CITY COUNCIL
CITY OF NEW YORK

---------- X

TRANSCRIPT OF THE MINUTES

Of the

COMMITTEE ON ZONING AND FRANCHISES

---------- X

December 2, 2014
Start: 2:13 p.m.
Recess: 5:28 p.m.

HELD AT: Committee Room – City Hall

B E F O R E: MARK S. WEPRIN
Chairperson

COUNCIL MEMBERS:
Daniel R. Garodnick
Jumaane D. Williams
Donovan J. Richards
Antonio Reynoso
Ritchie J. Torres
Vincent M. Ignizio
Vincent J. Gentile
Ruben Wills

A P P E A R A N C E S (CONTINUED)

Randy Mastro, Legal Counsel
Gibson, Dunn, & Crutcher
Outside Legal Counsel for Cablevision

Lisa Rosenblum, Executive Vice President
Government and Public Affairs
Cablevision

Jennifer Love, Senior Vice President
Security Operations
Cablevision

Harlan Silverstein, Legal Counsel
Law Firm of Kauff, McGuire and Margolis
Cablevision's Outside Labor Counsel

Jody Calemine, General Counsel
Communication Workers of America

Gay Semel, Counsel for District 1
Communication Workers Of America

Jerome Thompson
Former Cablevision Employee

Diedre Viegas, Technician
Cablevision in Brooklyn
Elected Representative for Local 1109
Bargaining Committee

Ruben Cruz
Cablevision

Elizabeth Parkin
Cablevision

Tiffany Oliver, Senior Coordinator
Construction Department
Cablevision - Brooklyn

Alicia Damone
Cablevision

Margaret Barnes
Cablevision

Dominic Montenegro
Cablevision, Long Island

John McCaughrean
Cablevision

CHAIRPERSON WEPRIN: All right. Good afternoon, everyone. My name is Mark Weprin. I'm Chair of the Zoning and Franchises Subcommittee. I thank you all for your patience. I know we have a lot of people here, and I know it was difficult getting in the rain. Hopefully, everybody has settled in. I don't know why they're sitting so far away from me, but somehow here are the following members of the committee have joined me today: Donovan Richards, Dan Garodnick, Antonio Reynoso, and who else is here? Ritchie Torres was here. Where did he go? Oh, there he went. Oh, sorry, Ritchie. Ritchie Torres. I'm joined by Anne McCaughey, the Counsel, and other members of the committee as well as other members of the Council I'm sure will be joining us. And I want to welcome everyone here today. Before we get started, I just want to set a couple of ground rules. I know there are people here on the bride's side and the groom's side, and I just want to make sure everyone gets along.

So we are going to have to limit any-- Please, no applause, no cheering, no booing. No matter how stupid you think what you just heard is, please keep it to yourself. Sometimes in these

meetings when people have a thing, they say we make them do jazz hands. I look at this crowd. This doesn't look a jazz hands crowd. I'm just saying. So what I would like to ask is to please keep quiet. You know, you'll have a chance. You know you'll have a chance. Someone will be speaking, who are speaking will get a chance to speak, and will describe. And we certainly can see the presence of both red shirts and the blue shirts. So we know you're here in force, but I'm going to ask that you please be quite, and respect the people who are testifying as well as your colleagues and our colleagues who are here today. So, if you would do that for me I would appreciate it. Otherwise, I will have to have the Sergeant-At-Arms, and he's a very mean guy, come and ask you to leave.

So with that in mind, I'll go back again and I'll put my glasses on. So, good afternoon. Okay. As I said, my name is Mark Weprin, and we are here today because the Subcommittee will receive testimony from representatives of Cablevision as well as the Communications Workers of America, and other members of the public. Cablevision, as you know, holds a franchise to provide cable television and

related services in Brooklyn and the Bronx in New York City serving approximate 700,000 residents and 40,000 small businesses. The City has a Franchise Agreement for the Bronx and Queens-- Excuse me, Bronx and Brooklyn, and it's set to expire July 18, 2020. The Franchise Agreement by the Council and with the City in accordance with the provisions of the New York City Charter reads the following:

According to the Collective Bargaining-- With respect to Collective Bargaining, a franchise should recognize the rights of employees to bargain collectively through representatives of their own choosing in accordance with applicable law. The franchise shall recognize and deal with representatives duly designated or selected by the majority of its employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other terms, conditions or privileges of employment, as required by law. Franchisees shall not dominate or interfere with or participate in management control or give financial support to any union or association or its employees.

In 1935, the United States Congress enacted the National Labor Relations Act, which protects the rights of employees and employers, and encourages both parties to collectively bargain. This Act also created the NLRB, which investigates charges made from employees, unions, and employers by covering a range of unfair labor practices. We had had a hearing in the City Council. It was actually across the street on February 26, 2013 because it had come to our attention, and it was widely reported of a dispute between Cablevision and some of its members. As union representatives, the Council had a subcommittee hearing. This subcommittee heard testimony from representatives of Cablevision, and the union. The union alleged that the permanently replaced workers who were fired at the time, or were replaced at the time, were done in an improper day. Cablevision representatives denied any improper actions with respect to the permanently replaced workers testifying that the workers were placed on recall list. Making them eligible for reinstatement as positions became available.

In the several months that followed, that subcommittee hearing, as it turns out each of those

22 workers had been reinstated by the company from the recall list. Cablevision also denies allegations that it is not negotiating in good faith, which they were accused of doing, just surface bargaining by the union. But in May of 2014, the NLRB filed a complaint against the company alleging that it had engaged in unfair labor practices by interfering with restraining and coercing employees from exercising their rights under the NLRA and failing to bargain collectively in good faith with the union. I won't outline all those charges here today of the original complaint. The trial was before the NLRB Administrative Law Judge in the fall of 2013, and decision has yet to come, although we do expect one shortly.

A second NLRB allegation on November 6, 3014, NLRB issued a second complaint against Cablevision. This complaint resulted from a series of unfair labor practice allegations made by the CWA against the company in regards to its alleged effort to eliminate the Brooklyn Workers' Union. The Union claimed, among other things, Cablevision high level management met with the Brooklyn workers to hear their grievances, and then blamed the unions for

these problems i.e., lack of pay parity, and with other cable workers. The wrongful termination of Jerome Thompson, who I believe we will hear from later today, one of the leaders of the Brooklyn Workers' effort to organize into CWA. And a legal Cablevision sponsored vote by a polling company, Honest Ballot Association, to determine if the Brooklyn workers still supported the union.

Specifically, the second NLRB complaint charged that Jerome Thompson was fired as retaliation for his union activity, and the company was intimidating workers, including through Jim Dolan's-- James Dolan's direct threat to the workers and if they did not return to the union, the would not receive raises and would be denied training and access to new technologies. That vote held by Cablevision conducted by the Honest Ballot Association on union representatives was an attempt to undermine the union. And the company improperly conducted surveillance of workers as they voted-- of the workers as they voted, and that Cablevision unilaterally changed the terms and conditions. That obviously is denied by Cablevision, and today we are hoping to hear from both sides just to get exactly

what is going on, what has happened, and that is why we are here today.

So we're going to start with representatives of the employer, Cablevision, and the only one testifying, although I know he's joined by other people, is Attorney Randy Mastro who is representing Cablevision, former Deputy Mayor. I want to welcome him back to City Hall. Mr. Mastro, if you could introduce the people who are with you for any consultation or whatever else. And whenever you're ready to give your testimony, we are ready to hear it.

RANDY MASTRO: Certainly, Mr. Chairman. Good afternoon, Mr. Chairman and members of the committee. I am Randy Mastro from Gibson, Dunn & Crutcher, a long time outside counsel for Cablevision. With me are Lisa Rosenblum, Cablevisions Executive Vice President of Government and Public Affairs; Jennifer Love, Cablevisions, Senior Vice President of Security Operations; and Harlan Silverstein of the Law Firm of Kauff, McGuire and Margolis, the company's long-term outside labor counsel.

Mr. Chairman, we're here today at the committee's request, but strongly believe that this second hearing to review Cablevision's Franchise Agreement is an inappropriate use of this Council's resources because the Council has no role to play in administering franchises and making these franchise decisions. So let's be honest about why we are all here because the Communications Workers of America and the Working Families Party are once again seeking to pressure Cablevision into acceding to the union's collective bargaining demands. The CWA and the WFP have infiltrated our City Government at all levels. It's unseemly for the Council acting at their behest to insert itself into private labor negotiations. It serves no legitimate governmental purpose. It won't work, and it has to stop.

At the outset, I want to make one thing crystal clear, Cablevision, which has contributed so much to our local economy and created thousands of local jobs employing a diverse workforce, is in full compliance with all of its franchise obligations including any arguably relating to collective bargaining. The company continues to bargain in good faith with CWA over contract terms covering some 270

employees having held 40 bargaining sessions. Having reached agreement in principle on 54 key terms and continuing negotiations on the few outstanding issues. To be sure, one of those remaining issues is wages, and while this will no doubt continue to be one of the most difficult to resolve, Cablevision has made multiple significant proposals for wage increases and is hopeful that agreement can be reached in the context of an overall collective bargain agreement.

At the same time, in September, a majority of Brooklyn employees polled voted that they do not want the CWA to represent them. And in October, a petition signed by more than 100 of them was filed with the National Labor Relations Board asking for an official vote on union decertification. But the CWA wants none of that. Filing a series of unfair labor practice charges with the NLRB that have obstructed and delayed that vote from occurring. So now, those employees are being denied their right to have that vote. Cablevision is committed to protecting these workers' legal rights, and asks all member of this Council who care about workers' rights to join us in calling for that vote to take place

now. Let these workers decide. Let these workers vote.

As this Council is well aware, Cablevision has long been a good corporate citizen, a major New York employer of a diverse workforce. Indeed in New York City alone the company has 2,000 employees more than 80% of whom are minorities. The company has invested literally billions of dollars in network infrastructure to provide city residents a state-of-the-art system with the most advanced video voice and broadband services anywhere in the country. And under its Franchise Agreement with the City, Cablevision contributes $40 million annually in franchise fees plus another $100 million in other benefits including $76 million to support Brooklyn and Bronx community access programs, $17 million in telecommunications infrastructure, $4 million to provide wifi in city parks, and free service to hundreds of schools, libraries, and municipal buildings. And it wired areas of the Bronx and Brooklyn, as members of this committee well know, when other providers refused to take that business risk, and our entire city is now the better for it.

Notwithstanding this history of service to the city, this Council has now held two hearings fixating on Cablevision's private labor negotiations with a union that represents only 270 employees in a regional workforce of 15,000. Cablevision has been the target of a sustained political attack orchestrated by the CWA, the WFP, and their political allies in the Mayor's Office to try to influence these private labor negotiations. This chamber should not allow itself to be misused in furtherance of such a blatantly political campaign. Collective bargaining is first and foremost a matter of private negotiation between management and labor. Without any other party's intervention, Cablevision and the CWA have already reached agreement in principle under a vast majority of key terms. Including many issues material to the union such as union security, due check-off, binding arbitration, layoff protection in connection with contracting, educational assistance, and medical and dental benefits. The party's substantial progress has been acknowledged in the CWA's own communications to its member describing a recent bargaining session as quote, unquote

"productive" and expressing quote, unquote, "hope of soon resolving any remaining issues."

The negotiations have at times been contentious. Indeed, the CWA has filed numerous baseless unfair labor practice charges against Cablevision, and Cablevision has filed charges against CWA. But to the extent either party seeks to address for matters relating to these negotiations, federal law provides the exclusive remedy. The redress for matters relating to these negotiations is a matter of federal law. The union's complaints have not even reached the NLRB itself yet let alone the courts where they will ultimately have to be resolved. They are merely under review by an administrative law judge, and ad the end of the day, Cablevision expects to be vindicated whether before the Board or in the courts. These are the appropriate fora for addressing these allegations. There is no reason for the Council to inject itself into collective bargaining between a private employer and its employees, particularly this late into the negotiations. And the fact that the Council appears to have done so at the best of the CWA and WFP, to

which so many of its members are indebted, cast a pall over these proceedings.

There are council members here who have claimed that Cablevision's alleged labor obligations under its City Franchise Agreement are a governmental hook for holding these hearings. But in the process, they have mischaracterized both the facts and the law. Indeed, the City Charter, as interpreted by our State's highest court in *Council City of New York v. Public Service Commission of the State of New York* and Cablevision's Franchise Agreement itself preclude the Council from having any involvement in the process of selecting and evaluating the status of franchisees. Thus, there is no basis for the Council holding these hearings concerning Cablevision's franchise, which isn't even up for renewal until 2020, six years from now. The language and structure of the Franchise Agreement, which Mr. Chairman you quoted, make clear that the Council has no role in adjudicating this dispute. The Agreement provides that the company shall recognize employees' rights to collectively bargain quote "in accordance with applicable law" end quote. The NLRB is the sole governmental body authorized to determine whether an

employer has committed any unfair labor practice. Indeed, the U.S. Supreme Court has expressly held in Wisconsin Department of Energy v. Gould that state and local laws purporting to debar government contractors for NLRA violations are preempted by federal law as administered by the NLRB.

Moreover, the mere issuance of complaints to be investigated by the NLRB obviously cannot in and of itself constitute a violation of the Franchise Agreement. Only after the NLRB makes a final determination and all appeals are exhausted is such an issue even potentially implicated. And even at that point, the Franchise Agreement requires that Cablevision be given written notice and an opportunity to cure, which presumably the company would do. But here none of those events has transpired or is it anywhere near transpiring. Moreover, even if such a violation were ultimately found, it would not permit revocation of an existing franchise, and the City has never made any such claim concerning any franchisee.

Indeed, the executive agencies responsible for overseeing franchises have even suggested that Cablevision franchise is implicated in

anyway by such a labor dispute. Nor could there ever be any such suggestion under well-established rules governing the franchise process under well-established federal preemption law. The CWA accuses Cablevision of being anti-union, but nothing could be farther from the truth. Indeed, Cablevision has a proven track record of working cooperatively and productively with unions including the more than 25 different unions at Newsday, a Cablevision subsidiary, and Madison Square Garden, formerly a Cablevision affiliate, and now a separate company with the same controlling owner. And Cablevision has continued to enjoy the support of many of those unions throughout these hearings, as you well know, Mr. Chairman, from the testimony that was given previously.

Since this committee's last hearing, the CWA's smears of Cablevision have become even more outlandish and desperate. For example, the CWA blasts as quote "anti-union animus" end quote Cablevision's recent termination for cause of Jerome Thompson, who also happened to be a union shop steward at the time. And who you, Mr. Chairman, you said would be testifying here later. So I need to

speak briefly to this. Mr. Thompson had a well documented and long history of violating company policies, for which he received ample warnings including crashing two company vehicles in avoidable accidents, failing to report the first accident to his supervisor, excessive personal use of a company cell phone, and repeated disruptive unprofessional and insubordinate behavior in multiple contexts. As a result, he was terminated for cause and no other reason. No employer private or governmental would have tolerated such repeated misconduct over such a long period of time. And the CWA has mischaracterized this September 2014 straw pole of Brooklyn Bargaining Unit employees. In which, a majority of those polled expressed opposition to continued representation by the CWA. Which has characterized that poll as an illegal attempt to undermine the union's authority in ongoing negotiations. That is simply untrue.

Cablevision decided to conduct this poll only after learning that more than 100 of its Brooklyn employees, nearly 40% of the represented workforce, signed a petition seeking a vote of decertification. And further learning that a paid

union employee was intimidating Cablevision employees who dared to question union representation. Notably, the NLRB requires only 30% of employees to sign such a petition in order for a decertification election to be held. But here, nearly 40% signed that petition. Casting further doubt on its credibility, the Union had earlier informed Cablevision that 189 employees had signed a petition quote "supporting the union" end quote, when, in fact, the petition really stated that the employees supported a particular union wage position, not union representation itself.

The totality of these circumstances called into question by the union continued to enjoy majority support among represented employees. Before taking an independent straw poll, Cablevision fully informed employees in advance that it would be non-binding, voluntary, and confidential. A vote by secrete ballot simply to gauge employee preferences. It was conducted by an independent organization, the Honest Ballot Association, which has existed for over 100 years. Has earned an exceptional reputation for integrity and reliability, conducted more than 25,000 elections, including labor organization elections. And has never had one of its votes invalidated ever

in 100 years, 25,000 votes. In this particular poll, nearly 93% of the employees in the Brooklyn Bargaining Unit participated.

And by a vote of 129 to 115 the majority expressed their preference to end representation by the CWA. And I have to add a union encouraged employees to participate in the poll, and only questioned its legality after learning the results. Despite the outcome of the vote, Cablevision continues to recognize the CWA as the employees' bargaining representative, and continues to negotiate with the union in good faith. The CWA in contrast was hell bent on denying employees the right to hold an actual binding decertification vote despite the employees' documented preferences. So it has filed baseless charges with the NLRB to obstruct and delay that process.

Today, we simply want you to know the facts that these workers wish to exercise their rights to undermine their own future, and to vote one way or the other whether to continue with this union or decertify it as their representative. That is a basic fundamental right to these works worthy of protection, and you see so many of them here. The

entire upper balcony basically. The front rows of this chamber, and more than 50 of them who couldn't even get into this hall because they were not permitted to enter when others were. They are here today to say it to you. They're here today to say it to you. They're screaming to you: Let us decide our fate. Let us vote.

Now, given that the Council has no role to play here, and the union's allegations are meritless in any event, it's particularly suspect to see the WFP once again playing the role of political bully, interloper, and manipulator. It is no secret that the WFP has used questionable methods to achieve political objectives. The WFP manipulated a local campaign finance system back in 2009 by funneling excessive income contributions to local candidates endorsed. As a result, it ultimately shut down its corporate arm, and is now the subject of an ongoing State Grand Jury investigation in which two local campaign aids have already been criminally charged. And one New York Daily newspaper's editorial board described the WFP as quote "a union front started by big labor to serve big labor" end quote that's becoming quote "a patronage mill masquerading as a

principled alternative" end quote. Against that backdrop, this committee should be proceeding with particular caution when pressed by the WFP to use the Council's good auspices to press their management on behalf of the WFP's union allies.

What should give this committee even more pause is what happened last week. When the Department of Investigation issued a report finding that the Mayor's Office and the City Department of Education violated DOE rules and the State's Education Law by permitting the CWA to use a public school for a quote "union meeting" end quote with the Mayor himself. It was essentially an anti-Cablevision rally orchestrated in advance by the Mayor's Office and the CWA's Legislative and Political Director Bob Master that barred members of the press and public from attending. The DOI report included that the violations were so serious that quote "The conduct described herein may violate the conflicts of interest provisions of the New York City Charter." End quote.

As one New York Daily Newspaper editorial put it just yester, the Mayor quote "crossed the line" end quote by quote "secretly conspiring to City

resources to rally workers against a private New York business." end quote and his quote "interference in a private labor dispute against a major New York employer is troubling." end quote. And just today, the Citizens Union, the City's most revered good government group wrote to the Conflict of Interest Board asking it to investigate this matter. As a result, we call upon this committee to pursue questioning on that troubling subject with the same vigor with which it has approached this non-issue holding yet another issue on Cablevision's franchise status at the behest of the CWA and WFP.

The Council should have no part of this growing scandal. Cablevision has great respect for this body, as do I as a former Deputy Mayor, who has testified here many times over the years. And Cablevision has always had a constructive working relationship with City officials in both branches of government. But this dispute has taken an ugly turn at the hands of other, including an over zealous union and a political party under grand jury investigation. Both trying to take advantage of their political allies in government. It is abusive and wrong, and it has to stop once and for all.

Cablevision will continue to collective bargain in good faith and meet all of its legal obligations. And it will continue to protect its workers' fundamental right to our democracy to decide their own future, whether that be through union representation or decertification.

Those employees, many of whom are here today, want to vote on decertification. We hope this Committee will hear from them today. Listen to their pleas and support their cause because what's at stake here today is not simply the agenda of a well-connected and self-interested union and political party. What's at stake are the fundamental rights of workers to decide their own destiny. So I end where I began. Let these workers decide. Let these workers vote. Thank you, Mr. Chairman. I will take any questions you or member of the committee may have.

CHAIRPERSON WEPRIN: Thank you, Mr. Mastro, and I want to thank the audience because I know that this is a very emotional dispute for a lot of people, and you guys are quiet. And I even jazz hands. Look at that. Go ahead. You can be proud of your jazz hands. But thank you because I know a

couple of comments did elicit a little bit of response, but for everyone behaving I really appreciate that. I realize the extra room didn't hear my warning ahead of time. So you're now-- We're trying to keep this calm and peaceful. So thank you, Mr. Mastro. I want to just mention we've been joined by the following council members: Council Member Lancman, Council Member Williams, who is a member of the subcommittee as well; Council Member Rodriguez, Council Member Mark Levine, Council Member Brad Lander, Council Member Vincent Gentile, and Council Member Julissa Ferreras. Oh, and Darlene Mealy. Sorry, Darlene. From Brooklyn, who is here as well. I do notice on the list a lot of people who you brought up from MSG who root for a team at MSG and I want to make sure they don't use a bias because of the 4 and 14 record in any of their questions. So, I just want to be clear on that.

Let me start off with a few questions. We have a number of members who want to ask questions, and I know a lot of them are going to ask really good questions that's really going to rile up the crowd again. I ask you to please be quiet. Let me ask this question, Mr. Mastro, because you

referenced the vote on September 10th I believe it was, the poll that was done. And you said that the reason you did that was there was a petition. You heard that the members of the union had wanted to decertify, and you wanted-- They wanted to find out for themselves. Is that the-- So this is the way they went about doing that? They decided to call to have this poll. Was that the rationale?

RANDY MASTRO: Again, Mr. Chairman, there had been a petition signed by more than 100 workers from this bargaining unit petitioning the NLRB to permit a decertification vote. Nearly 40%, much more than the 30% threshold needed, and Cablevision became aware of two other things. It became aware of the fact that there had been-- Since that petition, there have been threats and intimidation, and workers who have been threatened for speaking out against their union. Number one. Number two, the union made representations in response to that. It turned out to be the demonstrably false. The union represented that, in fact, 187 workers supported the union, but when one actually read what the union was referring to, it was it supported a particular wage position. No, not union representation.

So Cablevision decided in support of workers' rights to express themselves, decided that it would be appropriate to hold a poll. And it did more than that. It went out and hired one of the most respected reputable independent polling agencies in the history of this country. It has never had a vote rejected ever, but it does polling for unions because it is so good at doing independent unbiased fair polls. And guess what the results were?

CHAIRPERSON WEPRIN: interposing] Yeah, you had said.

RANDY MASTRO: The results were a clear majority in favor of decertification.

CHAIRPERSON WEPRIN: Well, what--? So what was the purpose of doing the poll? Was it just to-- I mean you had a petition. You knew that had to hold 100 people. I mean what were you hoping to get out of this poll? I mean one way or the other, what was the goal here.

RANDY MASTRO: Well, understand, Mr. Chairman, and I think you do understand it that the petition was filed by more than 100 of the workers in this union asking for a decertification vote. The union responded with blocking and tackling, filing

unfair labor practice charges that derailed the vote from occurring while those charges are investigated. Cablevision in the face of seeing union intimidation of workers, seeing the union misrepresenting the position of union members decided that a poll was appropriate. And that the NLRB, the public, and these workers had a right to know that more than a sufficient number of them supported decertification. And that that vote should go forward. This is a fundamental basic right of workers. But the first right is the right to decide whether to vote for a union. The second fundamental right is the right to decide whether to decertify your union more than a year later. And that's a right. These workers are being denied, and they're being denied unfairly by a union blocking and tackling at the NLRB. Now, the NLRB will ultimately decide that question.

CHAIRPERSON WEPRIN: [interposing] Right.

RANDY MASTRO: And hopefully these workers, a majority of whom in that poll of those polled-- 93% of them were polled said they wanted to vote to decertify. More than 100 of them having signed a petition to the NLRB saying let us vote to decertify. Nearly 40%, much more than needed for a

decertification vote. Hopefully, they will get that right.

CHAIRPERSON WEPRIN: [interposing] Okay.

RANDY MASTRO: You ask me the question, I give you the answer. That's why it was done. As a responsible response, as an action of an employer protecting workers' fundamental rights.

CHAIRPERSON WEPRIN: Okay. You're filibustering on me a little bit.

RANDY MASTRO: No, I'm not. You ask me a question, and I'll give you the answer.

CHAIRPERSON WEPRIN: [interposing] No, you're right, and you have a fine answer. I will admit, Mr. Mastro, being a little skeptical of the motives of Cablevision to do this as a fight for American workers. Only because if the goal really was hey let's assess this. There's a problem here. Obviously, all these people are upset. Why wouldn't you have called the union in ahead of time and done it with the union involved? Also, if you could comment-- If Mr. Mastro, you could comment. Mr. Dolan, Chairman and CEO of Cablevision, a big guy, came to the Brooklyn shop supposedly the day before. That's what we were told. Maybe it's not true. The

day before the vote. The CEO of the company showed up there to talk about this vote, and how important it is. Then the next day they have a vote.

The union, you mentioned, found out about it, but you didn't tell the union and say, hey, come on down. You want to watch it. We've got Honest Ballot Association, and I'll vouch for Honest Ballot Association. I know them from a lot of a lot of co-op votes and other things. So I'm not-- Even though it's a funny name sometimes, but it's a-- I'm not disputing Honest Ballot, but it just seems to me the way this was set up wasn't set up in such a great way to find out whether the workers of the company really wanted this. It sounded like it may have been a little, you know, to get the right answer.

RANDY MASTRO: Actually, the exact opposite.

CHAIRPERSON WEPRIN: [interposing] Okay.

RANDY MASTRO: First of all, what was said at that rally is what was said in the 24 hours by both sides to workers that is something that is capable of being verified. And the representations that were made by the union as to what Mr. Dolan said

when he addressed the workers were just flat out wrong and false.

CHAIRPERSON WEPRIN: But he was there. The--

RANDY MASTRO: [interposing] Let me just finish.

CHAIRPERSON WEPRIN: Okay.

RANDY MASTRO: You know, this was not to be a campaign by either employer or labor union. This was to genuinely find out where the workers stood in the face of conflicting accusations. And, therefore, both the employer and the union within a short period of time, in that 24 hours, each were made aware that the poll would go forward. And the union, in fact, encouraged its represented workers to vote in the poll. And that's exactly what Mr. Dolan did. He told the workers wherever you stand, vote in that poll, and the union took the same position. But guess what? Just like a lot of us who have been involved in elections, when the vote didn't come out the right way, maybe somebody felt differently afterwards. It didn't turn out for the union. But the fact of the matter is at the time, this was done in exactly the right way to gauge workers' support.

To make sure that no one influenced anyone. But it wasn't a campaign. It was a true straw pole by an independent organization.

CHAIRPERSON WEPRIN: [interposing] Right.

RANDY MASTRO: It was a chance to genuinely figure out where the workers stood.

CHAIRPERSON WEPRIN: Right. You're a good lawyer. [laughter] But it's hard for me. It's just I'm just--

RANDY MASTRO: [interposing] It's also the reality.

CHAIRPERSON WEPRIN: Okay, all right.

RANDY MASTRO: [interposing] It's also the reality.

CHAIRPERSON WEPRIN: Yeah. It just seems to me if I was trying to assess how the workers really felt, I would have tried to-- You know, you're right, the union may have representatives there, but the CEO of the company shows up. I assume this isn't normal. He doesn't normally show up at events. That's a pretty big deal. I mean the guy is a very well known famous guy who they all know. I just think that that in and of itself to me sounds like you're trying to have the workers go one way or

the other. But that it just seems to me that if you really want an honest assessment, there are better ways to do this. We don't have to argue in the way you did that.

RANDY MASTRO: [interposing] We don't have to argue, Mr. Chairman, but I just have to say I you genuinely want to assess where the workers stand--

CHAIRPERSON WEPRIN: [interposing] Okay.

RANDY MASTRO: --you would expect both the union and the top official at Cablevision to encourage all the workers to vote. And that's exactly what happened in that 24 hours. So at the end of the day-- And again, many of the subjects you're going to ask us about here today are the subject of ongoing litigation. And the place to litigate them is before those appropriate bodies like the NLRB and the courts.

CHAIRPERSON WEPRIN: [interposing] Right.

RANDY MASTRO: But you ask me a question, I give you an answer. That's what I would expect a responsible leader of a company to do. That's what I would have expected the union to do. Both saying participate in the straw poll, and they both did and

the vote came out as clear majority in favor of decertification.

CHAIRPERSON WEPRIN: I'm not here as a trier of facts. So, you right, and I'm not looking to do that. It just strikes me-- And I understand there is terrible bad blood between the union and management. You know, ads were taken in the paper, and they were calling each other names. You know, it's out of hand. Both sides I think sometimes get a little too emotionally involved. But it just seems to me, and I'm just saying it's my honest assessment and it only means my opinion. But if you really want just an honest vote, you could have done it in a way that would show everyone hey look we're doing this completely fairly. We're not bringing the chair of the company in. We're not-- We're just telling you what to do. And Bob Masters is a pretty intimidating guy, but Jim Dolan is a big guy. I know he's a Princeton guy and you're a Yale guy. So you guys may have that issue between you all. But I don't even think he has the same ability to intimidate workers about having the CEO of the company come. Just for what it's worth. Let me ask this question also because you mentioned the baseless claims that are

before the NLRB currently. Do you expect Cablevision to win in that NLRB ruling when it comes down?

RANDY MASTRO: Again, those issues are going to be litigated before the NLRB, and ultimately the courts, which decides. Right now the procedural posture is that there are complaints that are being reviewed by an administrative law judge. It hasn't even reached the NLRB yet let alone the courts and the appellate courts, federal appellate courts that ultimately decide these questions. Do I expect, do we expect based on the facts as we know them that Cablevision will be vindicated at the end of the day? Absolutely. Without question.

CHAIRPERSON WEPRIN: Okay. Thank you let me you another question since we discussed for all the people who are here today. The workers that are here, the guys in the blue shirts who are sitting on your side, you mentioned that they-- Are they from the actual union, the group that voted or are they from other places in Cablevision? I'm just curious.

RANDY MASTRO: Mr. Chairman, many of the individuals here--

CHAIRPERSON WEPRIN: [interposing] Please.

SERGEANT-AT-ARMS: Quiet in the chambers.

RANDY MASTRO: And I know, Mr. Chairman, you'll want to ask the same question of the red shirts later--

CHAIRPERSON WEPRIN: [interposing] Yeah.

RANDY MASTRO: --and see how many hands are raised then. But the fact of the matter is that many, if not most, of the individuals who are here today displaying "Let Brooklyn Vote" are from that bargaining unit. And I have to say this. I have to say this. All of them are Cablevision employees in the region, which can't be said of the red shirts. Please ask the red shirts. And they're all here because there are kind of spurious accusations that have been made here besmirch the company, and all of their reputations. So some of these folks are brothers and sisters who come here to support those in Brooklyn who want to vote to decide for themselves. And they are all Cablevision employees in this region, which cannot be said of the red shirts. Many of whom are from Verizon and other unions.

CHAIRPERSON WEPRIN: Right, now a lot of them-- We'll ask the question later on, too. I was

just curious who they were, and makes me wonder with the red shirts we have, who is running the company today? [laughter] Are they all on their-- Everyone on their-- ? Are they al on their day off? I'm just curious. Are these people all on their day off, or are they getting off from work?

RANDY MASTRO: Anyone who wanted to come here today from the company red shirt, blue shirt, no shirt--

CHAIRPERSON WEPRIN: [interposing] No shirt, we wouldn't allow in the Chamber.

RANDY MASTRO: --was permitted to come here today, and it was treated as perfectly fine for people who wanted to express themselves either way to be able to do that. And hence, you see red shirts. You see a sea of blue shirts. You see a lot of shirts, and you see some people without shirts, but who wanted to be here to hear these proceedings.

CHAIRPERSON WEPRIN: Okay. I'll tell you what, I know there are a lot of people who have questions to ask and--

[Pause]

CHAIRPERSON WEPRIN: All right. I'm going to let the members of the subcommittee to ask

their questions first. Vinny Gentile is the first name on my list here.

COUNCIL MEMBER GENTILE: Thank you, Mr. Chairman. Thank you Mr. Mastro.

RANDY MASTRO: It's a pleasure to see you again, Council Member.

COUNCIL MEMBER GENTILE: Good to see you. Great. I'm just curious. Before that vote of 129 to 115 took place, did you or did the company institute the wage and benefit increases for the Bronx workers prior to that vote in Brooklyn?

RANDY MASTRO: There had already been agreements with the workers not represented by the CWA in that discrete 270-person bargaining unit in Brooklyn. There had already been agreements reached on certain wage increases and other conditions of employment.

CHAIRPERSON WEPRIN: So Randy, could you just move the mic a little closer to you?

RANDY MASTRO: Sure.

CHAIRPERSON WEPRIN: Okay.

COUNCIL MEMBER GENTILE: So in effect, the Brooklyn workers who were taking this so-called decertification vote or another vote, were looking at

the benefits and wages that the Bronx workers had already-- were granted by the company?

RANDY MASTRO: Well, the question you asked is when there are different bargaining units, some of whom represented by unions and some not. You know, there are agreements reached with some while the others are continuing to go negotiate. Of course, that's always the case.

COUNCIL MEMBER GENTILE: But the case has been that they've been trying to negotiate in the Brooklyn-- CWA has been trying to negotiate with the Brooklyn workers with Cablevision over a period of time here while the Bronx workers were getting those wages and benefits increases?

RANDY MASTRO: But the Bronx wage increases you're referring to Councilman, occurred 2-1/2 years ago. You know, discrete and distant in time from the issues we're talking about today. So, there is no connection between that and what happened subsequently. And in the Bronx as you are also well aware, the workers there voted not to certify the union as their bargaining representative.

COUNCIL MEMBER GENTILE: So the Brooklyn workers signed a petition and filed it with the NLRB

more than 100 of them asking for an official vote on union decertification?

RANDY MASTRO: Yes.

COUNCIL MEMBER GENTILE: My question is everyone at the company knows the tension that's going on there. And despite the tension, Mr. Dolan and the company decides to step right in the middle of it, and hold its own vote. Rather than join those other workers in contacting the NLRB, and let the NLRB resolve the issue that those 100 workers were asking to resolve. Instead of doing that, despite all the tension, you decided to walk right in the middle of it. And decide to do your own vote.

