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SUZANNE A. BEDDOE
COMMISSIONER \ CHIEF JUDGE

ALESSANDRA F. ZORGNIOTTI
ADMINISTRATIVE LAW JUDGE
212-933-3017

June 7, 2013

Comptroller John C. Liu
Office of the Comptroller
Municipal Building - 1 Centre Street
New York, New York 10007

Re: *Office of the Comptroller ex rel. Local 237 v. Office of Labor Relations,* OATH Index No. 126/13

Dear Comptroller Liu:

A prevailing wage proceeding was held before me in the above-referenced matter. The record of the proceeding and my amended report and recommendation dated June 7, 2013, are enclosed for your review and final decision.

By copies of this letter, I am providing the parties with my amended report and recommendation.

Upon taking final action in this matter, please have your office send a copy of your decision to the Office of Administrative Trials and Hearings so that we may complete our files.

Very truly yours,

Alessandra F. Zorgniotti

Alessandra F. Zorgniotti
Administrative Law Judge

AFZ:mw
Encl.

c: Deborah Seidenberg, Esq.
Constantine P. Kokkoris, Esq.
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Office of the Comptroller, ex rel. Local 237 v. Office of Labor Relations

OATH Index No. 126/13 (June 7, 2013)

Preliminary determination that Local 237 elevator mechanics and supervisors be paid commensurate with wages and supplemental benefits of mechanics and supervisors in Local 1 and that Local 237 helpers be paid commensurate with wages and supplemental benefits of helpers in Local 3 should be affirmed.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
CITY OF NEW YORK OFFICE OF THE COMPTROLLER, EX REL. CITY EMPLOYEE UNION LOCAL 237, I.B.T
Petitioner
-against-
CITY OF NEW YORK OFFICE OF LABOR RELATIONS
Respondent

AMENDED REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

Petitioner, the City of New York Office of the Comptroller ("Comptroller"), brought this proceeding pursuant to section 220(8-d) of the Labor Law on behalf of the City Employee Union, Local 237, International Brotherhood of Teamsters ("Local 237"). Petitioner seeks a determination of the prevailing wages and supplemental benefits to be paid to supervisor elevator mechanics ("Local 237 supervisors"), elevator mechanics ("Local 237 mechanics"), and elevator mechanic helpers ("Local 237 helpers") (collectively "complainants"), who are employed by the City of New York ("City"). The City was represented by respondent, Office of Labor Relations ("OLR").

Petitioner alleged that this tribunal should uphold its preliminary determination (Pet. Ex. 5A) that retroactive to July 1, 2009, Local 237 mechanics and supervisors should be paid commensurate with wages and supplemental benefits set forth in the collective bargaining agreement ("CBA") between the Elevator Manufacturers Association of New York ("EMANY") and the International Union of Elevator Constructors Local Union No. 1 ("Local 1") for

comparable "elevator service/modernization mechanic" ("Local 1 mechanics") and "elevator mechanic-in-charge" ("Local 1 supervisors"). Petitioner further alleged that Local 237 helpers should be paid commensurate with wages and supplemental benefits set forth in the CBA between the Elevator Industries Association, Inc. ("EIA") and the International Brotherhood of Electrical Workers Local 3 ("Local 3") for elevator mechanic helpers ("Local 3 helpers").

Respondent OLR alleged that Local 237 mechanics and supervisors should be paid the same as the equivalent titles in Local 3 (Tr. 29; ALJ Ex. 2). Local 237 claimed that Local 237 helpers should be paid the same as Local 1 apprentice level 4 and/or journeymen-in-training (Tr. 18-19).

Following a six-day hearing that was interrupted by Hurricane Sandy, the record closed on May 16, 2013, with the submission of post-trial briefs. For the reasons below, I find that the Comptroller's preliminary determination should be affirmed.

BACKGROUND

Statutory Framework

Section 220 of the New York State Labor Law ("Labor Law 220") requires employers, including the City, to pay "laborers, workmen, or mechanics" in its employ the prevailing rate of wages and supplemental benefits paid in the private sector "for a day's work in the same trade or occupation in the locality" where the work is performed. Labor Law § 220(3)(a) (Lexis 2013). 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, 204 (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).

Labor Law 220 also requires that bargained rates paid in the private sector be deemed prevailing, providing that the CBAs cover at least 30% of the "workers, laborers or mechanics in the same trade or occupation in the locality." Labor Law § 220(5)(a).

The City and public employee organizations (unions) are required to negotiate in "good faith" and enter into a written agreement (CBA) as to the rate of wages and supplemental benefits to be paid prevailing wage employees. NYC Admin. Code § 12-307(a)(1). If

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

Procedural Background

In 1998, complainants were found to be comparable to helper, mechanic (maintenance mechanics and repair/modernization mechanics), and supervisor titles in Local 3 and the prevailing rate was set by the Local 3 CBA. *Comptroller v. Office of Labor Relations*, OATH Index No. 616/98 (May 18, 1998), *aff'd*, Comptroller's Dec. (August 10, 1998), *aff'd sub nom, Local 237 v. Comptroller*, 259 A.D.2d 314 (1st Dep't 1999). Subsequently, a consent decree established the prevailing rates for complainants through June 8, 2008, based on the Local 3 CBA (Pet. Ex. 2).

