

***Office of the Comptroller ex rel. Local 924
v. Office of Labor Relations***

OATH Index No. 464/10 (July 2, 2010), *adopted*, Comptroller's Determination (Oct. 13, 2010),
appended

Comptroller's preliminary determination that Laborers and City Laborers be paid prevailing wage commensurate with wages and supplemental benefits set forth in the collective bargaining agreement for the Local 79 Mason Tenders should be adopted. Respondent's motion to dismiss on basis that City Laborers are not entitled to prevailing wage, and other grounds, is denied.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**
In the Matter of
**OFFICE OF THE COMPTROLLER, EX REL.
LOCAL 924, DISTRICT COUNCIL 37, AFSCME, AFL-CIO**
Petitioner
-against-
OFFICE OF LABOR RELATIONS
Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

Petitioner, the Office of the New York City Comptroller ("Comptroller"), brought this proceeding pursuant to section 220 (8-d) of the Labor Law on behalf of Local 924, an affiliate of District Council 37, AFSCME, AFL-CIO (the "Union") against the city's Office of Labor Relations ("OLR" or "respondent") for a determination of the prevailing wages and supplemental benefits to be paid to Laborers and City Laborers (collectively "complainants") employed by the City of New York from July 1, 2002, to the present. Petitioner urges this tribunal to uphold its preliminary determination that complainants be paid commensurate with the wages and supplements set forth in the collective bargaining agreements of the Mason Tenders District Council of Greater New York ("Local 79") for workers in the title of Mason Tenders.

Following a 10-day hearing that included 34 witnesses and over 200 trial exhibits, the record closed on February 12, 2010, with the submission of post-trial memoranda of law by counsel for petitioner, respondent, and the Union. For the reasons set forth below, I find that the Comptroller's preliminary determination should be upheld.

ANALYSIS

Statutory Framework

Section 220 of the Labor Law requires the City of New York (“City”) 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)(a) (Lexis 2010). 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 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 nonunionized workers. In that case, “the average wage” paid to “such workers, laborers or mechanics in the same trade or occupation in the locality” is found to be prevailing. Labor Law § 220(5)(a).

The City and public employee organizations are required to negotiate “in good faith” to enter into a written agreement as to the rate of wages and supplemental benefits to be paid prevailing wage employees, but if negotiations break down, the union is authorized to file a complaint with the Comptroller on behalf of these employees. Upon the filing of such complaint, the Comptroller is authorized as the City’s fiscal officer 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 and prior to making any order or determination. Labor Law § 220(7), (8) & (8-d). The Comptroller is deemed to be acting in a judicial capacity in connection with the investigation and hearing and may issue subpoenas, administer oaths, or examine witnesses. Labor Law § 220(7) & (8).

The Comptroller may consent to a settlement of the claims contained therein, which occurs in the form of a consent determination. Otherwise, a prevailing wage hearing is held at this tribunal, in accordance with the Comptroller's rules. 44 RCNY § 2-02(d).

Consent determinations have been entered into on behalf of complainant Laborers and City Laborers in 1988, 1992, 1993, 1997 and 2000, establishing the wages received by these workers for consecutive terms covering the period July 1, 1984 through June 30, 2002 (Tr. 769; Union Exs. 126, 127, 128, 129 & 130; Pet. Ex. 2). Since then, there have been negotiations but no wage agreement. In this case, the Union filed complaints with the Comptroller on May 21, 2002, seeking an investigation and determination of the prevailing rate for the Laborer and City Laborer titles (Pet. Exs. 1A, 1B). The Union resubmitted the complaints on August 14, 2009 (Pet. Exs. 3A, 3B), after realizing the original complaints were filed untimely, prior to expiration of the last consent determination.

The Comptroller's Investigation and Preliminary Determination

The last consent determination entered on behalf of complainants governing rates for the period April 1, 2000, through June 30, 2002, established three different pay rates for workers according to the complexity of the work performed. The "A" rate was paid to those performing the most complex work, the "B" rate was paid for less complex work, and the "C" rate was paid for the least complex work (Pet. Ex. 2 at 4). The difference between the A, B, and C workers does not reflect any promotional opportunity under competitive title rules (Tr. 118-19). The consent determination described, in detail, the tasks expected of workers in each category (Pet. Ex. 2 at 2-4). It was not disputed, however, that there is no substantive difference between the work performed by workers in the Laborer or City Laborer titles (Tr. 776, 859-60).

To determine the type of work the complainants perform, the Comptroller's investigators visited a number of job sites to observe the work, solicit responses to worker surveys, and interview supervisors (Tr. 122-23, 135-42; Pet. Exs. 6A-6F). To find the group that is the best private sector analog, staff investigators also observed private sector workers who do the same or similar work. Investigators also reviewed the civil service job descriptions created for the Laborer and City Laborer titles by the Department of Citywide Administrative Services ("DCAS"). DCAS is the sole municipal civil service commission for the City of New York. City Charter § 811.

In a Comptroller's report dated November 17, 2008, investigators summarized their findings in which they concluded that the "best private sector matches" for each category of worker were as follows: Local 175 Landscapers for Group A workers; Local 79 Mason Tenders for Group B workers; and Local 79 Mason Tender Foremen for Group C workers (Pet. Ex. 5), mirroring the categories established in prior consent determinations. After issuing this initial report, the Comptroller reconsidered its decision and reopened its investigation, conducting additional employer interviews (Tr. 261-62). Considering that its investigation should have utilized only the DCAS position description for purposes of reviewing the actual in-title work performed, rather than the task list in the consent determinations (Tr. 259), the Comptroller decided that landscaping was out-of-title work for Laborers and City Laborers because other titles performed it and updated its findings to reflect these reconsiderations (Tr. 241).

The Comptroller issued its Preliminary Determination on March 18, 2009, which concluded that the Local 79 Mason Tenders was the best private sector analog for the Laborer and City Laborer titles in this locality (Pet. Ex. 10).

The Positions of the Parties

The parties have put forth different private sector groups as comparable matches to the Laborer and City Laborer titles.

The Comptroller contends that the Local 79 Mason Tenders do work comparable to complainants and make up thirty percent or more of the private sector collectively bargained workers in the same trade or occupation in the locality. Accordingly, the Comptroller asserts that complainants should be paid wages and supplemental benefits commensurate with those set forth in the Local's trade agreements with the Building Contractors Association, Inc., for the period 2001 through 2010 (Pet. Exs. 9A, 9B). The Union agrees with this finding.

OLR disputes that the Mason Tenders are comparable and contends that the Cleaner/Porter position of Service Employees International Union ("SEIU") Local 32BJ is the comparable private sector match. Petitioner considered Local 32BJ and rejected it as a match because, it contends, the work of Cleaners and Porters does not require physical strength or a commercial driver's license, two primary qualifications for the City Laborer position (Tr. 181).

Motion to Dismiss

On the eve of the commencement of the hearing, OLR filed an Article 78 petition in Supreme Court, New York County, seeking a stay of this proceeding, asserting that the tribunal

lacks jurisdiction to proceed in this matter. The stay was denied and the petition dismissed in *Bloomberg v. Thompson*, Index No. 402838/2009 (S. Ct. N.Y. Co., Nov. 12, 2009) (ALJ Ex. 3). OLR thereafter filed a motion in this tribunal seeking to dismiss the proceeding (Resp's Motion to Dismiss, by Letter dated November 12, 2009) ("Motion").

The motion to dismiss contends that OATH lacks the authority to hear this section 220 proceeding for several reasons. First, respondent contends that the tribunal may not hear a prevailing wage claim brought on behalf of a group of workers that are not entitled to the prevailing wage and that City Laborers are not entitled because the title is not listed in Part 38.

The Labor Law provides the basis for filing a prevailing wage complaint, stating that:

in a city of one million or more, where a majority of laborers, workmen or mechanics in a particular civil service title are members of an employee organization which has been certified or recognized to represent them pursuant to the provisions of article 14 of the civil service law or a local law enacted thereunder, the public employer and such employee organization shall in good faith negotiate and enter into a written agreement with respect to the wages and supplements of the laborers, workmen or mechanics in the title.

Labor Law § 220 (8-d). If the parties fail to arrive at agreement, the employee organization is "authorized to file a single verified complaint pursuant to subdivision seven herein, on behalf of the laborers, workmen or mechanics so represented." The statute provides, and respondent cites, no authority requiring a title be listed in Part 38 in order to file a complaint with the Comptroller. Subsection seven of section 220 provides that the Comptroller shall commence a compliance investigation upon the filing of "a verified complaint in writing of any person interested or of any employee organization pursuant to subdivision eight-d of this section." There is no requirement, that I can find, that requires an entitlement to the prevailing wage be established before the Comptroller commences his investigation, even though the Comptroller may in fact have adopted the convention of investigating only Part 38 titles (Tr. 198, 215). This dispute over the status of City Laborers appears to be an anomaly in the long history of prevailing wage disputes (Tr. 693).

Second, respondent contends that the Comptroller's preliminary determination finding the Mason Tenders the best private sector analog is invalid because the Comptroller's investigation was deficient in that it only surveyed work performed by City Laborers, which is

not a prevailing wage title, and failed to survey the work of any Laborers. Thus, the investigation and the preliminary determination resulting therefrom must be “dismissed” and a new investigation commenced of the tasks performed by the two remaining Laborers, who are entitled to the prevailing wage and were not surveyed by petitioner (Resp. Mem. at 10). It is undisputed that approximately two Laborers remain in service (compared to approximately 300 City Laborers), and neither Laborer was observed or surveyed during the Comptroller’s investigation; thus, the work of these two Laborers is not reflected in the investigation or preliminary determination. OLR argues that a new investigation must be conducted of the Laborer title only (Resp. Mem. at 10). The Comptroller did not become aware during the course of its investigation that there were only two Laborers remaining in the City’s workforce, and it inadvertently failed to visit any of the sites where the two remaining Laborers work (Tr. 128-29). The Comptroller acknowledges that it was taken by surprise by OLR’s recent assertion that there is any distinction, let alone a meaningful one, between the Laborer and City Laborer titles. For the past 26 years since the City Laborer title was created to replace the Laborer title, in 1984, the titles have been treated exactly the same with respect to wages and benefits in the numerous consent determinations that OLR and the Union have entered under section 220 of the Labor Law.

It is true that, by comparison to the large number of complainants involved in this filing, the variety in the work performed, and the large number and variety of City employers, the investigative materials were scant. For example, investigators visited only two of the 26 work sites that employ these complainants (Harlem Hospital and DCAS). The investigators also visited Queens College on two occasions, even though the City Laborers who work there are paid by the state, not the City, because it is a four-year college. While there are deficiencies in the investigation, there is no dispute that Laborers and City Laborers do the same work so there was little to be gained from surveying the only two remaining Laborers in the system. There is no basis or procedural mechanism for “dismissing” the Comptroller’s preliminary determination which is not even statutorily required. Nor is there a reason to order another investigation, which would only delay the proceeding and add nothing to the evidence submitted at the hearing. At this juncture, the question is simply whether the Comptroller proved his case. *See, e.g., Office of the Comptroller ex rel. Local 1087 v. Office of Labor Relations*, OATH Index No. 588/10 at 28 (June 23, 2010) (denying OLR’s request for “remand” for further investigation in case involving

locksmiths and supervising locksmiths); *Office of the Comptroller, ex rel. Local 1087 v. Office of Labor Relations*, OATH Index No. 2451/08 at 3 (Apr. 6, 2009) (denying OLR's motion to dismiss alleging the Comptroller failed to meet a statutory duty by not fully stating the cost of supplements in its preliminary determination and petition in case involving radio repair mechanics).

OLR also argues that OATH lacks authority to review a collateral challenge to the City Laborer's classification as a labor class title (Resp. Mem. at 11). I disagree that this case introduces a collateral challenge to the title's classification and am quite aware that OATH would have no authority to hear and decide upon one. At the end of this tribunal's Report and Recommendation, the City Laborer title will, indeed, remain a labor class title. This case, like the legion of cases that have gone before it, is a determination of whether the title ought to receive a prevailing wage under section 220 of the Labor Law. This is a question that I find to be safely within the carefully drawn jurisdiction of the tribunal.

As to respondent's primary argument, that City Laborers are not entitled to coverage, petitioner contends, as does the Union, that inclusion in Part 38 is not necessary to establish an entitlement to the prevailing wage for City Laborers because they are "laborers, workmen and mechanics" engaged in public work, and do not require inclusion in Part 38 for coverage under the statute (Tr. 1608-09). Secondly, petitioner asserts that OLR agreed by contract when the City Laborer title was created that the title would receive the prevailing rate and OLR is estopped, under the doctrine of judicial estoppel, from denying it now. I will address the second argument first.

History of the City Laborer Title

In and around 1984, the City of New York decided to earmark the Laborer title and to create a new title "City Laborer" in which all subsequent applicants for common laboring positions would be placed (Tr. 124, 733). *See also* Resp. Ex. 1a (1986 Resolution earmarking Laborer title); Resp. Ex. 2 (1984 Resolution creating City Laborer title). The Laborer title became a competitive class title in 1957 (Resp. Ex. 33). As a competitive class title, applicants were required to take a civil service exam but, by 1984, the City wanted to eliminate the cost of administering an exam (Tr. 742) (*see* Civ. Serv. Law § 44). So the new City Laborer title was created and placed in the labor class where no examination would be required.

These events flowed from a lawsuit filed by the Union, entitled *Zurlo v. City of New York*, by which the Union sought and obtained an order in Supreme Court requiring the City to administer an exam for the Laborer position. Index No. 17778/83, Mem. Dec. (Sup. Ct. N.Y. Co., Nov. 3, 1983) (Ascione, J.) (“*Zurlo*”)¹ (Tr. 727-28, 743, 772, 1652). The City had failed since 1973 to administer an exam, so the eligibility list for the title was exhausted in 1981 and Laborer positions were being filled by provisional employees, many of whom had served in that capacity for more than nine months, in violation of section 65(2) of the Civil Service Law (Union Ex. 122 at 1-2). The Office of Municipal Labor Relations (the predecessor agency to OLR) and the Union agreed to settle *Zurlo* by letter agreement dated November 15, 1984 (Pet. Ex. 11) (“1984 Letter Agreement”).