RANDY MASTRO: Well, actually again, the reason for conducting the poll was to determine-- a genuine interest in determining what the views of the workers were on the decertification question. Since there had been this petition by more than 100 of them, they filed. There have been some union actions, and disinformation and claims that, in fact, most workers supported them. And it was a genuine effort to understand where the workers stood.

COUNCIL MEMBER GENTILE: But that's why we have the NLRB.

RANDY MASTRO: And I have to say, but Council Member, it is the case that the NLRB will ultimately decide the union complaint about the decertification. But that is a long, arduous process, and it means that these workers who genuinely, 100 plus of them signing a petition asking for decertification their rights are being denied while that process has to play out. Because the pendency of the NLRB complaint delays and obstructs the vote from going forward. And the fact of the matter is that-- Well, you said, and I know you didn't mean it this way: Shouldn't Cablevision have joined in at the NLRB on the decertification petition? It's not the way it works.

COUNCIL MEMBER GENTILE: I understand.

RANDY MASTRO: But workers in that bargaining unit, more than 100 of them, 40% of them said they wanted to decertification. That's not up to Cablevision or its management. That's up to those workers, and they expressed themselves. And then, they have a genuine interest to understand where the workers stood after they have been blocked form having that vote by baseless NLRB complaints. A poll was taken, and the poll showed, in fact, that a clear

majority of these workers wanted decertification vote.

COUNCIL MEMBER GENTILE: Right, but you were not under any obligation to take the poll or take the vote.

RANDY MASTRO: Not under an obligation that than--

COUNCIL MEMBER GENTILE: [interposing] And in fact, the way it's--

RANDY MASTRO: [interposing] Other than Councilman, a commitment, a commitment to understand the reality and the truth. And I think that speaks well of Cablevision.

COUNCIL MEMBER GENTILE: [interposing] With the result--

RANDY MASTRO: It's not something I would criticize. It's something that I would applaud because these workers have spoken loudly multiple times that they want the right to vote to decertify their union and that's being blocked. Let them vote.

COUNCIL MEMBER GENTILE: Mr. Mastro, Mr. Mastro, you know there is the overarching structure of the NLRB--

RANDY MASTRO: [interposing] Yes.

COUNCIL MEMBER GENTILE: --and what Cablevision is doing is sort of taking it in its own hands, and in essence not only just increasing the tension, and not resolving any issue.

RANDY MASTRO: Not in the least, Councilman, for the following reason. There are now proceedings before the NLRB, and they will be litigated. And we are not here today to litigate them, and we will not litigate those issues that are before the NLRB or in court--

CHAIRPERSON WEPRIN: [interposing] Get closer to the mic.

RANDY MASTRO: --here today. But, Councilman--

COUNCIL MEMBER GENTILE: [interposing] Push the mic closer.

RANDY MASTRO: --is it a responsible thing for an employer to have done when there is conflicting information about the status of a bargaining unit and its representation, and whether they want to decertify their union? Yes, it was a responsible thing to have a genuine understanding of the truth.

COUNCIL MEMBER GENTILE: Let me ask you-- I don't know how much time I have here, but--

CHAIRPERSON WEPRIN: [off mic]

COUNCIL MEMBER GENTILE: Oh, I'm almost done? Okay. Let me ask you something. You had mentioned that the DOE and the State Education Law indicated that there was a violation, or the DOI indicator was a violation for having a meeting in a school. Isn't it-- Just to be clear, the violation was the fact that it wasn't open to the public. Not the fact that the meeting was there.

RANDY MASTRO: When you have a meeting--

COUNCIL MEMBER GENTILE: [interposing] But that's- that was the violation, to be clear.

RANDY MASTRO: I want to be crystal clear because what DOI said was there was a clear violation because members of the public and the press were excluded. It was not just excluding members of the press, or some prominent New York Press from this. It was that at the time they were being excluded, in fact, the people holding the meeting thought it was pro Cablevision folks who wanted to attend. And they were excluding it on the basis of their beliefs. So it goes to core principles that when you're using

public space, it has to be an open public meeting number one. Number two, DOI went on to say somehow they couldn't figure out whether there was a second major violation. Whether this was political activity on a public space. Because despite the prepared remarks that the Mayor had made, which showed he went there for political activity, they didn't-- They couldn't confirm what the Mayor actually said at the event, or they never even questioned the Mayor. Now while I have great respect for the Mayor, an investigation that doesn't even ask the Mayor what he said, ends up saying we can't say for sure whether there was political activity that went on there even it was an anti-Cablevision rally. Now, let me say this, that's why the DOI report concluded, Councilman, in no uncertain terms that there may have been conflict of interest violations that occurred here including political activity on public property. And Councilman, that's why this matter and Citizens Union has said it--

COUNCIL MEMBER GENTILE: [interposing] To be clear--

RANDY MASTRO: --and editorial reports have said that it should be referred to the COIB for further investigation.

COUNCIL MEMBER GENTILE: Well, I also see the conclusions in front of me here by DOI, and may indicate that--

RANDY MASTRO: [interposing] A major violation.

COUNCIL MEMBER GENTILE: --that place of disclosure on the event flyer and denial of access to the newspaper were inadvertent violations. Just to be clear. That was part of their conclusion results.

RANDY MASTRO: [interposing] And just to be clear. I know you want to read from page 12 that there may have been violations of a Conflict of Interest Board Rules, and that's something that should have been referred to the Conflict of Interest Board, and that it has to resolve. Because it seems very clear that there may have been political activity. There was an anti-Cablevision rally. The Mayor and the union and that's political activity on public property. And if that's what transpired there, then the Conflicts of Interest Board should get to the bottom of it. That is something that this

Council should be holding hearings on as well, instead of on private management member--

COUNCIL MEMBER GENTILE: [interposing] Mr. Mastro.

RANDY MASTRO: --collective bargaining negotiations.

COUNCIL MEMBER GENTILE: --let me finish out because I think we're actually playing a long-term game here all the way down the road. And so, what happens today, tomorrow or next week, I think is also looking toward what happens a couple of years from now. And sometimes the best defense is a good offense. So, I'm curious. Is the aggressiveness now in which the company has acted, and now defends what they've done, really anticipation of or to avoid a possible cure letter that would come down at the time of a license renewal?

RANDY MASTRO: Actually, Councilman, we're not playing any game, and you saying that term is what gives us cause and so many in the public cause about why these hearings are even happening. Because this isn't a game. You should be used a political pawns by the CWA and the WFP. This is--

COUNCIL MEMBER GENTILE: [interposing] We certainly don't think it is.

RANDY MASTRO: --this is real life. This is real life for these workers who are screaming out to you and to the NLRB that they want a decertification vote, and they're being denied that.

COUNCIL MEMBER GENTILE: Well, pawns--

RANDY MASTRO: [interposing] This isn't about--

COUNCIL MEMBER GENTILE: --pawns could be--

RANDY MASTRO: No one on this side of the aisle is playing a game. This is real life for these workers and this company and its reputation, which has been besmirched--

COUNCIL MEMBER GENTILE: [interposing] Okay, we'll see that--

RANDY MASTRO: --by this union and this political party.

COUNCIL MEMBER GENTILE: We'll see that-- We'll see that in the totality of the testimony that we hear today. But there can be pawns used on both sides, but we'll see the totality of the testimony,

and we'll make that determination here at least among ourselves. Okay, thank you.

CHAIRPERSON WEPRIN: We're going to keep moving. Mr. Mastro, I just want to caution you a little bit just to be careful in just-- into attacking the panel because it will just drag things on, and make things a little more nasty. Obviously, this is a Council that cares about workers to make sure they are being treated fairly. Who cares about public servants, Cablevision's workers or public servants. All of them trying to get services to the public. That is obviously an interest to the Council. So this is not about us being browbeating or anything. This is us trying to get to-- to hear the facts, and get them straight.

RANDY MASTRO: I appreciate that, Mr. Chairman. I'm just asking you to pursue with the same diligence the cause of so many of these workers for a decertification vote. The concerns about the misuse of public property for political events.

COUNCIL MEMBER GENTILE: [interposing] All right.

RANDY MASTRO: And I think that as long as we are here I would think with the great respect I

have for you and this chamber and this committee that you would be wanting to ask questions about that, too.

CHAIRPERSON WEPRIN: Well, the day is young, Mr. Mastro. The day is young.

RANDY MASTRO: I'll be waiting for those questions, Mr. Chair.

CHAIRPERSON WEPRIN: [interposing] Okay, Mr. Mastro.

RANDY MASTRO: I am committing them to my mind. [sic]

CHAIRPERSON WEPRIN: Okay, Mr. Mastro, let me move on. What I'm going to do is we are going to put a seven-minute time limit. We will give the extra two minutes there to each of the members. If you can't finish all your questions in the seven minutes, we're going to come back if you want to still be here and answer questions. It's just that we have a number of people to ask questions, and I want to make sure everyone does. What I would like to ask you, Mr. Mastro, as we are doing some sports references is to do the answer four-corner offense and more triangular offense to a point. Like you don't go on too much because only because I have them

on a clock, and then I'm going to hear about it from them. So if you could just try to make the answers concise, it would be helpful.

RANDY MASTRO: Mr. Chairman, I'm going to answer the questions to make sure that this is a complete record. So I'm going to give it to you straight, and I'm going to give it to you in a way I feel I need to give it to you.

CHAIRPERSON WEPRIN: Well, I don't expect that that, but if you could somehow try to make them as possible, I would appreciate it. Thank you, sir. I would like to call on Mr. Williams. Jumaane Williams.

COUNCIL MEMBER WILLIAMS: Thank you, Mr. Chair. Mr. Mastro, I think you would be one of the most disrespectful people that have ever come before the City Council and the hearing. Questioning our authority, and ability to call a hearing is ridiculous. And I came here actually to try to get to the bottom of certain things, but I found most of what you said to be disingenuous at best. I don't think you're doing your company a good service, by putting these spurious remarks and accusations. First, well, that you were the Deputy Mayor to Mayor

Giuliani, it's not surprising that a lot of what you said is asinine, imbecilic, and empty-headed, just like some of the comments he made that-- [laughter]

RANDY MASTRO: [interposing] That was very respectful, Mr. Councilman. Very respectful.

COUNCIL MEMBER WILLIAMS: Well, I'm giving back what you gave me. Okay.

CHAIRPERSON WEPRIN: [interposing] Okay, guys--

COUNCIL MEMBER WILLIAMS: You had also--

CHAIRPERSON WEPRIN: --please just try to -- try to be respectful, please.

COUNCIL MEMBER WILLIAMS: I will but to say and accuse of us I guess of essentially being lackeys of the Working Families Party, it is no secret that the Working Families has questionable methods to achieve its political objectives. The Working Families have manipulated our local campaign finance system back in 2009 by phony and excessive in-kind contributions. None of that has been proven. I know you brought the case. It has not been proven. So for you to mention that here I believe is asinine, imbecilic and empty headed, and has no business being in this testimony given today. You made a definitive

statement that has not been proven. And the case that is here now is even dumber than the one that you brought before. So please let us not mix up--

RANDY MASTRO: [interposing] Is there a question Mr. Williams?

COUNCIL MEMBER WILLIAMS: No, I'm talking.

CHAIRPERSON WEPRIN: Please guys.

COUNCIL MEMBER WILLIAMS: This is my time now. So you will listen to what I'm saying, and you will answer the questions that I ask period.

RANDY MASTRO: Well, ask a question of me then.

COUNCIL MEMBER WILLIAMS: Well, no, you're not going to take my time. That's not how it works. My question is since the Brooklyn workers both unionized, the National Labor Relations Board has twice filed complaints against Cablevision for engaging in a host of unfair labor practices. Is that true?

RANDY MASTRO: Have there been any complaints filed involving unfair labor practice? Yes, that's true.

COUNCIL MEMBER WILLIAMS: If NLRB charges are sustained, Cablevision will not be in compliance with its obligations under the Franchise Agreement, correct?

RANDY MASTRO: No, that is not true.

COUNCIL MEMBER WILLIAMS: Okay, what-- It's not true that you would be in compliance if it's found that you have-- Those complaints are substantiated, you're saying you will still be in compliance with the Franchise Agreement?

RANDY MASTRO: Yes, for multiple reasons, and I will briefly describe some of them. First of all, Cablevision has been recognizing collective bargaining in compliance with all applicable laws. It has been bargaining in good faith, and over 40 sessions and reached agreement on multiple terms. So it's in compliance regardless of what happens down the road, but the agreement provides that there has got to be notice and an opportunity to cure even if there were a potential violation. And I have to say, Councilman Williams, you know, the speech you gave at the beginning is really--

COUNCIL MEMBER WILLIAMS: [interposing] All right, are you going to answer my question? I

don't want to hear anything else besides what I'm asking.

RANDY MASTRO: I am. I am, but you're asking questions right off the memo that the WFP circulated to you and other members of this committee--

COUNCIL MEMBER WILLIAMS: [interposing] That's not true. I have never seen a memo.

RANDY MASTRO: --before--

COUNCIL MEMBER WILLIAMS: [interposing] I'm not doing this. I'm not doing this--

RANDY MASTRO: --and we don't know who or how far they are on that campaign. [sic]

COUNCIL MEMBER WILLIAMS: --at all. Mr. Chair, I'm not doing this at all. I am never going to work with this man on this at all.

RANDY MASTRO: [interposing] You don't know who is

COUNCIL MEMBER WILLIAMS: Mr. Chair, I'm not doing this at all. I'm never going to work with this man on this.

RANDY MASTRO: You don't know who else is on that campaign. [sic]

COUNCIL MEMBER WILLIAMS: You are not going to over-talk when I'm talking.

RANDY MASTRO: [interposing] We are not going to speak over what I am talking today.

COUNCIL MEMBER WILLIAMS: This is not your hearing. Period.

CHAIRPERSON WEPRIN: Okay.

RANDY MASTRO: Do you know, Janelle Quarles?

COUNCIL MEMBER WILLIAMS: It is not your hearing.

RANDY MASTRO: Do you know Janelle Quarles? Do you know Janelle, Mr. Williams?

COUNCIL MEMBER WILLIAMS: It is not your hearing, sir.

RANDY MASTRO: Well, don't answer the question then, but she handed me--

COUNCIL MEMBER WILLIAMS: [interposing] I've never seen or heard this kind of talk.

RANDY MASTRO: --a memo before this committee hearing encouraging you to ask questions like that, but in that memo she admitted--

CHAIRPERSON WEPRIN: All right, Mr. Mastro--

COUNCIL MEMBER WILLIAMS: [interposing] All right, Chair,

CHAIRPERSON WEPRIN: --you'll have. We're going to be here awhile

RANDY MASTRO: [interposing] I know.

CHAIRPERSON WEPRIN: -but just one second. Don't do that now. Wait until he's done--

RANDY MASTRO: [interposing] All right.

CHAIRPERSON WEPRIN: --and then you'll have a chance later on if you want to mention it.

RANDY MASTRO: I'll wait-- I'll until he's done, but--

CHAIRPERSON WEPRIN: No problem.

RANDY MASTRO: --[interposing] what was in that memo, and I'll go.

CHAIRPERSON WEPRIN: Just one second. Let him finish.

RANDY MASTRO: Go ahead, Mr. Williams.

COUNCIL MEMBER WILLIAMS: You don't have to tell me to go ahead because this is not your hearing. So you have to get that straight. I know what you used to be right now you are here for our hearing to answer our questions. And you believe that the cases before the NLRB right now will not be

sustained? They will not be sustained, is that correct?

RANDY MASTRO: It has to go through first an ALJ, which an ALJ is considering it now. Then it goes to the NLRB, and then it goes to the federal courts, and we believe that at the end of this process Cablevision will be vindicated in every respect absolutely vindicated.

COUNCIL MEMBER WILLIAMS: If you're not vindicated, would you agree not to reapply for your franchise in 2020?

RANDY MASTRO: With all due respect, it's a question that totally misses the mark. Obviously not. I've already said that no matter what happens before NLRB--

COUNCIL MEMBER WILLIAMS: [interposing] If you're not vindicated--

RANDY MASTRO: --no matter what happens before the NLRB--

COUNCIL MEMBER WILLIAMS:--if you are not vindicated, would you agree not to reapply for your franchise in 2020?

CHAIRPERSON WEPRIN: Let him answer the question.

RANDY MASTRO: Councilman, if you want me to answer the question, I'll answer the question--

COUNCIL MEMBER WILLIAMS: [interposing] Yeah.

RANDY MASTRO: --instead of interrupting me.

COUNCIL MEMBER WILLIAMS: Well, you're taking a lot of my time off. That's what you're doing.

RANDY MASTRO: Okay, Mr. Williams, please.

COUNCIL MEMBER WILLIAMS: Uh-huh.

RANDY MASTRO: The short answer to your question is obviously not--

COUNCIL MEMBER WILLIAMS: [interposing] Okay, can you--

RANDY MASTRO: --and I've already said that even if the NLRB were to find a violation, it would not result in any adverse action being able to be taken against Cablevision--

COUNCIL MEMBER WILLIAMS: [interposing] Okay, thank you.

RANDY MASTRO: --under their franchise.

COUNCIL MEMBER WILLIAMS: Thank you.

RANDY MASTRO: That's the fact. That's the law. A federal law preempts that--

COUNCIL MEMBER WILLIAMS: [interposing] Thank you for answering my question. I appreciate it.

RANDY MASTRO: --under the Franchise Agreement just to be crystal clear.

COUNCIL MEMBER WILLIAMS: [interposing] Now onto Mr. Jerome. Mr. Jerome in the NLRB Complaint alleges that Jerome Thompson, leader of the unionized effort, was fired in retaliation of his support of the union. And I understand you're saying that he had a long history of problems within the company. Why did it take so long to fire him and why was he fired around the time when people were unionizing if there were problems that existed beforehand?

RANDY MASTRO: Okay. The premise of your questions is wrong. He was fired for cause for a long--

COUNCIL MEMBER WILLIAMS: Wait, wait, wait, wait, don't. My question was if he had a long history with the company, why was he fired around the

time unionizing started as opposed to beforehand? That's my question.

RANDY MASTRO: It wasn't. It wasn't around the union organizing started. So the premise of your question is wrong.

COUNCIL MEMBER WILLIAMS: [interposing] So when was he---

RANDY MASTRO: And the reality is the following: The reality is that he had a long history of employment related issues. He received repeated warnings, which is the process that Cablevision follows for employees. He received a final warning long after the union had already been certified for this bargaining unit. And in 2014, he had a series of incidents after having receive final warning. He had two car crashes unreported to his supervisor in the first instance. He had unauthorized use of his cell phone more than 25 times what someone in the company normally has. Including while he was on vacation in Las Vegas, he had multiple instances--

COUNCIL MEMBER WILLIAMS: [interposing] Okay.

RANDY MASTRO: --of unprofessional and disgraceful conduct--

COUNCIL MEMBER WILLIAMS: [interposing] Okay, you answered my question. My time is up

RANDY MASTRO: --as he was part of the workforce-- [sic]

COUNCIL MEMBER WILLIAMS: So let me just way this. I consider myself to be a fair person, Mr. Chair. I'm sorry. I actually asked some of the representatives if I can-- I don't know if it's allowed legally, but if I can see some of the paperwork that had on Mr. Thompson because I've heard because I've heard that they have problems before. I still have yet to see that, and I haven't heard back whether it was legal or not. I actually came in to actually hear what you had to say, but a lot of what I'm hearing is disingenuous. You're saying that the raises that were given in January 2012 has nothing to do with what's happening now. I think Cablevision has been terrible actors. He was first fired as part of the 22 two years ago. There have been numerous times where Cablevision has displayed themselves as bad actors. And my hope was that some of that had changed right now, and I was trying to come here to get more information about where you were versus were CWA is. But I can see clearly, from the foolishness

that has been spewed by you. that it is my understanding that Cablevision is still being bad actors when it comes to negotiations here. And I'm sorry, not just for the people unionizing, but the people in the blue shirts. And I thank you guys for being here as well because I know everybody wants to have a good job and good pay. So I'm glad that you're here. But also know that what happens to one unit can spread all across. And so I know that many people got raises while one unit did not. Thank you.

CHAIRPERSON WEPRIN: Okay. Thank you. You want up.

RANDY MASTRO: Mr. Chair.

CHAIRPERSON WEPRIN: All right, thank you. Thank you, audience. No, the audience is being good. Mr. Mastro, do you want to respond to that I see.

RANDY MASTRO: Yes. Mr. Chairman, I just wanted to point out that Janelle Quarles of the Working Families Party, the Legislative Campaign Director, sent a memo to many Council Members that urged them to ask certain questions of the type that Council Member Williams asked, and admitted the following: Quote, "The City cannot enforce

violations of federal labor law." end quote. The City Cannot cancel the current franchise based on Cablevision's violations of the labor language" end quote. In the Franchise Agreement, but that the WFP wanted the Council to press an investigation of these issues to quote "Increase pressure on Cablevision" end quote to give into the CWA's collective bargaining demands. I just wanted that to be part of this record so we are all crystal clear. Thank you.

CHAIRPERSON WEPRIN: Thank you, Mr. Mastro. I know you don't want to hear my advice, but I know you are a very aggressive fighter for your client. But try not to let things get under you skin, okay because--

RANDY MASTRO: [interposing] Nothing is getting under my skin.

CHAIRPERSON WEPRIN: --we've got more here. Okay, we've got more people coming. They're not all going to say nice things. I know. I'm just saying.

RANDY MASTRO: I'm asking question not speaking.

CHAIRPERSON WEPRIN: I just can see where it will spin out of control. You'll make my job really tough between these guys and you.

RANDY MASTRO: Sure.

CHAIRPERSON WEPRIN: So let's all be on your best behavior. Okay. Council Member Reynoso followed by Council Member Richards, by the way.

COUNCIL MEMBER REYNOSO: Thank you very much. Mr. Mastro, thank you for being here. I wanted to ask why are you here? If we have no role to play in administering your franchise, why do you even care to be here?

RANDY MASTRO: That's a good question. And the answer to the question is Cablevision as a responsible party that is responsive to government is here at your invitation. But we would be remiss if we came here and didn't express to you our views on the scope of your authority whether you should even be having hearings like this and what the law is in this area. So we are here to answer your questions, but we would have been remiss had we not said at the outset we don't understand why yet another hearing is being held on the status of collective bargaining negotiations between a private entity and play--

COUNCIL MEMBER REYNOSO: [interposing] Okay, and for us--

RANDY MASTRO: --and labor.

COUNCIL MEMBER REYNOSO: So you answered the question. Thank you. You did a good job. The second part is if there is no real role for us to play here, you don't need to be here, by the way. You could just not show up, but I think that there is a role that we do play. Do you know what an authorizing resolution is?

RANDY MASTRO: Of course I do. I'm a former--

COUNCIL MEMBER REYNOSO: [interposing] Thank you

RANDY MASTRO: --Deputy Mayor, and you granted an authorizing resolution on franchises as you know--

COUNCIL MEMBER REYNOSO: [interposing] Okay so we as City Council.

RANDY MASTRO: --as the City Council.

COUNCIL MEMBER REYNOSO: Mr. Mastro, why is it that you can't answer questions--

RANDY MASTRO: [interposing] I'm answering them.

COUNCIL MEMBER REYNOSO: --the way everyone else does.

RANDY MASTRO: I'm answering your question.

COUNCIL MEMBER REYNOSO: Give us the respect we want to give you?

RANDY MASTRO: Okay.

COUNCIL MEMBER REYNOSO: You've got to respect us, and we'll respect you. If you don't do it, then we're going to get into a shouting match and that is--

CHAIRPERSON WEPRIN: Okay.

COUNCIL MEMBER REYNOSO: --not what we're trying to do.

RANDY MASTRO: Yu asked me if I knew what an authorizing resolution was?

COUNCIL MEMBER REYNOSO: I just-- Exactly. You can say yes or no.

RANDY MASTRO: I do know what an authorizing resolution is.

COUNCIL MEMBER REYNOSO: Thank you.

CHAIRPERSON WEPRIN: Okay, good.

COUNCIL MEMBER REYNOSO: Okay, in the Franchise Agreement, was there an authorizing resolution, yes or no?

RANDY MASTRO: There was an authorizing resolution to grant franchises to cable providers. yes.

COUNCIL MEMBER REYNOSO: Is there an authorizing resolution regarding bargaining collectively?

RANDY MASTRO: No.

COUNCIL MEMBER REYNOSO: Okay. so--

RANDY MASTRO: [interposing] Not the way you have put that, Council Member.

COUNCIL MEMBER REYNOSO: The right to bargain collectively is there an authorizing resolution that requests that-- Not requests but mandates that the workers have a right to bargain collectively?

RANDY MASTRO: I have-- Councilman, I'm not sure of your specific reference, but if you were asking whether in-- what is in cable franchise agreements is a provision is a provision about collective bargaining. There is such a provision that--

COUNCIL MEMBER REYNOSO: [interposing] Thank you.

RANDY MASTRO: --the Chair read at the outset of the hearing.

COUNCIL MEMBER REYNOSO: So there is an authorizing resolution, right, that resulted in the contract that specifically states rights to bargain collectively, franchise, i.e., Cablevision shall recognize the right of its employees to bargain collectively to representation of their own choosing in accordance with applicable law. Do you know what I'm reading here?

RANDY MASTRO: You're reading Section 17.1 of the--

COUNCIL MEMBER REYNOSO: [interposing] How does that-- What does it say? Right after 17.1, what are the words that it says? The right to bargain collectively. And that was--

RANDY MASTRO: [interposing] And I did say that already, Mr. Reynoso.

COUNCIL MEMBER REYNOSO: Okay, go ahead. I apologize. You're right. Go ahead.

RANDY MASTRO: I did say that there is such a provision, and I explained earlier why I

believe that Cablevision is in complete compliance with it--

COUNCIL MEMBER REYNOSO: [interposing] Okay, I didn't ask you whether you were in compliance. I asked you if that resolution if that was in there, and you said that my question wasn't being asked correctly, but obviously it's in there. And the measure was adopted by what body?

RANDY MASTRO: The City Council.

COUNCIL MEMBER REYNOSO: The City Council. So the City Council--

RANDY MASTRO: [interposing] It's an Authorizing Resolution Granting a Franchise and then it's entirely--

COUNCIL MEMBER REYNOSO: [interposing] I asked you a question, and you answered it.

RANDY MASTRO: --up to the Administering to decide whether to grant-- who to grant them to, and then how to administer it.

COUNCIL MEMBER REYNOSO: [interposing] And the City Council plays that role.

RANDY MASTRO: And that's what the New York Court-- [sic]

COUNCIL MEMBER REYNOSO: The City Council plays that role, and we play that role. So we do matter.

RANDY MASTRO: And this is--

CHAIRPERSON WEPRIN: Let him finish the question, and then you can answer.

COUNCIL MEMBER REYNOSO: Exactly. So we do matter, and this is real. And now I wanted to ask you another question.

RANDY MASTRO: [interposing] Can I respond to that?

CHAIRPERSON WEPRIN: Let him answer that question then you can--

COUNCIL MEMBER REYNOSO: The question was whether or not there is a provision in their contract for the right to collectively-- The right to-- I'll read it exactly. The right to bargain collectively?

CHAIRPERSON WEPRIN: I think he said yes to that.

COUNCIL MEMBER REYNOSO: He said yes.

RANDY MASTRO: Yes, but Council Member--

COUNCIL MEMBER REYNOSO: And that was adopted by who?

RANDY MASTRO: Council Member--

CHAIRPERSON WEPRIN: This is where-- this is where the answer is going to get long.

RANDY MASTRO: Okay.

CHAIRPERSON WEPRIN: But let's let him answer that question.

RANDY MASTRO: Okay.

CHAIRPERSON WEPRIN: Because I know he'll explain that one.

RANDY MASTRO: The City Council passed an Authorizing Resolution.

COUNCIL MEMBER REYNOSO: You've got to get closer to the mic. You've got to get closer. Really close.

RANDY MASTRO: The City Council passed an Authorizing Resolution permitting the City Administration to grant franchises. Then it is the exclusive providence under well-established law, New York Court of Appeals, City Council v. New York State Public Service Commission that the Administration has exclusive authority to decide who to grant a franchise to and how to administer the franchise. And whether there is problems under the franchise agreement, and whether to revoke or renew entirely, exclusively the franchise of the executive branch.

That's what our New York's highest court has said. So you did your job already when you passed the authorizing resolution. You have no right--

COUNCIL MEMBER REYNOSO: [interposing] Right.

RANDY MASTRO: --in the administration of the franchise.

CHAIRPERSON WEPRIN: Thank you.

COUNCIL MEMBER REYNOSO: I never said did we have the authority to administer a franchise. I asked if we adopted a resolution, an authorizing resolution adopted by the City Council that specifically speaks to the right to bargain collectively. And we are calling you in here to speak to something that we asked the Administration to adopt. So we do have a purpose in this Council and you are misrepresenting that. Now, I have another question.

RANDY MASTRO: And you did pass an authorizing resolution.

COUNCIL MEMBER REYNOSO: You don't need to answer anything. There was no question there.

CHAIRPERSON WEPRIN: That's fine. Just take note. He has another question.

COUNCIL MEMBER REYNOSO: The next question.

RANDY MASTRO: Please.

COUNCIL MEMBER REYNOSO: Is are you a member of the NLRB?

RANDY MASTRO: Pardon me?

COUNCIL MEMBER REYNOSO: Are you a member of the NLRB right now?

RANDY MASTRO: No, I am not.

COUNCIL MEMBER REYNOSO: So what gives you the authority to call these claims baseless?

RANDY MASTRO: Okay, your question is what is Cablevision's--

COUNCIL MEMBER REYNOSO: [interposing] No, no, no. In your testimony it specifically states that these are baseless claims. Are you a member of the NLRB?

RANDY MASTRO: No.

COUNCIL MEMBER REYNOSO: You are not.

RANDY MASTRO: [interposing] Mr. Council Member, I'm not an NLRB--

COUNCIL MEMBER REYNOSO: What gives you the authority to--

RANDY MASTRO: --but our law firm is representing Cablevision before the NLRB, and we have told the NLRB as their counsel that these charges are baseless, and we are vigorously defending against the complaints--

COUNCIL MEMBER REYNOSO: [interposing] You are--

RANDY MASTRO: --and we intend to win.

COUNCIL MEMBER REYNOSO: Exactly. You intend to win, but these claims are not baseless until the NLRB states it, not you.

RANDY MASTRO: If they're not founded on anything so why are you--

COUNCIL MEMBER REYNOSO: [interposing] You are not the authorized agent.

CHAIRPERSON WEPRIN: Mr. Mastro, you are just stating your opinion is what you were doing, and the opinion of your clients.

RANDY MASTRO: [interposing] Your opinion is not fact. The fact is that the NLRB decides whether or not those claims are baseless and you--

COUNCIL MEMBER REYNOSO: [interposing] I have said that.

RANDY MASTRO: --constantly chose the word and statement that specifically speaks to what is for you, and not what is fact. And we are a body that is significant. If not, you would not be here. The owner wouldn't spend his money on you to sit there when he could be using it for something else, maybe a yacht. And the other thing is also you are not an NLRB member so don't call the claims baseless until the NLRB does. So let's wait for that to happen, and then you can make your statement. Thank you very much for your time.

CHAIRPERSON WEPRIN: Thank you and that doesn't need a response, Mr. Mastro. Mr. Richards, Donovan Richards from Queens County

COUNCIL MEMBER RICHARDS: Good afternoon.

RANDY MASTRO: Good afternoon, Councilman.

COUNCIL MEMBER RICHARDS: First off I want to start by saying that you're an embarrassment to your company. You're a huge embarrassment, and I'm not-- I don't get into name-calling, but I've sat here and listened to you. And one thing my mother and my father always taught me is when I go into somebody else's house, I should respect them.

And if I'm in your house you have every right to act the way you are. But you're in our house. The members of this Council had every right to inject themselves in workers' rights. This is one of the reasons we were elected, the primary reason we were elected as council members in New York City. And I think I couldn't stand here in good faith and not represent the people of my district. I will go into just a few questions. I want to go to Brooklyn for a second. I'm a Queens council member, and I want to know why-- what was the reason for you guys not authorizing raises or anything for your Brooklyn members? Why was it that the Bronx members in particular, and I'm not pitting-- I don't want to pit the boroughs against each other because you have to be very cautious when you're in these particular battles. Because it's something called divide and conquer, and we've seen this for many years. So I know that perhaps-- Maybe the first question I should ask is who paid for those T-shirts? [crowd laughter]

SERGEANT-AT-ARMS: Quiet please.

COUNCIL MEMBER RICHARDS: And I think I would love to hear who paid for those particular T-shirts that the workers have?

CHAIRPERSON WEPRIN: Did you-- You asked a question before that. Did you not want to ask that question.

COUNCIL MEMBER RICHARDS: Well, I'll take two.

CHAIRPERSON WEPRIN: But the first question was why-- Repeat that question about offering a raise.

COUNCIL MEMBER RICHARDS: So why is it that the Bronx in particular receive raises and the Brooklyn members did not? And was there-- I find it very hard to believe that members, people in New York City would vote to decertify being part of a union when we all know that being part of a union in particular will bring you certain benefits.

CHAIRPERSON WEPRIN: Okay.

COUNCIL MEMBER RICHARDS: And obviously, some raises. So I just find it--

CHAIRPERSON WEPRIN: [interposing] Let him answer.

COUNCIL MEMBER RICHARDS: And I want to be clear--

CHAIRPERSON WEPRIN: [interposing] Let him answer one at a time.

COUNCIL MEMBER RICHARDS: --the Working Families Party has not had a damn thing with any question I'm asking today. And I respect them. I respect the CWA. but I also have been taught to think, and based on that, I would like to hear your answer?

RANDY MASTRO: Okay, Mr. Chairman. I'm not sure which question--

CHAIRPERSON WEPRIN: Well, I guess it just goes by where you start. Start with the first question about the pay raise.

RANDY MASTRO: Okay. The difference Councilman is that back in 2012, certain parts of the workforce and I've had direct negotiations with the company and there were terms and condition--

CHAIRPERSON WEPRIN: [interposing] You've got to get closer to that mic.

COUNCIL MEMBER RICHARDS: Don't be shy with the mic now.