Following unsuccessful negotiations with OLR, Local 237 filed a complaint with the Comptroller on October 3, 2008, seeking an investigation and determination of the prevailing rate for complainants as of June 8, 2008 (Pet. Ex. 1).

On March 29, 2010, the Comptroller issued a preliminary determination (Pet. Ex. 5A) finding that for the period June 9, 2008 through June 30, 2009, Local 3 was prevailing and that complainants were comparable to elevator helper, mechanic, and supervisor titles in Local 3. For the period June 9, 2008, to the present, the Comptroller found that Local 1 was prevailing and that Local 1 mechanics and supervisors were comparable to the Local 237 mechanics and supervisors. Since there was no equivalent title for helper in Local 1, the Comptroller concluded that Local 3 would prevail for Local 237 helpers. Local 237 and OLR engaged in further collective bargaining but were unable to reach an agreement.

The Comptroller filed the instant petition dated July 9, 2012 (ALJ Ex. 1). At the hearing, the parties stipulated that complainants should be paid commensurate with wages and supplemental benefits paid to Local 3 elevator mechanics, supervisors, and helpers for the period June 9, 2008 through June 30, 2009 (Tr. 16-18).

Thus, the questions to be determined here are whether as of July 1, 2009: (1) Local 237 mechanics and supervisors should be paid the same as Local 1 mechanics and supervisors as alleged by the Comptroller and Local 237; and (2) Local 237 helpers should be paid the same as Local 3 helpers as alleged by the Comptroller and OLR.

The Hearing

At the hearing each party produced witnesses and documentary evidence. On its direct case, petitioner presented Wasyl Kinach, the Director of Classifications of the Bureau of Labor Law, who led the investigation that resulted in the Comptroller's preliminary determination, and Mr. Martin, the President of EIA who negotiates the CBA with Local 3. The direct case focused on: (1) the Comptroller's conclusion that there were more members in Local 1 than Local 3 performing similar work as complainants and, therefore, that Local 1 was prevailing for Local 237 mechanics and supervisors; and (2) the Comptroller's conclusion that Local 3 is prevailing for Local 237 helpers because there is no helper title in Local 1. Petitioner argued that once the Comptroller proffered its preliminary determination it was respondent's burden to disprove it (Tr. 215-16).

Local 237 presented Mr. O'Neill, the day secretary for Local 1, Mr. Olenick, the business representative for Local 3, and various Local 237 mechanics, helpers, and supervisors. Local 237's proof focused on the work performed by complainants and how it was comparable to work performed by titles in Local 1.

Respondent presented Ms. Carnivale, the Deputy Director of Classifications at the Department of Citywide Administrative Services ("DCAS") and Mr. Buny and Mr. Abruzzo, the Director and Deputy Director, respectively, of the elevator department at the New York City Housing Authority ("NYCHA"). Respondent's proof focused on how the elevator repair unit at NYCHA is structured and how the work performed by complainants compared to work performed by titles in Local 3.

After respondent rested, petitioner was asked by this tribunal to elaborate on the basis for the preliminary determination. This was done over petitioner's objection without determining the burden of proof question to ensure a complete record and avoid delay.

On rebuttal petitioner recalled Mr. Kinach and presented additional documents and testimony which provided a chronology and explanation of the relevant investigations and support for the conclusions in the preliminary determination.

Complainants' Job Duties

Complainants are classified in three titles: elevator mechanic, elevator mechanic helper, and supervisor elevator mechanic. According to City records, there are 218 elevator mechanics, 196 elevator mechanic helpers, and 29 supervisor elevator mechanics. The majority of complainants work for NYCHA. The remaining complainants work for DCAS and other City agencies (Resp. Ex. F; Carnival: Tr. 567-68). DCAS job specifications and notices of examinations set forth the duties and qualifications for each title (Pet. Exs. 4A-C, 3A-C).

Local 237 mechanics work under supervision and inspect, maintain, adjust, and repair elevator/escalator systems and perform related work. Typical tasks include: lubricating, cleaning, adjusting, and repairing components; inspecting doors, cables, and related items to assure safe operations; and re-roping and re-wiring systems (Pet. Exs. 4A, 3A).

Local 237 helpers assist mechanics, make routine inspections of elevator equipment in a preventative maintenance program, and clean work areas (Pet. Exs. 4B, 3B). Helpers may not work alone and must be supervised by a mechanic or a supervisor.

Local 237 supervisors are responsible for the work of helpers and mechanics. Typical tasks include: assigning and monitoring work; estimating related costs; enforcing safety regulations; and keeping records and making reports (Pet. Exs. 4C, 3C).