The 1984 Letter Agreement, among other things, acknowledged the parties’ agreement that the Laborer title would be earmarked and a new City Laborer title created to replace it (Pet. Ex. 11, Tr. 126). It also specifically provided that (i) the City Laborer title would “be covered by Section 220 of the Labor Law” (“Paragraph 1”) and (ii) the salary for the City Laborer title “shall be the same as that set forth in the wage determination for the title Laborer” (“Paragraph 2”). The Letter Agreement was not approved or endorsed by a court or by the Comptroller.

The Comptroller asserts that the 1984 Letter Agreement replaced the Laborer title with the City Laborer title which would perform the identical job duties and be compensated at the prevailing rate of wage, as the Laborer title was, and eliminated the administration of a competitive exam as the City was anxious to do (Pet. Mem. at 5; Tr. 1652, 1662-63). Prior to the settlement, the Supreme Court had ruled in *Zurlo* that the City had a constitutional and statutory obligation to competitively test for the Laborer position, because the City had classified it a competitive title, and concluded that it was not impracticable to devise a suitable exam (Union Ex. 122). Finding that the state constitutional requirement to make appointments according to “merit and fitness” was absolute and could not be avoided by the City’s claims of impracticality, the court directed that an examination be administered no later than June 1984. Under the terms of the settlement, the parties were to seek jointly to vacate the *Zurlo* court order (Pet. Ex. 11 at 3). The record offered no proof that they did.

¹ This order and judgment appears to have been affirmed by the Appellate Division in *Zurlo v. City of New York*, 101 A.D.2d 1036 (1st Dep’t 1984), and leave to appeal denied by the Court of Appeals in *Zurlo v. City of New York*, 64 N.Y.2d 604 (1985), although there was uncertainty about whether these one-line decisions were appeals of the unpublished Supreme Court decision cited here (Tr. 411).

The Union contends that making City Laborers entitled to the prevailing wage under section 220 was the clear intent of the agreement, that Paragraph 1 clearly expresses that intent, and that OLR is judicially estopped from denying now what it has already agreed to (Union Mem. at 19). *See American Express Bank, Ltd. v. Uniroyal, Inc.*, 164 A.D.2d 275, 277 (1st Dep't 1990), *lv. denied* 77 N.Y.2d 807 (1991) ("In interpreting a contract, the intent of the parties governs."). In addition to the 1984 Letter Agreement, the Union points to the numerous consent determinations entered since that time pursuant to section 220, all agreeing to pay Laborers and City Laborers the same wage.

Respondent claims that Paragraph 1 merely "memorialized . . . attempts to equalize the pay of City Laborer to that of the Laborer title" (Resp. Mem. at 4). This argument is unconvincing inasmuch as pay to the two laborer titles could have been equalized without any reference to section 220 of the Labor Law. It is my belief that the 1984 Letter Agreement memorialized OLR's agreement that City Laborers were entitled to a prevailing wage. But this conclusion need not be reached as this tribunal which has no jurisdiction to mediate contract disputes, nor the power to enforce them.

Commissioner James Hanley, who was the Deputy Director for the agency that negotiated the 1984 Letter Agreement on behalf of the City, denied any intent to give City Laborers an entitlement to the prevailing wage (Tr. 740). He testified that the intent was to tie the compensation of City Laborers to that of Laborers until the last Laborer retired from service. As for what would happen next, Commissioner Hanley stated "I don't know that we were looking that much forward to the future from 1984 to 2009" (Tr. 740-41).² He said he was unfamiliar with Part 38 and had only heard of it as a result of this hearing (Tr. 748).

Commissioner Hanley acknowledged that both Paragraphs 1 and 2 of the Letter Agreement were attempts to establish how salaries would be set but said the meaning of the statement in Paragraph 1 that City Laborers "shall be covered by Section 220 of the Labor Law" was unclear and did not "make sense" (Tr. 730, 732, 735). He said a provision entitling City Laborers to the prevailing wage would be unenforceable because the collective bargaining

² Commissioner Hanley was unaware of what was done to implement the terms of the Letter Agreement. Sherry Schultz testified that DCAS implemented various provisions of the agreement, such as creating the City Laborer title, earmarking the Laborer title, and moving provisional workers into the City Laborer title, but she was unaware of any efforts to reclassify the City Laborer title to receive the prevailing wage (Tr. 862-63). DCAS's failure to place the City Laborer title in Part 38 appears not to have been raised by any party (Tr. 764), suggesting it was not contemplated by the parties.

process could not confer section 220 rights and privileges on workers (Tr. 747).³ Ms. Schultz agreed that classification of a title could not be achieved by contract agreement (Tr. 886).

Alan Viani, who is currently retired, was Director of Research and Negotiations for District Council 37 in 1984 (Tr. 1644). He executed the Letter Agreement on behalf of the Union. He testified that Paragraph 1 was intended to ensure that the new City Laborer title would receive prevailing wage coverage under section 220 of the Labor Law (Tr. 1649-50). Mr. Viani noted that, at the time, the City was “broadbanding” and reclassifying a number of titles from competitive to non-competitive in order to eliminate as many civil service exams as it could (Tr. 1652). Ms. Schultz also noted the City’s efforts to broadband and consolidate titles beginning in the 1970s (Tr. 821-22). Mr. Viani denied there was any intent to sunset the provision establishing prevailing wage coverage for City Laborers when all the Laborers retired. He said the Letter Agreement was conceived out of the City’s interest in eliminating the competitive exam for Laborers, which Mr. Viani did not oppose “so long as [the City Laborers] would continue to be treated as prevailing rate employees in all respects. Period. The City agreed to that. That was the understanding” (Tr. 1652). He continued “I just wanted to make sure that the city laborers enjoyed all the rights and benefits that the competitive class laborer enjoyed.” *Id.*

The question here is whether, as the Union asserts, the 1984 Letter Agreement and five consent determinations that OLR entered with the Union on behalf of City Laborers constitute admissions either explicit or implicit that City Laborer is a prevailing wage title which estop the City from denying City Laborers a prevailing rate.

The Estoppel Argument

The general principle that estoppel cannot lie against a government agency, *see Parkview Associates v. City of New York*, 71 N.Y.2d 274 (1988), is inapplicable to this case. Generally, estoppel is prohibited where a party seeks to prevent a government agency from complying with a statutory obligation. *Slater v. Town of Albion*, 217 B.R. 394, 408 (W.D.N.Y. 1997). The reasoning behind the prohibition is that estoppel would compromise the governmental interest in enforcing the law. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 (1984). That reasoning does not apply here where petitioner does not seek to prevent a

³ While section 220 rights may have been beyond respondent’s authority to grant, it is also true that the City could not void its court-ordered obligation to create a competitive test for the Laborer title by simply agreeing with the Union that it did not have to create such a test (Pet. Ex. 11 at 3; Tr. 777).

government agency from complying with a statutory obligation, but seeks to force the government to act in concert with its own prior statements.

The doctrine of judicial estoppel prevents a party from asserting a factual issue in a legal proceeding that is contrary to a position that the party took in a prior legal proceeding. *Bates v. Long Island Railroad*, 997 F.2d 1028, 1037-38 (2d Cir. 1993), *cert. denied* 510 U.S. 992 (1993). Quasi-estoppel precludes a party from adopting a position in a subsequent action that is contrary to a sworn statement submitted to an administrative agency. *See, e.g., Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 (2009) (statements made on an income tax return were grounds for estoppel); *Mitchell v. Washingtonville Central School District*, 190 F.3d 1, 6 (2d Cir. 1999) (statements made in application for social security benefits may be grounds for judicial estoppel); *American Manufacturers Mutual Insurance Co. v. Payton Lane Nursing Home, Inc.*, 2010 U.S. Dist. LEXIS 6617, *46 (E.D.N.Y. 2010) (statements made in Certificate of Actual Cost submitted to HUD were grounds for quasi-estoppel).

Judicial estoppel has been applied to the government. *See, e.g., New Hampshire v. Maine*, 532 U.S. 742, 755 (2001) (applying judicial estoppel against a state); *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995) (“Judicial estoppel serves a different function from other forms of estoppel, such as equitable estoppel or collateral estoppel. . . . Consequently, judicial estoppel may apply in contexts when other forms of estoppel do not.”); *Shepardson v. Town of Schodack*, 195 A.D.2d 630 (3d Dep’t 1993) (applying judicial estoppel against the town), *aff’d*, 83 N.Y.2d 894 (1994); *Matter of City of New York*, 2010 NY Slip Op 50084U, *7 (Sup. Ct. Richmond Co. 2010) (comparing the policy behind judicial estoppel with that behind equitable estoppel and finding that “under certain circumstances, estoppel by inconsistent positions is available against a governmental agency”); *but see City of New York v. The Black Garter*, 273 A.D.2d 188 (2d Dep’t 2000) (City not judicially estopped from making an assertion about zoning restriction that was contrary to assertions it made in prior court proceedings).

The U.S. Supreme Court has stated that when determining whether to apply the doctrine, three factors should inform the decision:

First, a party’s later position must be “clearly inconsistent” with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create “the perception that either the first or the second court was misled.” . . . A third consideration is

whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001) (internal citations omitted); *see also Bates*, 997 F.2d at 1038.

The consent determinations, which contain the prior statements petitioner claims are inconsistent, are essentially settlement agreements in which employees waived their right to a hearing that would determine their entitlement to the prevailing wage. These agreements contain no affirmative language declaring the employees entitled to the prevailing wage. They do contain a disclaimer which states that “the basic rates and supplemental benefits agreed to herein . . . shall be deemed substitute rates and benefits in compromise and settlement of all issues of law and fact raised in the complaint” (Pet. Ex. 2 at 10). Thus, the consent determinations do not offer an opportunity to misunderstand their intent. Granting employees “substitute rates and benefits,” they do not claim to establish an entitlement to the prevailing rate. Putting aside the question of whether the Comptroller’s signature on these agreements constitutes sufficient “judicial endorsement,”⁴ I find that the consent determinations do not express positions that are “clearly inconsistent” with those respondent currently advances. I therefore find the doctrine of judicial estoppel inapplicable to the consent determinations. While I agree that respondent’s actions, in repeatedly agreeing to consent determinations which are offered only to prevailing wage titles in accordance with section 220, are inconsistent with its stated position today, judicial estoppel is about express statements and positions that would conceivably work a fraud upon the court. I am unable to conclude that that is what occurred here.

As for the 1984 Letter Agreement, it declares that “[t]he title City Laborer shall be covered by Section 220 of the Labor Law” (Pet. Ex. 11 at 2), a position clearly at odds with

⁴ As previously noted, the Comptroller is empowered to act as a judicial officer in these proceedings. *See* Labor Law § 220(7) & (8). Specifically, the Comptroller is deemed to be acting in a judicial capacity in connection with the investigation and hearing and may “issue subpoenas, administer oaths, and examine witnesses.” It is unclear whether the Comptroller’s endorsement of the consent determinations after the parties signed is considered judicial in nature by the statute. Typically, a settlement, which the consent determination is in essence, “neither requires nor implies any judicial endorsement of either party’s claims or theories,” and thus does not necessarily provide the “prior success” necessary for judicial estoppel. *Universal City Studios, Inc. v. Nintendo Co.*, 578 F. Supp. 911, 921 (S.D.N.Y. 1983). Settlement agreements have succeeded as a basis for judicial estoppel only when there is evidence that a party’s position was endorsed by the judge. *See New Hampshire v. Maine*, 532 U.S. 742 (2001) (endorsement shown where court heard arguments for and against a consent decree before directing that it be entered). The goal of the doctrine is to “avoid a fraud upon the court and a mockery of the truth-seeking function.” *Festinger v. Edrich*, 32 A.D.3d 412, 413 (2d Dep’t 2006). Query whether that goal is served in the context of negotiated consent determinations.

respondent's current position. However, this document fails to establish "judicial acceptance of an inconsistent position" in that it was never endorsed by the Comptroller or by any other judicial officer. *New Hampshire v. Maine*, 532 U.S. at 750. See *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 148 (2d Cir. 2005) ("Our circuit has consistently limited the application of judicial estoppel to situations where a party both takes a position that is inconsistent with one taken in a prior proceeding, and has had that earlier position adopted by the tribunal to which it was advanced"). Therefore, the doctrine of judicial estoppel does not apply to it.

City Laborers Are Prevailing Rate Workers under Section 220 of the Labor Law

As noted above, OLR's primary contention is that City Laborers are not entitled to a prevailing wage because, unlike the Laborer title, the title is not listed in Part 38. OLR asserts that, in the City of New York, "only an official classification from DCAS can place a city title under Labor Law Section 220" (Resp. Mem. at 10), which would appear to place primary authority for making prevailing wage determinations in the hands of DCAS rather than the Comptroller, as is provided in section 220. OLR cites no legal authority for its contention.

Petitioner contends that City Laborers are "laborers, workmen and mechanics" engaged in public work and, under the statute, are entitled to a prevailing rate for those reasons alone. Labor Law § 220 (3)(a). Petitioner asserts that placement in Part 38 to designate City Laborer a prevailing wage title is irrelevant because Part 38 is established to provide the prevailing wage to graded competitive titles that would not otherwise be entitled to it. City Laborer, an ungraded labor class title that performs maintenance and construction-related work in public buildings, need not be placed in Part 38 to be entitled to the prevailing wage (Union Mem. at 28). And there is no City authority that can take the entitlement away from them.

Petitioner correctly states the relevant legal standard. See *Kelly v. Beame*, 15 N.Y.2d 103, 110 (1965) (Comptroller must fix and pay prevailing rates based on work actually performed within civil service title); *Erie County Industrial Development Agency v. Roberts*, 94 A.D.2d 532, 537 (4th Dep't 1983) (interpreting "laborers, workmen and mechanics" to mean "workers involved in the construction, replacement, maintenance and repair of 'public works'" and noting that courts have excluded school bus drivers and laundry workers from this group). Moreover, there is no dispute on this record that the work being performed by City Laborers, all of whom are employed by city agencies, city-run hospitals, or city-funded CUNY colleges performing maintenance, repair and improvements upon public facilities, is public work. See

Gaston v. Taylor, 274 N.Y. 359 (1937) (section 220 is applicable to public employment as well as public contracts); *Wood v. City of New York*, 274 N.Y. 155, 159-60 (1937). Thus, I find that the Laborers and City Laborers are “laborers, workmen and mechanics” engaged in public work in accordance with Labor Law section 220 (3)(a).