RANDY MASTRO: Oh, I'm not shy, Council Member.

COUNCIL MEMBER RICHARDS: Okay.

RANDY MASTRO: You've learned that already.

CHAIRPERSON WEPRIN: We will stipulate to that.

RANDY MASTRO: The discrete bargaining unit in Brooklyn where there are about 270 employees, they have had since 2012 a bargaining representative, the CWA. So you have to negotiate terms through the CWA. You can't directly impose terms and conditions once you have a bargaining representative. So the simple answer to your question is that's the process that's been going on through 40 bargaining sessions with 54 agreements on major terms. And the few that remain I think it's fair to say, and it's what the CWA told its members, negotiations have been quote "productive" and the CWA is hopeful of resolving them. But that's the collective bargaining process. You can't directly when you're an employer impose terms and conditions without going through the union. So that explains the difference between the two. Thank you.

COUNCIL MEMBER RICHARDS: Second question. Who paid for the T-shirts?

RANDY MASTRO: I personally do not know, but I hope you'll as the same question of who paid for the red T-shirts?

COUNCIL MEMBER RICHARDS: Those red T-shires have been around for a long time, prior to the blue.

RANDY MASTRO: I'm going to wait to see if-- I'm going to wait to see if you guys ask the same question--

CHAIRPERSON WEPRIN: I'm keeping track of the questions that he gave you.

COUNCIL MEMBER RICHARDS: All right, and I don't want to take too much time, Mr. Chairman. I think you've been very generous to this gentleman. Are there any further negotiations sessions being scheduled as of now?

RANDY MASTRO: It's my understanding that the parties continue to try to schedule negotiating sessions. We'll continue to have them, you know.

COUNCIL MEMBER RICHARDS: So when is the next one scheduled?

RANDY MASTRO: I don't have the answer to that. I don't know if there's a date for one. I know that Cablevision has proposed many more dates for potential sessions than the union has been able to accommodate, but I believe that--

COUNCIL MEMBER RICHARDS: Please don't use those generalities unless you really are giving a date.

RANDY MASTRO: I am being told that the date is December 16th for the next bargaining session.

COUNCIL MEMBER RICHARDS: So December 16th? Okay, Mr. Chairman, I want to thank you. You know what? I do want to add the last comment I have to make is I wish James Dolan would have hired you as a New York Knicks Coach. Perhaps he would have had a better record with your vigor. Thank you.

CHAIRPERSON WEPRIN: Thank you. You don't have to comment on that. As your counsel, I advise you not to comment on that, as a matter of fact. [crowd comments] That was Michael. Sorry about that. That other person is Michael. All right, we're going to move onto Council Member Mark Levine from Manhattan.

COUNCIL MEMBER LEVINE: Thank you, Chairman, Weprin. Mr. Mastro, speaking for myself, I have not been manipulated or infiltrated or used as a pawn or brainwashed as you implied. I'm here and this committee is here, and this hearing is underway for one simple reason, which is I and we are concerned about the labor practices of your company. Period. And we're here to ask tough questions. You may not like that, but I think it would be a dereliction of duty if we didn't ask these questions. And as for this memo that you continue to refer to from CWA, I haven't seen it. I haven't received it. I learned of its existence from you. I'm not sure why you keep mentioning it. I guess you're trying to get something into the record, but someone misinformed you on the facts of that one.

Council Member Richards asked a question of the T-shirts that at first struck me as odd, but I'm starting to understand the implications, and I can't help but noting that you didn't answer. Are you telling us that the employees bought these T-shirts with their own money? I can explain why I care about this if you'd like.

RANDY MASTRO: Sir, no, I actually answered, but I don't know who paid for the T-shirts. So that was my answer. So that is my answer. I don't know who paid for the T-shirts. And I don't know who paid for the red T-shirts, and I hope you'll ask--

COUNCIL MEMBER LEVINE: [interposing] I'll ask. I'll ask. I promise.

RANDY MASTRO: --these new people here [sic] who paid for the red T-shirts. Okay. All right?

COUNCIL MEMBER LEVINE: Well, we'll-- So among the concerns and questions that I have about your influence on the employees since this decertification vote, your possible expense of company resources in favor of your stated goal of getting certification. I just want to put that on the record. Mr. Dolan visited, as you mentioned, the garage prior to the night before the straw pole. What was the message he delivered? Was he threatening employees or promising them something?

RANDY MASTRO: Not in the least, and I think that the accusations that have been made by union in that regard are completely false,

demonstrably false, and the message that was conveyed as I understood at that session, and I think others will testify about or be prepared to testify about. Was to encourage everyone to vote in the straw pole regardless of what your position was on union decertification. And, in fact, the union took exactly the same position and urged members to vote in the straw pole, and only expressed opposition after they lost the vote. Those are the facts.

COUNCIL MEMBER LEVINE: And prior to when that speech was delivered, when was his previous visit to that garage?

RANDY MASTRO: He makes tours of garages periodically and speaks to workers periodically. So it was not-- it was not the first time. It won't be the last time. He's very, you know, hands-on person who cares about his company, and his workers. And he makes visits periodically to plan some bases and that happens periodically.

COUNCIL MEMBER LEVINE: You've made repeated reference to your plans to appeal the NLRB position.

RANDY MASTRO: I have not. I have said that there's a process that has to be followed,

Councilman, where the ALJ decides first. Then it goes to the NLRB. Then it goes to the courts, and I have said that I and the company expects to be fully vindicated. And they can be vindicated at any stage along that way, but expects to be fully vindicated.

COUNCIL MEMBER LEVINE: Do you accept the authority that NLRB puts into it, this matter. [sic]

RANDY MASTRO: No. The NLRB is the body that by law reviews complaints in the first instance. Ultimately, it's up to the courts to decide whether the NLRB got it right. But again Cablevision expects to be fully vindicated when these complaints are fully litigated through the NLRB and the courts.

COUNCIL MEMBER LEVINE: You're an attorney so you know that words matter, and you've made repeated reference to the DOI allegations regarding the recent mayoral meeting. Am I correct that the word inadvertent was how they described the incident, DOI. I didn't hear you mention that.

RANDY MASTRO: The DOI conclusion was that there was a violation of DOE rules and State Education Law, and that it appeared to be inadvertent. The violation they were referring to was a violation of having excluded members of the

public and the press from attending that meeting. The DOI report went on to say that it couldn't reach a conclusion on whether there had been a wholly separate violation of City Conflict Rules involving the use of public resources, and public position for political purposes. And it went on to say that there may have been a violation of Conflict rules and that's why groups were respected such as the Citizens Union have today called upon DOI and the Conflict of Interest Board to review the matter, and investigate the matter.

COUNCIL MEMBER LEVINE: Okay. I'm just going to close with one last question on the T-shirt topic. I've noticed that there are two classes of T-shirts here. We've got those that say Let Brooklyn Vote and Let us Vote, about maybe 90% saying let Brooklyn vote, and not to assume that then the other 10% are those who are part of this bargaining unit.

RANDY MASTRO: Since I don't know the origins, I don't know the answer.

COUNCIL MEMBER LEVINE: You can see the conclusion that we're drawing from that, though, unless the T-shirts are misleading.

RANDY MASTRO: Councilman since-- [crowd comments]

SERGEANT-AT-ARMS: Quiet please.

RANDY MASTRO: Councilman, I don't know the answer to your question. So I don't know how you could draw any conclusions when you don't have any information.

COUNCIL MEMBER LEVINE: Okay. Thank you.

CHAIRPERSON WEPRIN: Thank you, Mr. Levine, and I'd like to now call on Council Member Lander. Again, I advise both the members and the panel to make sure not to make it personal.

COUNCIL MEMBER LANDER: Thank you, Mr. Chairman. Thank you for being here today, Mr. Mastro. So you've acknowledge that your client entered into a Franchise Agreement that contained Section 17.1, the right to bargain collectively. And I just want to make sure we have the last sentence in evidence here that paragraph 2: Franchisee shall not dominate, interfere with, participate in the management or control of or give financial support to any union or association of its employees. Yes? Your client entered into a Franchise Agreement that contained that clause?

RANDY MASTRO: Cablevision entered into the Franchise Agreement that has been referred to earlier and quoted earlier by the Chair.

COUNCIL MEMBER LANDER: So your cute answer about your unawareness about the providence of the T-shirts notwithstanding if your clients had paid for the T-shirts supporting an association of employees that might be considered to be a violation of Section of 17.1 of the Franchise Agreement?

RANDY MASTRO: Right. [crowd comments] Both the assumption of your question and your conclusions are wrong.

COUNCIL MEMBER LANDER: So you've indicated that you think actually this entire section is preempted by Federal Labor Law. Did your client share that opinion when they entered into the Franchise Agreement?

RANDY MASTRO: What I said, Councilman, was that under U.S. Supreme Court precedent there was a cause in case that a punitive action or a debarment, a loss of a contract as a matter of state or local law that federal preemption bars that from occurring. It doesn't mean that you can't have a contract provision where folks have certain

obligations and that they act responsibly under those contracts. But the question that was asked earlier by another councilman and that has been raised directly or indirectly in these hearings. The answer is simple. Federal law preempts the same from having an application of law that would impose a different remedy than those allowed under federal law, or an additional remedy. So the answer to your question is--

COUNCIL MEMBER LANDER: [interposing] So based on your advice--

RANDY MASTRO: --the City could not as far as the law and the Supreme Court stands, the City could not revoke or take punitive action against Cablevision. The NLRB is the one who decides on labor disputes like this, and unfair labor practice charges, what the remedy has to be. And I have to add Councilman besides that--

COUNCIL MEMBER LANDER: [interposing] The NLRB decides--

RANDY MASTRO: --besides that, besides that--

COUNCIL MEMBER LANDER: --on these disputes and what the remedy has to be?

RANDY MASTRO: Besides that--

COUNCIL MEMBER LANDER: Because you've indicated before that you don't actually respect the NLRB's decisions as--

RANDY MASTRO: [interposing] That's right.

COUNCIL MEMBER LANDER: --to remedy. That you'll pursue that in court?

RANDY MASTRO: Absolutely incorrect, Council Member.

COUNCIL MEMBER LANDER: So you disagree with Mr. Dolan that the NLRB has turned into a tool of big labor, as he informed the New York Times?

RANDY MASTRO: Council Member Lander, the NLRB is the adjudicatory body and the regulatory body that go ultimately before the courts--

COUNCIL MEMBER LANDER: [interposing] And I asked if you agreed or disagreed with Mr. Dolan that the NLRB has turned into a tool of big labor.

RANDY MASTRO: Let me answer the question. Thank you.

CHAIRPERSON WEPRIN: Let's not struggle now. Let's try to finish the answer. Let him answer it and we'll get back to that.

RANDY MASTRO: Where the NLRB will ultimately be asked to decide the issues in this complaint and then it will go to the courts. And we are defending-- My law firm is defending Cablevision in those cases, and we are doing that in the highest traditions of the practice. But the fact of the matter is that it's the NLRB that will decide what the remedy is if any unfair labor practice charge were found to have been sustained at the end of the day. And under Supreme Court precedent the Wisconsin case that I cited to you and gave you the citation, local and state laws that attempt to impose different remedies or additional remedies are preempted by federal law.

COUNCIL MEMBER LANDER: So on your advice, your client actually didn't have anything to worry about from Section 17.1 and could essentially ignore it from the beginning because they need not based on your legal advice fear any consequence of willful violations of it. Because any city action to address it would be preempted under your federal law. That's a pretty clear-- You know, it's a good point. That was your advice to them don't worry about Section 17.1--

RANDY MASTRO: [interposing] No, that's-- that's actually.

COUNCIL MEMBER LANDER: --no remedy is called for there. [sic]

RANDY MASTRO: It's actually not what I said, Councilman and I explained already that the contract provision is something that Cablevision is respecting, in compliance with, and, you know, something--

COUNCIL MEMBER LANDER: [interposing] Do you believe it's respecting by Mr. Dolan declaring that the NLRB has turned into a tool of big labor. That indicates a respect for the NLRB role in this process that you just said supersedes the City's role.

RANDY MASTRO: I have nothing to answer.

CHAIRPERSON WEPRIN: You don't have to answer, but you seem to be choosing to ignore that one question, which is fine, but--

RANDY MASTRO: No. No, Mr. Chairman, that's not right either.

CHAIRPERSON WEPRIN: Okay.

RANDY MASTRO: The fact of the matter is that Cablevision is litigated before the NLRB and

respecting the NLRB Cablevision is here today to talk about and address the questions that you have about the franchise and compliance with that provision. We're respecting this contract. We are respecting the NLRB. There is nothing inconsistent about that in pointing out what the state of law ultimately is and who has the authority to decide these questions, and whether they preempt local law. There is nothing inconsistent about that. So you can try to find an inconsistency, but there is none.

COUNCIL MEMBER LANDER: I just think it's convenient to say that the City Franchise Agreement is irrelevant for remedy purposes and point to the NLRB. And then, when we discuss the NLRB's remedy, and I point to the fact that Mr. Dolan has said the NLRB has turned into a tool of big labor, you won't answer whether you agree with that or don't agree with that. I don't know if it's a contradiction or not a contradiction. It is convenient.

RANDY MASTRO: Councilman--

COUNCIL MEMBER LANDER: You can refuse to answer. I've asked you four times about that, and you haven't answered. So you can say, Councilman over and over again it still doesn't--

CHAIRPERSON WEPRIN: [interposing] All right, Brad. One second let him finish.

RANDY MASTRO: Okay, let's try to be accurate because I know you do want to be accurate. The fact of the matter is that I did not say that the Franchise Agreement is irrelevant. The Franchise Agreement is what it is, and there are clear rules in the Franchise Agreement for how the City goes about identifying what it considers to be an issue under the Franchise Agreement. And it gives notice and an opportunity to be cured. I am pointing out to you that when it comes to an unfair labor practice, and applicable-- compliance with the applicable laws, it is the NLRB and ultimately the federal courts that make that determination. And in that context, Cablevision will have to be responsive to the NLRB.

COUNCIL MEMBER LANDER: And I'm looking forward to finding out when the NLRB ALJ rules whether as the NLRB investigators charged after a lengthy that Mr. Dolan did, in fact, indicate that the workers could have a pay raise if they voted to be certified. That they get 14% average wages if they didn't choose a union, and 3% if they did. That they would be passed over for training opportunities

if they formed a union and didn't if they would. If they fired 22 workers for their union organizing activities. I agree, we need to see all of those things because there's a systematic pattern of unfair labor practices. And if I had a little more time, I was going to ask you why you think this is in the Franchise Agreement at all? But from my point of view, I'll just say I think it's in the Franchise Agreement because there is a recognition that systematic unfair labor practice activity by corporations whose CEOs indicate that they believe the NLRB has turned into a tool of big labor. Who can pay big money to hire excellent corporate attorneys to litigate first in front of the NLRB and then in court. And can stall out a worker's rights to work, to bargain while they're bargaining in bad faith. And I'll point out a whole series of unfair labor practices that the NLRB found in its complain-- and I also look forward to the ruling on those-- relate to bargaining in bad faith. You sustain the bad faith bargaining. You litigate and litigate and litigate to draw it out. You then invest in an illegal and another unfair labor practice the effort to decertify. We didn't really get to the fact that

the shirts say "Let Brooklyn Vote" and you're pretending as though we could let Brooklyn vote. In fact, it's the NLRB that is denying the decertification election because they believe you've engaged and your client has engaged in repeated unfair labor practices. It all adds up very, very simply to union busting. That's why the NLRB--

CHAIRPERSON WEPRIN: [interposing] Okay.

COUNCIL MEMBER LANDER: --seeks to enable unions to organize. And that's why the Franchise Agreement is designed to provide some modest additional support in case well-healed corporations seek to abridge their workers' rights to organize.

CHAIRPERSON WEPRIN: [interposing] Thank you, Brad.

COUNCIL MEMBER LANDER: Thank you very much, Mr. Chairman.

CHAIRPERSON WEPRIN: Okay.

COUNCIL MEMBER LANDER: Thank you for your indulgence.

CHAIRPERSON WEPRIN: Thank you. I'm going to give you the chance to respond.

RANDY MASTRO: Thank you.

CHAIRPERSON WEPRIN: You don't have to do as long an answer as he gave a question.

RANDY MASTRO: I don't need to. The factual predicates of his speech are false, and they will be proven as such before appropriate authorities. Number two, the fact of the matter is that a reality check, as this committee should know, because other union representatives came her to your last hearing and told you so. Cablevision, Madison Square Garden, Newsday, they've enjoyed excellent working relationships with their unions. This is about one well-connected union. One well-connected political party, and trying to put pressure on Cablevision in this one discrete bargaining unit. So, Council Member Lander, I reject categorically everything you said in that speech. It's wrong on the wrong on the-- they're wrong on the facts.

COUNCIL MEMBER LANDER: [interposing] They're not allegations? They're not allegations made by the National Labor Relations Board because that's all I said--

CHAIRPERSON WEPRIN: [interposing] Okay.

COUNCIL MEMBER LANDER: I didn't say that they had happened--

CHAIRPERSON WEPRIN: Thank you, Council Member. And we will hear from union reps who will lay out these allegations again. Just for the record just a reminder as you mentioned MSG as a separate company from Cablevision--

RANDY MASTRO: [interposing] Yes, it is.

CHAIRPERSON WEPRIN: --and this is regarding Cablevision.

RANDY MASTRO: It's ultimate common ownership but--

CHAIRPERSON WEPRIN: [interposing] Right.

RANDY MASTRO: --a separate company, correct.

CHAIRPERSON WEPRIN: Okay, as you mentioned.

RANDY MASTRO: And you're well aware, this committee is well aware of the excellent relationships--

CHAIRPERSON WEPRIN: All right, don--

RANDY MASTRO: --with you that Cablevision has enjoyed.

CHAIRPERSON WEPRIN: All right, don't start because then it's just going to get responses.

RANDY MASTRO: Hey, I've got all day.

CHAIRPERSON WEPRIN: All right, well--

RANDY MASTRO: I've got all day to answer questions.

CHAIRPERSON WEPRIN: --I'm glad you feel that way because we finished the first round--

RANDY MASTRO: [interposing] Thank you.

CHAIRPERSON WEPRIN: --and we're going back to Council Member Jumaane Williams. So where to put-- This is for Jumaane. This the second and last time.

SERGEANT-AT-ARMS: Quiet on the floor.

CHAIRPERSON WEPRIN: We're going to keep you-- Yeah, we're going to put a second five-minute clock on the second round. How is that?

COUNCIL MEMBER WILLIAMS: Sure.

CHAIRPERSON WEPRIN: Jumaane, whenever you're ready.

COUNCIL MEMBER WILLIAMS: Thank you, Mr. Chair, and Mr. Mastro--

RANDY MASTRO: [interposing] Yes, sir.

COUNCIL MEMBER WILLIAMS: --just back to one of the first things I've seen, which I believe as a sitting attorney you actually should be ashamed for what you said here about the Working Families Party.

Particularly as a person who brought the case, and to mention, you said-- The things that you said were made as statements of facts. And as an attorney, you probably know you shouldn't do that because none of those things have been proven. And so, I think you owe an apology on the record for making a statement that you know is not factual.

RANDY MASTRO: [interposing] Well, actually--

COUNCIL MEMBER WILLIAMS: Particularly about a person who brought it, and also how do you--

RANDY MASTRO: [interposing] Actually, Councilman, as an officer of the court, I have an obligation when I bring a case to bring that case in good faith because I believe the allegations that are made. And, in fact, we proved them in that courtroom.

COUNCIL MEMBER WILLIAMS: Honestly, they have not been proven.

RANDY MASTRO: [interposing] We proved that in court.

COUNCIL MEMBER WILLIAMS: They have not-- Okay, they have not been proven period.

RANDY MASTRO: We're not here to make a case.

COUNCIL MEMBER WILLIAMS: And so to me--

CHAIRPERSON WEPRIN: [interposing] We're not here to discuss that case, or anything else on that. So let's-- let's not go there.

RANDY MASTRO: We proved that to the best our ability.

COUNCIL MEMBER WILLIAMS: And also, let's-- And you have also brought cases--

CHAIRPERSON WEPRIN: [interposing] Let's just let that comment go. Hold on.

COUNCIL MEMBER WILLIAMS: So, you probably should have recused yourself from representing this company if you're going to bring some of that stuff up. And I would say to the Cablevision, you know, you kind of threw fuel on the fire here for no reason. I have no problem saying that I think that unionizing for the most part is a good thing. But I also am a fair person. And so I really want to get, to understand both sides. And that doesn't seem like what you came to do. You came to throw fuel on the fire. I've met with CWA a couple of times. I've asked them very difficult

questions as well. I've met with Cablevision. I've asked them difficult questions because I really want to understand what's happening. And it's just a shame that that's what we heard today. It was really just to showboat by Mr. Mastro I guess and to pump his chest. And it really just put fuel on the fire for no reason. I think we could have had a dialogue and really get your side a little better. That didn't happen here. Everything I hear it seems like the tight case for what union busting is that I've read in the history books. So I just have to say that, but I do have a couple more questions. So I just wanted to be clear because you said that-- You made it clear that the day before the vote, Mr. Dolan did appear. You said that he has appeared in other sites. I wasn't clear on the answer of how often that happened, and when was the last time he did it before that.

RANDY MASTRO: Okay. Councilman, I don't have an exact count, but I would be happy to follow up later and give you other instances where Mr. Dolan has gone and visited plants or sites. It's something that he does periodically.

COUNCIL MEMBER WILLIAMS: But you don't think that that particular visit was to push people to vote one way or the other?

RANDY MASTRO: It absolutely was not. It was to encourage everyone to vote regardless of what your views were. Just as the union urged its supporters to vote

COUNCIL MEMBER WILLIAMS: [interposing] Did he make--

RANDY MASTRO: --in that straw pole.

COUNCIL MEMBER WILLIAMS: Did he make mention about what would happen if the union came or did not come?

RANDY MASTRO: Not at all, and that will be proven--

COUNCIL MEMBER WILLIAMS: [interposing] Okay.

RANDY MASTRO: --in the appropriate forum, and it's a demonstrably false allegation by the union.

COUNCIL MEMBER WILLIAMS: Okay. Back to Mr. Thompson. Um, I understand that he was fire three times. I just want to be clear because I keep on this. I heard that it was because of issues that

he had before. My understand is the first time he was fired it was immediately after the Brooklyn votes unionized in January 2012. Is that correct?

[Pause]

RANDY MASTRO: Yeah, I'm not sure what you were referring to earlier, Councilman Williams. Mr. Thompson was among the 22 workers who, you know, refused to return to work and, therefore, were replaced. And then subsequently reinstate--

COUNCIL MEMBER WILLIAMS: [interposing] Hold on, hold on, hold on. Let me be clear. I want to be clear.

RANDY MASTRO: But let me--

COUNCIL MEMBER WILLIAMS: [interposing] No, no, no. No, no, no. Actually, as I said, I'm the Council Member so I get to--

RANDY MASTRO: So you get to cut me off when I'm speaking? [sic]

COUNCIL MEMBER WILLIAMS: [interposing] Yes, that's exactly what I'm saying.

RANDY MASTRO: Okay, if that's how you're going to play. If that's how you're going to play.

CHAIRPERSON WEPRIN: Okay. Let Mr. Mastro lead. [sic]

COUNCIL MEMBER WILLIAMS: So let me-- let me be clear because of what you said beforehand is that he was fired for cause because of longstanding history. That is what you said.

RANDY MASTRO: You're conflating different concepts, Councilman. If I can please finish what I was saying.

COUNCIL MEMBER WILLIAMS: Oh, boy.

RANDY MASTRO: If I can please finish my answer. If I can please finish my answer. You asked me about whether there were three incidents in which he was fired or almost fired. And I was not familiar with the first instance that you referred to. I don't know whether there is any reality to that or not. I am aware that he was among the 22 workers who refused to go back to work and they were replaced. And ultimately, all 22 were reinstated. And the process worked the way it was supposed to work, which is employment actions were taken. There were complaints. There was back and forth, and ultimately, Cablevision reinstated those 22 workers. In Mr. Thompson's case he was ultimately fired, terminated for cause based an ten plus year history

of different employment-related unprofessional behavior, and violation of company policies.

COUNCIL MEMBER WILLIAMS: [interposing] But you also-

RANDY MASTRO: And multiple things--

COUNCIL MEMBER WILLIAMS: [interposing] What you also said is that he was not fired, and it's on the record, and what you also said is that he was not fired around the time they were trying to unionize. And by your own description, he was fired around the time they were trying to unionize.

RANDY MASTRO: No, I meant-- Councilman Williams, please. Don't misstate my testimony.

COUNCIL MEMBER WILLIAMS: No, it's-- It's going to be in the record. So I-- hey.

RANDY MASTRO: I said I don't know what you're referring to--

COUNCIL MEMBER WILLIAMS: [interposing] No, sir. No, sir.

RANDY MASTRO: --around the time.

COUNCIL MEMBER WILLIAMS: No, sir. You said that he was not fired around the time they tried to unionize.

RANDY MASTRO: I know what I said. Please, let me just say this.

COUNCIL MEMBER WILLIAMS: You said that--

RANDY MASTRO: [interposing] Let me just finish. Let me just finish.

COUNCIL MEMBER WILLIAMS: Okay, my time is up, you know, I'm glad that it's going to go on the record and it's going to be transcribed.

RANDY MASTRO: [interposing] I just want-- I just want to--

COUNCIL MEMBER WILLIAMS: Mr. Chair, I just want to--

CHAIRPERSON WEPRIN: Let him finish. Let him finish.

COUNCIL MEMBER WILLIAMS: Mr. Chair, I want to--

CHAIRPERSON WEPRIN: [interposing] Let him finish. Let him finish.

COUNCIL MEMBER WILLIAMS: Mr. Chair--

CHAIRPERSON WEPRIN: Let him finish, and then I will have you, Mr. Mastro.

COUNCIL MEMBER WILLIAMS: What I'm going to ask you to ask them or to provide us is what they said they would, which was the last time that Mr.

Dolan appeared at this garage or in another garage. I'd like-- I'd like to understand that, and I know about that. [sic]

CHAIRPERSON WEPRIN: Okay.

COUNCIL MEMBER WILLIAMS: I did have one more question. Then I'll stop.

CHAIRPERSON WEPRIN: Okay.

COUNCIL MEMBER WILLIAMS: And I will say I'm also dangerously close--

RANDY MASTRO: [interposing] And I was just answering the last question, please?

COUNCIL MEMBER WILLIAMS: --to becoming a Mets because of the--

CHAIRPERSON WEPRIN: [interposing] Just one second. Let the-- Is that the question? COUNCIL MEMBER WILLIAMS: No, it isn't--

CHAIRPERSON WEPRIN: Let him finish him finish his last question. You can answer them all as sort of a broad answer to this. But go ahead.

COUNCIL MEMBER WILLIAMS: The question here is I wanted to know if it was true that workers-- Each worker was issued a PIN number in order to vote in the poll that you were referring to?

CHAIRPERSON WEPRIN: All right, Mr. Mastro, go ahead you have it.

RANDY MASTRO: I don't know-- I don't know about PIN numbers per se, but I know that there were efforts made by the Independent Ballot Association that's been doing this for 100 years to take extra steps to ensure confidentiality so that no one would know who was voting and how they voted at the time they voted. So there was absolute protections for confidentiality and--

COUNCIL MEMBER WILLIAMS: [interposing] You don't know if a PIN number was issued in order to vote?

CHAIRPERSON WEPRIN: He said it. You said it as--

RANDY MASTRO: [interposing] It was whatever. It was whatever their process was.

COUNCIL MEMBER WILLIAMS: Okay, thank you.

RANDY MASTRO: If their representative is here, they might be able to answer that. But, for a secret ballot confidential election, that would not be an uncommon thing to have done. But the fact of

the matter is--and I have to go back to his earlier statement--

CHAIRPERSON WEPRIN: Go head.

RANDY MASTRO: I did not say what the Council Member is saying I said. The record will speak for itself.

CHAIRPERSON WEPRIN: Okay.

RANDY MASTRO: I said I wasn't sure what he was referring to in 2012, but that I was aware of the circumstances in which he ultimate was terminated. It came after repeated warning over more than a decade, and a final warning given to him earlier. And then in 2014, a series of acts including two car crashes, one of which not reported to his superior, excessive cell phone use, unprofessional destructive behavior--

CHAIRPERSON WEPRIN: All right.

RANDY MASTRO: --that caused the company to terminate him for cause after having repeatedly given him warnings, and opportunities to repair the relationship.

COUNCIL MEMBER MILLER: Thank you, Mr. Mastro. I'm sure in the record it will say that he was not fired for and of those reasons. [sic]

RANDY MASTRO: [interposing] Now, here's the last, the last thing I have to say.

COUNCIL MEMBER MILLER: But that's good. I hope after all of this--

RANDY MASTRO: [interposing] Mr. Chairman, Mr. Chairman.

CHAIRPERSON WEPRIN: I'll get to you. I'll get to you.

COUNCIL MEMBER MILLER: --all the work, we'll be able to come back together because this worker was did not leave like. [sic]

RANDY MASTRO: [interposing] Mr. Chairman, Council Williams asked me--

COUNCIL MEMBER MILLER: Okay, thank you.

RANDY MASTRO: --Council Member Williams asked me--

CHAIRPERSON WEPRIN: We're going to get to you, Mr. Mastro. Go ahead.

RANDY MASTRO: I just have to do this one thing.

CHAIRPERSON WEPRIN: Yeah.

RANDY MASTRO: Council Member Williams said he wanted to know if Mr. Dolan showed up on this occasion, and how unusual he thought that was, and he

wanted to know when else Mr. Dolan showed up. Just last week, Mr. Dolan, I received information. You know, he went to two different sites, and at those sites he addressed workers and presented awards to certain workers. He does this on a regular basis. Okay, he did this twice last week.

CHAIRPERSON WEPRIN: Got it.

COUNCIL MEMBER MILLER: Okay, Mr. Chair so they are able to find out when he did it since the vote, but they don't know when he did it before the vote.

CHAIRPERSON WEPRIN: Well--

RANDY MASTRO: [interposing] We'll get you information about it.

CHAIRPERSON WEPRIN: Well, we're going to -- we're going to try to get that information from you.

RANDY MASTRO: I have-- I have told you very clearly that he periodically--

CHAIRPERSON WEPRIN: Got it.

RANDY MASTRO: --over the years has visited--

CHAIRPERSON WEPRIN: We understand, Mr. Mastro. We got that down, all right. I'm going to

call on Mr. Lander again and I think that may be the least question, and I have two questions of my very own at the very end. Mr. Lander.

COUNCIL MEMBER LANDER: Thank you, Mr. Chairman and I'll just indicate that I have been informed by workers that prior to this night before the vote it had been at least 15 years since Mr. Dolan was in that garage. So I'll look forward to your answer as to when it was.

[audience member yells]

COUNCIL MEMBER LANDER: I was-- In your answer after my final question, you disputed all of the things I said, but I had been careful as I think the record will reflect to indicate that I don't know how the ALJ will adjudicate. And that I don't have all of the facts of the case. So now I need to go back and make just make sure that I understand what's true. So did the NLRB assert after investigation that Cablevision engaged in unfair labor practices when Mr. Dolan went to the Bronx twice to indicate that workers would get better wages if they did not unionize than if they did unionize?

RANDY MASTRO: The NLRB is--

COUNCIL MEMBER LANDER: [interposing] Did the NLRB assert that?

RANDY MASTRO: Excuse me one second. The NLRB is pursuing an investigation of those allegations. There has been no ruling by an ALJ or the NLRB--

COUNCIL MEMBER LANDER: [interposing] I'll take that as yes they did assert it after investigation of the Brooklyn office. Did the NLRB, the NLRB Brooklyn office assert after investigation that Cablevision engaged in unfair labor practices by multiple instances of bargaining in bad faith?

RANDY MASTRO: The same answer. The allegation unproven and no ALJ finding, no NLRB finding.

COUNCIL MEMBER LANDER: The NLRB Brooklyn office did assert it, though? That's what you're defending in court? I'm not sure what you're defending in court otherwise.

RANDY MASTRO: There's a complaint that has been-- Yes, there is a complaint with that allegation that's being investigation and will be determined by an ALJ.

COUNCIL MEMBER LANDER: Did the NLRB's Brooklyn officer assert after investigation that Cablevision engaged in unfair labor practice by conducting a non-binding pole that the NLRB's Brooklyn office found to be outside of what's acceptable under the National Labor Relations Act, and therefore, an unfair labor practice?

RANDY MASTRO: The same answer. The allegation being pursued under investigation--

COUNCIL MEMBER LANDER: [interposing] Did the NLRB assert after investigation that Cablevision engaged in unfair labor practices by firing 22 workers for union activity?

RANDY MASTRO: The same answer. Allegation being pursed through investigation and now before an ALJ.

COUNCIL MEMBER LANDER: And did the NLRB's Brooklyn office assert after investigation that Cablevision engaged in unfair labor practice even more recently when Mr. Dolan went to Brooklyn to both offer the workers better pay raises if they voted to decertify, and threatened to deny them those raises if they maintained the union?

RANDY MASTRO: The same answer. Allegation being investigated to be determined by an ALJ.

COUNCIL MEMBER LANDER: Oh, just so we're clear about what I said. What I said was that the NLRB's Brooklyn office has asserted after investigation all of those things, and I look forward to the NLRB's finding. I understand that even after the NLRB makes those findings, you are going to appeal them in court. And spend much more time and money fighting them and stalling out the workers' rights to be negotiated with in good faith. But just for the record, that was what I had asked about.

CHAIRPERSON WEPRIN: Mr. Mastro, did you want to respond to that or not?

RANDY MASTRO: Actually, what I think I said was that the ALJ makes the determination and then it goes to the NLRB. Then it ultimately goes to the courts.

COUNCIL MEMBER LANDER: It automatically goes to the courts.

RANDY MASTRO: Either side would likely-- Either side would likely go to the courtside based on an adverse ruling.

COUNCIL MEMBER LANDER: It automatically goes to the courts, or you'll bring it to the courts if the--

RANDY MASTRO: [interposing] No, I said that--

COUNCIL MEMBER LANDER: -- NLRB find that those unfair labor practices were substantiated?

RANDY MASTRO: --I said, Council Member Lander-- Let's be crystal clear.