All three titles require that applicants pass a civil service exam. Except for a driver's license there are no licensing requirements. Complainants must have the requisite work experience and/or training in an applicable school to qualify for their title. The line of promotion from helper is to mechanic and then to supervisor (Pet. Ex. 4A-C; Carnival: Tr. 575).

The Elevator Trade in New York City

There are four areas of work in the elevator industry: new construction, maintenance, repair, and modernization. New construction involves the building of elevators in new buildings. Maintenance consists of routine inspecting, adjusting, and maintaining of elevators and involves the uses of light tools. Repair consists of the replacement and repair of existing parts and

involves the use of heavier tools. The term modernization was open to debate during the hearing. It was defined by witnesses for petitioner and Local 237 as the replacement of existing elevator parts with upgraded or modern equipment. Respondent's witnesses stated that modernization did not include the replacement of individual components but was limited to an upgrade of the entire elevator system. At issue was whether any of the work performed by complainants as part of their repair duties qualifies as modernization.

Complainants perform maintenance and repair but never do new construction. Local 1 performs maintenance, repair, modernization, and new construction. Local 3 performs maintenance, repair, and modernization (Tr. 308-10). Local 3 has different wages for maintenance and repair/modernization.[1] Local 1 has the same wage for repair, maintenance, and modernization and also has a higher rate for new construction (Kinach: Tr. 308-10; Paul: Tr. 483-84, 486-87; Sullivan: Tr. 520). The wages under the Local 1 CBA are higher than the rates under the Local 3 CBA. Moreover, the wages for the other elevator workers in Locals 1 and 3 are based on percentages of the mechanic rates (Pet. Exs. 8, 9). Locals 1 and 3 compete for business in elevator modernization, maintenance, and repair (Martin: Tr. 232).

Petitioner Comptroller's Proof on Direct and Rebuttal

Mr. Kinach testified that in addition to investigating prevailing wage complaints filed by City unions (under Labor Law § 220(8-d)), the Comptroller sets annual prevailing wage schedules for private contractors working on City contracts (under Labor Law § 220(6)) (Tr. 30-31, 315). The wages are established by the CBA of the prevailing private sector union. City laborers performing comparable work are paid the same as the prevailing private contractors (Tr. 102-04, 106, 314, 763, 766). Only journeyman titles are included in the wage schedule. Thus, only the elevator mechanic title is listed therein (Tr. 714-15, 729).

Mr. Kinach testified that investigations on behalf of City unions occur when specific titles are not in the prevailing wage schedule. The question is what private sector titles are comparable to the City titles in terms of the actual work performed (Tr. 290-91, 789-92).

For his investigation to determine complainants' prevailing wage, Mr. Kinach testified that the titles for elevator repair workers in the private sector are basically the same as the City

[1] The Local 3 CBA classifies mechanics as Grade A elevator repair modernization mechanic, Grade B elevator repair maintenance mechanic, and Grade A and B elevator maintenance mechanic (Pet. Exs. 8A, 8B at 34).

titles (Tr. 37). Thus, he focused on whether Local 1 or 3 was prevailing because both have more than 30% of the workers in the industry (Tr. 728, 778-79). Prior to July 1, 2009, Local 3 was prevailing and then Local 1 became prevailing for purposes of the wage schedule. This change was the result of a survey conducted by the Comptroller (Tr. 38, 95, 770-71).

In 2008 the Comptroller received a request from Local 1 for a determination whether it was prevailing for the annual wage schedule (Tr. 710-714). In 2009 Mr. Kinach asked Locals 1 and 3 to provide him with the employer-signatories of their respective CBAs. Using the list generated (Pet. Ex. 12; Tr. 716), Mr. Kinach sent the employers a survey to determine the number of mechanics each had (Tr. 316, 343, 716-18, 339, 341, 382, 797; Resp. Exs. C, D, E). Based on the responses and follow-up telephone calls (Tr. 726, 736-39), Mr. Kinach created a spread sheet (Pet. Ex. 13) and determined that Local 1 had more workers than Local 3 working in the elevator repair and maintenance trade (Tr. 723-27).[2] Accordingly, the Comptroller revised the wage schedule to reflect that Local 1 was prevailing as of July 1, 2009 (Tr. 727, 740).

In 2011, Local 3 requested that the Comptroller investigate whether it was prevailing (Tr. 734). In 2012 Mr. Kinach wrote to Locals 1 and 3 and requested a list of all members who performed elevator repair and maintenance in New York City between January 1, and March 31, 2012, with their titles and employers. Mr. Kinach also requested copies of the respective CBAs and any other information about titles performing this work (Pet. Ex. 6A; Tr. 78, 740-41).

Local 1 responded that it had 2,500 members engaged in construction, modernization, and repair and maintenance of elevators and other forms of people moving equipment. Local 1 provided the CBA, with a list of employers, and a list of more than 1,800 members with their titles who performed elevator repair and maintenance in New York City during the period requested. No workers or employers engaged in new construction were included (Pet. Ex. 6B2-6).

Local 3 provided a list of 1,310 individuals employed during the applicable period, the title of the employees, their employers, and the relevant CBA (Pet. Ex. 15).