The courts consistently have held that “laborers, workmen and mechanics” engaged in public work, who work in “ungraded” civil service titles, are entitled to a prevailing wage. *See, e.g., Cayuga-Onondaga Counties Bd. of Cooperative Educational Services v. Sweeney*, 89 N.Y.2d 395, 404-05 (1996) (civil service classification as temporary seasonal workers in ungraded positions were entitled to section 220 prevailing wage); *Casey v. Catherwood*, 28 N.Y.2d 702 (1971) (bridge painters who held graded positions in the noncompetitive class were not eligible for prevailing wage); *Corrigan v. Joseph*, 304 N.Y. 172 (1952) (city transportation employees who initially held positions in the ungraded services of the competitive class but were reclassified to graded positions were no longer entitled to section 220 protection); *Gaston v. Taylor*, 274 N.Y. 359 (1937) (structure maintainers in ungraded positions and not subject to competitive testing were entitled to a comptroller investigation as to the prevailing rate of wages); *Acunci v. Ross*, 73 A.D.2d 643 (2d Dep’t 1979) (prevailing wage was not available to village workers employed under various graded titles in the competitive, noncompetitive and labor classes, pursuant to holding in *Corrigan*); *Favreau v. Catherwood*, 62 Misc.2d 432 (S. Ct. Albany Co. 1970) (graded employees in noncompetitive class were not entitled to prevailing wage). This is true without respect to inclusion in Part 38.

All of these cases uphold section 220 protection for ungraded titles and deny it to graded titles. The holdings are consistent whether the title is placed in the competitive, noncompetitive, or labor class. For example, *Acunci v. Ross* involved 28 workers in various graded titles in the competitive, noncompetitive and labor classes who sought a prevailing wage determination. After a hearing that the court limited, by stipulation, to the issue of whether the employees were graded civil service employees, the court held that, under *Corrigan*, these employees were not entitled to a prevailing wage because the civil service commission had classified them in graded positions. *Acunci*, 73 A.D.2d at 643-44. In *Favreau*, the court held that grading was determinative, not whether the title was in the competitive or noncompetitive class. *Favreau*, 62 Misc.2d at 433.

Indeed, the reclassification of titles from ungraded to graded status prompted some of the lawsuits, as workers challenged the removal of their positions from 220 coverage. *See Corrigan*, 304 N.Y. 172; *Buffalo Building Trades Council v. Bd. of Education*, 43 A.D.2d 796 (4th Dep't 1973), *aff'd*, 36 N.Y.2d 782 (1975) (finding that the board had authority to reclassify ungraded positions in the competitive class as graded positions and that section 220 was inapplicable to the graded civil service).

The holdings in *Golden v. Joseph* and *Don v. Joseph* are not in conflict with my finding here. In both cases, the Court of Appeals upheld the prevailing wage for competitive class workers because their titles were listed in Part 38, stating that they were “classified by the municipal civil service commission in Part 38 of the competitive class, in a salary grade ‘at the prevailing rate of wages . . . as determined by law.’” *Don v. Joseph*, 1 N.Y.2d 708, 710 (1956) (emphasis added) (involving carriage upholsterers); *Golden v. Joseph*, 307 N.Y. 62, 68 (1954) (involving stationary firemen). Nevertheless, the court stated in *Golden* that “grading is a controlling factor in the fixing of compensation for incumbents of positions in the graded services of the competitive class.” *Id.*, citing *Corrigan*, 304 N.Y. at 182. The court noted that placing or “grading” the petitioners in Part 38 entitled them to section 220 protection without their having to sue for a prevailing rate determination. *Id.* Thus, it left open the possibility that, if not placed in Part 38, workers may sue to obtain a determination. Neither case held, as OLR suggests, that inclusion in Part 38 is the exclusive avenue to obtaining a prevailing wage.

The framework underlying these cases arises from a preference for merit-based employment established in state statutory and constitutional law. Article V, Section 6 of the state constitution established a civil service system premised upon merit and fitness, providing in part as follows:

Appointments and promotions in the civil service of the state and of all civil divisions thereof, including cities and villages, shall be made *according to merit and fitness* to be ascertained, so far as practicable, by examination which, as far as practicable, shall be competitive.

N.Y. Const. Art. V, § 6 (emphasis added). The Civil Service Law embodies that mandate through the classified civil service system, which is administered in the City of New York by DCAS.

As the city's municipal civil service commission, DCAS is empowered to create and administer the City's system of classified service. *See* Civ. Serv. Law § 17. The City Charter also provides that:

The commissioner [of DCAS] shall be responsible for citywide personnel matters, as set forth in this chapter, and shall have all the powers and duties of a municipal civil service commission provided in the civil service law or in any other statute or local law other than such powers and duties as are by this chapter assigned to the mayor, the city civil service commission or the heads of the city agencies.

City Charter § 811. Section 20 of the Civil Service Law provides that:

Each municipal civil service commission *shall prescribe, amend and enforce suitable rules for carrying into effect the provisions of this chapter and of section six of article five of the constitution of the state of New York*, including rules for the jurisdictional classification of the offices and employments in the classified service under its jurisdiction, for the position classification of such offices and employments, for examinations therefore and for appointments, promotions, transfers, resignations and reinstatements therein, all in accordance with the provisions of this chapter.

Civ. Serv. Law § 20(1) (emphasis added). DCAS also has authority to assign a “pay plan” to workers in the classified service (*see* Resp. Mem. at 8). The City Charter authorizes DCAS to “develop and recommend to the mayor”:

. . . career, salary and wage plans providing for the creation, abolition and modification of positions and grades and fixing salaries of persons paid from the city treasury, subject to the provisions of this charter, the civil service law, other applicable statutes and collective bargaining agreements.

NYC Charter § 814(a)(10). Part 38, as discussed below, is a category of pay plan that has existed since at least 1951 (Tr. 796).

The classified service consists of four “jurisdictional classes”: the competitive class, the non-competitive class, the exempt class, and the labor class. Under section 44 of the Civil Service Law, the competitive class is presumptive because, in accord with the policy mandate for merit and fitness, the preferred way to hire is by competitive examination (Tr. 815). The Civil Service Law provides that vacancies in the competitive class “shall be filled, as far as

practicable, by promotion from among persons holding competitive class positions in a lower grade in the department in which the vacancy exists.” Civ. Serv. Law § 52(1), formerly § 16(1), quoted in *Corrigan*, 304 N.Y. at 180. Section 52 also declares that an increase in the salary of a civil service worker “beyond the limit fixed for the grade in which such office or position is classified, shall be deemed a promotion.” Civ. Serv. Law § 52(9), formerly § 16(7), quoted in *Corrigan*, 304 N.Y. at 180.

Competitive exams are not required for the exempt, non-competitive, and labor classes as they are positions for which it is not practicable to test competitively (Tr. 786-87) (*see* Civ. Serv. Law §§ 41, 42 & 43). Those holding positions outside the competitive class are not allowed to take promotional exams; promotions only occur from one competitive title to a higher competitive title. Thus, a position in the labor class has no lines of promotion. One may move to a better title by taking an entry level exam but promotional exams take priority over open competitive exams (Tr. 815-16). An open competitive exam is open to anyone who meets the qualifications set forth in the notice of examination for the title and is conducted when there is no lower title. Promotional exams are only open to those listed in eligible titles in the notice of examination.

The Laborer title was placed in the competitive class, and in Part 38, in 1957 (Resp. Ex. 33; Tr. 802). According to Ms. Schultz, the act of adding the title to Part 38 made Laborers entitled to a prevailing wage (Tr. 807). According to the wording of Part 38 itself, that appears to be the case. The language in Part 38 states in its entirety: “The compensation for these positions is fixed pursuant to Section 220 of the Labor Law” (Resp. Ex. 39 at 338).

Part 38 is a sub-schedule of the Directory of the Classified Service of the City of New York (the “Directory”), portions of which were submitted by OLR as Respondent’s Exhibit 39. The Directory lists all positions in the classified service by category and organized into schedules. Schedule V is the competitive class. (Schedule II is the Exempt class, Schedule III is the non-competitive class, and Schedule IV is the labor class). Schedule V has three sub-schedules: “C-X”, “C-XI”, and “C-XII” (Resp. Ex. 39 at i, ii, iii). Sub-schedule C-X is entitled “The Skilled Craftsman and Operative Service [038]” and is referred to as Competitive Rule X or “Part 38” (Resp. Ex. 39 at 338-346; Tr. 799). Part 38 is a list of approximately nine dozen

competitive class titles. The City Laborer title is not listed and probably could not be as it is a labor class title.⁵

The sub-schedules can be cross-referenced to the city's Personnel Rules and Regulations in that Rules X, XI and XII are part of the Appendix to the city Personnel Rules and Regulations. Rules X, XI and XII are each applied to each category of the classified service: competitive, non-competitive, exempt and labor. Rule XI is entitled "Classification and Compensation of Career and Salary Plan Positions" (*see* Appendix A to 55 RCNY). Ms. Schultz testified that the Collective Bargaining Law requires that a majority of city positions be paid under the "umbrella" of the Career and Salary Plan to ensure uniformity in the terms and conditions of employment and requires the union representing the majority of employees under the Career and Salary Plan to be the spokesperson for the unions in negotiating the citywide agreement (Tr. 791). Rule XII is entitled "Classification of Positions in the New York City Housing Authority." Rule X is entitled "Classification of Positions *Not Included* in the Career and Salary Plan or in the NYC Housing Authority" (emphasis added). According to Ms. Schultz, Rule X is a catchall for those positions whose compensation is not determined under the city's Career and Salary Plan or its Housing Authority Plan. It consists of those titles that are not "mandatorily covered by . . . the Career and Salary Plan which is the citywide agreement" (Tr. 791).

When it was created in 1984, the City Laborer title was placed in Rule X (Resp. Ex. 2). It is listed in Schedule VI for labor class titles (Resp. Ex. 39 at 276). Thus, both the Laborer and City Laborer titles are subject to Rule X, outside of the career and salary plan.

In the case of competitive class titles, there is a tension between the desired merit-based system and the prevailing wage law which increases wages without regard to promotional merit, so courts have denied prevailing wage status to graded competitive positions. In so doing, they seek to ensure that "an employee in the competitive class of civil service may not gain an increase in the rate of pay in excess of the range of compensation fixed for his grade, without passing a competitive examination and thereby gaining a promotion." *Corrigan*, 304 N.Y. at 181 (citing *Ryan v. Kaplan*, 213 A.D. 131 (1st Dep't), *aff'd*, 240 N.Y. 690, 691 (1925)). *See also Wood v. City of New York*, 274 N.Y. 155, 159 (1937) ("There is force in the argument that

⁵ Anne Chamberlain, who as Director of Classification and Compensation at CUNY has responsibility for some 126 Laborers and City Laborers at CUNY's two- and four-year colleges, was familiar with the state Civil Service Law but had no awareness of Part 38 (Tr. 1066-67). The "Skilled Craftsman and Operative Service" is a grouping not used by CUNY.

section 220 . . . was not intended to apply to competitive positions.”). But the constitutional mandate for merit and fitness is undisturbed by providing prevailing wage protection to ungraded positions such as City Laborer.

In 1996 in *Cayuga-Onondaga Counties*, the Court of Appeals delivered its most recent review of the applicable standard and again based its holding on the fact that the temporary seasonal workers who petitioned for a prevailing wage were in ungraded positions such that “awarding them increases in remuneration to the level of prevailing wage rates would not effectively grant them a promotion to above-grade salary levels. Hence, no violation of Civil Service Law principles of merit and fitness promotions are implicated by application” of section 220. *Cayuga-Onondaga Counties Bd. of Cooperative Educational Services*, 89 N.Y.2d at 404.

It seems pretty clear that City Laborer is an ungraded title. OLR concedes the title has no minimum or maximum salary or wage rate set for it (Tr. 1634), and this appears to be the standard definition of “grading,” which deserves some discussion.

Sherry Schultz, who as the Director of Classification and Compensation at DCAS since 1993 is responsible for classifying and reclassifying all titles in the City’s classified service, was qualified as an expert at the hearing. She also maintains the pertinent records for all civil service titles and creates job specifications for all city titles (Tr. 781-85). She testified that she did not know exactly what grading was, although she had heard of it and read about it (Tr. 848). She thought it referred to the fact that a salary had been set for the position. While expressing doubt that grading also encompassed lines of promotion in addition to salary, Ms. Schultz candidly stated that she was “not quite sure what grading means” (Tr. 857). This was not unusual as uncertainty on the topic was expressed many times on this record.

Fundamentally, grading relates to compensation. Historically, under Civil Service Rules, a “grade” denoted “the order or standing of a position with reference to the compensation attaching to it.” *Beggs v. Kern*, 284 N.Y. 504, 511 (1940), quoting the Municipal Civil Service Rules; see *Slavin v. McGuire*, 205 N.Y. 84, 90 (1912) (quoting the rules which define “grade” in reference to “subdivisions of the competitive class, arranged for purposes of promotion and based upon the relative character of the duties, or upon the amount of compensation regularly attaching to the positions contained therein.”). The current Personnel Rules and Regulations define “grade” or “salary grade” as “the order or standing of a position with reference to the full-time annual compensation attaching to it or, if compensation be paid on other than a full-time per

annum rate, then the equivalent of such rate as determined by the commissioner” of DCAS. 55 RCNY, appendix A, rule 1 (definitions). Irrespective of the lack of a conclusive definition for grading in prior case law, the tribunal concludes that City Laborer is not a graded position.