COUNCIL MEMBER LANDER: I asked a question.

RANDY MASTRO: I said, and I'll repeat it that either side would likely go to the courts based on an adverse ruling. You are making assumptions about what rulings will be had--

COUNCIL MEMBER LANDER: [interposing] Yes, I am and I assuming that a majority--

RANDY MASTRO: I'm just saying-- I'm just saying--

COUNCIL MEMBER LANDER: That's fair. I'll be on the record about this.

RANDY MASTRO: -- you know what happens when you assume, Council Member Lander.

COUNCIL MEMBER LANDER: You can call me whatever names you want, Mr. Mastro. I haven't called you one yet.

RANDY MASTRO: I'm not--

COUNCIL MEMBER LANDER: I am assuming that your client will be found to have engaged in all these unfair labor practices. You're sure right. I am.

CHAIRPERSON WEPRIN: For the record, you need to finish that, by the way.

RANDY MASTRO: I finished.

COUNCIL MEMBER LANDER: I think it was fairly clear what he was saying, Mr. Chairman. [laughter] All right, I just have one final question. You've spoken to knowledge of what the Decert in numbers on the Decert Petition. These are petitions as I understand then under National Labor Relations Law are supposed to be secret. How did you learn or how did your client learn how many people signed the Decert Petition?

[Pause]

RANDY MASTRO: Those who were involved in the Decert process, as I understand it and they have the right to do that. You know, they disclosed what

information publicly about what they had done and how many signatures they collected. That's perfectly appropriate, and for you to suggest otherwise, is to denigrate the hard work of more than 100 individuals here from this unit who said they want a decertification vote and signed a petition to the NLRB asking for a decertification.

COUNCIL MEMBER LANDER: Can you point me to where they said it publicly?

RANDY MASTRO: What I meant by that was they disclosed--

It would be helpful if you could because if not--

RANDY MASTRO: What I meant by that was they disclosed--

COUNCIL MEMBER LANDER: To the employer. Because I'll just remind you the final section of 17.1, which I know your client wasn't concerned about because you told him there wouldn't be any remedy under the Franchise Agreement--

RANDY MASTRO: [interposing] Do you have a question?

COUNCIL MEMBER LANDER: --is Franchisee shall not dominate, interfere with, participate in

the management or control of or give financial support to any union or association of its employees.

RANDY MASTRO: And Cablevision hasn't and didn't--

COUNCIL MEMBER LANDER: [laughs]

RANDY MASTRO: --and those are the facts.

CHAIRPERSON WEPRIN: Okay.

COUNCIL MEMBER LANDER: Could you let the record reflect that I'm amused by this fine answer?

CHAIRPERSON WEPRIN: Yes. I think-- I think the mic has picked up on that. Yes. Thank you, Mr. Lander. Before we're done, I just want to ask. It's been a while Mr. Mastro. Mr. Mastro, at the beginning you talked in your testimony I believe it was when you were answering the questions about how there has been some progress made in the negotiations with the union despite the fact these disputes are going on.

RANDY MASTRO: Yes.

COUNCIL MEMBER LANDER: Could you describe what progress has been made, and what issues are outstanding and how often you had met to negotiate?

RANDY MASTRO: Yes, I would be happy to do that because I think it's important to understand the context here. Cablevision is a major employer in New York City, in New York State and this region. 15,000 employees. There's a discrete bargaining unit and issue here of 270 employees in Brooklyn. Otherwise, it has had no issues with any of those 15,000 other employees. There have been over 40 bargaining sessions. 40 at this point and another scheduled. 54 Key terms have been resolved, and among those key terms are such important issues to the union. The material to the union as: Union security, dues check-off, binding arbitration, layoff protection in connection with contracting, educational assistance and medical and dental benefits. Some of these have a direct economic benefit to those members.

What remains outstanding a few issues, but the principal one that remains outstanding is on the issue of wages and what that level will be. And I am not going to litigate in these hearings issues that are the subject or collective bargaining, and the subject of unfair labor practice charges that go both ways. Both the union and Cablevision have made

them. But the fact of the matter is that the union has tried to describe this wage issue as one of wage parity, when in reality it's an issue of parity plus. Cablevision has already agreed to certain terms, some of which have an economic benefit to this bargaining unit that are in excess of what other employees in the workforce are getting. Those have an economic value. The union's position is one that really amounts to parity plus based on the wage level that was negotiated and given to certain other workers. For today's purposes, we're not going to get into issues that will be subject to litigation. But the reality is even from the union's perspective other than the pressure tactics and political tactics that are being brought to bear now, the union told its members only weeks ago how quote "productive" the talks have been and how quote "hopeful" the union was that they would be resolved. So that's where these issues should be resolved in collective bargaining, and to the extent there are grievances at the NLRB. Thank you.

CHAIRPERSON WEPRIN: Okay. Well, we'll get to ask the union some questions about that ourselves. I want to thank this panel. Thank you

for participating Mr. Mastro, there is some water in that container, if you want a glass of water before you leave. We've been joined by Council Member Corey Johnson, by the way, who is with the panelists now. And we thank you very much. You are excused as a panel.

RANDY MASTRO: Thank you, Mr. Chairman.

CHAIRPERSON WEPRIN: And we are going to move on.

RANDY MASTRO: Thank you members of the committee. Thank you.

CHAIRPERSON WEPRIN: Well, thank you. All right, I would like to now call up a panel. I trust this is okay. Is this the first name? Oh, Gay Semel from CWA. Is it Jody Calemine? Jerome Thompson, the famous Jerome Thompson, I might add, and Diedre Viegas [sic]. Okay.

[Pause]

CHAIRPERSON WEPRIN: I'm not-- I don't know how long your statements are. I assume they're a reasonable length, your opening statements. We'll get into questions, but I'll let you read your statements. But let's try to keep it as short as

possible on the statements. I know some of the members will have some questions.

GAY SEMEL: Other people have it. Mr. Chairman. Do you have our testimony?

CHAIRPERSON WEPRIN: Did you pass it out already or not yet?

GAY SEMEL: The Sergeant-At-Arms--

CHAIRPERSON WEPRIN: The Sergeant-At-Arms, this gentleman, Mr. Sicora has testimony to pass out to the panel whenever you're ready.

JODY CALEMINE: Thank you. Good afternoon Chairman Weprin and members of the subcommittee and Council. My name is Jody Calemine. I am General Counsel for the Communication Workers of America. It is an honor to be here today especially to sit with these heroes at this table. To introduce, I'm going to just briefly introduce our panel and talk a bit about what's at stake. I became General Counsel for the International Union just this past July. Prior to that, I spent 11 years at the U.S. House Committee on Education and Labor. I served in various capacities there including Staff Director for the Committee Democrats. In my time at the House Committee we did a great deal of oversight

and legislative work on collective bargaining and labor disputes of all kinds, in all industries, in all regions of the country. So I appreciate your interest in these issues.

The matter before you today involves a cable company, Cablevision that promised the City that it would respect its employees' rights to collectively bargain. And the question is has Cablevision broken that promise? I won't go into any great depth about the importance of that promise. I think it reflects the values of this city, respect for human rights, the workers' rights, fair economy, and support for a stable, productive workforce. For the benefit of businesses and the customers and city they serve. Breaking this promise is no small matter, and yet breaking this promise is exactly what Cablevision is doing. In fact, breaking is probably not a strong enough word for what Cablevision is doing in response. [sic]

In 2012, Cablevision techs in Brooklyn gathered to form a union. They do so with federal law and with Franchise Agreement on their side. They did so with every expectation that the company would bargain in good faith. They did so with the hopes of

getting a better deal for themselves and their families. Once unionized, the company could respond in one of two ways: Either respect the employees' choice and bargain in good faith a contract, or defy both federal law and the company's promise to the City. As you will hear, Cablevision chose the latter course. One of the important lessons from my years of studying labor disputes was that a union busting campaign does not always end the day after workers' vote for a union.

It often continues into bargaining for a first contract. If a company is hell bent on getting rid of a newly formed union, it will find ways to delay bargaining. Give workers the impression that bargaining is futile, and drive them into decertifying the union before any contract can be reached. They squeeze the workers and run out flock. Such a campaign is what Cablevision has undertaken in Brooklyn. The company has no apparent intention of reaching an agreement with its workers. The bargaining has been set up to fail by the company. And while those talks get dragged out in bad faith, management has sought to undermine the union support.

The company has pulled practically every trick in the book to frustrate bargaining and bust the union.

But it has also gone above and beyond those typical tactics doing some things I frankly have never seen before. The billionaire CEO's personal involvement, and personally perpetrating so many unfair labor practices against his own employees is something I have never seen before. Often an employer might try to attribute an unfair labor practice to an over-zealous manager. But this anti-union campaign with all of its disregard for the law comes shamelessly, unapologetically straight from the top. The suggestion by the CEO to the employees is that he would try to pay off the union to go away. Suggesting that the union can be bought off with his money is something I have never seen before. You actually have to dig back decades to into case law to find similar examples of unscrupulous employers. The mass firing of 22 people who asked to speak to management about the need for good faith bargaining under its own open door policy is particularly egregious.

One of the worst examples of intimidation and flaunting of the law I have seen. I will let

others at this table describe in greater detail these and other aspects of the company's anti-union campaign. You will hear from Gay Semel, CWA District 1 Counsel, who will explain the complaints issued by the NLRB. You will hear from Diedre Viegas a 15-year Cablevision employee, and an elected member of the Bargaining Committee that has been working for three years to secure a first contract for the 280 workers in Brooklyn. And you will hear from Jerome Thompson, and 11-year Cablevision employee and a vocal union supporter. This past September he was fired for his union activity and he is fighting to get his job back. Their testimony will show this case to be one of the most egregious cases of union busting in the country today. Made all the more remarkable by the fact that it's happening right here in New York City. So I thank you very much for your attention to this issue, and I will yield to Gay Semel.

CHAIRPERSON WEPRIN: Thank you very much. Ma'am, you may go ahead.

GAY SEMEL: Good afternoon, Chairman Weprin and members of the committee. Thank you for holding this important hearing, and thank you for your time. My name is Gay Semel. I am Counsel to

District 1 of the Communication Workers Of America. I have held this position for more than 28 years. Before working for CWA, I worked as an attorney for Region 2 of the NLRB. Before I discuss the situation at Cablevision, I want to say a few things about the National Labor Relations Board and how it works. The NLRB is the United States Government agency charged with administering the Federal National Labor Relations Act. Unfair Labor Practices, called ULPs are violations of this federal law. The Board has two wings, the regional offices, which investigate and prosecute the cases.

And the administrative law judges who adjudicate the cases. The five-person board in Washington, D.C. over sees the ALJs and hears appeals from their decisions. Thus far the regions in Manhattan and Brooklyn have issued three complaints against Cablevision. The first two were issued in April of 2013. Before issuing an complaint, and this is really important, the region doesn't have a position. They investigate the unfair labor practice charges as they are filed, and the board, attorney or attorneys that investigate-- that are assigned to the case investigate the cases. Both sides produce

position statements, witnesses and other evidence to the region. After the region completes its investigation, the Regional Director decides how to handle the case.

The important thing, the really important thing is to understand that the complaint is issued only after the region has conducted a thorough investigation. So once the complaint is issued, it becomes the Regional Director's case. The allegations of Federal Labor Law violations that I will describe in the next several minutes are not mere allegations by CWA, but thoroughly investigated complaints issued over the last 18 months by the NLRB Regional Directors in Manhattan and Brooklyn. It is the federal government, not CWA that is charging Cablevision with these violations, the federal government that is in charge to administer the Federal Labor Law regarding Labor Relations such 1935.

Another very important thing to understand is that once a Regional Director issues a complaint, there is a very high likelihood that the region will prevail on most, if not all, of the allegations contained in the complaint. The win rate

before the ALJs and the Board is very high. In 2012, the Regional Offices won 90.1% of their cases in whole or in part. If you to their appeals, if the case is appealed beyond the Board, the win rate for the agency is even higher. It's almost 95%. So although Cablevision says that they plan on appealing up the line, the great likelihood is that they are going to lose over and over and over again. They are not appealing because they think they're going to win. They're appealing to drag things out.

Now let's turn to the multiple allegations in the three complaints against Cablevision. In February 2013, a year and ten months ago, this Committee held a hearing on the many unfair labor practices that had been committed by Cablevision up to that point. For some of you that saw it, the first part of my presentation will be familiar. Others not. I will try to do this as quickly as possible, and then discuss the current situation.

The first complaint issued by the Manhattan Region concerns events at Cablevision in the Bronx. The Brooklyn workers had chosen CWA as their collective bargaining representative on January

26, 2012 by a landslide vote of 180 to 86. That vote has to be respected. In the aftermath of that vote, interest in unionization spread throughout the Cablevision footprint. Support for the union was especially strong in the Bronx. So to stop the Bronx unionization drive, Cablevision gave huge raises to every one of the 15,000 plus Cablevision workers in the company's footprint with the exception of Brooklyn. The raises ranged from $2,000 to $9. Excuse me from $2.00 to $9.00 an hour, an average 14%. I'm not making this up. This is their testimony at the trial.

In the Spring of 2013, James Dolan, Cablevision's CEO, held meetings with the Bronx workers to pressure them not to unionize. At the first meeting he told them about the raises he planned and he promised to improve benefits, and he asked for their complaints so that he could settle them. At the second meeting held right before the vote in the Bronx, Dolan threatened the Bronx workers that if they voted for the union, he would reduce their wages and benefits. They would lose opportunities to advance in the company, and they would be left behind like the Brooklyn workers. Oh,

one more point about this. All of this is on tape. It's not like-- I am not telling you things that I overheard. This was all on tape. It was all presented at the Board. So after the barrage of promises and threats, the Bronx workers not surprisingly voted against the union. All of this was illegal, and it was sort of stunning. Other employers have fought unionization, but years later they hire other people to commit their ULPs. Only in the Cablevision cases in my 15 plus years of experience have I seen a CEO of a company commit his own unfair labor practices.

In Brooklyn, Cablevision proceeded to commit a massive number of ULPs. On January 30, 2013, Cablevision fired 22 workers who sought to speak to management, any manager under the company's open door policy. A group of about 60 workers wanted to convey to management a short message about their frustrations with the slow pace of bargaining towards the first contract. After which they had planned to go to work. Rather than meet them, Cablevision management kept the group work waiting. After the group had dwindled down, management directed the remaining 22 workers into the conference and held

them there for 20 minutes while they hired replacement workers. I mean this is sort of unheard of and outrageous. It's really disgusting. Cablevision then told all 22 workers that they were permanently replaced. Jerome Thompson, who will tell you about his firing this year, was one of those 22.

After the 22 workers were fired, CWA organized a massive campaign to get them back, and thanks to the help of many community religious and elected leaders including members of the City Council the 22 workers were brought back to work after several months although without back pay. Cablevision's goal was to get rid of the union and the firing of the 22 workers was meant to scare them into voting the union out. On the same day, the very same day that Cablevision fired the 22 workers, it distributed a memo informing the Brooklyn workers that it was getting close to the one-year period under which they could decertify the union, and giving them the phone number of the NLRB in Brooklyn. And suggesting to them that if they wanted to decertify, they could call the region.

The message was clear: Protect yourselves. Get rid of the union. A Decertification

Petition was filed, as Cablevision has suggested, and it was dismissed by the Regional Director. Not by the union, by the Regional Director of NLRB because of Cablevision's many unfair labor practices. Cablevision has also unlawfully surveilled workers in union activity, unlawfully changed their terms and conditions of employment among other things. Further, the region's complaint accused Cablevision of engaging in bad faith surface bargaining. What that means is that the region accused Cablevision bargainers of going through the motions of bargaining with no real intent to reach an agreement. Cablevision was running out the plan. [sic] Waiting to get to the point where the workers could decertify and trying to scare them into it. The Brooklyn region issued a massive complaint that was consolidated with the complaint issued by the Bronx region. That's the first complaint, and those are the two complaints that were discussed at the last hearing here. They were tried together before the Administrative Law Judge in the fall of 2013. Cablevision had three law firms defending them. The trial lasted 4-1/2 weeks, and usually on every single

day of the trial, they had at least 8 to 10 lawyers in the hearing room.

Meanwhile, bargaining, or should I say bad [sic] faith bargaining continued in Brooklyn. After giving all Cablevision workers other than Brooklyn raises averaging 14% in 2012, Cablevision finally made an offer-- A wage offer to the Brooklyn workers on September 11, 2013. Cablevision offered then 3-1/2%. 14% versus 3-1/2%. Keep those numbers in mind because we'll get back to them. After the briefs were filed and bargaining limped along, Cablevision began a new drive to get rid of the union. And that's the new issues that we're talking about.

CHAIRPERSON WEPRIN: If you can just sum up. If you can just try to wrap it up a little bit. I know you have a ways to go.

GAY SEMEL: I do have a ways to go.

CHAIRPERSON WEPRIN: We want to hear from Mr. Thompson, and other people want to testify.

GAY SEMEL: Okay. I'm going to try to rush through this. So two sweeping complaints and thousands of hours of lawyers' time did nothing to deter them. And in the summer of this-- the middle

of this past summer, Cablevision began its new campaign. And that Cablevision vision did was high-level managers came to the Brooklyn facilities and they asked the workers, We're understand that you're unhappy. We want to know why. And the workers said, we want parity. We want promotions. We want a contract. And they said, Well, that's meaningful. We've got to go talk to the union about it. And then the fired Jerome Thompson, one of the leaders of the organizing effort, and one of the 22 formerly fired workers. That was step two.

Jerome will tell his own story, and I just want to make two points about this. First, all of the actions for which Jerome was fired as opposed to laundry list that they told you about, and that they gave to the union. All of those things that he was actually fired for are protected activity, and it's illegal to fire him for him. Cablevision fired Jerome for using the word "slavery" and for playing union songs in non-work areas, and at non-work time. These were songs that were actually pretty great songs that Jerome and two of the other Brooklyn workers wrote and recorded. Playing union music in non-work areas and at non-work time is protected

activity. It is illegal to fire a worker for engaging in protected activity. And firing him for using the word slavery is simply outrageous.

The other quick point I want to make is that while Jerome was fired for using the word slave ship, another worker who had made really outrageous racial statements about her pro-union workers on Facebook was given a private slap on the wrist and was given expanded duties. Nobody on the union side is asking for that worker to be fired, but we are making a point that Cablevision treats pro-union and anti-union workers very differently.

The third and perhaps most shocking step in Cablevision's renewed anti-union campaign is something we have already discussed here, which is the meeting held on September 9th by James Dolan. We do not think it was an accident that the meeting was scheduled for Primary Day. Without prior notice, James Dolan held a mandatory meeting of all Brooklyn workers at one of the Brooklyn garages. Workers from the other two facilities were bussed into the meeting and Council Member Lander is correct. All of the workers have told me that they have never seen him there before. Dolan told the workers that he was

confused about what they wanted. He knew that there had been a decertification attempt, and he understood that many signed it.

He also knew they had a petition, and he was genuinely confused. So he was going to do something. He was going to have his own vote, and that's what he was going to do the next day. But before the vote, he also told the workers that if they voted for the union, he would work very hard to get a contract, but he was not going to change his mind. They would meet with the union even more, but they were not changing their mind. But if they got rid of the union, he would give them all the good things that all the other workers in the Cablevision system were able to get it. He even suggested that he would reimburse the union for expenses if that would convince the union to go away.

Step four took place the next day. Dolan hired a private organization called the Honest Ballot Association to conduct the vote. I'm not going to comment on the Honest Ballot Association, but contrary to what Dolan promised, this was not a confidential vote. All of the workers were getting PIN numbers that were tied to their worker numbers so

that any vote could be looked at. Further, the people from the Honest Ballot Association, hovered around the workers as they voted. And many people felt that they were being watched when they were voting.

Not surprisingly, the union lost to Dolan's sham vote, 129 to 115. Dolan then took out a full-page ads in the New York Times in the Post the next day announcing the results. Every aspect of this shame vote was illegal and the NLRB has since issued another sweeping complaint detailing the multiple ways in which the process violates Federal Labor Law. The vote was a charade aimed at changing the narrative about what has happened in Brooklyn Cablevision for the last the three years. Cablevision wants you and the rest of the political establishment and the general public to believe that the real problem is that workers no longer want the union. When, in fact, the real issue is massive and repeated violations of Federal Labor Law by Cablevision and its CEO James Dolan. We have no idea what the real results were in the Cablevision straw pole, but we are not surprised that some workers voted no. After three years of outrageous illegal

behavior and billionaire CEO's pledge that it would never get raise parity as long as they stuck with the union. It is an amazing testament to the strength and commitment of the many Brooklyn workers who voted for the union in the face of Cablevision's many flagrant violations of the National Labor Relations Act.

CHAIRPERSON WEPRIN: Okay, just sum it up. We've got to-- You're going to have to summarize the last couple of.

GAY SEMEL: Okay.

CHAIRPERSON WEPRIN: I know you've got a few more pages there.

GAY SEMEL: Yes, I do.

CHAIRPERSON WEPRIN: And it's going to take too much time.

GAY SEMEL: Yeah, but I think I should go to--

CHAIRPERSON WEPRIN: Because we'll have the NLRB decision at least provided by the time we're done.

GAY SEMEL: But I think I should get as much time as-- I think I should get as much time as

Mr. Mastro took. And I doubt that you'll have a lot of questions for us.

CHAIRPERSON WEPRIN: Okay, well, his testimony was shorter, but thank you.

GAY SEMEL: The only speech contained is are the threats and promises made to the Brooklyn workers to convince them that to vote against the union was sham vote. He's knows what he's doing is illegal, because lawyers know it's illegal. In this context it is impossible to have a fair vote, but Cablevision is not seeking to follow the law. They are hoping to change the narrative. In response to the Brooklyn region issued a third seeking complaint, and the trial is scheduled for January 2015.

I just want to make one point to all the Cablevision workers who are here. I understand that Cablevision gave you the day off to attend this hearing, and we welcome you, all of you. But when Brooklyn first voted for CWA almost three years ago, you did so in overwhelming numbers, 180 to 86. When you voted for the union, you did so because you had a vision of achieving dignity on the job, respect, and fair treatment. What you go instead is an unending campaign to defeat that vision, to convince you that

the only way you can get ahead in Cablevision is to give up solidarity with your brothers and sisters. To give up collective action. But as an individual, you only have the power one against the might of a powerful company. Remember, they can take away as easily as they can give.

I do have more to say, and I'll try to deal with it in answers to your questions, but I do want to ask one thing, and point out that what we are asking the Council to do today. We urge you to draft a resolution, a letter to the New York City Department of Information Technologies and Telecommunications, which administers Cablevision's franchise. Advising them that the Council has investigated and found significant evidence that Cablevision is in violation of the Labor Rights of the Franchise Agreement. We ask you to urge the Department to commence its own investigation into whether the franchise is being violated, and how its Labor Rights provisions should be enforced. Thank you for your time.

CHAIRPERSON WEPRIN: Thank you. I didn't mean to cut you off. I just want to keep it moving as much as possible.

GAY SEMEL: Okay.

CHAIRPERSON WEPRIN: Mr. Thompson. You ready.

JEROME THOMPSON: Good evening.

CHAIRPERSON WEPRIN: Okay.

JEROME THOMPSON: Good afternoon.

CHAIRPERSON WEPRIN: You said good evening. I heard you.

JEROME THOMPSON: I would like to thank you Chairman for convening this important hearing. I would also like to thank all the Council Members who are here today for your time. My name is Jerome Thomson, Jr. I was illegally terminated by Cablevision for my union activities. My story is not the run of the mill story of the worker being punished for standing up for his rights, although those stories are bad and unacceptable. As you will see, Cablevision has repeatedly shown contempt for the rule of law and contempt for its unionized employees. I have been fired three times by Cablevision. Three years after a vicious anti-union campaign, Brooklyn Cablevision workers voted 186 to 80 to be represented by the Communications Workers of America.

I am proud to say that I was a leader of that effort to become union. Shortly thereafter, Cablevision tried to fire me the first time. The story they gave wasn't true. Dozens of my co-workers demanded that they reverse my discipline, and the company was forced to back down, and I did get my job back. Almost two years ago, I was among 22 technicians that were permanently replaced, which to us meant we were fired. We didn't have benefits, and we weren't getting a paycheck. Cablevision took this action because of our union activity. As this Committee knows, after tremendous pressure from elected officials and community groups, management was forced to rehire all of us. But Cablevision's blatant disregard for the law seems to know no bounds.

Three months ago, management began a new campaign to get rid of the union. High-level managers came out to Brooklyn for the first time to ask us why we were unhappy. And then to tell us that it was all the union's fault. At one of those meetings, they brought a branding expert to talk about Cablevision rebranding strategy of the optimum brand. In trying to explain branding, the branding

expert showed us an image of a ship. And he told us to think about this ship having crossed the ocean, and seeing another ship. At first the people thought the ship was a friendly ship, but then it unfolds a pirate flag, and everyone knows what that means. Things will not end well. And this is what the branding is all about, and this is what the branding expert told us.

In describing the ship, the branding expert talked about the bad conditions of the ship. He said the ship was overcrowded, uncomfortable, tight quarters. And I, and I think many of my co-workers immediately thought of a slave ship. At the end of his presentation, he asked if anyone had any questions or comments. So I raised my hand politely, and I explained that there was a third ship on those waters, a slave ship. I said the American economy was built on slavery and that slavery was also the greatest stain on the American brand. I pointed out Cablevision's vision optimum brand might similarly be tarnished by the discriminatory treatment of the Brooklyn workers. I also said that I was concerned about this, as a Cablevision employee.

A few days later, I received a letter from the company thanking me for my participation in this discussing. Despite this letter, about two weeks after that, management fired me. They gave me a host of reasons including the fact that I had been late ten years earlier. But the real reason why I was fired because I talked about slavery, and because I played union music and company barbecues. By the way, the union music that I was playing, it was music that me and some of my co-workers performed to document our struggle. The Labor Board has issued a complaint about my termination, and hopefully I'll be getting my job soon. But Cablevision didn't fire me just to get rid of me, although clearly that is something that they wanted to do as they've done it three times.

No, they fired me because they wanted to send a clear message to my co-workers: Stand up for equality. Stand up for fair treatment. Fight for your co-workers. Support the Union. Then you, too, will get fired. Cablevision fired me as part of their campaign to get rid of the union. In closing, I would like to ask that you demand that Cablevision rehire me, and start bargaining a fair contract. All

we are asking for is respect, dignity, and a fair contract. This has gone on far too long. Cablevision has done very well in New York City. James Dolan, the CEO of Cablevision is a billionaire. It's not too much to ask him just to obey the law. Thank you.

CHAIRPERSON WEPRIN: Thank you, Mr. Thompson. We've got lots of hands in the air. Ms. Viegas.

DIEDRE VIEGAS: Good afternoon, Chairman Weprin and members of this committee. On behalf of our members at Cablevision, and on behalf of our bargaining team I would like to thank this committee for taking the time to listen to our story. I would like to say I did buy my own red dress. The company didn't buy it for me. The union didn't buy it for me.

CHAIRPERSON WEPRIN: The record will note.

DIEDRE VIEGAS: My name is Diedre Viegas, [sic] and I'm a technician at Cablevision in Brooklyn. I'm also an elected representative serving on Local 1109 Bargaining Committee. For three frustrating years, we have faced high paid management

attorneys who sit smugly across the table from us. For three years, I've seen Cablevision's management do many things, but rarely have I seen anything that looked like bargaining. It's painfully obvious their job is run up the clock and say no and not bargain. And let me be clear reaching an agreement there would be easy because the union is not asking for a penny more in wages that other workers at Cablevision. We are asking to be treated the same as the rest of the footprint. We are asking for parity.

Every time we ask for simple parity, management has one answer. No. Let me explain how we got here. After we on our union election, Cablevision gave every single technician in their footprint gigantic raises averaging 14% each. Some of those people are here today. Westchester, Long Island, Bronx, Connecticut, New Jersey and the list goes on. And that's what we mean when we say the footprint. Those are all the places that they gave raises to. Tens of thousands of people they gave raises to except for us in Brooklyn. Most reasonable people would draw the conclusion that paying Brooklyn workers less than everyone else was simply a

punishment for having the audacity to form a union. Of course, that assumption would be right.

But James Dolan wanted this punishment to be beyond clear to even the casual observer. So three years ago, Mr. Dolan screamed from the rafters that he was punishing us. In fact, when our colleagues in the Bronx tried to join the union, the CEO of the company went to their garage and told them that he was punishing Brooklyn for joining the union and if they went union, too, they would be punished as well. And if this wasn't enough, recently Dolan came to our garage, and I've been there 15 years, and I've never seen Dolan before that day. And he informed us that he was having a poll to determine whether or not we still wanted to keep our union. In a speech he told us that if we voted for the union, the company would not change its mind and would not give us the same raises he gave everyone else in the footprint.

But if we voted the union down, he would try to convince the union to walk away. Then give us all the good things. You know, it didn't make a lot of sense to us. The next day, during Dolan's sham vote, the company hired by Cablevision to conduct the

vote literally watched over our shoulders as we voted. Also, each one of us was given a special PIN number to vote, which was tag to our tech number. This mean that our votes were not confidential and how we voted could easily be traced. The original vote with the union won 180 to 86 was nothing like this. Then, our vote was confidential. Dolan's vote felt like we were voting in a totalitarian society where everyone knows how you vote, and everyone knows what the outcome is going to be.

Ladies and gentlemen of this committee, as I wrap this up, I ask you to put the maximum pressure on Cablevision. This company is breaking the law. I know this committee, which oversees Cablevision franchise wants to help. My request is that you deliberate between various options. Please choose the most aggressive one. A mere letter to Dolan won't cut it. This committee oversees the franchise, which allows Dolan and Cablevision to operate. I ask that the City put maximum pressure on Cablevision so that they stop punishing us for exercising our right to join a union. Dr. King told us the ark of the moral universe is long, but it bends towards justice. I ask that this committee

help bend the arc toward the Brooking at Cablevision. Thank you.

CHAIRPERSON WEPRIN: Thank you very much. Thank you all. Let me ask a couple of questions and I know Council Member Lander has a bunch of questions. Let me first ask two questions that I promised to ask. All the red shirted people--Ms. Semel, I don't know if you're the person to answer this--who are they and where do they come from.

GAY SEMEL: An overwhelming majority of them come from the Brooklyn unit in Cablevision, and some of the others are people from other locals.

CHAIRPERSON WEPRIN: Okay. And some of those shirts truthfully look a little more worn than the blue ones. I've got to say they've been worn. But where are the red shirts from and who paid for them?

GAY SEMEL: I have no idea. There are no special shirts for this event. People may have gotten red shirts in the past and they have their own red shirts. But you can see there's no-- These are just red. I've got a red shirt. I bought it myself. So it's sort of there's no special shirt here.

CHAIRPERSON WEPRIN: Okay. No problem. Let me move on. Let me ask Mr. Thompson a couple questions on what you said. When you told me-- You mentioned that when you were let go, they gave you a list of reasons one being a lateness ten years ago. And you talked about the slavery comment and the music. Was that mentioned in the reasons, or is that not included in the reasons?

JEROME THOMPSON: That was the defining-- That was the reason why I was fired because of the slavery comment.

CHAIRPERSON WEPRIN: It said that in thee paper?

JEROME THOMPSON: In my Termination Report it said I was-- I wasn't being terminated for being late ten years ago. I was being terminated for the slavery comment that I made at the branding meeting. I was being fired for playing loud music at a couple of barbecues.

CHAIRPERSON WEPRIN: Wow. Okay. Also, Mr. Thompson, I know had you ever met Mr. Dolan before, before September 9th, when he came to the shop?

JEROME THOMPSON: I have never met Mr. Dolan.

CHAIRPERSON WEPRIN: Were you at September 9th-- then when he came on September 9th?

JEROME THOMPSON: No, I was terminated at that point, so I was trying to get my life together.

CHAIRPERSON WEPRIN: Okay. So that was already after. I apologize. That's true. Okay. Sorry about that. Okay, Mr. Lander, I know you had some questions. Please, whenever you're ready.

JEROME THOMPSON: Just a few. So thank you. First, I'll follow up on the shirts. Just a question here. Do either the workers or the union have a Franchise Agreement with the City where worth many millions of dollars that contains a provision that you're obligated not to interfere with your member's or employee's ability to organize and bargain.

GAY SEMEL: No.

CHAIRPERSON WEPRIN: I didn't think so. So, even if you had paid for the members of the union's red shirts, it's really not what's in question at all. It's not a blue shirt versus red shirt. If Cablevision paid for those blue shirts,

then I believe they violated a section of the Franchise Agreement. So it's just not a tit for tat. Now, Mr. Mastro said that this case, you know, assuming the NLRB... Well, it will be appealed to a judge after the NLRB, and I asked him if it was his plan to appeal. And he tried to make it seem as though either side would certainly appeal whatever happened. Do you generally appeal from the NLRB to court?

GAY SEMEL: Usually, not. I just want to be very clear about this. This is not an appeal. He's made it sound like it was a process. In other words, first there is the decision and then it goes to the next thing and the next thing. That's not true. Complaints were issued after very through investigations. Then they're tried. In my experience, most times both sides will accept the ALJ's decision, and that will be the decision. Appeals are experience. I mean that's something that somebody in the union usually does. But sometimes you do appeal. And so there would be an appeal to the board. In my history at 30 years, I have never appealed a case to the Court of Appeals.

COUNCIL MEMBER LANDER: So Mr. Mastro-- Oh, go ahead, sir.

JODY CALEMINE: I was just going to say in addition to being expensive, appeals take a lot of time, and time is on Dolan and Cablevision's side when it comes to running out the clock on these things.

COUNCIL MEMBER LANDER: And I assume at this point where we are in the contract, that this bargaining unit is not generating substantial revenue for the CWA Legal Department to take this case far into the future. You know, I don't think so. So, you know, and you pointed out that 90% of the time the NLRB allegations are upheld. So I just think it's clear that Mr. Mastro's clarity that this would be appealed to the NLRB and then to the court is because he expects to lose, and to appeal. And that the resources of Cablevision to pay for legal representation to continue stalling this out while engaging in bad faith bargaining seems fairly straightforward from his answer and those statistics that you just gave. And I did hear that like 90% of the time you said that the allegations of the NLRB District Director are upheld.

