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 §§ 220, et seq. and For a
Judgment and Order Pursuant to Article 78 of the Civil
Practice Law and Rules

----- x
PLEASE TAKE NOTICE that upon the annexed petition, verified on December
18, 2009, and the exhibits annexed thereto, and all prior pleadings and proceedings heretofore
had herein, respondent will move this Court, located at 27 Madison Avenue, New York, New
York, on the 7 day of Sept., 2010, at 10 o'clock in the forenoon, or as soon thereafter as
counsel can be heard. for a judgment and order, pursuant to Sections 220, et seq., of the Labor

Law, and Article 78, Section 7803 of the New York Civil Practice Law and Rules ("CPLR"), annulling the order and determination of William C. Thompson, Jr., Comptroller of the City of New York in Comptroller, ex rel. Local 1320, District Council 37, AFSMCE, AFL-CIO v. Office of Labor Relations, OATH Index No. 1522/09, signed November 23, 2009, ("Order") on the grounds that the proceedings violated due process and that the Order is not supported by substantial evidence, is arbitrary, capricious, premature, and incomplete, is flawed and erroneous, entering judgment for petitioners, and remanding the matter to the Comptroller for a new determination and granting petitioners the costs, fees, and disbursements of this proceeding together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
December 18, 2009

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Petitioners
100 Church Street, Room 2-100
New York, New York 10007-2601
(212) 227-3153

By: 
LARRY R. MARTINEZ
Assistant Corporation Counsel

To: **WILLIAM C. THOMPSON, JR.**
Comptroller of the City of New York
Municipal Building
1 Centre Street
New York, New York 10007

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

----- x
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,

Petitioners,

- against -

For a Judgment, Pursuant to 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); 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 §§ 220, et seq. and For a
Judgment and Order Pursuant to Article 78 of the Civil
Practice Law and Rules

----- x
Petitioners, the **CITY OF NEW YORK, THE MAYOR'S OFFICE OF
LABOR RELATIONS**, and **JAMES F. HANLEY**, as Commissioner of The New York City
Mayor's Office of Labor Relations, by their attorney, Michael A. Cardozo, Corporation Counsel
of the City of New York, as and for their petition respectfully assert as follows:

VERIFIED PETITION

Index Number:

Volume I of VI

10. Moreover, there is no evidence in the record before OATH regarding the value of the supplements paid to workers in the Operating Mechanic A and Plant Operator titles under the collective bargaining agreement between Con Ed and Local 1-2.

11. Petitioners seek annulment of the Order and request that the matter be remanded to the Comptroller for further proceedings to determine whether there is a trade or occupation in the private sector that is comparable to STW and SSTW.

12. In the alternative, petitioners seek a remand to the Comptroller to set a wage and supplement schedule in conformance with Labor Law § 220.

PARTIES

13. Petitioner, the City of New York ("City"), is a municipal corporation duly organized and existing under the Constitution and laws of the State of New York.

14. Petitioner, the Mayor's Office of Labor Relations ("OLR"), is an agency of the City of New York.

15. Petitioner, James F. Hanley, is the Commissioner of OLR.

16. Respondent, William C. Thompson, Jr., is the Comptroller of the City of New York.

17. Respondent, District Counsel 37 AFSCME, AFL-CIO ("DC 37"), is a labor organization representing City employees in collective bargaining, including employees holding the title of STW an SSTW.

18. Respondent, Lillian Roberts, is the Executive Director of DC 37 AFSCME, AFL-CIO, and is sued in her official capacity.

19. Respondent, Local 1320, DC 37 AFSCME, AFL-CIO, ("Local 1087") is a labor organization representing City employees in collective bargaining, including employees holding the title of STW and SSTW.

20. Respondent, James Tucciarelli, is the President of Local 1320 and is sued in his official capacity.

JURISDICTION AND VENUE

21. The jurisdiction of the Court to hear this petition is based upon Article 78 of the Civil Practice Law and Rules ("CPLR"), and Labor Law §§ 220, et seq.

22. Venue is proper in the Appellate Division First Department under Labor Law § 220 and in particular Labor Law § 220(8) and under CPLR § 7804(b) and 506(b) because it is the judicial district where the respondents made the challenged determination.

FACTS

A. The Labor Law § 220 Process

23. Labor Law § 220(3)(a) provides that:

The wages to be paid for a legal day's work ... to laborers, workmen or mechanics upon said public works, shall not be less than the prevailing rate of wages as hereinafter defined.