The record shows that Laborer is a graded position. A 1955 Resolution of the civil service commission assigned a “Career and Salary Plan” to the Laborer title, with a minimum and maximum salary range and fixed annual salary increments (Resp. Ex. 32). In 1957, the title was moved to the competitive class and placed in Rule X along with the same salary range and increments (Resp. Ex. 33). The fact that the Resolution set a minimum and maximum salary range with annual increments and called it a “career and salary plan” indicated to Ms. Schultz that Laborer was a graded title (Tr. 852). By that definition, City Laborer would be an ungraded title. The 1984 Resolution establishing the City Laborer title and placing it in the labor class afforded the title no salary range and did not assign it a “career and salary plan” (Resp. Ex. 2).

I therefore find that, for the City Laborer title which is neither graded nor competitive, there was no need to place it in Part 38 to receive the protections of Labor Law section 220.

Merely citing the purported formality of the listing in Part 38, respondent has articulated no substantive reason why the Laborer title should be entitled to a prevailing wage while the City Laborer title should not. There is no qualitative difference in the duties performed by Laborers versus City Laborers, which OLR as much as concedes (Resp. Mem. at 11).⁶ The job descriptions are virtually identical. Sherry Schultz characterized them as “interchangeable” (Tr. 859-60). After all, the City Laborer title was created for the express purpose of replacing the Laborer title.

Moreover, there is a sound basis for finding that the City Laborer, who has no set salary range and for whom no promotional opportunities exist, is precisely the type of worker the legislature saw fit to protect by enacting section 220. Often noted is the statute’s origin as “an attempt by the State to hold its territorial subdivisions to a standard of social justice in their

⁶ In its memorandum of law, OLR submits a statement of facts that is generally agreed to by all parties: Laborers and City Laborers titles are utilized in numerous New York City Agencies. Their job duties and responsibilities vary and are tailored specifically to the individual agency. However, generally, both Laborers and City Laborers “perform common unskilled laboring work requiring physical strength.” This work requires “little skill or training” as employees’ job duties often include heavy moving and lifting, some construction work, landscaping work and the operation of motor vehicles in the normal course of business. (Resp. Mem. at 2).

dealings with laborers, workmen and mechanics” as is the need for it to be interpreted with a “degree of liberality.” *See Austin v. City of New York*, 258 N.Y. 113, 117 (1932).

DCAS’s power under section 20 of the Civil Service Law and under the City Charter is constrained by the statutory scheme established by the state constitution, Civil Service Law, and Labor Law. *E.g.*, Civ. Serv. Law § 20(1) (“shall prescribe, amend and enforce suitable rules for carrying into effect the provisions of this chapter and of section six of article five of the constitution of the state of New York.”); NYC Charter § 814(a)(10) (“subject to . . . the civil service law, other applicable statutes and collective bargaining agreements”). Any suggestion that its authority extends to excluding ungraded labor titles from the protection of section 220 would contradict the express purpose of a law designed to protect laborers who perform public work, as do these City Laborers.

In accordance with the foregoing, I find the City Laborers entitled to a prevailing wage determination. I also find that the Union was authorized to file a complaint on behalf of City Laborers and to obtain an investigation under section 220. The fact that only City Laborers were observed and surveyed did not invalidate the Comptroller’s investigation inasmuch as there was virtually no substantive difference between the duties and job descriptions of the two titles and no formal requirements for the investigation set forth in section 220.

Respondent’s motion to dismiss on the grounds that this proceeding is jurisdictionally deficient is therefore denied.

The Proof

In support of its finding that complainants are entitled to a prevailing wage tied to the Mason Tenders as the private sector match, the Comptroller presented the testimony of Jeffrey Elmer, Assistant Comptroller in the Comptroller’s Bureau of Labor Law.

The Union presented the testimony of its president, Kyle Simmons, who works as a City Laborer for the Department of Environmental Protection, and several other union members including Ricky Clayton, Alfred Della Valle, Antonio Gaudino, John Powers, and Joseph Perry, who are employed by mayoral agencies, the Health and Hospitals Corporation, and the City University of New York.

OLR presented the testimony of its Commissioner James Hanley and several supervisors who work at the city’s mayoral agencies, Health and Hospitals Corporation, and the City University of New York. OLR also called Sherry Schultz, director of classifications for DCAS,

Michael Doherty, president of the Building Maintenance Service, and two of the Comptroller's employees involved in its investigation, Jeffrey Elmer and Paul Brumlik. OLR also submitted 15 affidavits of employers describing the work performed by City Laborers.

Both the Comptroller and the Union also called rebuttal witnesses.

Complainants are more than 300 Laborers and City Laborers employed by the City of New York (Resp. Ex. 53).⁷ Only two of this number are Laborers. City records indicate that one Laborer and 147 City Laborers are employed by 12 city mayoral agencies, including police, fire, sanitation, the Administration for Children's Services ("ACS"), DCAS, Department of Cultural Affairs ("DCA"), Department of Education ("DOE"), Department of Health and Mental Hygiene ("DOH"), Department of Environmental Protection ("DEP"), Department of Transportation ("DOT"), Human Resources Administration ("HRA"), and the Manhattan District Attorney's Office (Resp. Ex. 53). There are 109 City Laborers employed by the Health and Hospitals Corporation in city-run hospitals that include Bellevue, Coney Island, Elmhurst, Coler-Goldwater, Harlem, Jacobi, Kings County, Lincoln, McKinney, Metropolitan, Morrisania, Queens and Woodhull hospitals (Resp. Ex. 55). And there are 42 City Laborers and one Laborer employed at its six two-year colleges within the City University of New York ("CUNY") system, including Borough of Manhattan Community College ("BMCC"), Bronx Community College, Hostos Community College, Kingsborough Community College, Laguardia Community College, and Queensborough Community College (Tr. 1019) (Resp. Ex. 46 at p. 8). CUNY is its own municipal civil service commission with its own system of classification. It employs Laborers and City Laborers at both its two- and four-year colleges and has always paid them the same wage rate negotiated in the City by OLR and the Union, even though wages for workers at its four-year colleges are funded by New York State (Tr. 135, 788, 1071).

There are two workers currently in the Laborer title: William Wilson who works at BMCC and James Lamberti who works for DOT at the Staten Island ferry (Resp. Ex. 53).

The DCAS job specification for the Laborer position contains broadly stated duties and responsibilities:

⁷ The actual number of Laborers and City Laborers varies depending upon source: OLR, CUNY or the Union. The Union believes there are 373 City Laborers but their data includes those employed by four-year state-funded CUNY schools (Union Mem. at 7). I used the data submitted by OLR for workers employed by the mayoral agencies (Resp. Ex. 53). I used data submitted by the Health and Hospitals Corporation to count its workers (Resp. Ex. 55) and data submitted by CUNY to count workers employed in its two-year colleges (Resp. Ex. 46). New York City College of Technology, which offers two-year and four-year degrees, was not included in the count although the record indicates it employs three City Laborers (Tr. 1584).

To do common laboring work exclusively, which requires little skill or training but for which physical strength is essential; may be required to operate motor vehicles in connection with the performance of laboring duties.

(Pet. Ex. 4A). A motor vehicle operator's license valid in the state of New York is required. No formal education or experience is required, and there are unspecified medical, physical, and age requirements. Although positions in the competitive class were intended to have lines of promotion (Tr. 814-15), there are no direct lines of promotion for the Laborer position.

The duties and responsibilities of a City Laborer are virtually identical to those of the Laborer and are similarly broad:

Under immediate supervision, in various City agencies, performs common unskilled laboring work requiring physical strength. Moves, lifts and carries items of various weights and sizes. May be required to operate motor vehicles in connection with the performance of duties. Performs related work.

(Pet. Ex. 4B). Unlike a Laborer, a City Laborer must obtain a Class B commercial driver's license during the course of his or her employment; some positions may require it at the outset. No formal education or experience is required, and there are unspecified medical and physical requirements. There are no direct lines of promotion. Despite the physical requirements noted, there has never been an examination administered for that purpose (Tr. 125).

Work Performed by Laborers and City Laborers

City University of New York

Anne Chamberlain, Director of Classification and Compensation at CUNY, testified generally about the tasks and responsibilities of the City Laborers and Laborer at CUNY's two-year colleges; she does not supervise or regularly observe their work on job sites. She noted that generally there was no difference between the work performed by Laborers as opposed to City Laborers although she noted that each campus is unique (some have beaches and large amounts of acreage while others exist in urban environments) so some differences in duties would be attributed to the inherent difference in individual settings (Tr. 1053). She reviewed the broad list of tasks and responsibilities contained in CUNY's job specifications for the two titles, noting that the list was not exclusive (Tr. 1030; Resp. Ex. 47). The job tasks are organized into five categories: assisting skilled trades and maintenance personnel (*e.g.*, assisting in concrete work, demolition, moving and holding sheetrock and pipes, digging trenches and setting up

scaffolding), lifting and transporting large and/or heavy items (*e.g.*, furniture, files and supplies), collection and processing trash and related material (*e.g.*, heavy debris, salvage and trash and recycling), grounds maintenance (*e.g.*, mowing lawns, trimming shrubs and hedges, and cleaning outdoor drains), and related duties (*e.g.*, stock room receiving and distribution, driving and inspecting vehicles, and humane trapping of animals) (Resp. Ex. 46). She indicated there was overlap between the work performed by complainants and the work of plumbers helpers and electricians helpers (Tr. 1082).

The witness testimony detailed below was offered by employees of six CUNY institutions and shows a wide range of laboring work performed by complainants. The evidence indicated that they most often (i) assist the trades by carrying construction materials to work sites and in other ways, (ii) dispose of work site debris and clean up at the end of the job, (iii) lift and transport heavy objects, (iv) perform landscaping or other grounds keeping, (v) do demolition, (vi) move furniture when renovations are performed and when relinquishment is required, and (vii) remove snow. They also operate motorized equipment such as forklifts.

Edward Sullivan, Director of Operations, Planning and Construction for the Borough of Manhattan Community College, a two-year college, testified that BMCC employs six City Laborers and one Laborer, William Wilson (Tr. 1360). There is no distinction between the duties of a Laborer or a City Laborer. These workers sweep the outside ramp and other areas in the morning, assist the skilled trades by moving equipment and supplies to work sites (Tr. 1363-64), remove construction debris for disposal, move office furniture (desks and file cabinets), drive vehicles conducting pickup and delivery of materials, perform set up for special events, remove snow, pull weeds, and water trees and shrubs (Tr. 1359-60). The minor landscaping work is a small part of the job on this urban campus. They do no demolition or planting (*see* Resp. Ex. 48, Tr. 1042).

Jaime Gonzalez, a City Laborer, works for Bronx Community College, a two-year college that employs six City Laborers (Tr. 1575-79). They assist the trades (plumbers, carpenters, electricians, and painters) and perform garbage removal, snow removal and landscaping. For the trades, they carry materials to and from job sites (pipes, couplings, electrical panels, lumber and sheetrock) and clean up the work site. Landscaping work includes grass cutting and raking leaves (Tr. 1582). They also fill sinkholes caused by campus

construction. The large 55-acre campus has 22 buildings, so Mr. Gonzalez spends perhaps an hour a day indoors and the rest of his workday is outdoors.

Geraldine Morseman is a City Laborer employed by Kingsborough Community College (“KBCC”), a two-year CUNY college with an 82-acre campus and a beach (Tr. 1560, 1568). There are 11 City Laborers at KBCC. They assist the trades (carpenters, electricians, plumbers, maintenance and painters) by carrying materials to the job site, including wood, sheetrock, bags of cement, pipes and tools, and they clean up by disposing debris in dumpsters (Tr. 1561-67). They transport heavy electrical materials in bobcats. They dig trenches for electrical pipe, mix cement, patch parking lots with asphalt, and demolish walls (drywall and cement). They are frequently outdoors and also do landscaping. They clear the beach of trash and logs and other heavy debris that washes up (Tr. 1568-69). They also shovel and plow snow and put down salt; they blow leaves. In an eight-hour day, the City Laborers might spend three hours on landscaping and the rest working with the trades (Tr. 1565). They move furniture when renovation or relinquishment is being done (Tr. 1572). While they dispose of large refuse items in dumpsters, they do not empty indoor trash cans.

Peter Dovidio is a City Laborer at NYC College of Technology (“NYCCT”), which offers two-year associates degrees (Tr. 1584-90). Three City Laborers work there. They assist the trades (plumbers, electricians, maintenance, painters, and a carpenter) by carrying their materials (sheetrock, pipe and conduit, paint) to work sites and disposing of debris. They help the carpenter mix and pour cement floors and demolish sheetrock walls and cement walls and floors. They use tools such as sledge hammers, a power floor jack and jackhammer. They shovel snow near the campus’s eight buildings. They move furniture, but do not clean bathrooms (Tr. 1591).

Roberto Cuevas is one of nine City Laborers who work at Queensborough Community College (“QBCC”), a two-year CUNY college with a 28-acre campus. There, City Laborers assist the trades (carpenters, painters, plumbers, maintenance, electricians, and steam fitters), demolish walls, and move heavy objects including furniture (Tr. 1522-28). They work indoors doing this type of work 70% of the time. During the other 30%, they work outdoors on grounds keeping in which they pick up trash, cut grass and dig holes for tree planting (Tr. 1530). In winter, they also shovel snow. City Laborers worked on a two-year project building a new Holocaust Center at the college during which they assisted the trades, demolished walls, moved

large machinery and construction materials (*e.g.*, sheetrock, drywall, studs, pipes, and plumbing materials), held studs, sheetrock, and plumbing for the trades, and ripped up carpet and demolished flooring (Tr. 1528). They use tools such as sledge hammers, jack hammers and sawzalls, and operate box trucks, backhoes, bobcats and hi/los (Tr. 1532). In another project, City Laborers assisted in the renovation of the library building, removing furniture, carpet and light fixtures, delivering rock, plywood, and ceiling and floor tiles to the work site, and assisting in mixing and pouring cement (Tr. 1529).