GAY SEMEL: Correct. It's even higher with the Court of Appeals. It's almost 95%.

COUNCIL MEMBER LANDER: Thank you. I also want to also make sure I understood the raises that all of the other workers in the footprint received of 14% came after union organizing drive in Brooklyn?

GAY SEMEL: Correct.

COUNCIL MEMBER LANDER: So it would seem to me not only that withholding the Brooklyn workers' raises is punishment, but that it's a good argument that it's a good argument that it was the organizing drive itself that pushed Cablevision to give substantial raises to the rest of the workers in its footprint. Which is a great testimony to the impact of organizing, and of their courage and what happens when workers stand up. Obviously, it horribly unfortunate that they are the only ones denied the fruits of that organizing. But I think it's worth making clear that there is at least a good case. We won't have evidence of this, but it's not only an issue of punishing them for their organizing, but an issue of their organizing have tremendous impact on

the raising the wages of other Cablevision workers. Yes?

GAY SEMEL: I would agree with that completely.

COUNCIL MEMBER LANDER: And finally, I guess I for the record want to make clear to you, and this especially goes to the two Cablevision workers who like with us today, and all the other ones who were here. You know, first I want to thank you for what you've done over the last couple of years, and the courage that it takes to stand up. And then to continue in the face of just real nasty, mean, small-minded union busting tactics. You know, for me that's why I'm here and still here deep into this hearing. It's not, you know, for the reasons Mr. Mastro suggested. I think it's actually for the same reasons that the provision itself is in the Franchise Agreement. And the same reason people want to have a National Labor Relations Board exist.

Working people don't have a level playing field when they seek to organize and bargain with their employers. And everyone knows it for all the reasons that we've discussed here. And it takes great courage to stand up in the face of that power

that an employer has over you. And then to continue in the face of being fired, seeing your co-workers fired, being threatened, being cajoled, being essentially bribed. And still recognizing that it's important to stand up for that basic legal right to organize. That is a kind of courage that this Council when it has the power wants to honor and respect. And I just want to say thank you for having it. Thanks to the workers for being here.

[applause]

CHAIRPERSON WEPRIN: Let's not have applause, but--

COUNCIL MEMBER LANDER: [interposing] I don't know what will happen really.

CHAIRPERSON WEPRIN: --how about the jazz hands. You know, it's better than that pizza car.

COUNCIL MEMBER LANDER: Well, thank you, Mr. Chairman. And Mr. Chairman, I do want to say that you've done an excellent job of chairing a challenging hearing, and making sure that a range of voices could be heard. And I know that it's still going to go on for a long time after this. So I will wrap up just to say that I'm here because whether or not the Franchise Agreement and the Council's power

and relationship to it gives us the ability to put the pressure on. It's sufficient that you ask. The courage that you have shown merits this Council standing up to do whatever it can to stand with you. And I hope you will maintain that courage, and continue on in your efforts. Thank you very much.

CHAIRPERSON WEPRIN: Yes, thank you very much, and Mr. Thompson I agree with that sentiment as well. Anyone? No one? Okay. Well, we're going to thank you all. Thank you very much to this panel. There are a number of other people here to testify. So, I just want to let you know that. So we're going to excuse this panel. Thank you very much.

JEROME THOMPSON: Thank you.

CHAIRPERSON WEPRIN: All right, I'm going to call names. I don't know exactly for or against, but they say Cablevision so I assume they are in support of the Cablevision people. But I'm going to read the names if they're still here. We're going to call four up at a time, and we're going to limit people to three minutes a piece because of time. So if you can sort of summarize your comments that would be great. Tiffany Oliver. Are you here, Tiffany still. Elizabeth Parkin, Dominic Montenegro, and

Ruben Cruz. How many have I got out of that group? Ladies, how many? Any of the people that I mentioned here? Dominic and Ruben are here?

[background discussion]

CHAIRPERSON WEPRIN: Do I have three only? I can get a fourth if you want. Alicia Devore. Oh, no, DAMONE. Sorry. I got a new letter. Is Alicia still here? Okay, come on, Alicia. Thank you. Come on up here. That last chair. I'm not going to decide who goes first. You guys are going to have to do that.

[background conversation]

CHAIRPERSON WEPRIN: Just wait. I'm sorry. Okay. Sorry about that. Dominic, if you can just hang on a few minutes, I'll get back to you. I'll just pull your card. Okay, so you guys can decide. We're going to limit you to three minutes each. I'm sorry about that. Whenever you're ready.

RUBEN CRUZ: Hi, my name is Ruben Cruz. I am an employee for 24 years on the Cablevision. And one thing I want to share with you guys is I'm hoping that in spite of all these three years that we've been through it's been hectic. A lot of people haven't reached so many agreements. Right now, I'm

kind of the unpopular guy. That's the way I feel now. However, we do have a voice, and unfortunately that voice has been smeared. It's been cast. We've been in the shadows for a long time. Yes, we are the guys that said no, don't let it cost you that vote. [sic] Okay, and there has been a lot of sentiments changed. Not on my part for the people who voted no, but for others. And that said a lot.

By hearing their voices, we went also and decided to get a petition. Just a regular piece of paper, a real big binder. Get everybody's signature aboard and see how everybody feels about this union that came in that was invited not by us but, of course. We respect they have their personal opinion. You know, I'm not disrespectful of you guys, you know, but for us we obviously think we don't need it. The company has been wonderful to us, by the way. And so we thought to submit this petition to you guys, and ever since-- a long three years nothing has comet out of it. And haven't you just considered it, or does it give us the right to us to vote, to give us a second chance.

We feel that we have a momentum. Yes, that pole was taken. You know why? Because there

was a large percentage of us that signed that and submitted that petition to the city by our legal right. Okay, and that vote right now is being smeared and is not even give the opportunity for us to do it. All right, there's a lot of political influences as well. As you've heard. You've seen the Mayor in padded meetings with the union. All right, not with us. Did the Mayor reach out to the guys that say no. I want to meet with you guys. All right, because we voted for that Mayor also. So we also have a right. We also have a right to vote. We also have a right to our opinion, and our opinion was expressed by that petition, and we want it on honored.

CHAIRPERSON WEPRIN: Thank you. Go ahead.

ELIZABETH PARKIN: Hi.

CHAIRPERSON WEPRIN: Hi.

ELIZABETH PARKIN: My name is Elizabeth. Thank you for letting me say something. I came to work for Cablevision in the year 2000. I left. I came back, and I did that without a union. A union didn't help me get my job back. I came back and I got it. We didn't have a union at Cablevision, and

you hear a lot of lies back and forth from both people's side. When the union got into our company, there was like a selective few of us, and I was one of them who called the Labor Board myself. Cablevision didn't ask me to do anything. I called them because I wanted to know what we could do to get the union out. The company didn't ask me. Management didn't ask me.

It was a selective few of us who didn't want the-- The union came to our job before, and they were voted out. They came back again. They won from the vote. Fine. We said what we could do. We were going on four years now. We were told that after a year, if we had no contract, we had a right if we got so many people to sign to do it to decertify the work. And it was four of us that did it, and I was one of the four that was done with doing it. I don't want a union. I don't feel like I need one, and it doesn't matter who bought my shirt, whether I bought it myself or whoever gave it to me. I represent what it says because I said that we followed all the rules that the Labor Board told us we needed to follow, and we still-- Calabrese came to our-- He's the CWA man. He came to our warehouse.

He sat down with us, and said, Yeah, we down with you all.

We going to do the vote over. My personal belief is that if CWA is so solid that there are so many of us that want a union, then what's wrong with us getting another vote? We complied with everything that NLRB said. Give us that vote. If the union wins we will bow out gracefully and go. Let us have that chance. Mr. Dolan he didn't-- We didn't call him and say, Oh, could you come do a vote. My question to him was, Well, do you care about the people who don't want the union. Because as quiet as it's kept, and whether they have a red shirt, a blue shirt there are people that don't want the union. But because they don't want to argue since CWA has come into our facility there's been so much arguing and controversy.

It's not like they're trying to work to settle nothing. It's argument and lies going on all the time. So there is so much wars we are kind of hating to come to work. I only come there because I have to. Not because I want to. But I think that I also have a right that if I don't want to be part of a union to say. The company has no bearing on my

brain. I was born an only child myself, and I follow what I believe in, and I don't believe I need a union, and I don't want one. So it was me who went through all of the three young ladies that was with me. The company didn't encourage us to do nothing. I did it because I wanted to do it.

CHAIRPERSON WEPRIN: Thank you, Elizabeth. Good timing, too.

SERGEANT-AT-ARMS: Quiet, please.

TIFFANY OLIVER: Good afternoon. My name is Tiffany Oliver. I'm a Senior Coordinator for the Brooklyn Construction Department and my shirt says, "Let Brooklyn Vote" and I'm a Brooklyn Employee. It was said earlier that the Brooklyn shirt wasn't Brooklyn employees. And today, we're going to read a letter that was attached with the petition that was given to you with the 100 signatures that you have. Thank you. This was sent to all the City Council members that are sitting up there today.

There was a time when unions were useful. There may have been a time that in order to get a fair wage or fair hours, unionizing was a good way to go. However, unions have outlived their purpose. Unions have strayed away from their original purpose.

Unions no longer care about their members. Nowadays unions are only out for themselves. Unions only care about their power and control, which we saw today. Unions only raise the cost of the services and products that companies provide, which in turn raises everyone's cost of living. Unions require businesses to pay employees based solely on seniority, and not performance, creating a socialist type of environment. Unions punish those that are motivated to work, and reward those that are lazy. When people are paid based solely on seniority, the quality of their work will falter every time because there is no longer an incentive for someone to excel in their trade. The result is always poor quality in service. As I saw my City Council because they wasn't here to listen to me who voted for them. As quality in products decline, customers go elsewhere. As customers go elsewhere, the company go out of business.

I'm an employee of the Brooklyn Cablevision offices. I represent 93% of those who wanted a fair vote to decertify CWA 1109. We put in for the decertification in February 2013, and after we did that, CWA filed a whole bunch of ULPs after we

put the decertification in to stop our Decert. And we put it in again October 2014. And again, after we put it in, CWA put in a lot of baseless ULPs. Since then, the union has put forth numerous ridiculous ULPs against the company so that we don't get our vote. The union has also put out false advertisement that all employees want the union. The union has also attacked me for being a racist employee, and I'm black because I said the "N" word on Facebook on my own time after work non-working hours. Facebook is a public social media format. It has nothing to do with the job, and whether I was reprimanded or not is not CWA's or the other employees' business. It's between me and the company.

CHAIRPERSON WEPRIN: If you could just wrap up.

TIFFANY OLIVER: All right, no problem. So you understand that it is our right that we are all here today in unity so that we can get our decertification vote.

CHAIRPERSON WEPRIN: Thank you. I just want to point out before we get to the last panelist, that I know a lot of people have left the panel. But you are actually on live television right now.

TIFFANY OLIVER: Oh.

CHAIRPERSON WEPRIN: Okay, in the corner I think behind me is the one on you. You can say hi mom if you want. [laughter] So I know a lot of people are watching. Believe it or not, there are people out there who should watch this because I've seen a lot of comments that have been popping up on the Internet. So some people are watching. So I want to just hear the record is established people are watching. Some are back in their offices right now watching. So you shouldn't feel lonely over there--

TIFFANY OLIVER: [interposing] Well, you, this is the thing--

CHAIRPERSON WEPRIN: --and I don't feel lonely up here and I'm sitting here all by myself.

TIFFANY OLIVER: --the face is more important than, you know, back offices.

CHAIRPERSON WEPRIN: No, I understand and it's a long day and some people had to leave, and I apologize for them. But I know they had other appointments, but believe me, people are listening to what you have to say. Yes.

ALICIA DAMONE: Okay. Good evening. My name is Alicia DAMONE. I'm a 13-year employee at Cablevision. I will tell anybody from day one, Brooklyn has stood out on a limb for us. Brooklyn was the voice for everyone in the company. Now, I'm here to be the voice for Brooklyn, and when I say that, I'm saying I started to take this shirt off because I saw all the back and forth about the shirt. And I'm like this is nothing about the color of the shirt you're wearing. I'm wearing white underneath here. I bleed for my brothers and sisters in the company. This is a family company. It's not slavery. It's not you're going to sit here and we're going to go cotton picking.

We're not doing this. I'm here because of my brothers and sisters in Brooklyn. When the union came into play, I know a lot of people were hurt behind a lot of things that was going on within the company. There were a lot of things that were not being heard. Higher management, and when I say higher management, I'll say Jim Dolan. He was behind the door being told by people that he hired, I'm sure, everything is going to be okay. I've got everything covered. Not knowing that they really

didn't at that point in time. It was Brooklyn who came out and said I'm going to have the union come out. They brought the union out. All of sudden, voices are heard.

Jim Dolan came to us to find out what was going on. He didn't want to hear from his management that he hired. He wanted to hear from the people. He came, he heard, and he went ahead and made changes. I would tell anybody and every last one of you here I don't care red, blue, white, green, whatever color shirt you have on. We are here to stand tall along with you guys. I told management from day one we beat the union out of the Bronx and I'm going to help my brothers and sisters and Brooklyn beat the union, too. At the end of the day, I have a lot of family in Brooklyn who does not want the union there. I speak to them on a daily basis, and though they're not my blood relatives, but when I work with you, you become my relative.

Let me explain one other thing, Councilmen, I am very passionate about what I have to say. I speak passionately. This company is a family-oriented business. Yes, it takes a lot for people to get fired from this company. I've seen it.

You are pretty much going to fire yourself. The company is not out to fire you. They will help a person more than trying to get rid of you, and I've seen it.

SERGEANT-AT-ARMS: Quiet please. Quiet.

ALICIA DAMONE: I didn't have to come here today. I had two young men that I needed to be home attending to doing schoolwork with. But I came here because I believe in what's going on. I believe let these people vote. At the end of the day, if they want the union, it's going to be, and if they don't, it won't be. Let them decide, and let them have a vote.

ELIZABETH PARKIN: That's on our petition.

CHAIRPERSON WEPRIN: All right, well thank you, Ms. DAMONE. Let me ask some questions. Well, first let me just say that I admire your bravery as well. I do think it does take some pressure to come here, and you did well, and you guys look great in those shirts. Let ask you first about the shirts. So where did you get them?

ALICIA DAMONE: I got them from other employees.

CHAIRPERSON WEPRIN: What's that?

ALICIA DAMONE: I got them from other employees. They was handing them out yesterday and today.

CHAIRPERSON WEPRIN: So yesterday they gave them out at work?

ALICIA DAMONE: Yes, uh-huh.

CHAIRPERSON WEPRIN: Okay. Just in reference to the slavery comment, and obviously I wasn't there. I don't understand it, but my impression just listening to what Mr. Thompson said, I don't think he was saying that he was treated like slaves. I think he just had a problem with the metaphor being used--

ALICIA DAMONE: [interposing] I know.

CHAIRPERSON WEPRIN: --of a boat coming across the sea, and using that as a metaphor, which it elicited other ideas of other boats that have come across the sea. That was my impression the way he said it.

ALICIA DAMONE: Yes.

CHAIRPERSON WEPRIN: You all voted against the union in this vote. Did any of you vote for the union in the first vote?

ALICIA DAMONE: No.

ELIZABETH PARKIN: No. This is like the second or third time that the unions came to Cablevision.

CHAIRPERSON WEPRIN: Okay.

ELIZABETH PARKIN: The first time we all voted no-

CHAIRPERSON WEPRIN: [interposing] Right.

ELIZABETH PARKIN: --and kicked them out. Then they came again.

CHAIRPERSON WEPRIN: But when it was voted yes, you guys were no?

ELIZABETH PARKIN: Yeah, we voted yes.

CHAIRPERSON WEPRIN: You all voted no?

ELIZABETH PARKIN: We went into overdrive with the Labor Board on the phone.

CHAIRPERSON WEPRIN: [interposing] Right.

ELIZABETH PARKIN: I know I did because I wanted to know how, what, why, when or how. So we was told that if a year came. So we waited for the year. We got our petitions because there are other people, and some of them sit in red. But they don't want to say that they don't want the union because

they don't want the reprisal of people jumping on them.

CHAIRPERSON WEPRIN: Okay. Let me call on. Is Brad here? Oh, yeah, here you are. You moved on me.

SERGEANT-AT-ARMS: Quiet please.

CHAIRPERSON WEPRIN: Council Member Lander from Brooklyn.

COUNCIL MEMBER LANDER: Thank you, and I--

CHAIRPERSON WEPRIN: [interposing] With all the Brooklyn references, I want to get my street right up. I've got a Brooklyn member here. [laughs] A kid from Queens, but my Brooklyn street craft. [sic]

COUNCIL MEMBER LANDER: Thank you, Mr. Chairman. I also want to say that I respect your courage for coming out, and I appreciate it. And I also wanted to stick around and hear you after I stayed for the prior panel. I disagree with some of the sentiments that you had indicated about the value of unions and whether they create socialist work places or not. But you are clearly entitled to those opinions and entitled to your voted and entitled to

be listened to in this Council. Ms. Damone, I was interested in a couple of things that you said indicating that Brooklyn went out on a limb and that the union organizing in Brooklyn identified important issues that were going unaddressed in the company previously. So I assume that's some mix of wages and training and working conditions?

ALICIA DAMONE: It was a mixture of things, and like I said, I'm a firm believer that upper management had no clue what was going on. And hence, they've taken care of things, and they have come down to address our issues.

COUNCIL MEMBER LANDER: After the union organizing, they went ahead and made changes to address many of those issues?

ALICIA DAMONE: Yeah, but let me be clear when you say that because sometimes people's eyes are closed to certain things, and it takes certain situations to open them. So absolutely I believe that it opened up a lot of eyes. But I do want to make reference to-- There was a lady up here in the last panel for CWA. She made reference that Jim Dolan and threatened people that if you go for the union, that pretty much you was going to be fired.

Like he made threats. That was never the case. I was there at that meeting. I spoke to Mr. Dolan directly myself on a couple of occasions, not just once. That man never--

ELIZABETH PARKIN: [interposing] Never.

ALICIA DAMONE: --threatened one person not even our Brooklyn brothers and sisters. Questions were asked in the Bronx about our brothers and sisters in Brooklyn. And he said I would love to have them. However, they are already in the union. It has to be up to the bargaining based on--

COUNCIL MEMBER LANDER: [interposing] So this is my question. So he indicated to you that workers that chose not to be in the union would get the benefits that you're describing the pay raises?

ALICIA DAMONE: No, I never said that.

COUNCIL MEMBER LANDER: And workers that were--

ALICIA DAMONE: [interposing] That's not the words.

COUNCIL MEMBER LANDER: --in the union would not. He said because there were issues that would be subject to collective bargaining?

ALICIA DAMONE: No, these are not-- Okay, I'm going to--

COUNCIL MEMBER LANDER: [interposing] I'm trying to understand. I'm fine with you.

ALICIA DAMONE: That, that, that's fine, and I'm going to repeat what I said exactly. He never-- The question was about getting our brothers and sisters out of this union agreement, out of the union agreement. It was made by employees in the Bronx. Jim Dolan could not specifically answer any questions, but, of course, at the end of the day, everybody was hoping the company-- it's for everybody to be one-- of one accord. No one wants-- I'm sorry.

COUNCIL MEMBER LANDER: I'm listening. I apologize. Please.

ALICIA DAMONE: I'm trying to-- [laughs] And he--

COUNCIL MEMBER LANDER: Take your time.

ALICIA DAMONE: You have to excuse me because when I told you I'm passionate about this, I am. Okay.

SERGEANT-AT-ARMS: Quiet, please. Can you be quite, ladies and gentleman. Quiet, please.

ALICIA DAMONE: No one is sitting here trying to swindle anyone. I've heard many people. I've worked in many different corporations. I know what a swindle is. No one in this organization is trying to swindle. No one is swaying no one any kind of way. Again, the business is based family-oriented. This is family. You want to see your family living well, right? You want to see your family doing well. Well, that's all we want, and that's--

COUNCIL MEMBER LANDER: I'm not questioning your motives at all. It's just it sounds--

ALICIA DAMONE: [interposing] Right, but now and when I say that, I'm speaking even-- Dolan is not here, but I'm going to talk for him as if I know him personally. That man wants-- I looked in h is eyes. I asked him the questions.

SERGEANT-AT-ARMS: Quiet.

COUNCIL MEMBER LANDER: All I'm saying is it sounds from what you said, the union organizing opened management's eyes to make changes, but those changes have been denied solely to the folks who have chosen to continue to stay in the union.

ALICIA DAMONE: Well, again because I'm not a lawyer--

ELIZABETH PARKIN: [interposing] That's something that is in negotiations in Brooklyn. So obviously he can't make offers like that. That would be totally illegal, and violate any NLRB law.

ALICIA DAMONE: Right, it's a bargaining agreement, correct?

COUNCIL MEMBER LANDER: Well, if it's under bargaining he can offer them the same exact deal that you had. Anyway, we don't need-- I don't want to reopen this.

ELIZABETH PARKIN: [interposing] Yeah, but the meetings that we sat in with Mr. Dolan--

COUNCIL MEMBER LANDER: He has not offered them anything like what you had.

CHAIRPERSON WEPRIN: Hold on one second, ladies.

ALICIA DAMONE: I don't know what's being offered in those meetings. Unfortunately, I'm not a part of those meetings.

COUNCIL MEMBER LANDER: [interposing] Three percent. To be clear 3% raises.

ALICIA DAMONE: Excuse me?

COUNCIL MEMBER LANDER: Three percent raises. That's what he talked about.

ALICIA DAMONE: Three percent? Is that all he's offering on the table?

COUNCIL MEMBER LANDER: For wages, yes.

ALICIA DAMONE: But is that all he's offering on the table because--

COUNCIL MEMBER LANDER: [interposing] You can do the math.

ALICIA DAMONE: --I mean the company is not just wages. It's benefits and everything else that comes along with this. I need to understand more so I can understand where you're coming from when you're talking about this.

COUNCIL MEMBER LANDER: I'm just trying to understand-- Anyway, so I appreciate that.

ALICIA DAMONE: [interposing] Okay.

COUNCIL MEMBER LANDER: I think you've helped us understand that situation. I just also want to make sure you're come and you're wearing the- - you're advocating the let us vote here today. And I want to make sure you understand we don't-- We are not allowing or denying the vote. Who is it that's allowing or denying the vote?

ALICIA DAMONE: The NLRB.

COUNCIL MEMBER LANDER: The NLRB is denying the hold the decertification election because they are alleging substantial unfair labor practices by the company.

ALICIA DAMONE: And perhaps hopefully-- hopefully they're watching this on live TV as well--

[background conversation]

CHAIRPERSON WEPRIN: One at a time. One at a time.

ALICIA DAMONE: --to understand, too, that they should allow Brooklyn to go ahead and vote. Maybe at the hearing everything that we have to say on live TV they'll understand. Let them vote.

COUNCIL MEMBER LANDER: And you understand that the reason why decertification elections are often not allowed by the NLRB in cases of unfair labor practices is out of a desire to make sure that companies don't engage in unfair labor practices in order to pressure people out of voting for unions. And precisely enable corporations to bargain in bad faith and engage in unfair labor practices. And then decertify the union because, of course, no worker signs up for a union to be involved

in interminable bargaining and divisiveness in their company.

ELIZABETH PARKIN: And we started trying to decertify them when we found out they want it. Not even when-- We haven't even talked with management. Our minds was already made up.

COUNCIL MEMBER LANDER: And I'm not-- and I'm not-- I have no question about your motives. I have some real questions about Cablevision's motive. I don't have any questions about your motives, and I'll just included this. This goes to the T-shirts as well. I don't doubt that any of you are wearing them because you believe it and want to wear them. But, you know, as I said before--

ELIZABETH PARKIN: [interposing] No, I want another vote.

COUNCIL MEMBER LANDER: But, you know, as I said before, it's-- You know, it's a violation of the Franchise Agreement for the company to have paid for them, if they did. That doesn't mean you don't mean it. That doesn't mean it doesn't express your sentiment, but it still is a violation of the Franchise Agreement--

ELIZABETH PARKIN: [interposing] It would be if they paid for it, but how do you know who paid for it?

COUNCIL MEMBER LANDER: --for the company to give financial support to a union or association of its employees.

ELIZABETH PARKIN: [interposing] We don't know who paid for it.

ALICIA DAMONE: You're making an accusation or something.

CHAIRPERSON WEPRIN: [Shushing panel members] One person.

COUNCIL MEMBER LANDER: Can you tell me who did because then I will know it wasn't them? Do you know who did pay for them?

ELIZABETH PARKIN: I don't know.

COUNCIL MEMBER LANDER: You don't know. Okay. So, I'm going to continue to assume it was the company that paid for them.

ALICIA DAMONE: [interposing] Well, you can assume. That's called an assumption.

COUNCIL MEMBER LANDER: That is an assumption--

ALICIA DAMONE: [interposing] Correct.

COUNCIL MEMBER LANDER: --but I'm putting it right out there.

ALICIA DAMONE: Yes, which is an opinion.

COUNCIL MEMBER LANDER: Okay. Yes it is, and if you can give me information that helps me understand otherwise, I would be very glad to have it.

ALICIA DAMONE: Okay.

COUNCIL MEMBER LANDER: All right.

CHAIRPERSON WEPRIN: Thank you.

COUNCIL MEMBER LANDER: Thank you very much for coming out today, and thank you, Mr. Chairman.

CHAIRPERSON WEPRIN: Thank you, Mr. Lander. Ladies and gentlemen, thank you very much. Very nicely done. I would like to call-- I have three other names here. I don't know if they're all here, but let's see. Dominic. We'll try again. Dominic is still here, right? Okay. Margaret Barnes and John McCaughrean or McKahan? It's one of yours. It's spelled like your name. Are they all here? Now, is anyone else here to testify who I have not called their name who would like to join us up here now? Speak now or forever hold your peace, as they

say. Oh, here. Yeah, I guess. If you signed a paper, that's you. Yeah. Okay, great. Whenever you're ready. I don't know. You want to do ladies first or you guys what to do-- ? Whatever. However you want to do it. Again, we've put a three-minute clock on you just to keep moving. You won't even need that three minutes, huh? Okay. All right, God bless. Whenever you're ready. Make sure to state your name when you speak.

MARGARET BARNES: [off mic] Good evening. My name is Margaret Barnes.

FEMALE SPEAKER: Turn on your microphone.

CHAIRPERSON WEPRIN: Is the mic on?

MALE SPEAKER: No, it's not on.

MARGARET BARNES: Good evening. My name is Margaret Barnes. I work with Cablevision and I want to say thank you to the members that decided to stay, and stay awake. I also want to say thank you for giving us this last couple of minutes to say what we have to say. I would like to say that while I respect the legitimate recent complaint of my co-workers that were here during the time of our past management, I don't agree with the issue of the union. Not because it couldn't help some folks, but

the union is notorious for misconduct. With the union, I don't have any control of my work life. The CWA as far as I and others are concerned is untrustworthy.

They had members come from their office to try to entice us to become members. Going as far as offering us steak dinners, rides home. Would like to come to my house and have private discussions. These are not acceptable ways to do things. Calabrese was supposedly collecting names and number supposedly to present our names to the union, which never got there because he was posturing himself to become the next president. They put him out. The CWA outed him themselves. Now, if you can't trust your own people who work for you, why should I trust them? They have attempted threats and intimidation. I mean all I'm saying is we deserve better.

We don't deserve a councilman who is so openly on the side of CWA. He didn't even bother to hide his behavior, and the majority of them who are no longer sitting here to give us the respect and honor that we gave them. As soon as they finished drilling that lawyer-- Now, maybe he wasn't on the point where you felt he should have been. I don't

know. I'm not a lawyer. I can't compete, but I noticed that you didn't give our team the same recognition that you gave the union. The union members came up here, and they had a nice little walk through the park, flowers and perfume, and then they left. And they made sure that they sat down quickly, and your people left.

I see that gentleman up there that was snide to the sister that was sitting here. He tried to make her feel bad about the T-shirts again. How many times can you all ask a question about T-shirt. Ask me about money. Ask me about time. About me about a ticket. Ask me about if I'm being treated better by the management that is there now. Ask if I will continue another three years to wait for the union to drag this situation out. If you care confident in what you got to say, and what you can do for us, let the vote go through, and then if you can. Now, in the end, I'm going to be ahead of the game because if the union comes in, I'm going to get what's due to me. If the union gets put out, I'm going to get what's due to me.

CHAIRPERSON WEPRIN: Okay.

MARGARET BARNES: But I need it to be done as soon as possible. We're tired of this.

CHAIRPERSON WEPRIN: Okay, thank you very much. Sir.

DOMINIC MONTENEGRO: Good afternoon. My name is Dominic Montenegro. I'm an employee from Long Island. I'm a 14-year employee.

CHAIRPERSON WEPRIN: A little closer to the mic, I guess.

DOMINIC MONTENEGRO: I'm a 14-year employee. I'm here in favor of the company. I started with the company as a field technician, and after about four years in the field unfortunately due to a back injury that required surgery that put my career with Cablevision in doubt. After I recovered and returned to work, it became clear to myself that I wasn't going to be able to continue in that position. And I thought my career with Cablevision would be over. So, I approached management with what I felt about it, you know, that I couldn't continue. And I thought that they would give me a pat on the back and I would walk out the door.

But it was explained to me that they appreciated the commitment, my dedication, and valued

for what I had done for the company over the four years that I had worked as a technician. And they wanted to see what they could do. Ultimately, I was able to transition into the office. And it was at that point that I really realized how much the company values their employees, particularly when you give 100% to them, they're going to do the same back. And over the years since then, I've seen nothing but an open door policy to management with any issues or concerns I've had. And any time I've gone to them, I've had some sort of tangible results. And that's management on any level whether it's my immediate manager or a high-level manager. I've always been encouraged to take my concerns and points of view to management.

[Pause]

DOMINIC MONTENEGRO: And, you know, basically I'm just-- Again, I'm here just to speak for the company, and my experience has been wonderful. I think that I've looked at other companies over the years, and I've found Cablevision's compensation benefit package to be as competitive as any company I've seen out there. And that's without union representation. So I think

Cablevision treats its employees extremely well, and I'm proud to be a Cablevision employee. And I say let the Brooklyn techs vote.

CHAIRPERSON WEPRIN: Just one thing. You live in Long Island, or you work out of Long Island? What's your position?

DOMINIC MONTENEGRO: I work in the, what's call the RCC. It's the Regional Control Center. Basically, my department supports all field service operations particularly in Suffolk County where I work out of.

CHAIRPERSON WEPRIN: Okay.

DOMINIC MONTENEGRO: Thank you.

CHAIRPERSON WEPRIN: Is it-- It's McCaughrean?

JOHN MCCAUGHREAN: McCaughrean.

CHAIRPERSON WEPRIN: Okay. This is Anne McCaughey. You know, so it's like very similar.

JOHN MCCAUGHREAN: Well, it's a pleasure to meet you and thank you for giving me your time. I just want to start off by saying I am a Cablevision employee. I have been an employee for over two years now. So I am fairly new, and I did come in actually after this has begun with our brothers and sisters in

Brooklyn. I transition to Cablevision from the military, which I still am currently a member of the Reserves, which is quite a bit of a hardship to find a company that is willing to train you and invest time into somebody who also has other obligations, and at any point in time you may leave. Now, understandably, it is protected by the law, but you do get a certain sense, and I have in the past received certain senses of frowning upon it.

I never once received any kind of disdain for any kind of obligations I have had on the other side dealing with the military. For one, for Cablevision they have treated me well. Their benefits packages, as most employees do say, is better. For one, I do not get charged as much as I would for Tricare. Tricare is out government's healthcare benefit. I pay around $300 less by using Cablevision healthcare plan than I would for one offered to service members and veterans. Which to me honestly screams that it is a family organization. That they are dedicated to its employees, our families, and a better relationship. Throughout my time at Cablevision, I've had certain problems, family

problems, family issues while I'm actually on the job.

I work in field service. So it's a little hard sometimes when you find out that your older mother falls downstairs and well, she needs somebody to get to her before the ambulance comes. And you're actually in someone's house. But my management staff they have always been there to reroute other people to help you, and to cover you, to console you. To be there for you in every step of the way. I have had plenty of opportunities to train, to encourage myself, to be better at what I do. And from that, I mean they're encouraging us to seek further education. They provide a lot of educational benefits for us whether it be tuition assistance programs for us to further our careers. Honestly, something like that really screams as a family organization.

Now, I know we're in here for union versus non-union. I know this is not the Council's decision-making, but it does go towards the franchising rights. And the fact that it really doesn't seem like the company is violating any kind of franchise rights. T-shirts, yes, yes, yes. We've

all heard about it. It was not given down from management. We probably decided to do it on ourselves because we do take our company's interest in mind. Because they are a family organization. And what I would do for my brothers and sisters, we would do for each other. That's my personal opinion on it, and that is really what I have to say. Thank you for your time, and thanks for hearing us out.

CHAIRPERSON WEPRIN: Thank you. I mean it is not our decision to make whether this is a violation here. Obviously, the NLRB will make that determination. Hopefully, soon, and hopefully at one point we'll be able to proceed with trying to settle things down. And move ahead for all the workers either union or non-union. Whatever it happens.

I want to thank all of you for coming. I'm just curious. Has Jim Dolan visited your office in Suffolk County?

JOHN MCCAUGHREAN: Yes.

CHAIRPERSON WEPRIN: He's been out there?

JOHN MCCAUGHREAN: Yes, he's come out there.

CHAIRPERSON WEPRIN: Okay. Well, nice to know. Okay. I have no other questions for you. I

appreciate your testimony. I know we did ask a lot of questions. We had a lot of-- You know, the reason this hearing is being held is to try to get the facts straight on what happens in Brooklyn, and what is happening with the union and the management. So that's why most of the questions were asked of the first speaker, who is the lawyer for Cablevision, and who had the facts. You know, then the union stated their facts, and Mr. Thompson stated his story. So we got to hear that, but those weren't as much in dispute as the idea of how this came about.