24. Labor Law § 220(3)(c) provides that:

It shall be the duty of the fiscal officer, as defined in this section to ascertain and determine the schedules of supplements to be provided and wages to be paid workmen, laborers and mechanics ...

25. Pursuant to Labor Law § 220(5)(e) the Comptroller of the City of New York is the fiscal officer authorized to determine prevailing wages and supplements for workmen, laborers and mechanics who are employees of the City. See N.Y. Lab. Law § 220(5)(e).

26. The "prevailing rate of wage" is defined as "the rate of wage paid in the locality . . . by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said

employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed. See N.Y. Lab. Law §220(5)(a).

27. "Supplements" is defined as "all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not "wages" within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance, and apprenticeship training." See N.Y. Lab. Law §220(5)(b).

28. Under Labor Law, the wages and supplements paid to City employees covered by Labor Law § 220 "shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality" within the state where the work is performed. N.Y. Lab. Law § 220(3).

29. The Labor Law § 220 process requires that collective bargaining representatives of civil service employees and public employers negotiate for an agreement on wages and supplements. N.Y. Lab. Law § 220(8-d).

30. If negotiations are unsuccessful then the collective bargaining representative is authorized file a complaint with the Comptroller seeking an investigation to determine the prevailing rate of wages and supplements. N.Y. Lab. Law §§ 220(7), 220(8-d).

31. Following the investigation, but before issuing an order determining the prevail rate of wages and supplements, the Comptroller must order a hearing and serve notice of the hearing, as well as the copies of the complaint or the statement of facts disclosed by the investigation upon the collective bargaining representative and employer to allow them an opportunity to be heard. N.Y. Lab. Law §§ 220(7), 220 (8), and 220(8-d).

32. Under the Comptroller's rules, hearings under Labor Law §220(8) are conducted by OATH. 44 RCNY §2-02(d).

33. OATH then issues a report and recommendation to the Comptroller which the Comptroller may accept, modify or reject in issuing his final order. 44 RCNY 2-03; N.Y. Lab. Law §220(8).

B. The Instant Case

34. On May 21, 2002 and on June 14, 2007, Local 1320 filed complaints with the Comptroller seeking an investigation and determination of the prevailing rate of wages and supplements for the period 2002-08 for City employees holding the title of STW and SSTW. See Local 1320's Complaints which are annexed to Volume I of the Petition as Exhibit C.

35. After being notified that collective bargaining negotiations between the City and Local 1320 had been unsuccessful, the Comptroller's Office commenced an investigation.

36. On or about August 9, 2007, the Comptroller's Office issued the results of its investigation which had concluded that the collective bargaining agreement between Con Ed and Local 1-2 covered the predominant number of private sector workers comparable to STW and SSTWs. See Comptroller's Preliminary Determination, dated August 9, 2007 which is annexed to Volume I of the Petition annexed as Exhibit D.

37. Specifically, the Comptroller found that STWs performing operations work perform duties and responsibilities comparable to Con Ed Production Workers and Operating Mechanics B and that STWs performing maintenance work perform duties and responsibilities comparable to Con Ed General Utility Workers and Maintenance Mechanics B. See Exhibit D.

38. The August 9, 2007 determination found that SSTWs supervising operations work were comparable to Con Ed Operating Mechanics A and SSTWs supervising maintenance work were comparable to Con Ed Maintenance Mechanics A. See Exhibit D.

the Pet... 39. On March 31, 2008, the Comptroller amended his position and asserted that STWs performing operations work were comparable only to Operating Mechanics B and STWs performing maintenance work were comparable only to Maintenance Mechanics B. That is, Production Workers and General Utility Workers were no longer alleged to be comparable to STWs. See Comptroller's March 31, 2008 Preliminary Determination which is annexed to Volume I of the Petition as Exhibit E.

Volume 40. Pursuant to Labor Law §220(8), on November 10, 2008, the Comptroller served notice of a hearing before OATH and a petition. The petition alleged, as the March 31, 2008 determination had asserted, that STWS performing operations duties were comparable to Operating Mechancis B and that STWs performing maintenance work were comparable to Maintenance Mechanics B and that SSTWs supervising operations work were comparable to Con Ed Operating Mechanics A and SSTWs supervising maintenance work were comparable to Con Ed Maintenance Mechanics A. A copy of the Comptroller's Petition which is annexed to Volume I of the Petition as Exhibit F.

title 41. Petitioners and respondent Local 1320 both answered the Comptroller's petition objecting to the Comptroller's decision to split the titles based on operations and maintenance functions. See Exhibit B, p. 3 and the Answers filed by the petitioners and Local 1320, which are annexed in Volume I of the Petition as Exhibits G and H, respectively.