Joseph Perry works as a City Laborer at Queens College, a four-year CUNY college with an 83-acre campus (Tr. 604-07, 624). Thirteen City Laborers work there. At Queens College, the City Laborers assist the trades (carpenters, painters, plumbers, steam fitters, electricians, engineers, and an auto mechanic). To perform their work, which includes what Mr. Perry called “heavy duty landscaping,” they operate garbage trucks, backhoes, bobcats, front-end loaders, bulldozers, sawzalls, chain saws and chippers. He identified several photographs taken of work being conducted by City Laborers including repair of potholes in a parking lot, trench digging and backfilling in connection with electrical work, sidewalk patching, and driving large trucks to transport materials (Union Exs. 71-80). Because the campus has so much acreage, the City Laborers have been used to conduct extensive landscaping such as planting and removing trees. The college has for several years received regular delivery of new trees as a part of a Mayoral program, and City Laborers were used to receive delivery of and plant those trees (Tr. 619-20; Union Ex. 89). They have excavated to remove trees, grinded the stumps, leveled the area with a bulldozer, laid topsoil and sprayed seed (Tr. 621, 626; Union Exs. 94, 95). City Laborers also planted trees for a 9/11 Memorial built on campus and added and replaced trees when new dormitories were built (Tr. 654, 661).

Perry testified that, in an eight-hour day, his landscaping duties take two to three hours and the rest of his time is spent working with the trades (Tr. 1596). City Laborers also carry materials to job sites such as piping for steam fitters and plumbers, do demolition, and dig trenches to repair and replace light poles. They do not clean bathrooms (Tr. 1599).

City Hospitals

The witness testimony detailed below was offered by supervisors and workers at Health and Hospitals Corporation to show the wide range of work performed by City Laborers in the city-run hospitals, including maintenance, construction and grounds keeping. The evidence

consistently showed that these workers most often (i) assist the trades by carrying construction materials to work sites and in other ways (*e.g.*, mixing cement), (ii) dispose of debris and clean the work site, (iii) perform demolition, (iv) move furniture, (v) load and unload heavy objects, (vi) perform grounds keeping or landscaping, and (vii) remove snow.

Michael Rawlings, Assistant Director of Maintenance at Bellevue Hospital, manages the maintenance shops for all the trades used at the hospital (carpenters, plumbers, electricians, painters, locksmiths, steam fitters, engineers and oilers) (Tr. 1191-95). He supervises eight City Laborers whose tasks include assisting the trades by moving materials to the job site, loading and unloading trucks, removing debris and cleaning the shop at the end of the day, putting away supplies, moving furniture, and doing minor demolition such as making holes in walls for pipe repair. They perform major demolition on occasion. They also do routine maintenance repair. One City Laborer is assigned to the garden to plant, prune, rake, water plants, and clean up.

Testifying from Harlem Hospital were Ricky Clayton, a City Laborer, and his supervisor Anthony Raffo, a Supervisor of Mechanics and Facilities Maintenance who oversees the shops in the maintenance department. Raffo supervises the ten City Laborers who primarily assist the trades (electricians, plumbers, steam fitters, carpenters, masons and painters) by carrying materials to and from job sites (lumber, brick, cement block, metal studs, sheetrock), load and unload heavy objects and materials, perform demolition, and remove rubbish and debris from job sites and load it into the dumpster (Tr. 508, 538, 544, 1197-99; Union Ex. 144). City Laborers are assigned to work full time in the electrical, carpenter, and masonry shops (Union Ex. 144). The two City Laborers in the mason shop mix cement, carry block and brick, lay tile, and clean up. Raffo said these workers can demolish anything needed in construction, including cement block, brick, plaster walls and ceilings (Tr. 1200; Union Ex. 30). Clayton detailed a large job conducted over eight months by four City Laborers that included demolition of walls and ceilings on the 7th and 8th floors of the hospital with the use of sledge hammers, sawzalls and a chipping gun (Tr. 511-12). On days when work is light, City Laborers move furniture and set up for special events by moving tables and chairs. They also remove snow. City Laborers do not mop or clean bathrooms or furniture (Tr. 522).

Clayton testified that when he worked as a Mason Tender from 2002 to 2005, he assisted bricklayers, loaded scaffolds, carried block and brick and did demolition. The primary

difference from his work as a City Laborer is that he currently assists all the trades, not solely bricklayers (Tr. 529). The demolition work is the same.

Gerard Woods, a Senior Stationary Engineer at Jacobi Hospital, oversees the hospital's plant operations, boiler room, stationary engineers, oilers, high-pressure plant tenders, the refrigeration shop, and the steam shop (Tr. 1123-27). He supervises seven City Laborers in engineering and maintenance who assist the trades (masons, carpenters, and steam fitters), move sheetrock, clean the machine rooms, rip up rugs, demolish walls to reach pipes, assist with fire safety by cleaning the electrical closets and linen closets, and inspect doors.

Greg Tosi, coordinator and manager of the grounds, moving, patient transportation, mailroom, and conference services departments at Jacobi, supervises 13 City Laborers (Tr. 1118-23). Ten of them work on the grounds crew, cleaning the grounds, removing outside garbage, landscaping (including leaf removal and lawn mowing), and removing snow. The three City Laborers on the moving team load and unload trucks, move furniture, boxes, and other items, and transport them between hospital buildings. They do not assist the trades or perform demolition, construction or renovation. Tosi does not supervise City Laborers in the mason, machine, steam fitting, refrigeration or electrical shops.

According to John Mendez, a Supervisor of Mechanics at Kings County Hospital, the 10 City Laborers employed by the hospital work in two shops: carpentry and preventive maintenance (Tr. 1101-07). The two who work in the carpenter's shop assist the carpenters on daily jobs involving construction and renovation by retrieving equipment and materials from the storeroom and transporting them to the job site (foot ladders, sheetrock, plywood, and doors), performing demolition and clean-up, and loading and unloading packages and deliveries. Eight City Laborers work in preventive maintenance cleaning the hospital's 44-acre campus, cutting grass, sweeping curbs, and cleaning sidewalks. They operate debris handling equipment including bobcats to move heavy furniture or garbage. They pick up garbage containers outside campus; inside garbage is collected by housekeeping. They also move furniture and operate snow removal equipment. They used to do landscaping that included tree removal and planting, but that work is contracted out now. The workers rotate assignments so all will spend time in the carpenter's shop.

Michael Vonnoh, Senior Associate Director of Maintenance at Lincoln Hospital, oversees maintenance at the hospital which employs 13 City Laborers (Tr. 1174-76). They assist the

trades (plumbers, carpenters, electricians, masons, and painters) by moving materials to job sites, and cleaning up job sites. They also perform demolition (including sheetrock and block walls, steel studs) and prepare sites for construction or renovation by moving furniture. Vonnoh identified photographs of a demolition conducted by City Laborers using sledge hammers, claw hammers and chipping guns (Union Exs. 41-48) and sites where they had assisted masons in sidewalk repair and cement mixing (Tr. 1180-85). The City Laborers do not carry sheetrock, erect scaffolding, or do landscaping.

James Prendergast, a Supervisor of Mechanics at Metropolitan Hospital, oversees trades, construction and maintenance at the hospital and supervises 18 City Laborers (Tr. 1208-13, 1225). He noted that a number of in-house projects created the need for City Laborers to do demolition work over the past 10 years. These workers also assist the trades (electricians, plumbers, sheet metal workers, carpenters, painters and masons) by carrying materials to job sites, unload supplies from trucks, clean the grounds, and move furniture. He identified several photographs that show City Laborers at work mixing cement and driving a bobcat and forklift while assisting a mason or plasterer lay a concrete sidewalk (Tr. 1220-34; Union Exs. 168A-J, 168N). This job was performed over a year ago and is typically performed every year (Tr. 1230). A City Laborer also would assist a carpenter by making the forms to lay the sidewalk. Prendergast considers all of this to be laboring work (Tr. 1233).

Louis Iglhaut, Acting Director of Maintenance Engineering at Queens Hospital, testified that he supervises nine City Laborers, six of whom are assigned to construction projects and three who are assigned to grounds keeping (Tr. 1238-42). The construction team includes three City Laborers who supervise. The team works on construction projects and hospital renovations by assisting the trades (plumbers, steam fitters, carpenters, a plasterer, and outside contractors), performing demolition, moving and unloading materials from trucks, and moving furniture in preparation for a renovation. They also dig trenches for repair of steam pipes (Tr. 1246). The grounds keeping team removes trees, cleans sewer basins, and removes snow. They do very little landscaping.

Mayoral Agencies

The duties and responsibilities of Laborers and City Laborers who work for Mayoral agencies throughout the City of New York vary according to work location but also contain a number of similarities. In general, their tasks and responsibilities include construction work,

moving and lifting heavy objects, some landscaping work, and operating motor vehicles. The following tasks were consistently found in reports of the work they perform: (i) assisting the skilled trades by carrying construction materials to work sites and in other ways, (ii) disposing of debris and cleaning up the work site, (iii) lifting and transporting heavy objects with forklifts or other hoisting equipment, (iv) performing demolition, (v) helping mix cement, (vi) moving furniture, (vii) loading, unloading and driving trucks and making deliveries, (viii) running stockrooms, (ix) performing grounds keeping and landscaping, and (x) removing snow.

Kyle Simmons, president of Local 924, is a City Laborer employed by the Department of Environmental Protection since 1996 (Tr. 291-94). In his role as president, Simmons has visited many sites where Laborers and City Laborers work and is fully familiar with their work. He listed the four most prevalent tasks performed by Laborers and City Laborers as assisting the skilled trades, demolition, cement mixing, and using manual equipment to lift and hoist heavy objects and materials, which he said account for approximately half of their work (Tr. 431). He also said their work consisted of building pits, jack hammering, and heavy duty landscaping.

Mr. Simmons is one of nine City Laborers assigned to DEP's Groundwater Division. Their work includes assisting the skilled trades (plumbers and electricians) by carrying their supplies, installing fences, repairing concrete, building pits, installing and repairing doors, digging trenches, and breaking up sidewalk (Tr. 333). He identified photographs showing that the division's City Laborers had patched cement stairs, laid new sections of sidewalk, dug trenches for the installation of chemical lines, lifted pipe for plumbers to set, built pits, patched cinder blocks surrounding a pit, repaired barbed wire fencing, excavated and built a cement platform for a generator, and installed gates and support posts (Tr. 334-41; Union Exs. 1-15).

Andrew Kuchynsky, the Deputy Chief in charge of Groundwater & Pumping Operations at DEP, supervises the nine City Laborers who work in grounds maintenance, building maintenance, and operations (Tr. 1306-09). One City Laborer, whose work was not described, works in operations. Five City Laborers work in building maintenance winterizing and de-winterizing station buildings, closing vents and installing plywood or lowering hatches, and maintaining and performing minor repairs on buildings, doors and windows. In the past year, this team was assigned to install several large fences and gates. The three City Laborers in grounds maintenance cut grass, rake leaves, and cut up and remove fallen trees. They do not often repair public sidewalks, but they more frequently repair interior sidewalks on station

property. They may also dig trenches for a plumber or electrician or work with cement or concrete (Tr. 1315-16). They also remove snow and conduct daily clean-up at headquarters, mopping floors, cleaning the kitchenette and bathrooms, picking up litter and cleaning inside the groundwater well pumping stations (Tr. 1311-12). There are no custodians on site (Tr. 1319).

Kuchynsky reviewed the photographs and confirmed that DEP's City Laborers patch sidewalk, dig trenches, build and repair pits, install and repair fencing, install gates, and bring materials to the job site for the skilled trades (Tr. 1321-27).

Kenneth Carchietta, Director of Construction Services in the division of facilities management and construction at DEP, supervises all the trades that perform daily maintenance on DEP facilities throughout the boroughs (Tr. 1153-61). He supervises four City Laborers who assist the trades in the field (bricklayers, electricians, plumbers, and carpenters) by carrying tools and materials to work sites and putting them away when the job is over, removing debris from the site, and moving furniture (Tr. 1165-67). They also drive large vehicles that require a commercial driver's license to make deliveries and pickups, to transport sand and gravel, and for weekly dump runs of scrap metal accumulated from jobs. They also perform housekeeping inside the facility which includes custodial duties (cleaning restrooms and locker rooms) when the custodian is away for an extended period of time.

In an affidavit submitted by respondent, an Assistant Commissioner at the Administration for Children's Services stated that ACS employs three City Laborers whose work consists of assisting the trades (carpenters, electricians, plumbers and sheet metal workers) by delivering materials to work sites, moving furniture, boxes and supplies between offices, loading and unloading vans, and removing snow (Resp. Ex. 50).

Matthew Curatola, a Supervisor of Mechanics at DCAS, supervises 12 City Laborers who work in trades shops. The City Laborers assist carpenters by setting up scaffolding, picking up and delivering supplies and materials, assisting in hanging sheetrock, and doing demolition and clean-up (Tr. 942-46). In the paint shop, they help plasterers and painters set up scaffolding, help mix plaster, make deliveries, and pick up and deliver materials. In the bricklayer shop, they help mix cement, dig trenches to install and repair pipes, assist in repairs, and remove and re-hang marble from the walls. In the electrical shop, they make deliveries and assist mechanics in running pipe. In the plumbing shop, they assist in the installation of pipes and transport equipment. In the ceremonial unit, they set up for special events such as the Mayor's

inauguration and press conferences and the Yankee parade by setting up staging, dressing the stage, and breaking it down at the end. And they assist in demolition work.

Steve Darragh, Director of Storehouse Operations at DCAS, oversees the city's central storehouse which supplies over 200 commodities to the Mayoral agencies in all five boroughs through shipping, receiving, and fleet operations (Tr. 971-73). He supervises eight City Laborers in the central storehouse who make deliveries of commodities ranging from plumbing supplies like copper tube piping, flush valves, conduit, and electrical wire, to bond paper. They all have commercial driver's licenses and drive box trucks and use pallet jacks to make deliveries. Their in-house assignments include cleaning and sweeping the storehouse, picking requisitions, stocking items on pallets, and unloading trucks. Pick-up and delivery can be 85-95% of their work some parts of the year (Tr. 979). They sweep floors when needed. A couple times a year they power wash the 20 loading docks but they do not perform general cleaning (Tr. 982-83). A maintenance crew, not consisting of City Laborers, does the cleaning.