Mr. Kinach testified that in reviewing the employer lists (Pet. Ex. 6C), the investigators made sure that they were not double counted. There were follow-up calls to employers to verify that the listed workers were on staff during the designated period and were performing repair and

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[2] The Comptroller performed an earlier survey (Tr. 724-25, 739) that was found insufficient. *See Matter of Intern'l Union of Elevator. Constructors Local No. 1 v. Thompson*, 22 Misc. 3d 1136(A) (Sup. Ct. N.Y. Co. 2009).

maintenance only (Tr. 95-98, 749). Mr. Kinach prepared a spreadsheet (Pet. Ex. 14) and found that Local 1 was still prevailing because it had more workers employed in the elevator trade in New York City (Tr. 98-99, 750-53).

In 2012 the Comptroller also conducted an investigation on the prevailing wage for the Local 237 helper. Mr. Kinach looked at all of the complainants' titles. The investigators first considered the prevailing wage schedule for elevator repair workers (Tr. 38, 753-54). Since Local 1 was prevailing and it has an elevator supervisor and a mechanic title that are comparable to Local 237 supervisors and mechanics, they were matched to those titles. However, since Local 1 does not have a helper title, Local 237 helpers were matched to Local 3 because it has a helper title. In reaching this conclusion, the investigators reviewed the CBAs and documents provided by the relevant unions, as well as the DCAS notices of examination and job specifications. They also observed elevator workers on Locals 237, 1, and 3 job sites (Tr. 45-50, 313, 757-62; Pet. Exs. 3, 4, 7, 9).

On visits to the two Local 237 sites, investigators observed complainants, including helpers, performing basic elevator repair and maintenance such as replacement of hoist cables, adjusting doors and the motor break, and greasing and evaluating motor brushes. These tasks were consistent with the DCAS helper job specifications (Tr. 50-66; Pet. Ex. 7).

At the first Local 3 site, investigators observed two crews working on modernization of elevators. The first crew consisted of a mechanic, a helper, and an apprentice and they were replacing hoist motors. The second crew consisted of a mechanic and two helpers who were checking doors. The Local 3 helpers stated that they performed the duties listed on the DCAS helper job specification and were seen performing that work (Pet. Ex. 7 at 4). At the second site, the investigators spoke to a Local 3 supervisor who stated that helpers perform work that includes cleaning pits, repairing door checks, and technical wiring jobs (Pet. Ex. 7 at 5). At the third site there were no Local 3 helpers working (Pet. Ex. 7 at 5).

Mr. Kinach testified that despite numerous attempts, the investigators had difficulty setting up visits to observe Local 1 fourth year apprentices and journeymen-in-training ("JIT") (Tr. 69-74, 88). At the first location there was a Local 1 mechanic and several fourth year apprentices but they refused to work in front of the investigators. Upon speaking to the crew, the investigators learned that apprentices usually work in the repair section and do not perform maintenance tasks. The work at the site consisted of replacing hauling cables which entailed

securing the cab, preparing the cables for replacement, and replacing each one sequentially (Tr. 108-09; Pet. Ex. 7 at 5). The second site was a residential building. A Local 1 mechanic and a first year apprentice were repairing an elevator and the work consisted of removal and replacement of hoist cables. The work performed did not match the work of a Local 237 helper (Pet. Ex. 7 at 6). No Local 1 JITs were observed (Tr. 69, 88; Pet. Ex. 7 at 6).

In rejecting the Local 1 fourth year apprentice and JIT titles as a match for the Local 237 helper, Mr. Kinach found that the JIT title is a temporary title that is subject to termination from employment within four years (Tr. 77, 763-65, 781; Pet. Ex. 9 at 7). Moreover, the title is not regularly used as evidenced by the investigators's inability to ever see a JIT working (Tr. 77; Pet. Ex. 7 at 6-7). The fourth year apprentice title was also inapplicable because an apprentice does not have the same latitude as a Local 237 helper, is required to take classes, and must be registered with the New York State as an apprentice (Pet. Ex. 7 at 6-7). Mr. Kinach further testified that the apprentice is a training title that requires passing an exam whereas the Local 3 helper can remain in that title and performs the same tasks as the Local 237 helper (Tr. 75-76; Pet. Ex. 7 at 7).

Mr. Martin testified that Local 3 helpers assist mechanics in their duties and perform general maintenance including: working on controllers; changing brushes in motors; taking an elevator out of service; replacing parts; changing contacts; and cleaning and oiling doors and related parts (Tr. 226-27). Helpers can do general maintenance alone under the "watchful eye" of a nearby mechanic or work directly with a mechanic (Tr. 228-29, 237-38, 241). There is also a rule in the Local 3 CBA that allows helpers to work alone in a residential complex so long as the ratio to the mechanics does not fall below 50% (Tr. 249-53; Pet. Ex. 8B at 35).