42. Petitioners also objected on the ground that the minimum-maximum ranges of hourly rates and supplements calculated as a percentage of wages set forth by the Comptroller did not comply with Labor Law 220 which requires the Comptroller to set a wage rate and value of supplements. See Exhibits G and H.

43. A hearing was held before ALJ Zorgniotti on April 6-9, 13, 14, 21, 27, 28 and May 14, 2009. Transcripts of the OATH hearing are annexed to Volumes I through III of

CONCLUSION

WHEREFORE, petitioners respectfully request that the Petition be granted, that a Judgment and Order be entered annulling the Order and Determination of the Comptroller in Comptroller, ex rel. Local 1320, District Council 37, AFSMCE, AFL-CIO v. Office of Labor Relations, OATH Index No. 1522/09, signed November 23, 2009, ("Order"), and request that the matter be remanded to the Comptroller for further proceedings and granting petitioners costs, fees, and disbursements, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
December 18, 2009

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Petitioners
100 Church Street, Room 2-100
New York, New York 10007-2601
(212) 227-3153

By: 

LARRY R. MARTINEZ
Assistant Corporation Counsel

EXHIBIT C



THE CITY OF NEW YORK
OFFICE OF LABOR RELATIONS
40 Rector Street, New York, NY 10006-1705
<http://nyc.gov/olr>

JAMES F. HANLEY
Commissioner
MARGARET M. CONNOR
First Deputy Commissioner

December 22, 2009

Mr. James Tucciarelli
President
Local 1320, Sewage and
Senior Sewage Treatment Workers
125 Barclay Street
New York, NY 10007

Dear Mr. Tucciarelli:

This letter is to confirm that the City of New York will be filing an Appeal of the Comptroller's Final Order and Determination covering Sewage Treatment Workers and Senior Sewage Treatment Workers dated November 23, 2009. The City will be setting a return date in early September 2010.

It is the City's intention to continue to engage in good faith discussions with the Union in the hope of reaching a negotiated settlement across the bargaining table. Toward that end, the City represents that it will not file a brief or take other action in the appeal that would require the Union to respond before September unless the negotiations fail.

Sincerely,

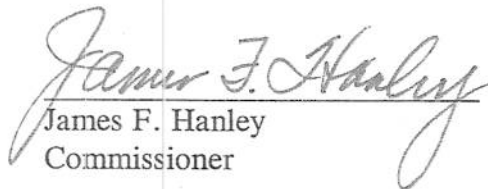

James F. Hanley
Commissioner

EXHIBIT D

LOCAL 1320

NYC Sewage Treatment Workers & Senior Sewage Treatment Workers

District Council 37, AFSCME, AFL-CIO • 125 Barclay Street, New York, NY 10007 • (212) 815-1320

Jim Tucciarelli
President

December 22, 2009

Tommy Custance
Vice President

James F. Hanley
Commissioner
New York City Office of Labor Relations
40 Rector Street
New York, New York 10006

Richie Russo
Treasurer

Jerry Vedovino
Secretary

Dear Mr. Hanley:

Executive Board Member
Joe Licari, III
Barry DeCoursey
George Rodriquez
Tony Cantalino

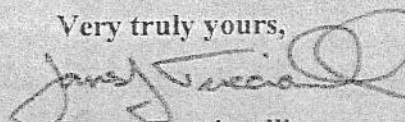
I am in receipt of your letter dated December 22, 2009. The union has, for the past eight years, been ready, willing and able to engage in good faith bargaining to arrive at a settlement which addresses the needs of Local 1320 members.

SSTW Chapter Chair
John Quinn

While I understand that the City may wish to file court papers in order to preserve its right to appeal the Comptroller's final determination, the bargaining process is not served by drawing out the appeal. To that end, I wish to state unequivocally, that it is the wish of the membership of Local 1320 that any court proceedings be undertaken and completed as expeditiously as possible. Contrary to the assertion in your letter, the process would not been served by not filing "a brief or taking other action in the appeal that would require the Union to respond before September unless negotiations fail."

Therefore, we would request that the earliest possible return date for the appeal is set.

Very truly yours,


James Tucciarelli