So I do appreciate everyone for coming down, for your very good behavior. I've got to say everyone really did come through. I was a little concerned at the beginning this morning that the reds and the blues would go to war. But no, everyone behaved themselves. I thank you all for coming. I really do appreciate you taking the time, and being so patient. So with that mind in mind and there is nobody else here to testify, we are going to close this hearing. I thank everyone for participating, and with that in mind, the Zoning and Franchises Subcommittee is now adjourned. Thank you. [gavel]

C E R T I F I C A T E

World Wide Dictation certifies that the foregoing transcript is a true and accurate record of the proceedings. We further certify that there is no relation to any of the parties to this action by blood or marriage, and that there is interest in the outcome of this matter.

Date December 5, 2014

POLITICO

At hearing, restaurateurs question threshold for fast food wage hike

Randy Mastro argues against a minimum wage hike for fast food workers. | Jimmy Vielkind/POLITICO New York

By **JIMMY VIELKIND**
11/19/2015 04:55 PM EST

ALBANY — So heated was Thursday morning's hearing on a restaurateurs' challenge to the proposed minimum wage hike for fast food workers that the lawyers involved couldn't agree on how broadly it applied.

A lawyer for the state's department of labor, Pico Ben-Amotz, said the wage order it issued this summer — which followed recommendations of a three-member board convened by Gov. Andrew Cuomo — would eventually impose an hourly wage rate of $15 on employees of any fast food chain with more than 30 locations, be they in New York or elsewhere.

Randy Mastro, the representative of the National Restaurant Association, said the wage order applied only to "national chains" that had locations both in and beyond New York. The point is somewhat academic: no one can think of a fast food chain that has more than 30 locations in New York but doesn't have any outlets in other states. But Mastro yoked it to the core of the association's challenge to the minimum wage order: that it is an arbitrary threshold that creates an unlevel playing field among fast food restaurants.

"Under the commerce clause [of the U.S. Constitution], this is discrimination and it cannot stand," Mastro said, saying the board and acting labor commissioner Mario Musolino exceeded their statutory authority. "The board regulated a sliver of a slice of a subset of a segment of an industry … it's not regulating an industry, it's not regulating a class of employees."

Cuomo convened the wage board with great fanfare and in close concert with labor unions — including the Service Employees International Union and its two major affiliates in New York, 1199 and 32BJ — saying employees of fast food chains like McDonald's and Burger King deserve special attention because they often qualify for and seek public assistance even while working full-time.

The governor is pushing for an across-the-board minimum wage hike, but said the fast food workers — who tearfully testified at hearings — needed immediate attention. To start the board's process, Musolino determined that "fast food workers in the hospitality industry are receiving wages insufficient to provide adequate maintenance and to protect their health." The eventual wage order covered any worker at a fast-food establishment "which is part of a chain … and is one of thirty or more establishments nationally."

"The words that were used have plain meeting," Ben-Amotz said. "It wasn't like they cut out half the fast food industry — it captures 98.9 percent."

(The restaurant association notes that this figure relates only to fast food franchises, which comprise roughly 20 percent of the state's fast food restaurants.)

Being a franchise of a national chain, even if independently owned, brings benefits, Ben-Amotz said, including advertising that reaches a national customer base. He cited a U.S. Supreme court case from 1937 which affirmed Louisiana's right to tax large chains (in that case, A&P) at a higher rate than smaller businesses, and said New York's labor department has for decades distinguished between workers at seasonal and year-round hotels in wage regulations for years.

Mastro said the 30-location threshold was set with political considerations in mind, to protect any small chains in New York that are close to the threshold but do not meet it.

“Maybe the number 30 was pushed with nothing that has to do with national discourse, but protectionism,” he said.

Thursday’s hearing was the precursor to what is likely to be a court battle. Mastro and Ben-Amotz faced off before the Industrial Board of Appeals, an obscure state body whose hearing officers are appointed by the governor. The IBA is currently chaired by Vilda Mayuga, and includes ex-Rep. Mike Arcuri.

It met in a windowless room, unmarked for its purpose, buried in a back hallway of the labyrinthine bowels of the Empire State Plaza. Mastro provided color in the otherwise dank room: with his legs still crossed and his spine touching the back of his chair, he gestured with his hands, elicited a smile from one judge by complimenting her question, repeatedly referenced his own past service as a deputy to Mayor Rudy Giuliani and said Ben-Amotz’s arguments were “the height of hypocrisy.”

At one point he visibly censored himself from using profanity, saying Ben-Amotz’s reasoning for the 30-location threshold was “cock and bull post-hoc rationalization.”

The hearing officers seemed to look for ways to deal with the appeal without handling the gist of the argument. Several asked Mastro how his arguments about the constitutionality of the wage order fit within their limited jurisdiction to judge the labor department’s actions, and Mayuga (in response to Ben-Amotz’s assertion) grilled him about whether the restaurant association even had standing to appeal.

“If they’re not subject to the wage order, they’re not aggrieved and they don’t have standing,” Ben-Amotz said.

Mastro called legal questions of standing “the worst kind of red herring” and “the refuge of scoundrels.” He offered to have an association official sign an affidavit swearing that some members of the organization would be subject to the order.

The board's ruling will come by Dec. 10. Under New York law, a formal court challenge — known as an Article 78 procedure — cannot be filed until all administrative remedies like the IBA are exhausted. Christin Fernandez, an association spokeswoman, said the group was "prepared to pursue any legal

Matter of National Rest. Assn. v Commissioner of Labor

Matter of National Rest. Assn. v Commissioner of Labor 2016 NY Slip Op 04498 Decided on June 9, 2016 Appellate Division, Third Department Devine, J., J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided and Entered: June 9, 2016
522160

[*1]In the Matter of NATIONAL RESTAURANT ASSOCIATION, Appellant,

v

COMMISSIONER OF LABOR et al., Respondents.

Calendar Date: April 26, 2016
Before: Peters, P.J., Lahtinen, Egan Jr., Devine and Mulvey, JJ.

Gibson, Dunn & Crutcher LLP, New York City (Randy M. Mastro of counsel) and Thomas H. Dupree Jr., Washington, D.C., pro hac vice, for appellant.

Eric T. Schneiderman, Attorney General, Albany (Andrea Oser of counsel), for Commissioner of Labor, respondent.

Gladstein, Reif & Meginniss, LLP, New York City (James Reif of counsel) and Altshuler Berzon LLP, San Francisco, California (Michael Rubin of counsel), for Alvin Major and

others, respondents.

Littler Mendelson, PC, Washington, D.C. (Joshua B. Waxman of counsel), for National Federation of Independent Business and another, amici curiae.

Harwood Law PLLC, New York City (Anthony Harwood of counsel), for Greater New York Chamber of Commerce and others, amici curiae.

Paul Sonn, National Employment Law Project, New York City (Laura Huizar, Washington, D.C., of counsel) and Meyer, Suozzi, English & Klein, PC, New York City, for National Employment Law Project and others, amici curiae.

Devine, J.

Appeal from a determination of the Industrial Board of Appeals, filed December 9, 2015, which confirmed a minimum wage order issued by respondent Commissioner of Labor increasing the cash wage paid to certain food service workers.

Respondent Commissioner of Labor issued a determination on May 7, 2015 opining "that a substantial number of fast food workers . . . are receiving wages insufficient to provide [*2]adequate maintenance and to protect their health," and stating his intent to "appoint a wage board to inquire into and report and recommend adequate minimum wages and regulations for" those workers (see Labor Law § 653 [1]). The Commissioner proceeded to name a three-member wage board with one representative each for the interests of employers, employees and the general public (see Labor Law § 655 [1]). After conducting several public hearings and receiving an array of written submissions, the wage board issued a July 2015 report recommending that the minimum wage for fast food workers be increased. The wage board suggested a gradual phase-in of the increase, which would take full effect on December 31, 2018 in New York City and July 1, 2021 elsewhere in the state. The recommended increase was additionally limited to fast food workers employed by fast food establishments in New York that were part of a chain with at least 30 "establishments nationally," including those operating under a franchise agreement where the franchisor "owns or operate[s]" at least 30 such "establishments in the aggregate nationally."

In September 2015, the Commissioner accepted the report in full and ordered that the recommended minimum wage increase be implemented (see Labor Law § 656). Petitioner thereafter appealed to the Industrial Board of Appeals (hereinafter IBA), asserting that the

wage order issued by the Commissioner was "contrary to law" (Labor Law § 657 [2])[FN1]. The IBA disagreed and confirmed the wage order, and petitioner now appeals to this Court (see Labor Law § 657 [2]).

We consider at the outset whether the 2016 enactment by the Legislature of a gradual increase in the statutory minimum wage to $15 an hour — the rate of increase dependent upon factors such as the location of the employees, the size of the employer and the state of the economy — has rendered this appeal moot (see Labor Law § 652 [1], as amended by L 2016, ch 54, part K, § 1; see also Matter of Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of United Bhd. of Carpenters & Joiners of Am., AFL-CIO, 72 NY2d 307, 311 [1988], cert denied 488 US 966 [1988] ["mootness is a doctrine related to subject matter jurisdiction and . . . must be considered by the court sua sponte"]). In raising the statutory minimum wage, the Legislature stripped the Commissioner of his authority to appoint a wage board and establish a minimum wage for an occupation "that exceeds the highest rate listed in [Labor Law § 652 (1)] as amended . . . prior to such rate becoming effective" (L 2016, ch 54, part K, § 4)[FN2]. The Legislature recognized that existing wage orders would remain in effect, however, and permitted the Commissioner to "smooth wages and modify an existing wage order to conform with" the [*3]gradual increase in the statutory minimum wage (L 2016, ch 54, part K, § 5)[FN3]. The Legislature further prevented the Commissioner from modifying an existing wage order in a manner that reduced "a worker's wages," and fast food workers subject to the wage order here are presently entitled to a higher minimum wage than other employees (L 2016, ch 54, part K, § 5). The wage order accordingly remains viable and has impacts distinct from those wrought by the increase in the statutory minimum wage, and the present appeal has not "become moot by passage of time or change in circumstances" (Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714 [1980]).

We must also, before reaching the various arguments of petitioner and amici curiae, address the scope of our review. Labor Law § 657 (1) states that "[t]he findings of the [C]ommissioner as to the facts shall be conclusive on any appeal from a[]" wage order. The IBA assesses whether a wage order is "contrary to law" (Labor Law § 657 [2]) and, while the statute is presently silent as to the scope of our review, there is little question that it is similar (see L 1944, ch 705, § 1; L 1942, ch 693, § 1; Matter of New York State Rest. Assn., Inc. v Commissioner of Labor, 45 AD3d 1133, 1135-1136 [2007], lv denied 10 NY3d 703 [2008]; Matter of Wells Plaza Corp. [Industrial Commr. of State of N.Y.—New York Hotel Trades Council AFL-CIO], 10 AD2d 209, 212-213 [1960], affd 8 NY2d 975 [1960])[FN4]. Petitioner is therefore entitled to argue that the wage order "is contrary to some provision of the [F]ederal or [S]tate [C]onstitution or laws, or [that] it is beyond the power granted to

the [Commissioner], or [that] it is based on some mistake of law" (People ex rel. New York & Queens Gas Co. v McCall, 219 NY 84, 88 [1916], affd 245 US 345 [1917] [internal quotation marks and citation omitted]). Petitioner is also free to claim that findings of fact constitute an error of law in that they are unsupported by a rational basis in the record (see Matter of Kiamesha Concord v Catherwood, 28 AD2d 275, 279 [1967]; Matter of Kiamesha Concord, Inc. v Lewis, 15 AD2d 702, 703 [1962]; see also Matter of Colton v Berman, 21 NY2d 322, 329 [1967]). If a rational basis exists for the findings of fact, however, they are "conclusive" and beyond our review (Labor Law § 657 [1]; see Matter of Wells Plaza Corp. [Industrial Commr. of State of N.Y.—New York Hotel Trades Council, AFL-CIO], 10 AD2d at 214). With those principles in mind, we turn to the arguments advanced by petitioner and supported by certain amici curiae. Inasmuch as we are uniformly unpersuaded by those [*4]arguments, we affirm.

Petitioner first contends that the issuance of the wage order violates the separation of powers doctrine, and "[a] typical point of dispute in this area is the [L]egislature's delegation to an agency of the authority to administer . . . a statute as enacted by the [L]egislature" (Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv., 27 NY3d 174, , 2016 NY Slip Op 02479, *2 [2016]). In determining whether an agency has usurped the authority of the legislative branch, relevant guidelines

"to be considered are whether (1) the agency did more than balance costs and benefits according to preexisting guidelines, but instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) the [L]egislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) the agency used special expertise or competence in the field to develop the challenged regulation" (id. at *4 [internal quotation marks, citations and brackets omitted]; see Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn., 25 NY3d 600, 610-612 [2015]).

The Commissioner is tasked with making complex economic assessments in issuing a wage order, but has special expertise to do so in the form of investigative powers in the area of wages and leadership of an agency capable of providing expert guidance (see Labor Law §§ 196, 653, 655, 660). Moreover, even a cursory review of the enabling statutes reveals that "the basic policy decisions underlying [wage orders were] made and articulated by the Legislature" (Matter of New York State Health Facilities Assn. v Axelrod, 77 NY2d 340, 348 [1991]). The Commissioner is authorized to investigate whether the wages paid to

employees "in any occupation or occupations . . . are sufficient to provide adequate maintenance and to protect the health of the persons employed in such occupation," as well as to empanel a wage board "to inquire into and report and recommend adequate minimum wages and regulations for employees in such occupation or occupations" as a prelude to the issuance of a wage order (Labor Law § 653 [1]). Labor Law § 654 more fully sets forth the factors to be considered in that analysis, directing that "the wage board and the [C]ommissioner shall consider the amount sufficient to provide adequate maintenance and to protect health and, in addition, . . . the value of the work or classification of work performed, and the wages paid in the state for work of like or comparable character." Limits are then placed on any recommendation offered by the wage board, with Labor Law § 655 (5) (a) directing that the recommended minimum wage "shall not be in excess of an amount sufficient to provide adequate maintenance and to protect the health of the employees." The statute further prohibits the wage board from recommending an amount below the floor set by the statutory minimum wage and defines the limits of the wage board's power in other respects (see Labor Law § 655 [5] [a]).

The Commissioner is accordingly authorized to make the assessment as to whether the minimum wage should be increased for employees in specific occupations, does so with help from an agency having special competence in the area and a wage board tasked with investigating the relevant questions as set forth by the Legislature, and thereafter issues a wage [*5]order setting a minimum wage in a specific occupation if such would further the policy objectives delineated by statute. The Commissioner complied with that procedure, and the fact that the Legislature failed to agree on an increase in the statutory minimum wage in the leadup to the issuance of the wage order in no way reflects dispute or confusion as to the longstanding authority of the Commissioner to set a minimum wage for employees in a given occupation (see Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv., 2016 NY Slip Op 02479 at *7)[FN5]. Petitioner also takes issue with various provisions in the wage order but, suffice it to say, they amount to choices involving "the appropriate means for achieving [statutorily defined] ends . . . [which fall] well within the authority delegated to the [Commissioner] for the purpose of administering the statute" and do not offend the separation of powers doctrine (Matter of New York State Health Facilities Assn. v Axelrod, 77 NY2d at 348; see Matter of Rainbow Beach Assn. v New York State Dept. of Health, 187 AD2d 891, 893 [1992]). Thus, the Commissioner "acted within the confines of that delegated power and did not usurp the authority of the [L]egislature by" issuing the wage order (Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv., 2016 NY Slip Op 02479 at *8).

Petitioner also argues that the order runs afoul of Congress' power to "regulate [c]ommerce . . . among the several [s]tates" (US Const, art I, § 8). The grant of power to Congress implies a corollary limitation on state power known as the dormant Commerce Clause, which "prohibits economic protectionism [by the states] — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors" (New Energy Co. of Ind. v Limbach, 486 US 269, 273 [1988]; see Comptroller of Treasury of Md. v Wynne, US , , 135 S Ct 1787, 1794-1795 [2015]). The wage order purportedly offends the dormant Commerce Clause in that it targets fast food chains with 30 or more locations "nationally" to the exclusion of fast food chains of similar size located solely within New York. The wage order, however, does nothing of the sort.

The wage order states that the minimum wage will be raised for "fast food employees in fast food establishments," and such establishments are defined in relevant part as:

"any establishment in the state of New York . . . which is part of a chain . . . and . . . which is one of [30] or more establishments nationally, including: (i) an integrated enterprise which owns or operates [30] or more such establishments in the aggregate nationally; or (ii) an establishment operated pursuant to a Franchise where the Franchisor and the Franchisee(s) of such Franchisor owns or operate[s] [30] or more such establishments in the aggregate nationally."

Nationally means "[n]ationwide in scope" and, as such, includes New York (Black's Law Dictionary [10th ed 2014], national). This language can in no way be read to exclude chains with locations solely in New York and, if a fast food chain has at least 30 establishments anywhere in [*6]the United States, its component establishments in New York are subject to the wage order. The wage order also lacks any mechanism to assist chains with 30 establishments within New York at the expense of similarly sized chains with establishments located outside of it (cf. West Lynn Creamery, Inc. v Healy, 512 US 186, 195-196 [1994]). Accordingly, "there is no differential treatment of identifiable, similarly situated in-[s]tate and out-of-[s]tate interests, [and] there is no dormant Commerce Clause violation" on the face of the wage order (Matter of Tamagni v Tax Appeals Trib. of State of N.Y., 91 NY2d 530, 539 [1998], cert denied 525 US 931 [1998]; see International Franchise Assn., Inc. v City of Seattle, 803 F3d 389, 400 [9th Cir 2015]; Matter of Pascazi v Gardner, 106 AD3d 1143, 1145 [2013], appeal dismissed 21 NY3d 1057 [2013], lv denied 22 NY3d 857 [2013]). Petitioner further asserts that the wage order violates the dormant Commerce Clause even if it is facially nondiscriminatory, but makes little effort to show how "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits" (Pike v Bruce Church, Inc., 397 US 137, 142 [1970]; see Oregon Waste

Systems, Inc. v Department of Environmental Quality of Ore., 511 US 93, 99 [1994]; International Franchise Assn., Inc. v City of Seattle, 803 F3d at 405). There is nothing to suggest, in any case, that the wage order's effect on interstate commerce would outweigh the substantial local benefits that will flow from the desired objective of granting fast food workers a wage enabling them to escape the bonds of public assistance and spend more money in the local economy.

Petitioner also claims that the wage board order was invalid because two board members appointed by the Commissioner were not true "representatives of the employers and employees" and, as such, lacked authority to sit on it (Labor Law § 655 [1]). This sort of factual challenge to a facially valid appointment offends the rule that "the acts of one who carries out the functions of a public office under color of authority are generally valid as to third persons and the public, and hence immune from collateral attack, notwithstanding irregularities in the manner in which the officer was appointed" (Matter of County of Ontario v Western Finger Lakes Solid Waste Mgt. Auth., 167 AD2d 848, 849 [1990], lv denied 77 NY2d 805 [1991]; see Matter of Eadie v Town Bd. of Town of N. Greenbush, 47 AD3d 1021, 1024 [2008]; Morris v Cahill, 96 AD2d 88, 90 [1983]). Inasmuch as petitioner failed to challenge the factual basis for the appointments in an appropriate manner (see Executive Law § 63-b; Morris v Cahill, 96 AD2d at 90), it will not be permitted to raise the issue now and undermine "the interests and reasonable expectations of the public, which must rely on the presumptively valid acts of public officials" (Matter of County of Ontario v Western Finger Lakes Solid Waste Mgt. Auth., 167 AD2d at 849).

Petitioner also challenges specific terms of the wage order. To reiterate, "[i]n establishing minimum wages and regulations for any occupation . . ., the wage board and the [C]ommissioner shall consider the amount sufficient to provide adequate maintenance and to protect health and, in addition, [they] shall consider the value of the work or classification of work performed, and the wages paid in [New York] for work of like or comparable character" (Labor Law § 654). Petitioner asserts that the wage order was deficient because it set a minimum wage for workers employed by fast food establishments in chains with 30 or more establishments, impermissibly limiting the scope of the wage order to a subset of the "industry, trade, business or class of work in which employees are gainfully employed" rather than the entire occupation (Labor Law § 651 [4]). The wage board report did not limit the definition of the occupation itself, however, categorizing it as "all fast food workers performing functions related to preparing food and drinks, serving customers, and maintaining and protecting the property" (emphasis added). The wage board found that an increase in the minimum wage would be warranted for all of those workers but, because of documented concerns that smaller employers would face greater

financial challenges in dealing with an increase, recommended limiting the increase to employees working for establishments affiliated with large chains and [*7]"better equipped to absorb" the costs. A minimum wage increase would not "provide adequate maintenance and . . . protect the health of . . . [an] employee[]" if it imperiled the employee's job by financially crippling his or her employer (Labor Law § 655 [5] [a]; see Labor Law §§ 650, 654). As a result, the limits placed on the applicability of the wage order were a foray into "an area of reasonable administrative discretion into which" we will not intrude (Matter of Wells Plaza Corp. [Industrial Commr. of State of N.Y.—New York Hotel Trades Council AFL-CIO], 10 AD2d at 218; see Matter of Lodging House Keepers Assn. of N.Y. v Catherwood, 18 AD2d 725, 725 [1962]).

Petitioner makes a related claim that the selection of 30 or more establishments as the cutoff point is not sufficiently exact, but such a line need not be drawn with mathematical precision, and a rational basis in the record exists to support the one drawn here (see e.g. Schneider v Sobol, 76 NY2d 309, 314 [1990]). A franchising agreement gives significant advantages to a business owner by allowing him or her to benefit from an established brand name and customer base, use information and expertise not available to other small businesses, and exploit increased purchasing and borrowing power created by the pooling of resources within the franchise system. The wage board noted these advantages, all of which would assist an establishment in adjusting to a higher minimum wage for its workers, and there is nothing unreasonable in the belief that those advantages would be less potent in smaller fast food chains.

Petitioner finally claims that the "value of the work" and "the wages paid in the state for work of like or comparable character" were not properly considered, but we disagree (Labor Law § 654). With regard to the wages paid for comparable work, the wage board pointed to proof that fast food workers received wages well below those paid to other food service workers, noting that workers in full-service restaurants annually earn approximately 50% more than fast food workers. As for the value of the work performed, fast food workers spoke to the difficult nature of that work, which involved performing multiple tasks over irregular hours for employers who had little concern for the dignity of their employees or the environment in which they worked. A sociologist agreed that fast food workers engaged in "a variety of complex tasks, often under extreme time pressure and poor working conditions," and opined that $15 an hour appropriately valued their work. The wage board further noted — correctly, in our view — that fast food chains have recently experienced significant increases in profit without an accompanying rise in wages for their workers, implying that those profits were "'wrung from the necessities of their employees'" by undervaluing their labor (West Coast Hotel Co. v Parrish, 300 US 379, 397

[1937], quoting Adkins v Children's Hospital of D.C., 261 US 525, 563 [1923] [Taft, C.J., dissenting]). A rational basis in the record therefore supports the factual findings underpinning the wage order and, as such, it will not be disturbed.

Peters, P.J., Lahtinen, Egan Jr. and Mulvey, JJ., concur.

ORDERED that the determination is affirmed, without costs.

Footnotes

Footnote 1: Labor Law § 657 (2) refers to a "review before the board of standards and appeals." The IBA replaced that body in 1975 and assumed its "functions, powers and duties" except for those explicitly transferred to the Commissioner (L 1975, ch 756, § 21).

Footnote 2: The Legislature first authorized the Commissioner to convene wage boards and establish minimum wages on an industry-by-industry basis in 1937 (see L 1937, ch 276). The separate statutory minimum wage, applicable to workers statewide, was established in 1960 (see L 1960, ch 619). Governor Rockefeller noted at that time that New York could look forward to enjoying "the simplicity of a statutory minimum wage with the desirable flexibility of the industry-by-industry wage board procedure" (Governor's Mem approving L 1960, ch 619, 1960 McKinney's Sess Laws of NY at 2032).

Footnote 3: Petitioner advises us that it has inquired, without response, as to whether the Commissioner intends to exercise his "smoothing" authority with regard to the wage order here. The Commissioner is presumably well aware of that authority — which, in any event, would not have an effect on the increase in the minimum wage already granted to fast food workers — and we decline the invitation made by petitioner at oral argument to remit this matter so that the Commissioner may continue to mull over whether he should exercise it.

Footnote 4: The predecessor to the IBA was permitted to develop the record and consider whether the wage order was unreasonable, but the IBA is now directed to rely "upon the record certified and filed by the [C]ommissioner" and assess whether the wage order "is contrary to law" (Labor Law § 657 [2]; see Matter of Lodging House Keepers Assn. of N.Y. v Catherwood, 18 AD2d 725, 725 [1962]). Outside of the wage order context, the IBA remains empowered to develop the record and revoke, amend or modify an order of the Commissioner if it "is invalid or unreasonable" (Labor Law § 101 [3] [emphasis added]; see Labor Law § 100 [5]).

Footnote 5: Petitioner's claim in this regard is not assisted by the fact that, after the wage order was issued, the Legislature increased the statutory minimum wage but recognized the validity of existing wage orders such as the one here (see L 2016, ch 54, part K, § 5).

Gibson Dunn's Mastro to Fight Wage Hike for NY Food Workers

Law.com (Online)

July 21, 2015 Tuesday

THE AMERICAN LAWYER

Length: 636 words

Body

Gibson, Dunn & Crutcher's Randy Mastro, a former deputy New York City mayor turned thorn-in-the-side of state and local government, has found a new target: New York Gov. Andrew Cuomo's proposal to raise minimum wages in the state's fast food restaurants.

Mastro confirmed Tuesday that he's been tapped by a coalition of fast food franchisees to contest the governor's plan to bump the fast food industry's minimum wage to $15 per hour. Many of the franchisees in the group, he said, are minority and women-owned businesses whose operations could be endangered by the wage hike.

"They're already struggling to survive on low margins," said Mastro. "This kind of dramatic fiat from the government could cause many of them to go under."

A three-member wage board that Cuomo *convened in May* was *expected* to adopt the proposal on Wednesday and send it to the state's labor commissioner for final approval. New York's current minimum wage is $8.75 per hour for all workers, although that's due to increase to $9 by the end of this year.

While opponents of Cuomo's plan have *cried foul* over the proposal's targeting of a single industry, backers have hailed it as a step toward increasing pay for all low-wage workers. The governor, for his part, defended his executive action *in a May 6 New York Times Op-Ed*, citing a delay among lawmakers to move forward with related legislation.

Crain's New York Business, which first noted Mastro's new assignment, *reported Tuesday* that the Gibson Dunn-led legal challenge will likely focus on whether Cuomo overstepped his authority by skirting normal legislative channels.

Mastro told us on Tuesday that it's premature to say exactly how he'll contest the wage hike, since the increase hasn't yet been finalized. But all options are on the table, he said.

Amanda DelGrosso

"We're going to explore all available legal remedies, including the composition of the wage board, the rush to judgment that occurred here, whether the action is consistent with the legal mandate, and whether the ultimate outcome can be justified on any rational basis, given the discrimination that it imposes," he said.

Mastro, a co-chair of Gibson Dunn's litigation practice, served as chief of staff and deputy mayor for New York City in the Rudy Giuliani administration. Since then, he's developed a reputation for challenging various government actions, or, as he put it: "Who better to know when government screws up than a former deputy mayor who's a litigator?"

In April, for example, Mastro filed a state court petition contesting a ban on polystyrene foam food containers imposed by current New York City Mayor Bill de Blasio. The ban, which took effect July 1, prohibits restaurants in the city from using foam for certain food-service products, such as takeout containers, cups and plates.

Mastro's clients, the Restaurant Action Alliance NYC, Dart Container Corp. and others, *maintain* that the foam prohibition serves to further de Blasio's political agenda, but came without a meaningful review by city officials.

Meanwhile, at least some of Mastro's time has been consumed by a more personal crusade against New York City's government. The Gibson Dunn lawyer in October sued the city, its environmental control board, fire department, fire commissioner and other departments in state court, contesting a $375 fine he was issued over two false fire alarms at his residence in Manhattan's Upper East Side.

Beyond his battles with government, Mastro is probably best known as the bane of a group of Ecuadorean plaintiffs' attempts to collect on a megajudgment against Chevron Corp. over environmental damage to the Amazon rain forest. He's also been keeping reporters busy as the head of a Gibson Dunn team tapped by New Jersey Gov. Chris Christie's office to investigate the 2013 George Washington Bridge lane-closure scandal.

Classification

Language: ENGLISH

Publication-Type: Web Publication

Subject: WAGES & SALARIES (93%); COMPENSATION & BENEFITS (90%); GOVERNMENT & PUBLIC ADMINISTRATION (90%); GOVERNORS (90%); MAJOR US LAW FIRMS (90%); MINIMUM WAGE (90%); REGIONAL & LOCAL GOVERNMENTS (90%); WAGE GROWTH (90%); MAYORS (89%); WAGE & HOUR LAWS (89%); LITIGATION (84%); LAW & LEGAL SYSTEM (79%); LEGISLATION (79%); COMPANY ACTIVITIES & MANAGEMENT (78%); NEGATIVE PERSONAL NEWS (78%); US STATE GOVERNMENT (78%); FRANCHISING (77%); COMPANY STRUCTURES & OWNERSHIP (76%); FRANCHISEES (76%); MINORITY BUSINESS ASSISTANCE (75%); APPROVALS (73%); BUSINESS OPERATIONS (73%); WOMEN (73%); PETITIONS (71%); MINORITY GROUPS (70%); WOMAN OWNED BUSINESSES (70%); US PRESIDENTIAL CANDIDATES 2008 (50%)

Company: GIBSON DUNN & CRUTCHER LLP (98%)

Industry: NAICS541110 OFFICES OF LAWYERS (98%); SIC8111 LEGAL SERVICES (98%); FAST FOOD RESTAURANTS (90%); MAJOR US LAW FIRMS (90%); FOOD INDUSTRY (77%); RESTAURANTS & FOOD

SERVICE INDUSTRY (77%); RESTAURANTS (72%); POLYSTYRENE (60%); POLYSTYRENE FOAM PRODUCTS (50%)

Person: ANDREW CUOMO (79%); RUDY GIULIANI (58%)

Geographic: NEW YORK, NY, USA (93%); NEW YORK, USA (95%)

Load-Date: May 18, 2019

End of Document

To Be Argued By:
RANDY M. MASTRO

New York County Clerk's Index No. 100734/15

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of

RESTAURANT ACTION ALLIANCE NYC, CECILIO ALBAYERO, JOSE CASTILLO, MAXIMILIANO GONZALES, ANDRES JAVIER-MORALES, ARISMENDY JEREZ, TONY JUELA, RUPERTO MOROCHO, ASTRID PORTILLO, SERGIO SANCHEZ, LUCINO RAMOS, ESMERALDA VALENCIA, PLASTICS RECYCLING INC., DART CONTAINER CORPORATION, PACTIV LLC, GENPAK LLC, COMMODORE PLASTICS LLC, and REYNOLDS CONSUMER PRODUCTS LLC,

Petitioners-Appellants,

For Judgment Pursuant to CPLR Article 78

—against—

THE CITY OF NEW YORK; KATHRYN GARCIA, in her official capacity as Commissioner of the New York City Department of Sanitation; THE NEW YORK CITY DEPARTMENT OF SANITATION, a charter-mandated agency; and BILL DE BLASIO, in his official capacity as Mayor of the City of New York,

Respondents-Respondents.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

RANDY M. MASTRO
MYLAN L. DENERSTEIN
PAUL J. KREMER
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166
(212) 351-4000
rmastro@gibsondunn.com
mdenerstein@gibsondunn.com
pkremer@gibsondunn.com

Attorneys for Petitioners-Appellants Restaurant Action Alliance NYC, Cecilio Albayero, Jose Castillo, Maximiliano Gonzales, Andres Javier-Morales, Arismendy Jerez, Tony Juela, Ruperto Morocho, Astrid Portillo, Sergio Sanchez, Lucino Ramos, Esmeralda Valencia, Plastics Recycling Inc., Dart Container Corporation, Genpak LLC, Commodore Plastics LLC

(*Counsel continued on inside cover*)

C. David Watson
(*pro hac vice*)
General Counsel,
Reynolds Consumer Products
1900 W. Field Court
Lake Forest, Illinois 60045
(847) 482-3155
david.watson@reynoldsbrands.com
Attorney for Petitioner-Appellant
Reynolds Consumer Products LLC

Steven R. Karl
(*pro hac vice*)
Vice-President and General
Counsel, Pactiv LLC
1900 W. Field Court
Lake Forest, Illinois 60045
(847) 482-2113
skarl@pactiv.com
Attorney for Petitioner-Appellant
Pactiv LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

PRELIMINARY STATEMENT

The City Appellees (hereinafter, the "City" or "Appellees") largely ignore the legal standards applicable to this case—including their obligation under local law to recycle here, rather than ban "soft foam" food-service items. Instead, the City devotes the bulk of its presentation to trying to cast aspersions on so-called "dirty foam" recycling and urging deference to the City's Sanitation Commissioner on a matter of statutory interpretation vested to this Court to determine. But both the statutory standard and administrative record could not be clearer: Local Law 142 mandates that "soft foam" EPS must be recycled because it "can be recycled" in an "economically feasible" and "environmentally effective" manner.

It is undisputed here that the industry's comprehensive, self-funded plan satisfies that statutory standard, ensuring that all of the City's polystyrene (rigid and soft) will be recycled for the first time, that far less polystyrene will therefore end up being landfilled than under a "soft foam" food-service ban alone, and that the City will benefit financially from this recycling, saving millions of dollars in landfill costs as a result. Thus, this will necessarily be a "win-win" for the City, economically and environmentally.

The City now "readily acknowledge[s]" that "it is technologically possible to recycle" even "dirty food-service foam," "with enough time, effort, and money." *See* Opp'n at 51. The industry's comprehensive plan undeniably does just that,

giving the City "enough time, effort, and money" to guarantee a successful recycling program for the next five years and beyond. That should end the inquiry. The statutory standard requiring recycling is clearly met here. Hence, the Sanitation Commissioner had no discretion to ban "soft foam" food-service items, and her determination is entitled to no deference whatsoever. *See, e.g.*, *Claim of Gruber*, 89 N.Y.2d 225, 231–32 (1996) ("[W]here the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, the judiciary need not accord any deference to the agency's determination." (internal quotation marks omitted)).