Mr. Martin reviewed the DCAS helper job specification and stated it was consistent with the duties of the Local 3 helper but that some tasks would be considered repairs and others maintenance (Tr. 230-31, 259-60). He testified that there are no plans to have the helper title expire; it is a permanent position. The helper rates are frozen throughout the life of the 2009-2012 Local 3 CBA. This was done at Local 3's request to save money and put improvements into other areas of the contract, not to encourage helpers become mechanics (Tr. 225, 246-49).

Mr. Martin testified that Local 3 has an apprentice title. Unless the apprentices are experienced, they cannot work alone. Local 3 helpers and fourth-year apprentices often perform the same work. Moreover, apprentices can perform mechanic's work and be paid that wage if

they have the skills, whereas a helper must become a mechanic to do that work (Tr. 242-46, 265-66). A Local 3 apprentice does not need to pass a test to become a mechanic but a Local 1 apprentice does (Tr. 267-68). A Local 3 maintenance mechanic can only do maintenance whereas a repair mechanic can do both maintenance and repair (Tr. 272).

Local 237's Proof

Mr. O'Neill testified that mechanic apprentices in Local 1 train in a four-year program. Upon completion they are eligible to sit for an exam to qualify as a mechanic who performs maintenance and repairs. Those who do not take the exam apply to be classified as JITs. There is no helper title in Local 1 but a JIT or a fourth-year apprentice is like the helper title in Local 3 (Tr. 148-50, 172, 192; Pet. Ex. 6B-1). JIT and fourth-year apprentices receive the same pay and have the same job duties and requirements. Both work under supervision (Tr. 151-52; Pet. Ex. 3B). According to the Local 1 CBA, JITs are subject to termination after four years of completing the apprenticeship program (Tr. 161-62; Pet. Ex. 9 at 7). Mr. O'Neill testified that as of May 2012, there were no JITs listed on Local 1's roster of employees but that they could be listed as apprentices (Tr. 166, 184-89; Pet. Ex. 6B-4).

Mr. Olenick testified that Local 1 became prevailing after Local 3 lost some large employers. Recently, the Local 3 helper became the only title that does not get a rate increase each year of the life of the Local 3 CBA. This was done to encourage helpers to move into the mechanic title (Tr. 199-200, 202-03). Apprentices become A helpers after they complete their training. The apprentice and helper titles are similar except that helpers can work on their own and do not need direct supervision if there is more than one A helper on a residential job (Tr. 201-03, 208).

Mr. Hudak, Mr. Paul, Mr. Sullivan, Mr. Ungania, and Mr. Deleonibus are Local 237 helpers, mechanics, and, supervisors who testified about the work they perform for NYCHA or DCAS. The mechanic and supervisor witnesses started out as helpers and were promoted to their current positions. Each witness reviewed the relevant DCAS job descriptions and testified that they perform the duties listed and that their daily tasks cover repair, maintenance, and modernization. They usually work in teams that are comprised of a mechanic and a helper. They do not work alone but sometimes they work apart but are in radio contact.

The Local 237 witnesses testified that modernization means upgrading elevators with new equipment. Typical modernization jobs that they perform include: changing operator heads; changing mechanical safety edges to electronic eyes; installing zone locks, clutches, and controllers; replacing cables; and bringing an elevator up to code. Repairs usually mean fixing and replacing parts such as: changing machine and motor bearings; replacing cables; installing doors, hanger rollers, tethers, handrails, chains, pull motors, cables, and safety devises. Maintenance involves checking the elevator to make sure it is running properly including: greasing, cleaning and checking parts; checking fluid levels; and performing inspections. Although not in their job descriptions, some of the Local 237 witnesses have been called upon to rescue people who are stuck in elevators and know how to shut down elevators so that they do not drift and injure people (Hudack: Tr. 425-31; Sullivan: Tr. 505-06).

Mr. Paul, a Local 237 mechanic, testified that at DCAS, mechanics are given a list of tools to purchase and that any tools not on the list are provided by DCAS (Tr. 475-76). Mr. Ungania, a Local 237 supervisor at DCAS, testified that repairs requiring special tools are done by the repair team but any mechanic can do the work (Tr. 529-33, 536).

Mr. Hudak, a Local 237 mechanic, testified that NYCHA has a separate repair team that does scheduled maintenance such as replacing worn cables as opposed to emergency repair jobs that require immediate attention. There is no separate maintenance team. Instead, there is a house team that works daily in a particular building or complex and is responsible for the maintenance, repair, and modernization of the elevators. If the team comes across a big job, a request will be made to the repair team that has the necessary equipment. Local 237 mechanics can perform both types of jobs and receive the same rate of pay for each (Tr. 431-35). Moreover, NYCHA has a standard operating procedure for elevator service, maintenance, and repair (Union Ex. 2). Mr. Hudak also testified that NYCHA has a modernization unit that uses outside contractors for complete overhauls of elevators. Complainants are qualified to perform those tasks but are not provided with the equipment to do so (Tr. 441-44, 451). NYCHA provides tools to the mechanics (Tr. 451). The modernization teams have mechanics and helpers and receive the same rate of pay as others in their titles (Tr. 449).