In an affidavit submitted by respondent, a Human Resources Director familiar with the Materials and Arts program at the Department of Cultural Affairs ("DCA") states that the Department employs two City Laborers in its arts reuse and recycling program (Resp. Ex. 60). Their primary duties include picking up and delivering donated materials to the warehouse, driving trucks and other motor vehicles, lifting heavy objects, and performing minor inspections of trucks. They do not assist the skilled trades.

John Powers, a City Laborer and vice president of Local 924, has worked for the Department of Education for 27 years. He is also a foreman of cleaners with Local 32BJ and said the two jobs are completely different (Tr. 581-85). There are 15 City Laborers at DOE's Long Island City central shop, and they assist the trades and deliver materials to school facilities in the five boroughs. When previously assigned to assist the plasterers and painters, he erected scaffolding, and set up and cleaned work sites. His current assignment is assisting the glazers, and he drives the truck and delivers glass. As a working foreman of cleaners, he picks up and empties garbage, mops floors, cleans bathrooms, washes down walls, and scrapes gum (Tr. 585-87). In this work, he has never operated a hi/lo, forklift, or front-end loader; nor has he assisted a trade, carried materials to a job site for a skilled trade, or done demolition.

Antonio Gaudino, a City Laborer at DOE, works on one of two teams that install permanent fencing around city schools (Tr. 563-67). The fence installation teams are comprised

of four City Laborers, one Construction Laborer, and a Maintenance Worker. When a work request is received, the team surveys the job, orders the materials and, when they arrive, conducts the repair. They perform jobs that range from patching a hole to installing a 200-ft run of 15-ft fence. He identified photographs of work done at a Staten Island school where they replaced 600 feet of chain link fence, four sets of gates and poles (Union Exs. 59, 60). The physical work includes digging out the posts, removing the pipes and cutting them into small sizes, and mixing cement. At a school in Sheepshead Bay, the team demolished the whole fence, with rails and gates, and installed new fencing and gates (Union Exs. 61, 62). In one photograph, he identified a City Laborer welding clamps on a fence and said that welding was typical work for them to perform (Tr. 568). Their tools include the sawzall and chipping gun. He works out of doors 99% of the time performing fence repair work exclusively (Tr. 569).

Frank Borowiec, the Director of Facilities Management for DOE, testified that DOE employs 20 City Laborers who routinely assist the trades (machinists, carpenters, construction laborers, and steam fitters), make daily deliveries to schools in all five boroughs, carry materials (such as sheetrock and tile) for the trades and deliver them to the schools, operate forklifts, move school furniture, and remove construction debris (Tr. 907-11). City Laborers have assisted the trades in the repair of exterior stairs, treads and risers (Tr. 928, Union Ex. 147), repair of fencing (Union Ex. 148), picking up, delivering and dismantling a sump pump for the machinists (Tr. 930-31, Union Ex. 150), and removing and disposing of 12 wooden doors (Tr. 931). When shown photographs of chain link fencing under repair, he confirmed that Mr. Gaudino did this type of work on a team of City Laborers and Construction Laborers (Tr. 918-21; Union Exs. 59-62), but he described lesser tasks than Gaudino did, stating that City Laborers unloaded the truck, carried materials (poles and fencing) and put them in place, and assisted the Construction Laborers in measuring and holding the fence fabric as it was being fastened to the pole (Tr. 935-36). He said that welders assist the fence crew and disputed that Gaudino would do any welding since a license is required. He denied that City Laborers do demolition.

Borowiec also testified that he manages the cleaning and maintenance services contract for 100 DOE school buildings and that custodial work, which is performed by Local 32BJ cleaners and porters, was unrelated to the type of work done by complainants and that laborers should not do custodial or cleaning work (Tr. 917).

Isaac Suggs, Director of Transportation and Health Services for the Department of Health and Mental Hygiene (“DOH”), provides vehicles and services to transport supplies, material, and personnel for the Department (Tr. 988-90). He supervises 14 City Laborers who load and unload cartons or skids containing supplies and materials (*e.g.*, cartons of drinking water, paper, flu vaccine pods, and office furniture) and then transport the items. City Laborers operate forklifts and hi/los, remove snow, and clean up debris (Tr. 1003). They do no demolition. Mechanics are the only skilled trade in his shop, and the City Laborers do not assist them (Tr. 994). City Laborers do not perform cleaning; a cleaner comes in to clean bathrooms and empty trash (Tr. 1004).

In an affidavit submitted by respondent, a supervisor in the Department of Sanitation states that the Department employs 15 City Laborers (Resp. Ex. 45). Seven City Laborers work in building maintenance and assist the trades (masons, bricklayers, and the stationary engineer), receive deliveries of parts and equipment, operate the vacuum truck, take emergency orders, work the stockroom, and remove snow. Another City Laborer picks up and delivers mail. A City Laborer inventories and disburses supplies from the stockroom, moves furniture and boxes, makes deliveries, performs maintenance such as minor repair and light bulb replacement, removes waste and recyclables, and provides custodial services such as cleaning, sweeping, mopping and vacuuming. Another City Laborer picks up and delivers mail and office supplies and heavier materials such as parts and drums of antifreeze; one City Laborer picks up and delivers flat tires and supplies; another picks up and delivers parts, small tools, and mail; another drives a van loading and unloading materials and cleans; another works as a messenger and driver; and another delivers and mounts tires. None of the City Laborers perform demolition.

As Director of Engineering for the Department of Transportation, John Collins is responsible for maintenance and repair of the ferry fleet and for the supervision of Laborers and City Laborers (Tr. 893-94). DOT employs four City Laborers who load and unload trucks, operate heavy duty rack trucks and forklifts, pick up and deliver parts for repair, change light bulbs, and clean up (Tr. 894-95, 904-05). Collins said they assist the trades (carpenters, boilermakers, electricians, riggers, machinists, steam fitters, and painters) 25% of the time by carrying their materials, erecting safety barriers, and cleaning up debris (Tr. 896-97, 900-01). The City Laborers do not do construction work.

Since February 2009, James Lamberti, who is one of the last remaining Laborers employed by the City works under his supervision in the ferry maintenance facility escorting service contractors. Since the Coast Guard deemed the Staten Island Ferry a secure facility, all outside contractors must have special identification for access to the facility or be escorted while on premises; so Lamberti does that. Lamberti also assists the trades and does snow removal. Prior to February 2009, Lamberti performed general laboring duties inside the ferry terminal, occasionally assisting the skilled trades, conducting minor bathroom repair and clean-up, and changing light bulbs (Tr. 899).

In an affidavit submitted by respondent, a supervisor in the Manhattan District Attorney's Office states that he supervises six City Laborers for whom 60-70% of their work comprises office moves (Resp. Ex. 49). They also assist the trades (electricians, painters, and carpenters) by delivering their materials, lift and move heavy items, stock the supply room, retrieve keys for locks, and remove snow. They do not assist bricklayers or cement masons and do not perform demolition or remove construction debris.

Trevor Simpson is a City Laborer employed by the Fire Department in its Bureau of Facility Management, Construction and Trades, located in Long Island City (Tr. 1544). He testified that City Laborers at FDNY assist the skilled trades (plumbers, electricians and masons) by delivering their construction materials (ceiling tile, roofing, pipes, brick concrete, sand, and gravel) and disposing of debris (Tr. 1537-39). They also demolish walls (sheetrock, block and brick) and use tools such as sledge hammers and drills. They use forklifts to unload shipments and make deliveries. They do snow removal. He described a 16-week reconstruction job in which his unit, which includes six City Laborers and numerous other trades, repaired a landmark firehouse that had been severely damaged in a fire (Tr. 1541). The unit won a Fire Commissioner's Award for Outstanding Service and was noted for its excellent work, which using City employees to do the work was completed in 14 weeks rather than the 19 months estimated by private contractors and saved the City a million dollars (Union Ex. 170).

A supervisor at FDNY's Bureau of Facility Management stated by affidavit that the six City Laborers he supervises assist the trades (carpenters, electricians, inside masons, and plumbers), deliver construction materials, conduct clean-up and disposal, demolish sheetrock, perform minor sidewalk repair, do landscaping and snow removal, and clean basements (Resp. Ex. 42). Another supervisor of two City Laborers stated by affidavit that they operate vehicles

and machinery such as automatic and hand jacks, load and unload furniture, computers, and other office supplies and materials, stock the supply room, deliver items to headquarters, clean the work area and remove debris (Resp. Ex. 43). In other affidavits, Fire Department supervisors stated that three City Laborers under their supervision gather scrap metal for recycling, move furniture and boxes, operate floor sweepers for stripping and polishing floors, track hazardous material disposal, perform gardening and weeding, and remove snow (Resp. Exs. 40, 41).

For 19 years, Alfred Della Valle has been a City Laborer at HRA where he and seven other City Laborers work in HRA's facilities headquarters (Tr. 546). The City Laborers assist the trades (carpenters, plumbers, electricians, HVAC, tin knockers, and masons) by taking delivery of materials (such as plywood, sheetrock, pipe, electrical conduit, wire, and plumbing fittings) and moving them to work sites, setting up scaffolding, assisting in mixing concrete, and removing construction debris (Tr. 550-56). Demolition is done almost daily and he described a four-month demolition project of four floors of the facility in which City Laborers took down a masonry wall that was 90 feet tall and one foot thick. City Laborers also demolished 25 offices made of sheetrock, taking out a drop ceiling and a tiled bathroom. Three City Laborers do office moves when other work is not pressing (Tr. 558).

By affidavit a Supervisor of Maintenance and Laborers at HRA stated that six City Laborers he supervises assist carpenters and masons, load materials for the trades including sheetrock, conduct interior demolition and clean up, operate forklifts and hi/los, remove construction debris, empty dumpsters, perform office moves, and remove snow with a blower (Resp. Ex. 44).

In an affidavit submitted by respondent, a Supervisor of Mechanics employed by the New York Police Department's fleet services division states that he supervises four City Laborers (Resp. Ex. 56). They perform building maintenance including repair of small concrete patches, minor plumbing and minor carpentry work; they remove demolition debris, clean sewage drains, load and unload trucks, remove snow, and maintain fire prevention equipment. The fleet services division does not employ skilled trades and does no major construction. NYPD's barrier section employs four City Laborers who drive barrier trucks, load, unload and set up wooden and metal barriers for events, repair wooden barriers and stack them inside the warehouse, operate trucks, clean and sweep the warehouse, and remove snow and salt the grounds (Resp. Ex. 57). NYPD's plant management division employs two City Laborers who

assist skilled trades by setting up and cleaning job sites, perform demolition on cement and plaster walls and remove debris, move office furniture and remove snow (Resp. Ex. 58).

The Assistant Commissioner for facilities management for the Office of the Chief Medical Examiner states by affidavit that the office employs six City Laborers who assist the trades by holding ladders and carrying tools, operate motor vehicles to make deliveries, unload trucks, stock the storeroom, clean machine rooms, bulk trash, move furniture, clean and maintain the grounds, and remove snow (Resp. Ex. 59). They do not assist cement masons or bricklayers, perform demolition, or operate forklifts or power tools.

Work Performed by Mason Tenders of Local 79

The Comptroller selected the Mason Tenders of Local 79 as the comparable private sector match for Laborers and City Laborers. The Comptroller is already familiar with the work of this title as its wage and benefits are the prevailing rates for the Mason Tender trade in the City of New York and are published in the Comptroller's annual prevailing wage schedules (Tr. 160-61) (*see* Pet. Exs. 9A, 9B, 22A-G).

Based on its review of the DCAS job specifications, collective bargaining agreements for both titles, its site visits, and meetings and discussions with officials of the City agencies who supervised Laborers and City Laborers concerning the work they actually perform, the Comptroller concluded that the Mason Tenders were the comparable match (Tr. 1373-74, 1380).

According to petitioner, Local 79 Mason Tenders perform common "interior" laboring work for building construction and renovation (Tr. 160-61, 1487). They assist the trades, bring materials to job sites for multiple trades including masons, bricklayers, carpenters, electricians, and plumbers, clean the site when the work is done, erect scaffolding and do demolition (Tr. 1422, 1425-27). According to their CBA, they erect and maintain safety equipment, wheel or carry materials for construction jobs, operate concrete mixers, remove debris, complete demolition of masonry, wood and metal fixtures, use tools and equipment for this work, and use manually operated hoists, among other tasks (Pet. Exs. 9A, 9B). They also tend Masons or Bricklayers on construction jobs, although they may also assist other trades (Tr. 1515, 1489; Resp. Ex. 22A at 42).

Petitioner maintains that, similar to Laborers and City Laborers, Mason Tenders are jacks-of-all-trades, despite the basic difference that the work of Mason Tenders is always construction-related and common laboring work sometimes does not involve construction (Tr.

1378-79). Petitioner contends that the Mason Tenders come closest to the work performed by City Laborers and Laborers because the Mason Tender is an unskilled laborer and performs work that is considered common unskilled laboring work that requires physical strength, lifting and carrying heavy objects (Tr. 1430).

Work Performed by Porters and Handymen of Local 32BJ

Respondent contends that the Porters and Handypersons of Local 32BJ are the only appropriate private sector match for Laborers and City Laborers (Resp. Mem. at 11-12). Although not specified in its submissions, respondent appears to seek a match to one of the office cleaner titles listed in the prevailing wage schedules for building service employees (Resp. Ex. 23A at 6), which were admitted as Respondent's Exhibits 23A through 23G (Tr. 1390-91).

Respondent offered the testimony of Michael Doherty, president of Building Maintenance Service ("BMS"), a company that provides building maintenance services to commercial office buildings, schools and malls, including 27 buildings in New York City. BMS employs 2,300 porters, window cleaners, security guards and handypersons represented by Local 32BJ; 1,300 work in the five boroughs of New York City. These workers perform general cleaning, window cleaning, security, and metal and marble restoration (Tr. 1249-52, 1284-85). BMS does not employ a significant percentage of the Porters who work in New York City and employs only six Handypersons. BMS is owned by Vornado Realty Trust, a real estate investment trust that owns commercial buildings and retail locations in the U.S. Vornado is a member of the Realty Advisory Board which has entered into commercial building agreements (collective bargaining agreements) with Local 32BJ (Resp. Exs. 19, 20, 21).