To conjure the appearance of discretion where there was none, the City now insists that this case is not about the plain meaning of the statute, but rather, a sea of red herrings irrelevant to the statutory standard—including other cities' supposed experiences, all necessarily on a smaller scale and without the benefit of a guaranteed, industry-backed plan.[1] But the core facts here are not in dispute: the industry's plan will save the City money and cost it nothing (making it "economically feasible"), and it will necessarily result in far less polystyrene being landfilled than a "soft foam" ban alone (making it not only "environmentally effective," but far more "environmentally effective" than a "soft foam" ban alone).

[1] Of course, Appellees fail to mention to this Court that the City of San Diego has been successfully recycling "soft foam" polystyrene for the past year.

Put simply, the industry has offered the City a plan that satisfies the plain language of Local Law 142, and the City therefore has no choice but to accept it.

Indeed, Appellees concede that the industry plan to recycle EPS will be "economically feasible" for New York City. Opp'n at 9–10. The City admits that it has enough excess capacity to pick up all polystyrene waste at no extra cost within its existing recycling program and that recycling foam will reduce the City's landfill costs, that manufacturer Dart Container Corporation ("Dart") will pay for the machinery and personnel needed to incorporate foam into the City's recycling stream, and that recycler Plastic Recycling, Inc. ("PRI") will purchase all of the foam collected by Sims Municipal Recycling ("Sims"), the City's recycling contractor. *Id.* Because the industry has ensured that this proposal will cost the City nothing, it is, by definition, "cost effective" and, therefore, "economically feasible." *See* R.210 (Ex. 1 (LL142) § 16-329(a)).

Nor is there any credible dispute about the "environmental effectiveness" of this proposal. The Commissioner's own pre-2015 sorting and recovery estimates (which were obtained only through FOIL requests) demonstrate that a comprehensive recycling plan for polystyrene will divert more recyclable material from landfills than a ban on food-service foam or no change in policy. Recycling is therefore the most "environmentally effective" approach, mandating it under the statute.

In addition to rejecting a comprehensive recycling plan that comports with the statute, the Commissioner also exceeded her statutory discretion on remand by conducting a wide-ranging and ultimately fruitless review, rather than evaluating the undisputed merits of this comprehensive recycling plan. Indeed, the entire 2017 Determination is an *ultra vires* act and must be annulled. The Commissioner simply cannot justify a "ban" by claiming she is unconvinced there will be a market for foam recycling in perpetuity. The statute imposes no such requirement, and life provides no such guarantees. But for at least the next five years, the industry has guaranteed a recycling market for all of the City's polystyrene. That triggers the statute's recycling mandate. For all of these reasons, this Court should reverse the judgment below and order the City to implement the recycling program required under Local Law 142.

ARGUMENT

I. There Is No Dispute That Under the Plain Meaning of Local Law 142, Recycling EPS Is "Economically Feasible."

It is undisputed that the plan proposed by Appellants would cost the City nothing and would thus be, by definition, "economically feasible" for New York. *See* R.210 (Ex. 1 (LL142) § 16-329(a)) (defining "economically feasible" as "cost effective"); Appellants' Br. at 15–17. Indeed, Appellants' comprehensive recycling plan directly satisfies the plain language of Local Law 142, which requires an analysis of "cost effective[ness]," by looking to "costs[,] such as

whether the material is capable of being collected by the department in the same truck as [other] recyclable material," and benefits derived from "markets for recycled material." R.210 (Ex. 1 (LL142) § 16-329(a)).

Here, the market has spoken, in the form of a guaranteed plan assured to cost the City nothing while providing economic benefits to the City's recycling contractor and the City, in the form of both avoided landfill costs and potential revenue sharing. *See* Appellants' Br. at 3, 16. The industry's plan is "cost effective" by definition—it costs the City nothing. The City does not (and indeed, could not) dispute that in its brief.

In fact, there has never been any dispute about whether Appellants have made the showing of economic feasibility required under the statute. As the City readily admits, under Appellants' proposed plan, EPS would be transported on New York Department of Sanitation ("DSNY") trucks at no additional cost, R.267 (Ex. 3 (2015 Determination) at 7), and Appellants—not the City—would then cover the remaining costs of recycling EPS by installing the necessary equipment at Sims, providing additional staffing, and training Sims employees, R.356 (Ex. 21 (2014 Dart Letter) at 2); R.222 (Ex. 2 (2017 Determination) at 6). The City also does not dispute that under the comprehensive recycling plan, PRI would purchase *all* of the City's foam from Sims at a locked-in price guaranteed to be equal to or greater than $160 per ton. R.222–23 (Ex. 2 (2017 Determination) at 6–7).

The City cites **no** evidence to the contrary. Instead, it ignores Appellants' comprehensive recycling plan and relies on spurious claims that certain selected cities in other parts of the country or Canada—without comprehensive recycling programs in place—have not sold all of their supply of EPS to buyers. Opp'n at 28–40. But Local Law 142 governs only "economic feasibility" in New York City; it is not concerned with other cities' recycling programs; and it is undisputed here that Appellants have provided a guaranteed market for New York City's foam, at an agreed upon price, which will cost the City nothing.

The City's contention that the market is illusory based on select cities, *see* Opp'n at 32–35, is nonsensical. In essence, the City is suggesting that for New York's recycling plan to be successful, Appellants would have to provide a market for EPS in every jurisdiction that recycles it. But that is absurd. And it is the height of irrationality to claim that "there is no market" for **New York City's** EPS when there is a reliable, guaranteed buyer offering a profitable price to buy all of the City's polystyrene.

Nor can the Commissioner expand the definition of economic feasibility to require, for example, a guarantee enforceable in perpetuity for New York City. The statute did not and could not impose any such "in perpetuity" requirement, and there is nothing in Local Law 142 that requires recycling to last forever. Indeed, nothing is guaranteed to last forever. Rather, the Local Law only required a

finding that the City's soft foam EPS could be recycled at that time, which Appellants' plan guaranteed for at least five years. In sum, the City's claims against "economic feasibility" have nothing to do with that statutory requirement at all, and this Court should reject them.

II. There Is No Dispute That Under the Plain Meaning of Local Law 142, the Recycling Plan Is "Environmentally Effective."

The Commissioner effectively conceded in 2015 that the comprehensive recycling plan was environmentally effective,[2] when the Commissioner's own efficiency assumptions (obtained only as a result of Appellants' FOIL requests) confirmed that the industry's plan to recycle foam would do more to divert polystyrene from landfills than the Mayor's preferred policy (an outright ban on food-service foam). *See* Appellants' Br. at 17–19. In other words, less polystyrene will be landfilled under the comprehensive industry recycling plan than under the Commissioner's ban, such that recycling EPS is clearly "environmentally effective." Because the plan satisfies the statutory criteria for "economic[] feasib[ility]" and "environmental[] effective[ness]," the Commissioner was compelled to find that EPS must be recycled and had no discretion to find anything

[2] Local Law 142 defines "environmentally effective" as "not having negative environmental consequences including, but not limited to, having the capability to be recycled into new and marketable products without a significant amount of material accepted for recycling being delivered to landfills or incinerators." R.210 (Ex. 1 (LL142) § 16-329(a)).

to the contrary. *City of N.Y. v. Novello*, 65 A.D.3d 112, 118 (1st Dep't 2009) (holding that an agency determination that "fails to comply with a mandatory [statutory] provision . . . will not be permitted to stand"); *see also* Appellants' Br. at 29–34.

Under the comprehensive recycling plan, PRI will purchase all of the material sorted by Sims and process "effectively 100%" of all of that material, with little to no EPS ending up in landfills. *See* R.289 (Ex. 6 (2017 Shaw Aff) ¶ 9); R.345 (Ex. 20 (2015 Shaw Aff.) ¶ 7). Even using the Commissioner's own estimates as to the amount of EPS recoverable, Appellants' recycling plan would remove 17,497 tons of material from landfills each year, whereas the partial foam ban favored by the Commissioner will remove only 11,866 tons. R.504, 509 (Ex. 35 (July 2015 Cantor Aff.) ¶ 4, p. 7).

Had the Commissioner considered that the amount of recyclable material diverted to landfills under the comprehensive plan is greater than the amount diverted under the Commissioner's pre-ordained soft foam ban, she would have reached the inevitable conclusion that recycling EPS is, in fact, "environmentally effective," and that recycling is therefore mandated.[3]

[3] To the extent the Commissioner now construes "material accepted for recycling" to include only food-service foam, despite the fact that the City undisputedly accepts various other polystyrene materials for recycling, that determination is contrary to the plain language of the statute and should be

(Cont'd on next page)

III. The Commissioner Flagrantly Disregarded the Statutory Limits on Her Authority.

Local Law 142 is clear not only with respect to the showing it requires, but also with respect to exactly by when that showing must be made—January 1, 2015. The trial court's remand order did not change that; nor did it open the door to the irrelevant and flawed inquiries on which the 2017 Determination was ultimately based.

A. Local Law 142 Required a One-Time Determination Based on the Record by January 1, 2015.

The plain text of Local Law 142 could not be clearer: a determination was required "[n]o later than" January 1, 2015. R.212 (Ex. 1 (LL142) § 16-329(b)). The City Council did not authorize the City to go on a three year fishing expedition, and indeed, it was the City—not Appellants—who repeatedly made clear to the trial court that Local Law 142 required a "one-time determination" "by January 1, 2015." R.3337, 3342, 3349, 3379 (Ex. BBB (Respondents' 2015 Opp. Br.) at 1, 6, 13, 43). The City rang that bell relentlessly in the trial court in 2015 when it believed that it had done enough homework to justify Mayor de Blasio's foam ban. Yet after the trial court vacated the 2015 Determination and the City

---

given no weight. *See Claim of Gruber*, 89 N.Y.2d at 231–32 (the "judiciary need not accord any deference to the agency's determination" for questions of statutory interpretation); *Belmonte v. Snashall*, 2 N.Y.3d 560, 565–66 (2004) (finding that the court has ultimate authority to interpret statutory definitions and an agency's interpretation is not entitled to deference).

was confronted with the reality that the industry had satisfied the statutory requirements, the City changed its tune, claiming that the Commissioner now had carte blanche to consider whatever evidence she gathered after January 1, 2015 to reach her pre-determined outcome and ban foam. But no remand order can grant powers in excess of local law, and the mandate of Local Law 142 has never changed: it has—as the City readily admitted—always required that the Comissioner collect and review the relevant evidence and issue a final determination "[n]o later than" January 1, 2015. R.212 (Ex. 1 (LL142) § 16-329(b)).

Moreover, the language in Local Law 142 mandating that a determination must be made "[n]o later than" January 1, 2015 mirrors the statutory language in *Novello*, requiring an agency to act "in no event later than" a specific date, which this Court held imposed a mandatory deadline. 65 A.D.3d at 114, 118. *Sinawski v. Cuevas*, 123 A.D.2d 548 (1st Dep't 1986), the case on which the City relies to purportedly demonstrate that the January 1, 2015 deadline imposed by Local Law 142 is merely directory, is inapposite. The statute at issue in that case did not have limiting language such as "[n]o later than" or "in no event later than," and was distinguished by the Court in *Novello* for precisely that reason. 65 A.D.3d at 117–18. Local Law 142's plain language imposes a mandatory temporal deadline for

the Commissioner to consider the evidence before her and make a determination, which the Commissioner was not permitted to ignore.

Even if this Court found that Local Law 142's deadline was directory, rather than mandatory, Appellants could make the showing of "substantial prejudice" that the City insists is necessary under *Syquia v. Bd. of Educ. of Harpursville Cent. School Dist.*, 80 N.Y.2d 531 (1992) (*cited* at Opp'n at 59–60). Demonstrating substantial prejudice is easy: if the Commissioner's 2017 Determination is permitted to stand, then food-service foam will be banned by the City and Appellants will suffer irreparable harm in not being able to sell, use, or recycle foam. And it is disingenuous for the City to say that Appellants cannot demonstrate substantial prejudice because the Comissioner considered evidence submitted by Appellants after that date, *see* Opp'n at 60, when it was the City who requested that evidence over Appellants' objections, R.657 (Ex. 49 (Letter to B. Anderson) at 2).

B. The Commissioner Did Not Have Authority to Ignore the Plain Meaning of Local Law 142 Regardless of the Court's Remand Order.

The City's desperate attempt to rely on Supreme Court to expand the scope of the Commissioner's review beyond the mandatory January 1, 2015 deadline does not have any merit. *See* Opp'n at 55–56. As explained in Appellants' opening brief, the Commissioner had no discretion to consider evidence extraneous

to the strictures of Local Law 142 in determining whether EPS is recyclable. *See* Appellants' Br. at 34–40. The trial court's remand order did nothing to change that. Having found that "[t]he one undisputed short answer to whether EPS is recyclable is yes: single serve EPS is recyclable," the trial court remanded this case to the Commissioner for the limited purpose of determining whether recycling EPS would be "economically feasible" and "environmentally effective" for the City. R.278 (Ex. 4 (2015 Order) at 8).

It cannot be, as the City apparently contends, that because Local Law 142 does not specify what should happen in the event of an Article 78 remand, the statutory deadline for making a decision has no force. Opp'n at 56. The trial court was powerless to expand the time period for the relevant inquiry under Local Law 142, which had an explicit deadline. *See Novello*, 65 A.D.3d at 117 ("This Court may not disregard peremptory language that contains a plain, clear and distinct expression of mandatory legislative intent . . . .").

None of the cases cited by the City to suggest that it was entitled to expand the record on remand involve a statute, like the one at issue here, which clearly imposes a hard deadline by which the agency must take action. *See Quittner v. Herman*, 15 A.D.2d 68 (1st Dep't 1961), *aff'd*, 11 N.Y.2d 800 (1962) (*cited* at Opp'n at 54); *Yasser v. McGoldrick*, 282 A.D. 1056 (2d Dep't 1953), *aff'd*, 306 N.Y. 924 (1954) (*cited* at Opp'n at 54). And *Yasser*, on which the City relies, did

not even involve new, irrelevant evidence considered by an agency when forced by a court order to reconsider its prior determination, as is the case here. Rather, that case involved an agency's willing reversal of its prior decision based a reexamination of "substantially the same evidence" after the agency—not the petitioner—requested the remand. *Id*. at 1057. The City also offers no response to Supreme Court's holding in *A.F.C. Enters., Inc. v. N.Y.C. Transit Auth*., 2013 WL 3948421, at *1 (Sup. Ct. N.Y. Cty. July 23, 2013) that an agency's redetermination is arbitrary and capricious where, as here, it "conduct[s] a *de novo* investigation" and improperly considers new evidence on remand. Indeed, such a *de novo* review is flatly contrary to New York's "long-standing policy of finality" for actions by administrative agencies. *Centennial Restorations Co. v. Abrams*, 180 A.D.2d 340, 344 (3d Dep't 1992). The City's contention that the remand order authorized the Commissioner to expand the scope of her review beyond January 1, 2015 is simply wrong.

C. The 2017 Determination Was Irrational Because it Relied on Speculative and Irrelevant Evidence Cherry-Picked by the Commissioner to Support a Pre-Ordained Outcome Without Crediting the Recycling Plan.

Even if the Commissioner had authority to reopen the record after the January 1, 2015 deadline, the 2017 Determination was still irrational because it relied on speculative, unsubstantiated and demonstrably false evidence and again

failed to address much of the indisputable evidence supporting recycling. Appellants' Br. at 40–47.

As an initial matter, the City's argument that the Commissioner is entitled to a presumption that she executed her duties faithfully and independently, *see* Opp'n at 50, carries no water. Questions of "pure statutory reading and analysis," like the Commissioner's failure to comply with Local Law 142, require no such deference. *Kurcsics v. Merchs. Mut. Ins. Co.*, 49 N.Y.2d 452, 459 (1980); *see also Novello*, 65 A.D.3d at 118. Moreover, the Commissioner's determination was hardly independent. Indeed, it is undisputed that at the very same press conference announcing her appointment, Mayor de Blasio declared war on foam, vowing to "eliminat[e] the use of Styrofoam" and ordering his administration to "try[] to get it out of our society writ large." R.292 (Ex. 7 (Capital N.Y. Article) at 2). The Commissioner then spent three years carrying out the Mayor's plan, culminating in a second determination banning foam issued just hours after a public hearing on a foam recycling bill. This is the exact type of failure to "reach[] . . . [an] independent conclusion" that overcomes any presumption of good faith. *See Kilgus v. Bd. of Estimate of the City of N.Y.*, 308 N.Y. 620, 628 (1955).[4]

[4] The cases cited by the City, *see* Opp'n at 50, do not dictate a different result, as those cases do not involve an agency crediting irrelevant and speculative evidence while completely ignoring relevant evidence of a disfavored conclusion, as is the case here. *See N.Y. Pub. Interest Research Grp.*

(Cont'd on next page)

The 2017 Determination was flawed in myriad other respects that render it irrational. The Commissioner, for instance, relied on a faulty "throughput test" run at Sims over the course of one day in 2016 purporting to show Sims could only capture 56% of the "soft foam" EPS it attempted to sort, and, therefore, the City could not effectively recycle "dirty" foam. *See* R.239 (Ex. 2 (2017 Determination) at 23). But this trumped-up test was completely disreputable, and it was arbitrary and capricious for the Commissioner to rely on it at all. The Commissioner's 2015 Determination noted that, by Sims' own admission, its optical sorters could capture 75% of the "soft foam" EPS in the City's recycling stream. See R.265 (Ex. 3 (2015 Determination) at 5). And even this 75% estimate was low, because it did not account for the addition of four critical elements of the comprehensive recycling plan that the industry has offered to provide and pay for at no cost to the City: (1) state-of-the-art technology, which has previously demonstrated capture rates of 90–95%, *see* R.286 (Ex. 5 (2017 Centers Aff.) ¶¶ 7–8); (2) fine-tuning and programming that technology to ensure optimal performance; (3) the addition of new personnel at Sims to operate the new technology; and (4) specialized training for all personnel to maximize the effectiveness of the sorting process. Thus, as the trial court recognized in voiding the Commissioner's 2015 Determination, it was

---

Straphangers Campaign, Inc. v. Metro. Transp. Auth., 309 A.D.2d 127, 139 (1st Dep't 2003); *Taub v. Pirnie*, 3 N.Y.2d 188 (1957).

arbitrary and capricious of the Commissioner to fail to recognize a capture rate of at least 75%, and as much as 95%, as clear evidence that it is "environmentally effective" to recycle post-consumer "soft foam" EPS. R.278 (Ex. 4 (2015 Order) at 8).

Yet that is exactly what the Commissioner did in her 2017 Determination. Realizing that the recognition of such a high capture rate would require her to find that post-consumer EPS was recyclable, the Commissioner had Sims contrive the 2016 one-day "test" to produce a rate lower than what Sims previously admitted it could capture. And while the Commissioner claimed Sims used an unidentified optical sorter "calibrated to identify and positively sort for polystyrene," R.239 (Ex. 2 (2017 Determination) at 23), it performed this faux "test" without any of the four essential components that the industry has committed to provide and pay for in connection with its comprehensive recycling plan—the state-of-the-art technology that the industry has successfully used elsewhere to achieve 95% capture rates, fine-tuning of that technology, additional personnel to work the sorting line to increase capture rates, and specialized training of such personnel—all of which should ensure an even higher capture rate than the 75% Sims admitted it could achieve in 2015.

This suspect 2016 one-day "test" commissioned on remand was therefore inherently unreliable as a measure of long-term recovery rates and cannot

reasonably have been relied upon by the Commissioner to supplant her earlier 2015 finding, when she recognized a recovery rate of at least 75% based on information provided by the City's same contractor, Sims. R.265 (Ex. 3 (2015 Determination) at 5). Indeed, Sims itself has never questioned its ability to achieve a satisfactory "soft foam" recovery rate.

Moreover, buried in the City's appeal brief is its own admission that "it is technologically possible to recycle" even "dirty food-service foam," "with enough time, effort, and money." *See* Opp. at 51. The industry's comprehensive plan undeniably does just that, giving the City "enough time, effort, and money" to guarantee a successful recycling program for many years to come. Therefore, the Commissioner had no choice but to credit this indisputable record evidence.

The Commissioner also relied on irrelevant, data-free comments about other cities' recycling efforts in her 2017 Determination. R.245–52 (Ex. 2 (2017 Determination) at 29–36); Opp'n at 24–25, 32–34. But not one of those cities had a comprehensive recycling plan like the one proposed in New York, which would provide a guaranteed market for recycled foam, cost the City nothing, and utilize state-of-art equipment that would make sorting foam economical and effective.[5]

---

[5] It also makes no difference that a non-party to this suit, Evergreen, was ultimately unsuccessful in implementing its own plan to recycle foam lunch trays in Massachusetts. *See* Opp. Br. at 42–44 (*citing Evergreen Partnering Grp. v. Pactiv Corp*. 116 F. Supp. 3d 1 (D. Mass. 2015)). That argument fails

(Cont'd on next page)

Even to the extent that evidence as to other cities' recycling efforts could be construed as relevant, the Commissioner's assessment of that evidence was irrational. The Commissioner focused only on purportedly failed recycling efforts in other cities to support the Mayor's pre-ordained foam ban, ignoring successful efforts like the program employed in San Diego—the nation's eighth largest city—in 2017. R.725–26 (2017 City of San Diego Press Release).[6] And in no instance

---

for the same reason as the City's reliance on efforts to recycle EPS in other markets generally—it is irrelevant and says nothing about the safeguards Appellants have put in place to ensure that recycling will be a success in New York City. There is no dispute that a successful recycling progress will require industry expertise and financial commitment—precisely what Appellants here have provided. What was done in another state as part of a program implemented nearly 20 years ago has no bearing on whether recycling EPS is feasible now under the uniquely comprehensive plan tailored to meet New York City's needs proposed by Appellants.

[6] For over a year, the City of San Diego has collected clean food-service foam for recycling, with the city's primary material recovery facilities then turning that material over to recycling expert Titus for sorting and processing. *See Yes, these can be recycled in your curbside bin*, City of San Diego, https://www.sandiego.gov/environmental-services/recycling/residential/curbside/yes (last visited Aug. 23, 2018) (noting that foam packaging and clean food-service foam containers are accepted for recycling); Cole Rosengren, *San Diego will allow polystyrene food containers in curbside recycling bins*, Waste Dive (June 21, 2017), https://www.wastedive.com/news/san-diego-will-allow-polystyrene-food-containers-in-curbside-recycling-bins/445436/; *see also* David Garrick, *Instead of ban, San Diego will allow recycling of foam food containers,* The San Diego Union Tribune (June 20, 2017), http://www.sandiegouniontribune.com/news/politics/sd-me-foam-recycle-20170620-story.html.

did the Commissioner actually report a recovery rate for any of the so-called "failed" recycling efforts. R.245–52 (Ex. 2 (2017 Determination) at 29–36).

Worse yet, the Commissioner cherry-picked opinions within each city, relying on a haphazard selection of statements favoring a ban, to the exclusion of evidence of successful recycling efforts. The Commissioner's refusal to account for objective evidence in support of recyclability is perhaps best evidenced by her inexplicable refusal to credit the many letters from Burrtec Waste Industries, Inc. ("Burrtec") stating that it successfully and profitably recycles dirty foam, including from the municipality, Riverside, California. *See* Opp'n at 25–27. Instead, the Commissioner relied on an unnamed source to allege that Riverside does not recycle post-consumer foam (even though Burrtec was, in fact, recycling it). Three times in three years, Burrtec voluntarily provided evidence in the record when it did not have to, for the benefit of a potential competitor (PRI), only to have its statements ultimately disregarded and discounted. *See* R.705 (Ex. 52 (2016 Burrtec Letter)) (stating that "[s]ince 2009, [Burrtec] ha[s] been successfully sorting and recycling post-consumer EPS," and that they "sort foam at two of [their] material recovery facilities"); R.719 (Ex. 57 (2014 Burrtec Letter)) (noting that Burrtec's EPS recycling pilot program was "successful," so Burrtec expanded it); R.721 (Ex. 58 (2017 Burrtec Letter)) (stating that Burrtec's "post-consumer recycling program for foam foodservice containers is alive and well").

Similarly, in citing concerns about PRI's ability to process all of the City's foam, R.240–41 (Ex. 2 (2017 Determination) at 24–25), Opp'n at 36–40, the Commissioner failed to consider relevant evidence to the contrary. PRI has repeatedly (in sworn statements) reported internal demand for polystyrene for more than the expected yield of the New York City recycling program, has shown it will recycle all of the City's polystyrene for a profit, and has submitted letters from more than a dozen non-parties who are potential buyers for any excess supply, which PRI does not use to manufacturer its own products. *See, e.g.*, R.289 (Ex. 6 (2017 Shaw Aff.) ¶¶ 9–12); R.347–48 (Ex. 20 (2015 Shaw Aff.) ¶¶ 22–23, 25); R.360 (Ex. 22 (June 2014 PRI Letter)); R.476–77 (Ex. 31 (List of Interested Companies)); R.478–96 (Ex. 32 (Letters from Interested Companies)); R.500–02 (Ex. 34 (Sept. 2014 PRI Letter) at 2–4). On the cost side, PRI showcased its commitment to the recycling plan by investing millions of dollars in an expanded facility, thereby evidencing its belief that recycling New York City's polystyrene would be a profitable endeavor. R.289 (Ex. 6 (2017 Shaw Aff.) ¶¶ 5–8).[7]

[7] The City's latest attempt to backfill a record that does not support its position does not change that result. In its opposition brief, for the first time, the City posits hypothetical numbers to claim that PRI does not have capacity to process the City's foam. *See* Opp'n at 39–40 (claiming there are not enough hours in a year for PRI to fully process all of the recycled material it would receive from the City). This newfound argument erroneously assumes, among other things, that PRI has limited processing capacity, that neither the City (which must promulgate rules for recycling) nor Sims (which must implement the program,

(Cont'd on next page)

Indeed, the multitude of affidavits submitted from recycling experts support that the PRI facility "is best-in-class and will be able to recycle all of New York City's foam efficiently and without any significant amount of material being landfilled." R.385 (Ex. 25 (Firpo Aff.) ¶¶ 16, 18); *see also* R.289 (Ex. 6 (2017 Shaw Aff.) ¶¶ 5–9); R.647–48 (Ex. 46 (2016 PRI Letter)). Moreover, Dart and PRI, the backers of the comprehensive recycling plan, have demonstrated a willingness and an ability to expand whenever necessary.

The City's opposition brief misconstrues Appellants' position to suggest that the Commissioner could not consider **any** contradictory evidence in issuing the 2017 Determination. Opp'n at 53. Not so. Appellants object to the Commissioner's consideration of wholly irrelevant and false evidence purportedly supporting a ban to the exclusion of relevant, credible evidence in favor of recyclability. Indeed, none of the authorities cited by the City suggest that an agency may properly weigh irrelevant and unsubstantiated evidence when making a determination. *See, e.g.*, *Farrell v. N.Y. City Police Dep't*, 37 N.Y.2d 843 (1975) (*cited* at Opp'n at 53) (agency's determination was proper where petitioner only

---

employing new workers and technology) would require any ramp-up time, and that PRI cannot continue to expand to accommodate increasing supply over time. The administrative record does not support any of those assumptions, and the City has therefore engaged in "fuzzy math" unworthy of any further consideration, especially since raised for the first time on appeal, and, therefore, not anything on which the Commissioner purported to rely.

submitted evidence directly relevant to the agency's inquiry); *P'ship 92 LP & Bldg. Mgt. Co. v. State Div. of Hous. & Cmty. Renewal,* 46 A.D.3d 425 (1st Dep't 2007) (*cited* at Opp'n at 53) ("contradictory" evidence before the agency consisted of relevant information regarding the central issue of the case, not irrelevant information untethered from the scope of the agency's review).[8] Because the 2017 Determination turned on irrelevant, speculative, and false information, it must be set aside.

Moreover, as discussed in Sections I and II, here, the Commissioner ignored the plain meaning of the statute, which requires recycling under these circumstances. Indeed, late in its brief, the City concedes that "it is technologically possible to recycle" even "dirty food-service foam," "with enough time, effort, and money." *See* Opp'n at 51. Appellants have demonstrated that their comprehensive recycling plan does just that, guaranteeing "enough time, effort, and money" to ensure a successful recycling program for the next five or more years. The statutory standard requiring recycling is clearly met here, and the Commissioner

[8] Contrary to the City's claim, *see* Opp'n at 50, this case is nothing like *Taub v. Pirnie*, 3 N.Y.2d 188 (1957), in which a zoning board member absent from a variance hearing later apprised himself of relevant information prior to voting. *Id.* at 193, 195–96. Whereas the board member in *Taub* reviewed the contemporaneous record of the variance application, here, the Commissioner blatantly ignored pertinent information collected during the relevant timeframe, choosing instead to conduct a *de novo* investigation.

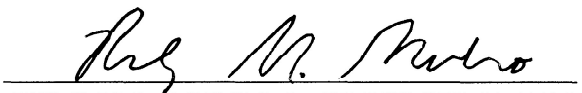
had no discretion to ban food-service foam. Her arbitrary and capricious decision to the contrary cannot stand.

CONCLUSION

For the reasons stated herein, this Court should reverse the lower court's decision, reinstate Appellants' Article 78 petition, and grant the relief requested therein, annulling and vacating the Commissioner's May 12, 2017 determination and ordering DSNY to adopt rules for recycling EPS food-service packaging pursuant to Local Law 142.

Dated: New York, New York
August 24, 2018

Respectfully submitted,

By: 

GIBSON, DUNN & CRUTCHER LLP
Randy M. Mastro
Mylan L. Denerstein
Paul J. Kremer
200 Park Avenue, 47th Floor
New York, New York 10166-0193
(212) 351-2400

Attorneys for Petitioners-Appellants Restaurant Action Alliance NYC, Cecilio Albayero, Jose Castillo, Maximiliano Gonzales, Andres Javier-Morales, Arismendy Jerez, Tony Juela, Ruperto Morocho, Astrid Portillo, Sergio Sanchez, Lucino Ramos, Esmeralda Valencia, Plastics Recycling Inc., Dart Container Corporation, Genpak LLC, and Commodore Plastics LLC

C. David Watson
(admitted *pro hac vice*)
General Counsel,
Reynolds Consumer Products
1900 W. Field Court
Lake Forest, IL 60045
(847) 482-3155

Attorney for Petitioner-Appellant Reynolds Consumer Products LLC

Steven R. Karl
(admitted *pro hac vice*)
Vice-President and General Counsel,
Pactiv LLC
1900 W. Field Court
Lake Forest, IL 60045
(847) 482-2113

Attorney for Petitioner-Appellant
Pactiv LLC

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 600.10(d)(1)(v)

The foregoing brief was prepared on a computer using a proportionally spaced typeface:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 6,109.

To Be Argued By:
RANDY M. MASTRO

New York County Clerk's Index No. 100734/15

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of

RESTAURANT ACTION ALLIANCE NYC, CECILIO ALBAYERO, JOSE CASTILLO, MAXIMILIANO GONZALES, ANDRES JAVIER-MORALES, ARISMENDY JEREZ, TONY JUELA, RUPERTO MOROCHO, ASTRID PORTILLO, SERGIO SANCHEZ, LUCINO RAMOS, ESMERALDA VALENCIA, PLASTICS RECYCLING INC., DART CONTAINER CORPORATION, PACTIV LLC, GENPAK LLC, COMMODORE PLASTICS LLC, and REYNOLDS CONSUMER PRODUCTS LLC,

Petitioners-Appellants,

For Judgment Pursuant to CPLR Article 78

—against—

THE CITY OF NEW YORK; KATHRYN GARCIA, in her official capacity as Commissioner of the New York City Department of Sanitation; THE NEW YORK CITY DEPARTMENT OF SANITATION, a charter-mandated agency; and BILL DE BLASIO, in his official capacity as Mayor of the City of New York,

Respondents-Respondents.

BRIEF FOR PETITIONERS-APPELLANTS

RANDY M. MASTRO
MYLAN L. DENERSTEIN
PAUL J. KREMER
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166
(212) 351-4000
rmastro@gibsondunn.com
mdenerstein@gibsondunn.com
pkremer@gibsondunn.com

Attorneys for Petitioners-Appellants Restaurant Action Alliance NYC, Cecilio Albayero, Jose Castillo, Maximiliano Gonzales, Andres Javier-Morales, Arismendy Jerez, Tony Juela, Ruperto Morocho, Astrid Portillo, Sergio Sanchez, Lucino Ramos, Esmeralda Valencia, Plastics Recycling Inc., Dart Container Corporation, Genpak LLC, Commodore Plastics LLC

(*Counsel continued on inside cover*)

C. DAVID WATSON
(*pro hac vice* admission pending)
GENERAL COUNSEL,
REYNOLDS CONSUMER PRODUCTS
1900 W. Field Court
Lake Forest, Illinois 60045
(847) 482-3155
david.watson@reynoldsbrands.com

Attorney for Petitioner-Appellant
Reynolds Consumer Products LLC

STEVEN R. KARL
(*pro hac vice* admission pending)
VICE-PRESIDENT AND GENERAL
COUNSEL, PACTIV LLC
1900 W. Field Court
Lake Forest, Illinois 60045
(847) 482-2113
skarl@pactiv.com

Attorney for Petitioner-Appellant
Pactiv LLC

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Rules

QUESTIONS PRESENTED

1. Whether Local Law 142 of 2013 ("Local Law 142") mandates New York City's Sanitation Commissioner to recycle expanded polystyrene food-service items (also known as "soft foam"), rather than ban them, because the industry's self-funded plan has guaranteed the City a successful recycling program that will be "environmentally effective" and "economically feasible" for years to come.

The court below erred in answering this question, "No."

2. Whether, on remand after the lower court vacated the Commissioner's original decision as failing to comply with Local Law 142's recycling requirement, the Commissioner was precluded from expanding the administrative record to try to support her original decision with wholly new material generated after January 1, 2015, as contrary to (a) the plain text of Local Law 142, which required the Commissioner to make a one-time only determination on the recyclability of expanded polystyrene food-service packaging by no later than January 1, 2015, and (b) the principle of administrative finality.

The court below erred in answering this question, "No."

3. Whether the Commissioner's determination should be vacated and annulled in any event because she relied on rank speculation, unsubstantiated assertions, and demonstrably false claims, while, at the same time, failing to consider many facts establishing the feasibility of recycling.