Mr. Sullivan, a Local 237 supervisor at NYCHA, testified that complainants are allowed to bid for the location or type of work they wish to perform. For example they can ask to work in a specific borough or housing development, on a repair team, in the contracts unit where

modernization projects are being done by private contractors, in the violations unit inspecting elevators, or doing elevator shutdowns (Tr. 496-99). If a repair involves the entire day, the repair team will be assigned rather than an individual mechanic and helper (Tr. 500-01, 518).

Respondent OLR's Proof

Ms. Carnival testified that she is responsible for classifying, updating, and modifying information for all the titles in the City including DCAS job specifications (Tr. 569). An agency can assign an employee to do only tasks within a job specification (Tr. 574). The City has apprentice titles which include on-the-job training to take the civil service exam and move into a higher title. The helper title is not an apprentice title. A 237 helper performs entry level duties and can remain in that title (Tr. 575-77).

Mr. Buny and Mr. Abruzzo testified about the elevator department at NYCHA which has 3,330 active elevators. Both witnesses testified that NYCHA does not construct new elevators and contracts out modernization projects. They further testified that elevator modernization is the replacement of entire elevator systems not the replacement of individual components. Replacement of safety edges and zone locks are considered repairs because it is an upgrade or replacement of an existing component (Tr. 594-97, 657-60).

Mr. Buny and Mr. Abruzzo reviewed the operational chart of the NYCHA elevator department and testified about the work performed by the various units (City Ex. F). The operations unit covers day-to-day maintenance including preventative maintenance and restoring service to inoperative elevators. Mechanics are assigned to different buildings and work under a supervisor. If the work does not need an outside team, the "house team" will do it (Tr. 602-04, 661-65). The elevator support unit is responsible for the repair of elevators during the day and on off hours. It has special equipment and does heavy duty repair of machinery, doors, and cables (Buny: Tr. 605, 608-09). Mechanics in the repair unit work on violations and do heavy repairs (Abruzzo: Tr. 664-66). The emergency service department ("ESD") responds to outages and restores cars that are out of service during off hours (Buny: Tr. 606-07). ESD performs maintenance work but on a smaller scale than operations (Abruzzo: Tr. 667). The training center provides training to mechanics and helpers and includes special operation teams that handle electrical and other issues that cannot be fixed by the teams in the field (Buny: Tr. 608-10).

The elevator maintenance support teams handle problems that the preventative maintenance teams cannot do because of work flow (Buny: Tr. 610-11). Maintenance teams do outages, preventative maintenance, and violations (Abruzzo: Tr. 667-68). The inspection unit fulfills the City's mandated inspection requirements (Buny: Tr. 613-14). Special teams are versed in electrical components and controllers and install remote monitoring systems (Abruzzo: Tr. 667). The contracts unit has two divisions: modernization and contracts. The modernization unit acts as a liaison and oversees vendors that do modernization projects because NYCHA does not have full-time teams to replace an elevator (Buny: Tr. 611-13).

Mr. Buny and Mr. Abruzzo reviewed the Local 3 CBA and testified that the work performed by NYCHA mechanics in specific units is similar to the work performed by mechanics in the various classifications at Local 3. Mr. Buny stated that the operations unit performs similar work to Local 3 maintenance mechanics; the repair and special operations units perform similar work to Local 3 Grade A elevator maintenance mechanics; ESD performs similar work to Local 3 elevator maintenance mechanics; and the maintenance support division performs similar work to Local 3 Grade B elevator maintenance mechanics (Tr. 617-19). Mr. Abruzzo agreed that the operations unit performs similar work to Local 3 maintenance mechanics but stated that the repair unit, special operations unit, maintenance support teams, and ESD perform similar work to Local 3 Grade B elevator maintenance mechanics; and the special teams perform similar work to Local 3 Grade A elevator maintenance mechanics (Tr. 669-70).

On cross-examination, both Mr. Buny and Mr. Abruzzo acknowledged that in the past 10 months NYCHA has performed two in-house modernization jobs where an elevator and a controller were replaced by NYCHA mechanics (Buny: Tr. 624-25; Abruzzo: Tr. 673-74). Mr. Buny also acknowledged that installing zone locks on elevators that never had them was "in a vague way" modernization work (Tr. 626) and that mechanics have completed jobs not finished by outside contractors (Tr. 635). Mr. Buny also stated that NYCHA mechanics have the qualifications to perform modernization and special repair work that is contracted to outside vendors but that it is more efficient to contract the work out (Tr. 640-43).

Mr. Abruzzo agreed that NYCHA mechanics are allowed to pick the unit where they wish to be assigned every two years. He stated that some mechanics are better suited to certain jobs and that in order to be in one of the repair or special teams they must be assigned by management (Tr. 681-87).

ANALYSIS

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

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

Labor Law § 220 (5)(a).