BMS has no job descriptions for the positions covered under the existing commercial building agreement ("CBA"), so respondent's case on comparability centered on Mr. Doherty's testimony about the work performed by the Porters and Handypersons who work for him (Tr. 1274). The CBA provides a few brief definitions of elevator starter, foreperson, guard, and handyperson. A Handyperson, the prevailing rate match for the city's Maintenance Worker title (Pet. Ex. 12A), is someone who "possesses a certain amount of mechanical or technical skill and devotes more than fifty (50) percent of working time in a building to work involving such skill" (Resp. Ex. 19 at 88). Other positions noted but not defined in the CBA include elevator operators, porters, porter/watchmen, cleaning persons, matrons, security porters, fire safety directors and exterminators (*id.* at 89).

Doherty said the Handyperson title requires a degree of skill to perform repairs and building maintenance, an ability to use tools, do light plumbing and carpentry, and minor electrical work (Tr. 1253-54). A Handyperson can perform concrete patch repairs on sidewalks and use and operate tools, and Porters assist Handypersons in their duties and may set up and clean up after a job.

A Porter's primary function is to keep common areas and tenant areas of office buildings clean (Tr. 1281-83). Their regular job duties consist of office cleaning, bathroom cleaning, floor care, moving furniture, shoveling snow, sweeping sidewalks and moving materials out of a building (Tr. 1255). They clean carpets, unclog toilets, wax and mop floors, scrape gum off of floors, remove graffiti from walls, and pick up litter. In connection with their cleaning duties, Porters operate machinery such as floor shampooers, buffing machines, scrubbing machines, snow plows, tractors, bobcats, steam machines, high-pressure washers and pallet jacks (Tr. 1256-57). He said they might use a bobcat to move snow, trash or debris into a dumpster.

With respect to grounds keeping, Porters water trees, remove dead plants, seed, water and fertilize fields, and occasionally lay sod (Tr. 1258-61). They set up barricades to isolate an area for cleaning or for safety. They operate forklifts to move items from a truck in the loading dock into the building and a steam jenny to clean graffiti, dirt or paint off of sidewalks and exterior walls. They carry cleaning materials or supplies to job sites. They would help a contractor load sheetrock into a freight elevator and off-load it if asked and would drive a pick-up truck to move supplies from building to building, though he later admitted they do not generally move items from building to building.

Reviewing photographs supplied by the Union, Doherty testified that Porters erect chain link fencing, dig trenches, erect barricades, haul debris in dumpsters if left by a contractor, transport plants, and water lawns on athletic fields or schools (Union Exs. 7, 9, 15, 55, 95; Tr. 1261-62, 1267, 1271).

Comparing Mason Tenders to Porters, Doherty conceded that generally the former works on construction sites and the latter works inside of existing buildings (Tr. 1275). If construction or renovation were needed on one of his buildings, a private contractor would be hired to do that work and the contractor would be responsible for performing its own demolition and clean-up (Tr. 1276). Porters would help unload or clean up only if the contractor asked for assistance or failed to do it. Porters are not responsible for assisting contractors who perform construction or

renovation projects. Although they move objects, they do so within a building, not from building to building.

Porters do not use bobcats or lifts to do construction work (Tr. 1283). They do not have commercial driver's licenses and do not operate backhoes or front-end loaders (Tr. 1298). BMS does not employ carpenters, plumbers, steam fitters or electricians, and none of their Porters have primary responsibility for assisting these or other skilled trades people (Tr. 1286-87).

Reviewing the photographs offered by the Union of work performed by Laborers and City Laborers, Doherty testified that Porters only occasionally mixed concrete or patched sidewalk (Tr. 1288-91). Porters would not build a brick pit or cement platform from scratch or lay a sidewalk, though they would bring materials to a sidewalk repair, albeit infrequently. Porters would not operate a jack hammer or float concrete. Handypersons use the sawzall but Porters do not (Tr. 1292). Neither Porters nor Handypersons do demolition. They would be responsible for disposing of construction debris very infrequently (Tr. 1295-97). They would not erect a fence the size of that depicted in Union's Exhibit 59. They would never hot patch a parking lot. They would not lay conduit but would occasionally dig the trench in which conduit is placed. They would not excavate, re-level, or resod a field (Tr. 1300-01). They do not break up and remove concrete or transport it to work sites.

Comparability

As stated above, section 220 of the Labor Law requires the City pay its "laborers, workmen, or mechanics" 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)(a). The locality, New York City, is not in dispute. The "same trade or occupation" has been interpreted as workers who do similar or "comparable" work. *See Smith v. Joseph*, 275 A.D. at 203-04; *Flannery v. Joseph*, 300 N.Y. at 152.

The question here is whether the record demonstrates that Laborers and City Laborers are comparable to Mason Tenders, as petitioner has proposed, or to the Local 32BJ groups proposed by respondent. The comparable group will be designated the prevailing group for purposes of rate-setting, 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). The issue of thirty percent coverage has not been raised for either collective bargaining group proposed.

Any comparability analysis must focus on 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 v. Beame*, 15 N.Y.2d at 110 (prevailing wages must be fixed “based on the work actually performed”). Workers who are in two different fields but perform “similar” work may still be in the same “trade or occupation” for purposes of the prevailing wage law. *Watson v. McGoldrick*, 286 N.Y. 47, 53 (1941); *see Office of the Comptroller, ex rel. Local 1087 v. Office of Labor Relations* (“*Local 1087*” (radio repair mechanics)), OATH Index No. 2451/08 at 20 (Apr. 6, 2009). *See also Comptroller’s Office, ex rel. Local 621 v. Office of Labor Relations* (“*Local 621*”), OATH Index No. 1398/97 at 19 (Nov. 5, 1997), *adopted in full*, Comptroller’s Order and Determination (Apr. 1, 1998), *aff’d sub nom Office of Labor Relations v. Comptroller*, 253 A.D.2d 596 (1st Dep’t 1998) (groups found comparable even though one worked in the building construction field and the other worked in the sewage treatment field).

Thorough review of the record indicates that complainants perform a wide variety of tasks for their agencies. Although the tasks performed by Laborers and City Laborers vary across agencies, there were patterns of consistency with respect to a core group of tasks that were performed most frequently. Those tasks included (i) assisting the skilled trades by carrying construction materials to work sites, mixing cement, patching sidewalks, and digging trenches, (ii) disposing of construction debris and cleaning the work site, (iii) lifting and transporting heavy objects sometimes with forklifts or other hoisting equipment, (iv) performing demolition in connection with construction or renovation projects, (v) moving furniture, (vi) lifting, loading and unloading materials and supplies and driving trucks to deliver them, (vii) performing grounds keeping and/or landscaping, and (viii) removing snow. *See Office of the Comptroller ex rel. Local 1087 v. Office of Labor Relations*, OATH Index No. 588/10 at 30 (June 23, 2010) (duties of city’s supervising locksmiths varied according to type of facility where they were employed); *Local 1087 (radio repair mechanics)*, OATH 2451/08 at 21 (finding consistency among tasks in spite of the variety of tasks performed by city’s radio repairmen at different agencies).

Among the most consistently reported tasks was complainants’ assistance of the skilled trades. Practically all of the 26 work sites offered evidence at the hearing that Laborers and City

Laborers assisted the trades in various ways. Most typically, they carry materials to and from the work site and remove work site debris, usually in connection with construction. Only the Departments of Health and Cultural Affairs indicated their City Laborers provide no assistance to skilled trades (Tr. 994, Resp. Ex. 60). Many City Laborers are assigned to “shops” for the skilled trades and actively assist the trades in skilled work such as cement mixing (KBCC, NYCCT, Harlem, Lincoln and Metropolitan Hospitals, DEP, DCAS and HRA), repairing sidewalks (Queens College, Lincoln and Metropolitan Hospitals and DEP), digging trenches to run pipe (KBCC, Queens College, Queens Hospital, DEP and DCAS), and installing fencing (DEP and DOE).

Demolition is another construction-related task that consistently characterized City Laborer work. Although some agencies did not allow City Laborers to perform demolition or did not have demolition tasks for them to perform (BMCC, DOE, DOH, the District Attorney’s office and Office of the Chief Medical Examiner), the majority of employers use City Laborers for this task (KBCC, NYCCT, QBCC, Queens College, all seven City hospitals, DEP, DCAS, FDNY, HRA and NYPD).

What is significant about these two tasks, in addition to their consistent inclusion in City Laborer work, is the fact that they are primary tasks of the Mason Tenders, the match proposed by petitioner, and are rarely associated with the work of the Porters and Handymen of Local 32BJ, the match proposed by respondent.

Pointing to the frequency with which they move furniture and perform landscaping, respondent seeks a match with Local 32BJ’s Porters and Handypersons. It is true that Laborers and City Laborers frequently move furniture (at 20 work sites) and perform landscaping (at 11 work sites). But their involvement in custodial cleaning, the essential task for the building services titles, was rare. Some of the Union’s witnesses, and some of respondent’s, explicitly stated that City Laborers at their agencies did not perform cleaning functions (NYCCT, Queens College, DOE, DCAS and DOH). Many others simply failed to list cleaning as a relevant job task. John Powers, a City Laborer who is also a foreman of cleaners for Local 32BJ, stated that the two jobs are completely different and described duties that had no overlap (Tr. 585-87). Frank Borowiec, the Director of Facilities and Management for the Department of Education who supervises City Laborers and also manages a cleaning and maintenance services contract for 100 DOE school buildings, indicated that City Laborers at DOE did not perform custodial or

cleaning work and that such work was unrelated to the work of City Laborers (Tr. 917). Indeed, only three agencies reported that City Laborers routinely performed custodial or indoor cleaning: DEP (where three City Laborers clean the headquarters and pumping stations (Tr. 1319)), DOS (where one of 15 City Laborers cleans, sweeps, mops and vacuums (Resp. Ex. 45)), and DOT (where its four City Laborers perform “general clean-up” in addition to laboring duties (Tr. 895)).

The Union contends that cleaning work should not even be considered here because it is out-of-title work for complainants since it is not work “requiring physical strength,” the fundamental characteristic of laboring work (Union Mem. at 16).

The testimony about the duties of Porters and Handypersons was limited by the fact that it was offered by a single witness. Mr. Doherty stated that Porters largely performed tasks inside of a building yet inexplicably listed extensive outdoor work (erecting chain link fencing, digging trenches, and erecting barricades) while failing to assign frequency to these and other tasks he reported. This testimony was difficult to rely upon.

The record shows that Local 32BJ Porters are primarily cleaners; they clean and port, *i.e.*, carry things (Tr. 1493-95). They do general cleaning, vacuuming, moving of objects inside buildings. They do not transfer objects between buildings. Although a Handyperson may perform maintenance and minor repairs and a Porter may lift heavy furniture or other objects, at the end of the day their primary responsibility is cleaning building interiors (Tr. 1431-32). By contrast, although Laborers and City Laborers may do some cleaning and garbage collection, their primary responsibility is laboring, often on construction projects.

Consider the task list in the Mason Tenders’ CBA which shows significant overlap with the actual work of City Laborers: they assist or “tend” the “Masons or Bricklayers on construction jobs of every nature” (Pet. Ex. 9A, Art. IV, § 1(f)); “wheel or carry materials in or about the job . . . or assist in the preparation of masonry materials to be used,” *id.* at § 1(i); “loading or unloading materials for Bricklayers . . . to and from trucks at the job site,” *id.* at § 1(v); “all cleaning and removal of debris, rubbish and refuse of any type and kind for all trades on all jobs,” *id.* at § 1(bb); “final construction cleaning operation on any construction project,” *id.* at § 1(cc); “operate mortar or concrete mixers,” *id.* at § 1(o); and demolition or “gutting of the interior of a building or structure” by removing the walls, flooring or partitions and “the use of

any and all tools and/or equipment necessary to perform this work” including shovels, picks, sledge hammers, jack hammers, saws, chipping guns, etc. (*id.* at § 3(b) & (d)).

There is no evidence that Porters would regularly assist a skilled trade. BMS, for example, does not even employ skilled trades people and any private contractor would have to request the assistance of a Porter. City Laborers often work in connection with construction and renovation projects and Porters almost never do. City Laborers often work outdoors (either with the trades or doing landscaping) while Porters typically work indoors.

Fundamentally, the similarities in the type of work performed by Mason Tenders and complainants are significant and are sufficient to support a finding that the two jobs are comparable. *See, e.g., Local 1087 (radio repair mechanics)*, OATH 2451/08 at 23 (finding maintenance engineers and radio repairmen to be comparable jobs); *Local 621*, OATH 1398/97 at 12 (finding privately employed master mechanics comparable to city-employed supervisors of mechanics and mechanical engineers where both sets of workers supervised repair and maintenance of heavy, complex mechanical equipment although the equipment repaired by the groups was not identical). Although there is not complete overlap of duties, that is to be expected. For example, the fact that Mason Tenders do not perform landscaping is not fatal to my conclusion. Just as Construction Laborers are primarily laborers who perform some landscaping work (Pet. Ex. 13; Tr. 1429), City Laborers are also. I did not find complainants’ work to be comparable to the Local 32BJ titles.

After its initial determination, the Comptroller ruled out Local 175’s Landscaper title as a match for Laborers and City Laborers and decided that landscaping was out-of-title work because their DCAS job specifications did not reference it and other titles were more obviously involved in landscaping (Tr. 1370-71, 1404). I am not convinced that landscaping is out-of-title work for City Laborers simply because a Climber and Pruner primarily does landscaping, so long as the work is “common unskilled laboring work requiring physical strength,” which moving trees appears to be (Pet. Exs. 4B, 12G). If complainants were not allowed to do this work, would an agency have to go out and hire a Climber and Pruner to put the trees in the ground? By contrast, the Comptroller also asserts that demolition, though not stated in the job specifications, is permissible in-title work because it is widely performed by complainants while landscaping is not (Tr. 1375). By my count, landscaping was reported at 11 work sites and demolition was

reported at 16 work sites. The difference is not sufficient to draw a distinction, in my view. If there is a distinction, it was not established on this record.

