

Respondent, contractor, appeals from a recommended decision finding a violation of Section 2-11(e)(16)(iii) of Title 34 of the Rules of the City of New York (RCNY) for failure to comply with Department of Transportation (DOT) standard specifications and applicable laws or rules. In the summons, the issuing officer (IO) affirmed observing at the cited location on December 2, 2016 as follows. “[R]espondent failed to comply with . . . DOT standard specifications, 1042A. Portion of 2016 kiosk installation trench measures 35" which means 6" & 12" cutbacks were not made. Respondent was notified on CAR #20166400318 on 10/26/16 to perform correct cutbacks but failed to do so.”

### **The hearing**

At the hearing, Petitioner submitted photographs of the cited conditions; details of Respondent’s street opening permit, effective from October 24, 2016 to November 13, 2016; and a record of the Corrective Action Request (CAR) referenced on the summons, notifying Respondent, among other things, that “correct cutbacks [were] not made per 1042A [in that the] trench measures 35" at portions.” The CAR record indicated that Respondent protested the CAR on December 5, 2016 on the ground that the CAR was not applicable on a non-protected street.

Respondent’s representative argued as follows. Petitioner’s response to Respondent’s CAR protest was that 34 RCNY Section 2-11(e)(12)(xi), as amended in August 7, 2016, now applied to non-protected streets. That rule now required all trenches to have a minimum opening width of 18 inches and to be restored in accordance with Standard Detailed Drawing<sup>1</sup> #H-1042. However, Drawing #H-1042 did not exist; the drawing numbers were #H-1042A, -B, -C, and -D. The amended rule provided no notice that Drawing #H-1042A, which previously only applied to protected streets, was now intended to apply to non-protected streets as well. Petitioner did not amend that drawing when it amended the rule. In support, Respondent’s representative submitted a copy of Drawing H-1042A, dated July 1, 2010.<sup>2</sup>

Petitioner’s representative responded that 34 RCNY Section 2-11(e)(12)(xi) always applied to non-protected streets, as well as protected streets. He stated that the purpose of the amendment was to make all the cutbacks conform. He further stated that Drawing #H-1042 included all four drawings (A through D).

The hearing officer found that 34 RCNY Section 2-11(e)(12)(xi), as amended, applied to all trenches, whatever the nature of the street, and that Respondent was on notice of that change. He found that Respondent’s trench was required to follow Drawing #H-1042, as in effect on August 7, 2016, and that it did not comply. He further found that the added identifier “A” to Drawing H-1042 was immaterial.

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<sup>1</sup> Section 2-02 of 34 RCNY defines “Standard Detail Drawings” as “the most recent version of the standard details of construction, available from [DOT] and the New York City Department of Design and Construction, which contains drawings showing required dimensions of items to be constructed.” The Standard Detail Drawings are published by DOT in *Standard Details of Construction*, which is available on the DOT website.

<sup>2</sup> Drawing H-1042A is described on the bottom right corner of the drawing as: “Standard Trench or Hole Restoration for Streets Protected by NYC Administrative Code § 19-144.”

## **Issues presented on appeal**

The issue on appeal is whether the cutback requirements set forth in Drawing #H-1042A, as required by 34 RCNY Section 2-11(e)(12)(xi), apply to non-restricted streets and, if so, whether Petitioner established a violation of 34 RCNY Section 2-11(e)(16)(iii).

## **Applicable law**

Section 2-11(e)(16)(iii) of 34 RCNY provides that “[p]ermittees shall comply with all applicable sections of these rules, the specifications, and all other applicable laws or rules.”

Section 2-11(e)(12)(xi) of 34 RCNY provides that “[a]ll trenches must have a minimum opening width of eighteen inches (18”)” and that “[t]he trench must be restored in accordance with Standard Detail Drawing # H-1042.”

## **The appeal**

On appeal, Respondent’s attorney reiterates her argument that Respondent had no notice that the requirements of 34 RCNY Section 2-11(e)(12)(xi), as amended, now included non-protected streets. She states that neither Drawing # H-1042A nor the amended rule notifies the permit holder that Drawing # H-1042A now applied to non-protected streets. She also claims that the July 1, 2010 version of Drawing # H-1042A was the most recent version of that drawing.

Respondent did not answer the appeal.

## **The Board’s determination**

Having fully reviewed the record, the Board finds that the hearing officer’s decision is supported by the law and a preponderance of the evidence, and denies the appeal.

## ***Cutback requirements set forth in Drawing #H-1042A apply***

The Board finds that the cutback requirements set forth in Drawing #H-1042A apply to non-restricted streets. Section 2-11(e)(12)(xi) of 34 RCNY applies to “all trenches” and requires an 18-inch minimum opening width and restoration of the trench “in accordance with Standard Detail Drawing #H-1042.”<sup>3</sup> The reference to “Drawing #H-1042” applies to all relevant drawings under that number, regardless of the letter suffix. The Board takes official notice that the most recent revision of Standard Detail Drawing # H-1042A is dated March 15, 2016. The revised drawing contains the notation, “Revised non-protected streets to protected,” and refers to methods of concrete removal for protected and non-protected streets in Note 6. Contrary to Respondent’s attorney’s contention, the revised drawing clearly notifies permit holders that the revision applies to non-restricted streets. Section 2-09(a)(2) of 34 RCNY requires, in relevant part, that all public

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<sup>3</sup> As Petitioner’s representative noted at the hearing, 34 RCNY Section 2-11(e)(12)(xi) applied to both restricted and non-restricted streets before the August 7, 2016 amendment. The previous provision set forth different cutback requirements for restricted and non-restricted streets. The amended provisions sets forth uniform requirements.

infrastructure work be designed and installed in compliance with the last versions of DOT rules and the DOT publications *Standard Specifications* and *Standard Detail Drawings*. Permit holders are required to be knowledgeable about the latest published requirements. Additionally, Respondent was notified in CAR #20166400318 about its non-compliance with the most recent cutback requirements, but failed to comply.

***Violation of 34 RCNY Section 2-11(e)(16)(iii) established***

On this record, Petitioner established the violation charged. Section 2-11(e)(16)(iii) of 34 RCNY makes it a violation to fail to comply with DOT rules and specifications, and other applicable laws and rules. On the summons, the IO charged Respondent with a failure to comply with “standard specifications” in Drawing #H-1042A based on a failure to make required “6" & 12" cutbacks” in a trench installation. The cutback requirements and the requirement to comply with Drawing #H-1042 are set forth in 34 RCNY Section 2-11(e)(12)(xi). Because Respondent failed to comply with the requirements under 34 RCNY Section 2-11(e)(12)(xi), it was in violation of 34 RCNY Section 2-11(e)(16)(iii).

Accordingly, the Board affirms the hearing officer’s recommended decision sustaining a violation of 34 RCNY 2-11(e)(16)(iii) and imposing a civil penalty of \$750.

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Additional information from OATH records (not in original decision)

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Master NOV #

700828682

Name of Respondent's counsel or other  
authorized representative (if any)

BONNIE P. ESQ.