It was undisputed that there are private sector employers in the City of New York who perform elevator repairs and maintenance, that those employers employ members of Locals 1 and/or 3, and that Locals 1 and 3 each represent 30% or more workers in the "same trade or occupation" as complainants. Respondent does not contest that Local 1 is prevailing under Labor Law 220(6) for purposes of setting the annual prevailing wage schedule for workers who perform elevator repairs and maintenance in New York City (OLR Brief dated April 19, 2013, at 22, 24). Thus, to the extent respondent asserted that the Comptroller's surveys used to set the annual prevailing wage schedules were flawed, these arguments need not be addressed.

The gravamen of respondent's argument is that petitioner's preliminary determination, under Labor Law 220(8-d), to match Local 237 mechanics and supervisors to comparable Local 1 titles because Local 1 is prevailing is flawed. Respondent asserted that when there are two unions representing at least 30% of the workers in the same trade, the union chosen should be the one whose workers are most similar to the City employees. Here, Local 237 mechanics and supervisors should be matched to Local 3 because the classifications in the Local 3 CBA more closely match the division of work within NYCHA which employs the majority of complainants.

As a preliminary matter I find that the burden of proof did not shift to respondent after the Comptroller proffered its preliminary determination. Petitioner's reliance on *Liquid Asphalt Distributors Ass'n v. Roberts*, 116 A.D.2d 295, 298 (3d Dep't 1989) is misplaced. *Liquid Asphalt* was an action brought by an association of asphalt businesses to challenge the annual prevailing schedule for workers who operated liquid asphalt distributors. The association argued that Labor Law 220(6) required the State of New York to prove that 30% of the workers were covered by the designated contract. The Court noted that in conjunction with abolishing the

State's obligation to conduct surveys, Labor Law section 220(6), as amended, explicitly placed the burden on employers who contest prevailing wage rates to show that less than 30% of the workers are subject to the adopted rate.[3] Since the association failed to do so, the prevailing wage schedule was upheld.

The instant case does not involve a challenge to the annual prevailing wage schedule under Labor Law section 220(6). It involves a challenge to the prevailing rates due to public employees under Labor Law section 220(8-d). Unlike section 220(6), nothing in section 220(8-d) places the burden on the party challenging the Comptroller's preliminary decision to disprove it. Thus, the burden shifting analysis in *Liquid Asphalt* does not apply to these proceedings.

While the burden did not shift to respondent, respondent's argument that Local 1 CBA rates do not apply to complainants even though Local 1 is prevailing cannot be sustained.

Labor Law 220 is silent as to the means of determining which prevailing wage should apply to public employees when a trade is covered by more than one private sector CBA. *See New York Telephone Co. v. N.Y.S. Dep't of Labor*, 272 A.D.2d 741, 744 (3rd Dep't 2000); *Local 175 v. Thompson*, 28 Misc. 3d 283, 287 (Sup. Ct. N.Y. Co. 2010). However, this tribunal has concluded, based on a review of the legislative history of Labor Law 220 as amended, that when two or more CBAs meet the 30% threshold, the CBA covering the greater number of workers controls in a Labor Law section 220(8-d) proceeding. *Comptroller v. Office of Labor Relations (Stationary Engineers Electric)*, OATH Index No. 230/92 at 69-72 (Apr. 15, 1992), *aff'd in relevant part*, Comptroller's Dec. (June 17, 1992); *see also International Union of Elevator Constructors Local No. 1 v. Thompson*, 22 Misc. 3d 1136A (Sup. Ct. N.Y. Co. 2009) (under definition of "prevailing . . . it stands to reason that when a trade is represented by more than one union . . . the rate should be set by using the rate set forth in the CBA of the union that has the most members employed in that trade within New York City.").

The finding that the CBA with the greater number of workers prevails is not only consistent with the legislative history, it is in harmony with Labor Law 220(3), which requires that *all* workers employed on public works be paid the prevailing rate of wages set forth in the annual schedule. *Gaston v. Taylor*, 274 N.Y. 359 (1937) (Labor Law section 220 applies to both private employers who contract for public works projects and municipal employers performing

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[3] Labor Law section 220(6) states in relevant part: "The employer must allege and prove by competent evidence, that the actual percentage of workers, laborers or mechanics is below the required thirty per centum . . . ."

their own public works). Here, the prevailing wage has been set by Local 1 because it has more workers in the elevator trade than Local 3. Matching Local 237 supervisors and mechanics to Local 3 titles would thwart the statutory mandate of Labor Law 220 because it would result in municipal employees working on public works for less than the prevailing rate. *See Kelly v. Beame*, 15 N.Y.2d 103, 110 (1965) (noting the statute's "basic underlying policy" that "persons who are employed on public works should receive the prevailing rate of wage that those doing the same work on nonpublic works receive"); *see also Bucci v. Village of Port Chester*, 22 N.Y.2d 195, 201 (1968) ("We are here required to give effect to a unique statutory scheme, one that has as its entire aim the protection of workingmen against being induced, or obliged, to accept wages below the prevailing rate from a public employer. This court has more than once noted that section 220 must be construed with the liberality needed to carry out its beneficent purposes").