Respondent contends that Mason Tenders are not comparable because they have already been matched to the city's Mason Helper title, and Laborers and City Laborers cannot also be found to do the work of a Mason Helper, which is a skilled competitive class title. Petitioner denies there is any inconsistency, asserting that the Mason Tender favorably compares with both titles but in different ways (Tr. 1509-10). For example, a Mason Helper performs limited duties in assisting Masons and Bricklayers "in the preparation and finishing of cement, concrete, brick, tile and other masonry work" including laying out tools, cleaning the work area, mixing cement, and operating powered tools and machines and motor vehicles (Pet. Ex. 12C). While many City Laborers perform these Mason Helper duties, City Laborers also perform more diverse tasks that Mason Helpers do not, which Mason Tenders also perform, such as assisting skilled trades other than masons and bricklayers, moving non-masonry materials and doing demolition. The breadth of tasks that Laborers and City Laborers are likely to perform is the stand out characteristic of the work of these laboring titles. Unlike other titles that have a tightly contained list of tasks and functions, Laborers and City Laborers perform the roll of jack-of-all-trades for their agencies, a characteristic that also attaches to the Mason Tenders.

I am not troubled to find that an unskilled worker such as a City Laborer might assist the skilled trades by mixing cement, digging trenches, or performing demolition because these duties are by and large performed under the observation of the skilled tradesman (Tr. 1503). It is not out-of-title "skilled" work simply because over time the workers may have assimilated a skill (Tr. 1502). Ultimately, they are not responsible for the skilled work since they work alongside and under the direction of the skilled tradesman.

I also find without merit respondent's argument that any duties performed by City Laborers that overlap with those of the competitive Mason Helper title must be deemed out-of-title work because of the overlap (Resp. Mem. at 12-13). The argument fails, again, to consider the nature of these laboring positions and the broad list of duties ascribed to them largely because of the generality of their job descriptions. *See* Pet. Ex. 4B ("performs common unskilled laboring work requiring physical strength").

In support of its argument, respondent cites *Office of the Comptroller, ex rel. Local 1320 v. Office of Labor Relations* ("Local 1320"), a prevailing wage case filed on behalf of sewage

treatment workers, which states that “A civil service employee performing the tasks of a higher competitive class cannot be paid the higher prevailing wage under Labor Law 220 because this would conflict with the CSL.” OATH Index No. 1522/09 at 14 (Sept. 10, 2009) (citing *Flannery*, 300 N.Y. at 155). In context, the quoted statement means that under section 220 a civil service employee cannot receive the benefit of tasks that constitute out-of-title work so as to bump their wage rate into a higher competitive position, which would constitute a promotion that the worker would otherwise be required to pass an examination to obtain. *Local 1320* and *Flannery*, which is cited by Judge Zoragniotti in *Local 1320*, do not stand for the proposition that any overlap in a worker’s duties with those of another title must be deemed “out-of-title” work that cannot be considered for purposes of finding an appropriate private sector match. Some degree of overlap in tasks is acceptable, which Judge Zoragniotti notes in the same paragraph (“Although there is no dispute that complainants perform a variety of tasks consistent with other trades . . .”). Even Sherry Schultz acknowledged that some titles have “overlapping duties” that would not be considered out-of-title work (Tr. 867). She defined out-of-title work as work that is “substantially different” from the duties described in the job specification (Tr. 845). *See, e.g., Local 1087 (radio repair mechanics)*, OATH 2451/08 at 24 (two groups found comparable despite some difference in the complexity and scope of work by members of one group across agencies). The duties performed by complainants that are also consistent with the Mason Helper title are not “substantially different” from the common laboring work broadly described in their job descriptions.

The record demonstrates marked similarity in the work performed by Mason Tenders and Laborers and City Laborers. Accordingly, I find these City titles to be comparable to the Mason Tender title and that the wages and supplements set forth in the collective bargaining agreement with Local 79 Mason Tenders be deemed prevailing for city workers in the Laborer and City Laborer titles.

RECOMMENDATION

In light of the foregoing, I recommend that the Comptroller’s preliminary determination

that Laborers and City Laborers be paid commensurate with the wages and supplements set forth in the collective bargaining agreement for Local 79 Mason Tenders be adopted.

Tynia D. Richard
Administrative Law Judge

July 2, 2010

SUBMITTED TO:

JOHN LIU
Comptroller

APPEARANCES:

CONSTANTINE P. KOKKORIS, ESQ.
Attorney for Petitioner, Office of the Comptroller

SCHWARTZ, LICHTEN & BRIGHT, P.C.
Attorneys for Complainant, Local 924

BY: DANIEL R. BRIGHT, ESQ.

STEVEN E. SYKES, ESQ.
Attorney for Complainant, District Council 37, AFSCME, AFL-CIO

MAYRA E. BELL, ESQ.
DESIREE BUSCHING, ESQ.
MATTHEW CAMPESE, ESQ.
Attorneys for Respondent, Office of Labor Relations

Office of the Comptroller's Order and Determination (Oct. 13, 2010)

**OFFICE OF THE COMPTROLLER, EX REL.
LOCAL 924, DISTRICT COUNCIL 37, AFSCME, AFL-CIO**
Petitioner

-Against-

OFFICE OF LABOR RELATIONS
Respondent

KAREN S. COHEN, *Assistant Comptroller*

ORDER AND DETERMINATION

Whereas:

This proceeding was brought by the Comptroller's Bureau of Labor Law ("Bureau") pursuant to Labor Law §220 (8)(d) in response to complaints filed by Local 924, an affiliate of District Council 37 AFSCME, AFL-CIO (the "Union") to fix the prevailing rate of wages and wage supplements for direct employees of the City of New York serving in the titles Laborer and City Laborer (collectively, "Complainants") during the period July 1, 2002 through June 30, 2010. The Office of Labor Relations ("OLR") represented the City of New York.

Honorable Tynia D. Richard, Administrative Law Judge ("ALJ") of the Office of Administrative Trials and Hearings ("OATH") conducted fact-finding hearings between October 30 and December 8, 2009. The Union, OLR and the Bureau submitted post-hearing memoranda of law and ALJ Richard issued a Report and Recommendation on July 2, 2010.

Now, after reviewing the ALJ's Report and Recommendation, the transcript of the hearings, the exhibits thereto, and the post-hearing memoranda of law, pursuant to the powers and duties invested in me by the Comptroller under Labor Law §220 *et. seq.*, I make the following Order and Determination, adopting in full the ALJ's Report and Recommendation, which is incorporated by reference herein.

It is Hereby Ordered and Determined that:

1. The prevailing rate of wages and benefits for the Complainants during the period July 1, 2002 through June 30, 2010 are those of Mason Tenders District Council of Greater New York, affiliated with the Laborers International Union of North America ("Local 79").

2. For the period July 1, 2002 through June 30, 2010, the City of New York shall pay the complainants wages and wage supplements commensurate with those contained in the collective Bargaining Agreement of Local 79 (Pet. Ex. 9A and 9B covering the period 2001-2005 and 2006-2010, respectively) and summarized in the "Summary of Prevailing Wages and Benefits" for City Laborers attached to the August 14, 2009 petition filed by William C. Thompson, Comptroller (ALJ Ex. 1).

Discussion:

Although I have adopted the OATH Report and Recommendation in full, I think it appropriate to supplement some of ALJ Richard's findings.

In 1957, the City of New York created the ungraded competitive class title of Laborer. In 1984, as part of a settlement between the Union and OLR, the City closed the title to new applicants and in its place created the non-competitive title of City Laborer. The settlement agreement which resolved internecine litigation, hoped to achieve the following:

- avoid the cost of administering mandated civil service examinations to unskilled laborers; and
- ensure the Union that incumbent Laborers and new hire City Laborers continue to receive prevailing wages.

In the instant matter, OLR challenged the Comptroller's authority to adjudicate wage complaints filed by City Laborers alleging that:

- the title lacks standing under Labor Law §220 (8)(d); and
- only titles specifically classified in Skilled Trades and Operative Services, Part 38 of the Competitive Class of the Civil Service, are entitled to seek prevailing wage compensation.

We agree with OLR and the courts that Part 38 titles are entitled to have their compensation fixed at the prevailing wage rate. (*Golden v. Joseph*, 307 N.Y. 62, 68 [1954]; *Don v. Joseph*, 1 N.Y.2d 708 [1956]). However, we do not believe that membership in Part 38 is a condition precedent to filing prevailing wage complaints with the Comptroller. On this point, the case law is also clear. Ungraded or non-competitive workers hired by the City of New York to perform public work are entitled to prevailing wages-all the more so where, as here, there is no competitive examination preventing the City of New York from compensating the workers accordingly. (*Corrigan v. Joseph*, 304 NY 172; *Gaston v. Taylor*, 274 NY 359)).

Notably, OLR's recently contracted view stands in stark contrast with its 25-year course of good faith bargaining with all the Complainants at the same time. Inasmuch as OLR and the Union have consistently negotiated good faith settlements for Laborer and City Laborer in accordance with both existing case law and their internal §220 protocol, there is little reason for the Comptroller to uncouple them now.

Ordered this 13th day of October, 2010

KAREN S. COHEN, *Assistant Comptroller*, NYC Office of the Comptroller

SUMMARY OF PREVAILING WAGES AND BENEFITS

Prevailing Rates: City Laborer (Laborers)

Prevailing Union: Mason Tenders District Council of Greater New York Local 79

July 1, 2002 - December 31, 2002

Hourly Rate: \$26.55 Supplemental Benefits: \$14.44 Total Package: 40.99

January 1, 2003 - June 30, 2003

Hourly Rate: \$27.05 Supplemental Benefits: \$14.69 Total Package: \$41.74

July 1, 2003 - December 31, 2003

Hourly Rate: \$27.55 Supplemental Benefits: \$14.94 Total Package: \$42.49

January 1, 2004 - June 3, 2004

Hourly Rate: \$27.80 Supplemental Benefits: \$15.44 Total Package: \$43.24

July 1, 2004 - December 31, 2004

Hourly Rate: \$28.00 Supplemental Benefits: \$15.99 Total Package: \$43.99

January 1, 2005 - June 30, 2005

Hourly Rate: \$28.00 Supplemental Benefits: \$16.74 Total Package: \$44.74

July 1, 2005 - December 31, 2005

Hourly Rate: \$28.25 Supplemental Benefits: \$17.24 Total Package: \$45.49

January 1, 2006 - June 30, 2006

Hourly Rate: \$28.75 Supplemental Benefits: \$17.49 Total Package: \$46.24

July 1, 2006 - December 31, 2006

Hourly Rate: \$29.20 Supplemental Benefits: \$17.99 Total Package: \$47.19

January 1, 2007 - June 30, 2007

Hourly Rate: \$29.85 Supplemental Benefits: \$18.29 Total Package: \$48.14

July 1, 2007 - December 31, 2007

Hourly Rate: \$30.38 Supplemental Benefits: \$18.86 Total Package: \$49.24

January 1, 2008 - June 30, 2008

Hourly Rate: \$30.64 Supplemental Benefits: \$19.70 Total Package: \$50.34

July 1, 2008 - December 31, 2008

Hourly Rate: \$31.17 Supplemental Benefits: \$20.37 Total Package: \$51.54

January 1, 2009 - June 30, 2009

Hourly Rate: \$31.72 Supplemental Benefits: \$21.02 Total Package: \$52.74

July 1, 2009 - December 31, 2009

Hourly Rate: \$32.24 Supplemental Benefits: \$21.70

Total Package: \$53.94

The Supplemental Benefits are composed of the following: Welfare Fund, Pension Fund, Annuity Fund, Training Fund, "L" Account, Vacation (as of 7/1/08), Greater NY LECET, NYS LECET and NYS Health & Safety.

HOLIDAY SCHEDULE

No paid holidays.

SHIFT RATE

The Employer may work two (2) shifts with the first shift at the straight time wage rate and the second shift receiving eight (8) hours paid for Seven (7) hours work at the straight time wage rate.

OVERTIME

Time and one-half shall be paid for all work performed on Saturdays and for all work in excess of eight hours per day. Saturday may be used as a make-up day at straight time when a day is lost during that week to inclement weather. Double time shall be paid for all work performed on Sundays and the following holidays: New Years Day, President's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day.

2006-2010 TRADE AGREEMENT BETWEEN

BUILDING CONTRACTORS ASSOCIATION, INC.

AND

MASON TENDERS DISTRICT COUNCIL OF GREATER NEW YORK

4"1

Subject to the Union's right of allocation/reallocation as hereinafter provided in this section, and effective January 1, 2007, wages and/or fringe benefit contributions shall be increased by \$0.95 per hour.

Subject to the Union's right of allocation/reallocation as hereinafter provided in this section, and effective July 1, 2007, wages and/or fringe benefit contributions shall be increased by \$1.10 per hour.

Subject to the Union's right of allocation/reallocation as hereinafter provided in this section, and effective January 1, 2008, wages and/or fringe benefit contributions shall be increased by \$1.10 per hour.

Subject to the Union's right of allocation/reallocation as hereinafter provided in this section, and effective July 1, 2008, wages and/or fringe benefit contributions shall be increased by \$1.20 per hour.

Subject to the Union's right of allocation/reallocation as hereinafter provided in this section, and effective January 1, 2009, wages and/or fringe benefit contributions shall be increased by \$1.20 per hour.

Subject to the Union's right of allocation/reallocation as hereinafter provided in this section, and effective July 1, 2009, wages and/or fringe benefit contributions shall be increased by \$1.20 per hour.

Subject to the Union's right of allocation/reallocation as hereinafter provided in this section, and effective January 1, 2010, wages and/or fringe benefit contributions shall be increased by \$1.20 per hour.

The Union, in its sole and absolute discretion, reserves the right to allocate/reallocate any portion of the foregoing increases to any of the fringe benefit funds. The rate for Foremen and for Assistant Foremen (Deputies) shall be \$35.00 per day and \$25.00 per day, respectively, above the prescribed rate for Mason Tenders.

Section 2.

Except as specified in Article IV, Section 1(x) and Article VI. Section 2(b), all work performed outside of the regular workday as per Article V Section 1A, and on Saturdays shall be paid for at the rate of time and one-half (1/2). All work performed during lunch