Respondent's argument that Local 237 supervisors and mechanics are more similar to titles in Local 3 than Local 1, even if true, is without merit. Comparability does not require that the nature of the business performed by the private employer and the municipal employer be identical. Even workers employed in different fields can be working in a comparable trade or occupation if the actual work performed is similar. *Watson v. McGoldrick*, 286 N.Y. 47, 53-55 (1941). Here, Local 237 supervisors and mechanics are in the "same occupation or trade" as Local 1 supervisors and mechanics. The fact that NYCHA classifies complainants' work as maintenance/light repair and heavy repair and that this is arguably similar to the Local 3 CBA is not dispositive. The actual work performed by complainants, maintaining and repairing elevators, is comparable to the work performed by Local 1 which is prevailing.

Although NYCHA routinely outsources the modernization of entire elevator systems, respondent's witnesses acknowledged that complainants are qualified to perform this modernization work and that they perform it when necessary. It was also undisputed that complainants routinely replace individual elevator parts with upgraded or modern equipment. Whether complainants are replacing individual parts or entire elevator systems is of no moment because a central function of the work, removing old or obsolete parts and replacing them with new ones, is essentially the same. *Office of the Comptroller, ex rel. Local 1087 v. Office of Labor Relations*, OATH Index No. 2451/08 (Apr. 6, 2009) *adopted,* Comptroller's Order and Determination (June 26, 2009) (similarities in work performed by the maintenance engineers and

radio repair mechanics, and the skill sets needed to repair, maintain, and install the electronics communications equipment found sufficient to support finding that the two jobs are comparable).

Thus, the Comptroller's preliminary determination that Local 237 elevator mechanics and supervisors should be paid commensurate with wages and supplemental benefits of Local 1 mechanics and supervisors should be affirmed.

Moreover, the determination that Local 237 helpers should be paid commensurate with wages and supplemental benefits of Local 3 helpers should be affirmed. Local 237 argued that their helpers should be paid wages commensurate with apprentice level 4 and/or JITs in the Local 1 CBA because: (1) Local 237 helpers perform comparable work and the match should not be based on nomenclature; (2) the Local 3 helper title is becoming a transitional title and the wages frozen in the current CBA to encourage helpers to move to the mechanic title; and (3) matching Local 237 helpers to the non-prevailing Local 3 rate could theoretically result in a lower title receiving a higher wage than the superior title.

There was no dispute that Local 237 helpers perform comparable work to Local 3 helpers. Assuming that Local 237 helpers also perform comparable work to the Local 1 apprentice level 4 and JIT titles, these titles cannot, as a matter of law, be used for comparability purposes under Labor Law 220(8-d) because they are training titles subject to termination after three years. *See Office of the Comptroller, ex rel. Local 1320 v. Office of Labor Relations*, OATH Index No. 1522/09 at 15-16 (Sept. 10, 2009), *adopted*, Comptroller's Dec. & Order (Nov. 23, 2009) (entry-level titles not appropriate for comparison because they are training titles); *see also Local 363, International Brotherhood of Electrical Workers v. N.Y.S. Dep't of Labor*, 230 A.D.2d 440, 443 (3rd Dep't 1997) (prevailing wage schedule containing apprentice rates erroneous where "progression through the step rates is dependent upon the mastery of skills acquired during on-the-job training and formal course work" and the failure to pass the requisite tests results in apprentices being downgraded or terminated).

The fact that Local 3 helpers will not get any wage increases over the life of the current CBA, is not germane to the prevailing wage determination, just as the higher wages under the Local 1 CBA are not a factor in determining the Local 237 supervisors and mechanics rates.

Moreover, there was no evidence that the Comptroller's preliminary determination will lead to lower titles receiving higher wages than superior titles. Even if true, there is no legal support that this would necessitate a different result. There is no requirement in Labor Law 220

that lower and superior titles be paid wages and supplemental benefits under the same CBA. Indeed, in *Comptroller v. Office of Labor Relations,* OATH Index No. 588/10 (June 23, 2010), *modified and remanded*, Comptroller's Interim Order & Determination (Oct. 28, 2010), locksmiths and locksmith supervisors were found comparable to private sector employees represented by different employee organizations.

Nor is the determination to pay complainants under two CBAs inconsistent with *Comptroller*, OATH 616/98, where complainants were paid commensurate with rates in one CBA. In 1998 there was no dispute that the comparable workers be selected from the Local 3 CBA which was prevailing at the time. The only question was how to classify the work performed by Local 237 mechanics because there were different rates for maintenance and repair in the Local 3 CBA. Since Local 1 is now prevailing but has only comparable trainee titles for the Local 237 helper whereas Local 3 has a comparable helper title, it is appropriate to pay complainants under the applicable CBAs.

RECOMMENDATION

The Comptroller's preliminary determination should be affirmed.

Alessandra F. Zorgniotti
Administrative Law Judge

June 7, 2013

SUBMITTED TO:

JOHN C. LIU
Comptroller

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