The court below erred in answering this question, "No."

NATURE OF THE CASE

This appeal challenges the New York City Sanitation Commissioner's renewed attempt to ban expanded polystyrene ("EPS") food-service packaging, even though local law expressly mandates recycling so long as "economically feasible" and "environmentally effective" for the City to do so. *See* R.212 (Ex. 1 (LL142) N.Y. City Admin. Code § 16-329(b)). Industry participants have offered to self-fund a comprehensive recycling program that guarantees the City will meet these statutory criteria for years to come. As a result, when the court below annulled the Commissioner's first attempt to ban soft foam in 2015, the court expressly found that "[t]he one undisputed short answer to whether EPS is recyclable is yes: single serve EPS is recyclable." R.278 (Ex. 4 (2015 Order at 8)).

That should have ended the statutory inquiry. However, last year, the Commissioner, intent on fulfilling Mayor de Blasio's campaign promise to ban "Styrofoam," *see, e.g.*, R.575 (Ex. 39 (Huffington Post Article) at 2); R.580 (Ex. 40 (PIX 11 Article) at 2); R.585–86 (Ex. 41 (Candidate Profile) at 5–6), issued this second determination parroting her first (the "2017 Determination"). The court below then inexplicably found this latest decision somehow passed muster, even though the core facts establishing the feasibility of soft foam recycling remained unchanged. R.17–19 (2018 Order at 8–10). Appellants therefore now ask this

Court to reverse the judgment below, order the Commissioner's second determination annulled and vacated as arbitrary, capricious and an abuse of discretion, and compel the Commissioner to implement a recycling program, as local law requires.

When the New York City Council passed Local Law 142, it could not have made its intentions any clearer: it expressly mandated that, if EPS can be recycled in an "economically feasible" and "environmentally effective" manner, then the Commissioner "shall adopt" rules implementing its recycling. *See* R.212 (Ex. 1 (LL142) § 16-329(b)). In response to that statutory mandate, industry participants, including some of those appealing here, offered the City a self-funded, comprehensive plan to purchase and recycle all of the City's polystyrene—none of which is being recycled now—at a guaranteed price for the next five years, and, in the process, assured the City millions of dollars for its coffers and less polystyrene going to landfills than under a soft foam food-service packaging ban alone. R.356 (Ex. 21 (2014 Dart Letter) at 2). Indeed, it remains undisputed that the industry's comprehensive plan to recycle all of the City's EPS is necessarily "economically feasible"—because it will cost the City nothing more to collect soft foam within the City's existing recycling program, save the City millions in landfill costs, and potentially generate millions more in recycling revenues, R.222 (Ex. 2 (2017 Determination) at 6); R.267–68 (Ex. 3 (2015 Determination) at 7–8); R.356 (Ex.

21 (2014 Dart Letter) at 2); R.415 (Ex. 29 (2016 BRG Report) at 10)—and "environmentally effective"—because polystyrene will be made into new, marketable products using state-of-the-art technology, rather than going to landfills, *see, e.g.*, R.345, 347 (Ex. 20 (2015 Shaw Aff.) ¶¶ 6, 23); R.289 (Ex. 6 (2017 Shaw Aff.) ¶¶ 9–11). In fact, the industry's self-funded comprehensive plan to recycle all of the City's polystyrene is even more "environmentally effective" than the Commissioner's ban on soft foam food-service items alone, because less polystyrene will end up being landfilled than under that limited ban. R.504 (Ex. 35 (July 2015 Cantor Aff.) ¶ 4). In short, the Commissioner's determination is not only the height of irrationality; it also directly violates her statutory mandate.

Under Local Law 142, the Commissioner had only one job: to "determine," "no later than" January 1, 2015, whether soft foam recycling would be "economically feasible" and "environmentally effective" for the City to do. R.212 (Ex. 1 (LL142) § 16-329(b)). The industry's self-funded plan should have made that determination a foregone conclusion. But Mayor de Blasio had promised to ban soft foam when he ran for mayor, and after his election, he announced at the March 15, 2014 press conference appointing Sanitation Commissioner Garcia that he expected her to "eliminat[e] the use of Styrofoam" and that the administration would "try[] to get it out of our society writ large." R.292 (Ex. 7 (Capital N.Y. Article) at 2). It came as no surprise, then, that the Commissioner did as her boss

instructed, issuing a January 1, 2015 determination questioning the efficacy of soft foam recycling without the industry's self-funded, five-year guaranteed plan and directing an outright ban (the "2015 Determination"). R.269 (Ex. 3 (2015 Determination) at 9). The Commissioner made this determination, despite having to acknowledge core facts establishing the "environmental[] effective[ness]" and "economic[] feasib[ility]" of recycling soft foam. *See* R.262, 264–68 (Ex. 3 (2015 Determination) at 2, 4–8); R.2112.10–.11, .17, .32, .37 (Ex. SS (2015 Garcia Aff.) ¶¶ 35, 42, 64, 114, 126).[1] Appellants then brought an Article 78 action, and on September 21, 2015, the Supreme Court (Chan, J.) annulled and vacated the Commissioner's 2015 Determination, remanding the matter for further action and expressly holding, based on the record evidence, that "[t]he one undisputed short answer to whether EPS is recyclable is yes." R.278 (Ex. 4 (2015 Order) at 8).

What happened next was a farce. Instead of implementing a recycling program consistent with her statutory mandate and the undisputed record evidence, the Commissioner spent the next 20 months struggling to contrive a rationale for

[1] The Commissioner, while effectively conceding the industry's self-funded plan ensured fulfilment of the statutory criteria requiring recycling for at least the next five years, reasoned that there was no guarantee of a continuing market for the City's recyclables thereafter. R.258 (Ex. 2 (2017 Determination) at 42). But the statute did not purport to impose any such "in perpetuity" requirement, nor could it. Rather, it required only a finding that the City's soft foam EPS could be recycled at that time, R.212 (Ex. 1 (LL142) § 16-329(b)), which the industry's plan admittedly guaranteed.

evading that mandate. On May 12, 2017, the Commissioner issued a wholly "new" determination, once again endorsing the mayor's preordained outcome to ban foam. R.216–59 (Ex. 2 (2017 Determination)). This "new" determination came, despite the industry's renewed guarantee to self-fund a comprehensive EPS recycling program for the City for at least the next five years, *see, e.g.,* R.356 (Ex. 21 (2014 Dart Letter) at 2), the City Council's statutory mandate requiring the Commissioner to make a determination based on a record established by January 1, 2015, and to implement a recycling program so long as "environmentally effective" and "economically feasible" to do, R.212 (Ex. 1 (LL142) § 16-329(b)), and the lower court's order directing the Commissioner on remand to credit the "undisputed" fact that "single serve EPS is recyclable." R.278 (Ex. 4 (2015 Order) at 8).

The 2017 Determination purported to be based on new arguments and an expanded record supplemented since the 2015 Determination. But the City Council's mandate and the core facts compelling recycling remained the same, and no matter how hard the Commissioner tried to recast the determination and attribute it to "new" information, it was like "déjà vu" all over again.

As a result, Appellants once again had to bring an Article 78 challenge, fully expecting this equally flawed repeat decision to suffer the same fate as the first. But this time, the court below inexplicably upheld the Commissioner's "new"

determination, finding the Commissioner had discretion both to expand the administrative record beyond that created as of the City Council's January 1, 2015 statutory deadline and to reject the industry-funded recycling proposal that would admittedly have guaranteed compliance with the City Council's express statutory mandate for years to come. R.17–18 (2018 Order at 8–9).

Under Local Law 142, however, the Commissioner had no discretion to do either of those things. That the court below permitted otherwise was clear error of law, violating not only the plain language of Local Law 142 but also New York's "long-standing policy of finality" for actions by administrative agencies. *Centennial Restorations Co. v. Abrams*, 180 A.D.2d 340, 344 (3d Dep't 1992). But even considering this so-called "new" information, the 2017 Determination is fatally flawed, because the Commissioner credited rank speculation, unsubstantiated assertions, and demonstrably false claims, while, at the same time, "fail[ing] to consider" a myriad of facts supporting recycling. R.19 (2018 Order at 10). As a result, even on this expanded record, the Commissioner's determination lacks a "sound basis in reason." *See Nestle Waters N. Am., Inc. v. City of New York*, 121 A.D.3d 124, 127 (1st Dep't 2014) (*citing Pell v. Bd. of Educ. of Union Free Sch. Dist. 1 of Mamaroneck*, *Westchester Cty.*, 34 N.Y.2d 222, 231 (1974)).

Accordingly, this Court should reverse the judgment below, order the Commissioner's determination annulled and vacated, and direct the Commissioner to implement a recycling program, as mandated under local law.

FACTS

A. The City Council Passes Local Law 142 to Require EPS Recycling if "Environmentally Effective" and "Economically Feasible" for the City.

On December 19, 2013, the New York City Council passed Local Law 142 of 2013, N.Y. City Admin. Code § 16-329, which directed the Commissioner of the New York City Department of Sanitation ("DSNY") to make a one-time determination, by "[n]o later than January first, two thousand fifteen," as to whether "expanded polystyrene single service articles can be recycled at the designated recycling processing facility at the South Brooklyn Marine Terminal in a manner that is **environmentally effective**,[2] **economically feasible**,[3] and safe for

[2] Local Law 142 defines "environmentally effective" as "not having negative environmental consequences including, but not limited to, having the capability to be recycled into new and marketable products without a significant amount of material accepted for recycling being delivered to landfills or incinerators." R.210 (Ex. 1 (LL142) § 16-329(a)).

[3] Local Law 142 defines "economically feasible" as "cost effective based on consideration of factors including, but not limited to, direct and avoided costs such as whether the material is capable of being collected by the department in the same truck as source separated metal, glass and plastic recyclable material, and shall include consideration of markets for recycled material." R.210 (*Id.*).

employees.[4]" R.212 (Ex. 1 (LL142) § 16-329(b) (emphasis added)). If so, the law directed that "the commissioner shall adopt and implement rules designating expanded polystyrene single service articles and, as appropriate, other expanded polystyrene products, as a recyclable material and require the source separation of such expanded polystyrene for department-managed recycling," consistent with the City's longstanding policy in favor of recycling. R.212 (*Id.*); *see also* N.Y. City Admin. Code § 16-302. If not, then a limited ban on foam food-service items would be imposed, effective July 1, 2015.

Late in 2013, Mayor Michael Bloomberg tried and failed to get the City Council to ban food-service foam outright. *See* R.1903 (Ex. U (R) (N.Y. Times Feb. 2013 Article) at 1). During hearings on the bill that became Local Law 142 (Intro. 1060), the Bloomberg administration falsely estimated that "an EPS foam curbside recycling program would require the addition of the minimum [*sic*] of . . . 1,000 additional truck routes at a cost of [$]70 million per year." R.333–34 (Ex. 16 (2013 Legislative Hr'g Tr.) at 27:24–28:4). The City Council thereafter amended the bill to address the Bloomberg administration's putative concern about the City's increased trucking costs, specifying that recycling would have to be "cost effective" even after taking into account the costs of transporting foam

[4] There is no dispute in this case that EPS recycling would be "safe for employees" under Local Law 142. *See* R.255–56 (Ex. 2 (2017 Determination) at 39–40); R.265 (Ex. 3 (2015 Determination) at 5).

material to the City's municipal sorting facility. R.210 (Ex. 1 (LL142) § 16-329(a)) (requiring consideration of "factors including, but not limited to, direct and avoided costs such as whether the material is capable of being collected by the department in the same truck as source separated metal, glass and plastic recyclable material").

The Bloomberg administration also expressed its view that New York City's post-consumer EPS would be too "dirty" from food contamination to be effectively washed and recycled into useful products. *See* R.1910 (Ex. U (T) (N.Y. Times Dec. 2013 Article) at 2). The Council therefore required a determination of "environmental[] effective[ness]," defined as whether EPS has "the capability to be recycled into new and marketable products without a significant amount of material accepted for recycling being delivered to landfills or incinerators." R.210 (Ex. 1 (LL142) § 16-329(a)).

Local Law 142 also required the Commissioner to "consult[] with the department's designated recycling contractor for metal, glass and plastic materials, manufacturers and recyclers of expanded polystyrene, and . . . any other person or group having expertise on expanded polystyrene," and to publicly "report to the mayor and the council on" her findings by January 1, 2015, in a one-time determination considering all the evidence made available to her by that date. R.212 (*Id.* § 16-329(b)).

B. Mayor Bill de Blasio Resists the City Council's Mandate to Recycle Polystyrene.

One month after Local Law 142 was signed into law, Bill de Blasio became the Mayor of New York. Shortly thereafter, at the March 15, 2014 press conference introducing DSNY Commissioner Kathryn Garcia, Mayor de Blasio pledged that he was committed to "eliminating the use of Styrofoam" and that he would "try[] to get it out of our society writ large." R.292 (Ex. 7 (Capital N.Y. Article) at 2).

Not surprisingly, despite overwhelming undisputed evidence that New York City's foam can be recycled at no cost to the City, and in a manner that will actually save the City money and reduce landfill waste, *see infra*, Section C, the Commissioner issued a determination rejecting the recycling plan and banning EPS on January 1, 2015. *See infra*, Section D.

Since his election, Mayor de Blasio has also arbitrarily refused to take action on other, related opportunities to increase recycling in the City. Indeed, to this day, New York City still does not have a formal program in place to recycle the tens of thousands of tons of rigid (non-foam) polystyrene that it has been collecting on DSNY recycling trucks since 2013—material that Appellants committed to recycle, at no cost the City, as part of their comprehensive plan under Local Law 142. *See* R.1870–71 (Ex. U (I) (Crain's Article)); R.356 (Ex. 21 (2014 Dart Letter) at 2). That rigid polystyrene material likely goes to landfills overseas, for no

reason other than Mayor de Blasio's refusal to adopt Appellants' zero-cost proposal. As of 2014, the City was failing to recycle approximately 30,000 tons of rigid polystyrene each year, more than twice the amount of polystyrene that would be subject to the Mayor's preferred "foam ban," and paying to landfill it at taxpayer expense. R.509 (Ex. 35 (July 2015 Cantor Aff.) at 7); *see also* R.831–35 (Ex. 70 (Waste Characterization Study)).

C. Appellants and Other Industry Participants Guarantee that New York City Can Recycle Foam in an "Economically Feasible" and "Environmentally Effective" Manner.

Over the course of several months following the adoption of Local Law 142, Dart Container Corporation ("Dart," a "manufacturer[] . . . of expanded polystyrene" under the statute), Plastic Recycling, Inc. ("PRI," a "recycler[] of expanded polystyrene"), and Sims Municipal Recycling ("Sims," DSNY's "designated recycling contractor for metal, glass and plastic materials") worked to develop a comprehensive recycling plan that would satisfy the statute. *See, e.g.*, R.212 (Ex. 1 (LL142) § 16-329(b)); R.356 (Ex. 21 (2014 Dart Letter) at 2); R.360 (Ex. 22 (June 2014 PRI Letter)); R.499 (Ex. 34 (Sept. 2014 PRI Letter) at 1). Under the plan:

- DSNY trucks would collect foam and other polystyrene from residences at curbside, as part of DSNY's regular residential recycling program, utilizing excess truck capacity at no additional cost to the City. *See* R.346 (Ex. 20 (2015 Shaw Aff.) ¶ 11); R.267 (Ex. 3 (2015 Determination) at 7);

- Sims would sort and bale the City's food-service foam, other EPS foam, and rigid polystyrene material, like Sims does for other recyclable metals, glasses, and plastics delivered by the City. R.355–56 (Ex. 21 (2014 Dart Letter) at 1–2);

- PRI would purchase all of the sorted polystyrene material from Sims for a market price of no less than $160/ton. R.356 (Ex. 21 (2014 Dart Letter) at 2); and

- PRI would clean and process the City's polystyrene in its new, state-of-the-art facility, before turning it into office supplies through its manufacturing arm and selling any excess to other polystyrene products manufacturers. R.289 (Ex. 6 (2017 Shaw Aff.) ¶¶ 7, 10–11).

Appellants then bolstered their recycling plan with enforceable guarantees.

First, to ensure cost-effectiveness for the City, Dart—the nation's largest manufacturer of polystyrene food-service products—agreed to purchase all necessary equipment for Sims, including a state of-the-art optical sorter, and pay for additional expenses that Sims had identified, including additional staff and training. *See, e.g.*, R.356 (Ex. 21 (2014 Dart Letter) at 2).

Second, Dart underwrote the market for recycled polystyrene by guaranteeing that PRI would purchase and recycle all of the polystyrene material Sims could collect at a market price no less than $160/ton for at least the first five years of the program—a term requested by Sims. R.356 (Ex. 21 (2014 Dart Letter) at 2); R.654 (Ex. 48 (Westerfield Aff.) ¶ 6). Dart and PRI reserved a right of first refusal for themselves, but did not seek to prohibit Sims from selling its collected material to other bidders in the future.

Third, PRI assured DSNY that it would recycle all of the City's polystyrene. R.345 (Ex. 20 (2015 Shaw Aff.) ¶¶ 5–7). PRI, which has been successfully and profitably recycling polystyrene and other types of plastics since 1988, has the experience and the capacity to efficiently recycle all of the New York City polystyrene received from Sims. *See* R.344, 347 (*Id.* ¶¶ 2–3, 16–22). Indeed, starting in 2014, in anticipation of recycling New York City's polystyrene, Dart and PRI invested millions to build out PRI's Indianapolis facility so that PRI could profitably recycle New York City's foam in the long-term, not just for the five-year initial term suggested by Sims. R.289 (Ex. 6 (2017 Shaw Aff.) ¶¶ 7, 12); R.654 (Ex. 48 (Westerfield Aff.) ¶ 6); R.1897–98 (Ex. U (P) (Aug. 2014 Dart Letter) at 1–2).

In mid-2014, Sims, Dart, and PRI reached a deal in principle on these terms and presented their comprehensive plan to DSNY. *See*, *e.g.*, R.355–59 (Ex. 21 (2014 Dart Letter)).

1. The Recycling Plan Is "Economically Feasible," Because It Will Never Cost the City Anything and Will Generate Millions in "Avoided Costs" and Revenue.

Under Local Law 142, recycling is economically feasible if it is "cost effective based on consideration of factors including, but not limited to, . . . whether the material is capable of being collected by the department in the same truck as source separated metal, glass and plastic recyclable material." R.210 (Ex.

1 (LL142) § 16-329(a)). To make a determination on "cost effectiveness," the Commissioner must consider "markets for recycled material," *i.e.*, whether the City will have a buyer to justify any costs it might incur. R.210 (*Id.*).

Appellants obviated the need for guesswork by agreeing to bear all of the City's and Sims's out-of-pocket costs and by guaranteeing a price for the City's EPS for at least the first five years, such that the City would bear no risk of loss. R.356 (Ex. 21 (2014 Dart Letter) at 2). Indeed, since 2014, it has been undisputed that the City will not be liable for **any** of the expenses associated with recycling, including incremental trucking costs—since, as the Commissioner found, there are none, and EPS can be added seamlessly to existing routes. R.261–62, 267 (Ex. 3 (2015 Determination) at 1–2, 7).

The City, Sims, and New York City residents also stand to reap additional economic benefits under the Recycling Plan. There is no dispute that the City will save upwards of $800,000 per year by sending all polystyrene to Sims instead of banning only some food-service foam and landfilling the rest. *See* R.274 (Ex. 4 (2015 Order) at 4). The City will also avoid the costs of sending heavier substitutes to landfills or recycling facilities. *See* R.415 (Ex. 29 (2016 BRG Report) at 10 (noting that heavier substitutes are likely to incur landfill charges up to $1.48 million more per year)).

Appellants thus conclusively and indisputably demonstrated that the comprehensive recycling plan is "economically feasible."

2. The Recycling Plan Is "Environmentally Effective," Because PRI Will Turn EPS Into "New and Marketable Products" Without a "Significant Amount" of EPS Ending Up in Landfills.

Under Local Law 142, recycling food-service foam is "environmentally effective" if the material can be turned into "new and marketable products without a significant amount of material" going to waste. R.210 (Ex. 1 (LL142) § 16-329(a)). Not only did Appellants present a plan to do just that; they actually presented a plan that is **more** environmentally effective than the foam ban instituted by the Commissioner. R.356 (Ex. 21 (2014 Dart Letter) at 2).

Under the comprehensive recycling plan, after Sims has sorted the City's food-service foam and other polystyrene using the state-of-the-art optical sorters paid for and provided by Dart—at no cost to the City—PRI will purchase all of the sorted material, then clean, process, and either use or sell it. R.356 (*Id.*). PRI, which manufactures office supplies using recycled plastics, has enough demand (internally and from its outside customers) to handle New York City's entire potential supply, ensuring that the City's foam will be turned into "new and marketable products." *See, e.g.*, R.289 (Ex. 6 (2017 Shaw Aff.) ¶¶ 10–11); R.347 (Ex. 20 (2015 Shaw Aff.) ¶ 23). Moreover, PRI offered to purchase many more products than what was affected by the ban. For example, foam used to package

televisions and other electronics, foam egg cartons, foam coolers, and foam meat trays, along with rigid polystyrene products such as CD cases, cups and lids, and a multitude of office products would all get recycled instead of landfilled. R.360 (Ex. 22 (June 2014 PRI Letter)). Thus, PRI would process "effectively 100%" of **all** the polystyrene it receives from Sims, with little to no polystyrene ending up in landfills—satisfying Local Law 142. *See* R.289 (Ex. 6 (2017 Shaw Aff) ¶ 9); R.345 (Ex. 20 (2015 Shaw Aff.) ¶ 7).

Indeed, Appellants' recycling plan is **even more** "environmentally effective" than the Commissioner's proposed ban, because less recyclable material would end up in landfills than under a soft foam ban alone. R.504 (Ex. 35 (July 2015 Cantor Aff.) ¶ 4). Under the status quo, over **58,300 tons** of polystyrene is being delivered to landfills each year, and a partial foam food-service products ban would keep only about **11,866 tons** of that material out of landfills. R.509 (*Id*. at 7). By contrast, even under the Commissioner's own efficiency assumptions from 2014, the Recycling Plan would divert **17,497 tons** of polystyrene from landfills, approximately **50% more** than a ban. *See* R.504, 509 (*Id.* ¶ 4, p. 7). These assumptions are highly conservative; for example, they do not account for the fact that banned food-service foam products will likely be replaced with heavier disposable products that will continue to be shipped to landfills, thereby increasing

both the overall tonnage of waste sent to landfill and the energy required to transport it in a "partial ban" scenario. R.549 (Ex. 36 (Goodfellow Report) at 35).

Recyclable Material Diverted from Landfills Each Year, by Polystyrene Type

Polystyrene Type	Food-Service Foam Ban	Recycling Plan (Commissioner's Assumptions)	Recycling Plan (Industry Estimate)
Food-Service Foam (subject to proposed ban)	Max 11,866 tons (subject to hardship waivers, enforcement limitations, and noncompliance)	3,560 tons	4,509 tons
Other EPS (not subject to proposed ban)	0 tons	4,962 tons	6,286 tons
Rigid polystyrene	0 tons	8,975 tons	11,368 tons
Total recyclable material diverted from landfills	**11,866 tons**	**17,497 tons**	**22,163 tons**

Appellants thus conclusively and indisputably demonstrated that their recycling plain is "environmentally effective."

D. In 2015, the Lower Court Annuls and Vacates the Commissioner's Arbitrary and Capricious Determination that Foam Is Not Recyclable Under Local Law 142.

On January 1, 2015, the Commissioner issued a negative determination adopting a partial ban on foam and ignoring the voluminous, unrebutted evidence

that foam would be recycled in an "environmentally effective" and "economically feasible" manner as defined by Local Law 142. *See* R.260–69 (Ex. 3 (2015 Determination)); R.1770 (Ex. T (2015 Article 78 Petition) ¶¶ 80–86). On April 28, 2015, Appellants filed their first Article 78 petition in this case, seeking to annul and vacate the Commissioner's determination. R.1844 (Ex. T (2015 Article 78 Petition)).

During the proceeding, which included a lengthy hearing, the Commissioner made several compelling concessions. On "economic[] feasib[ility]," the Commissioner conceded, or did not dispute, that:

- She could not identify—let alone quantify—any costs to the City from recycling EPS, including any additional costs to collect EPS on the City's trucks; indeed, the Commissioner concluded that there were no costs to recycle, despite the City's prior claims to the contrary. *See* R.267–68 (Ex. 3 (2015 Determination) at 7–8); R.333–34 (Ex. 16 (2013 Legislative Hr'g Tr.) at 27:24–28:4).

- The comprehensive recycling plan would result in net cost savings of approximately $400,000 per year for the City, as well as reduce the amount of foam sent to landfills, thereby saving the City money. R.268 (Ex. 3 (2015 Determination) at 8); R.449–50, 472–73 (Ex. 30 (2017 Cantor Aff.) ¶¶ 43, 46 & Attachments 6–7).

- PRI agreed to buy all of the City's polystyrene from Sims. *See* R.262–63 (Ex. 3 (2015 Determination) at 2–3).

- "[T]here are buyers for clean EPS," R.265 (Ex. 3 (2015 Determination) at 5); "a market does exist" for the "relatively clean EPS material" that PRI would produce, R.2112.32 (Ex.

SS (2015 Garcia Aff.) ¶ 114), and "clean polystyrene can be recycled effectively," R.2112.37 (*id.* ¶ 126).

On "environmental[] effective[ness]," the Commissioner conceded, or did not dispute, that:

- There would be no "negative environmental consequences" (such as the release of pollutants) to recycling New York City's EPS, almost all of which is currently sent to landfills or not captured for responsible disposal at all. *See* R.265–67 (Ex. 3 (2015 Determination) at 5–7).

- PRI committed to "'capture[] **all** of the polystyrene material in the bales that [it] received from Sims.'" R.3370 (Ex. BBB (Respondents' 2015 Opp. Br.) at 34 (emphasis added)).[5]

- In 2014, DSNY's research into sorting technologies and tests performed at Sims showed that recycling polystyrene would remove up to 50% more polystyrene from landfills than a ban on food-service EPS alone. R.509 (Ex. 35 (July 2015 Cantor Aff.) at 7); R.824 (Ex. 68 (April 2015 Cantor Aff.) ¶¶ 9–10); R.2983–87 (Ex. TT (DD) (Waste Characterization Study).

On September 21, 2015, the lower court annulled and vacated the 2015 Determination, holding based on the facts above that the "undisputed short answer to whether EPS is recyclable is yes." R.278 (Ex. 4 (2015 Order) at 8).

[5] Despite acknowledging that PRI committed to recycle substantially all of the polystyrene received from Sims, the Commissioner went on to claim that PRI would in practice recycle only about 25% of what it received. R.262 (Ex. 3 (2015 Determination) at 2). The Commissioner's claim was based on a misinterpretation of a PRI letter stating that at the time, it had capacity to recycle 25% of New York City's total polystyrene supply—roughly the amount that the Commissioner calculated could be recovered from City residences and sorted by Sims. R.2124 (Ex. TT (D) (2013 Dart Letter) at 2). The lower court noted this error by the Commissioner. R.278–79 (Ex. 4 (2015 Order) at 8–9).

In its 15-page opinion, the lower court also correctly found that the Commissioner had ignored critical evidence supporting the recyclability of New York City's foam, including by:

- Ignoring PRI's 30 years of expertise in plastics recycling. R.283 (*Id.* at 13).
- Ignoring Dart's commitment to make technological investments in Sims, which would markedly improve Sims's recovery rate to at least 75%, and up to 90–95%. (The Commissioner relied instead on Sims's preliminary estimate that it could recover only 39–45% of EPS using its current equipment.) R.278 (*Id.* at 8).
- Ignoring corroboration of the higher expected recovery rate by DSM Environmental Services, Inc. ("DSM")—a research group commissioned by the Natural Resources Defense Council. R.279 (*Id*. at 9).
- Ignoring that the recycling plan covered both EPS and rigid polystyrene, generating maximum benefits for the environment. R.280 (*Id.* at 10).
- Ignoring evidence of the robust markets for recycled polystyrene, which justified PRI's commitment to purchase all of New York City's collected material. R.281 (*Id.* at 11).

The court ordered the matter "remanded to the Commissioner . . . for reconsideration and determination consistent with this court's decision." R.284 (*Id.* at 14). Appellees immediately sought leave to appeal the lower court's order to this Court, but were denied. *See* R.588–605 (Ex. 42 (Respondents' Request for Leave to Appeal)); R.642 (Ex. 44 (Order Denying Appeal)).

E. Rather Than Issue a Determination to Recycle EPS, the Commissioner Expanded the Record Relying on Untimely and Irrelevant Issues.

On May 13, 2017, the Commissioner issued her second "Determination on the Recyclability of Food-Service Foam." R.216–59 (Ex. 2 (2017 Determination)). Knowing full well that the evidence collected prior to January 1, 2015 showed indisputably that food-service foam must be recycled under Local Law 142, the Commissioner on remand went to great lengths to expand the administrative record to support the mayor's preference for banning foam and again ignored the plain meaning of Local Law 142. R.223 (*Id.* at 7). The Commissioner does not shy away from this fact. Indeed, she freely admits that on remand, DSNY "conducted new research" on a variety of topics, none of which had anything to do with the industry's specific proposal for New York City or Local Law 142. R.224 (*Id.* at 8).

That alleged "research" consisted largely of irrelevant observations about the effectiveness of unrelated recycling programs implemented in other municipalities. R.234–35, 245–52 (*Id.* at 18–19, 29–36). It also included a review of EPS industry websites, which proved only that "clean foam" (the product that PRI would be selling in the market) is preferred to "dirty foam." R.243–44 (*Id*. at 27–28). That observation only heightens the need to clean "dirty" post-consumer foam, as PRI has planned to do all along.

The Commissioner also made the same errors she had in 2015. For example, she once again ignored the deal reached by Dart, PRI, and Sims, under which PRI

would purchase and clean all of the City's dirty polystyrene, thereby guaranteeing a market for dirty foam. R.345 (Ex. 20 (2015 Shaw Aff.) ¶ 7); R.356 (Ex. 21 (2014 Dart Letter) at 2); R.360 (Ex. 22 (June 2014 PRI Letter) at l); R.499 (Ex. 34 (Sept. 2014 PRI Letter) at 1). Sims and PRI had even agreed on a purchase price for that deal, which ensured that recycling would also be "cost effective" for the City's contractor. R.2123 (Ex. TT (D) (2013 Dart Letter) at 1); *see also* R.274 (Ex. 4 (2015 Order) at 4). And despite conceding that "clean foam is worth the effort to recycle," R.245 (Ex. 2 (2017 Determination) at 29), the Commissioner ignored the fact that PRI would sell and use just that—clean foam. Thus, there was a "market" to buy all of the City's "dirty" foam and rigid polystyrene.

By soliciting new materials after January 1, 2015, the Commissioner shirked her mandate to implement the intent of the City Council, which was to require recycling immediately upon a finding that it would be "economically feasible" and "environmentally effective" for the City to do. R.212 (Ex. 1 (LL142) §16-329(b)). Because the industry's proposal for recycling EPS complied with the "environmental[] effective[ness]" and "economic[] feasib[ility]" prongs of Local Law 142, the Commissioner could not reject recycling under the law, and had to resort to a slew of unsubstantiated concerns and irrelevant concerns about recycling. R.233–53 (Ex. 2 (2017 Determination) at 17–37).

F. Appellants File a Second Article 78 Proceeding, Challenging the Commissioner's Arbitrary and Capricious 2017 Determination.

On September 11, 2017, Appellants filed a second Article 78 petition, this time challenging the Commissioner's 2017 Determination. R.103–96 (2017 Article 78 Petition). In that proceeding, the lower court erred by inexplicably disregarding the legislative intent and plain directive of Local Law 142 and ignoring the fact that Appellants' comprehensive recycling plan was, indisputably, "economically feasible" and "environmentally effective." *See* R.18–19 (2018 Order at 9–10).

Instead of focusing on those definitions, the lower court held, among other things, that "[t]he Commissioner's finding of a lack of a sustainable market of food-service EPS was based on . . . **municipalities in California and Canada** that had ended recycling." R.18 (*Id.* at 9 (emphasis added)). But Local Law 142 did not concern itself with other localities' recycling efforts; it was concerned with whether recycling would be "environmentally effective" and "economically feasible" for New York City, R.212 (Ex. 1 (LL142) § 16-329(b)), or whether it would cost the City $70 million per year, as Mayor Bloomberg had suggested, R.1911 (Ex. U (T) (N.Y. Times Dec. 2013 Article) at 3). The undisputed answer is that the plan presented to the Commissioner would cost the City nothing, and all of the City's "dirty" polystyrene would be purchased at an agreed-upon price and recycled for at least the first five years. R.356 (Ex. 21 (2014 Dart Letter) at 2).

The court simply missed the mark, paying little to no attention to the relevant issues. R.17–19 (2018 Order at 8–10).

On July 5, 2018, Appellants filed a notice of appeal and initiated this appeal of the lower court's decision.

ARGUMENT

This Court reviews the lower court's decision *de novo*. "[B]oth [the Appellate Division] and Supreme Court have jurisdiction to determine whether, on the record presented, a given result would be arbitrary or capricious." *Pantelidis v. New York City Bd. of Standards & Appeals*, 43 A.D.3d 314, 318 (1st Dep't 2007), *aff'd*, 10 N.Y.3d 846 (2008); *see also N. Westchester Prof'l Park Assoc. v. Town of Bedford*, 60 N.Y.2d 492, 499 (1983) (holding that the Appellate Division's "authority is as broad as that of the trial court and . . . it may render the judgment it finds warranted by the facts"). Indeed, a lower court's decision is entitled to no deference where, as here, the record is "sufficiently developed" and the lower court has failed to consider all of the facts. *See Pantelidis,* 43 A.D.3d at 318 (an appellate court may "address[] the issues the lower court failed to address where the record is sufficiently developed to allow the higher court . . . to do so.").

While a court ordinarily owes deference to an agency decision if it is premised on that agency's specialized knowledge, questions of "pure statutory reading and analysis, dependent only on accurate apprehension of legislative

intent" require no such deference, because "there is little basis to rely on any special competence or expertise of the administrative agency." *Kurcsics v. Merchs. Mut. Ins. Co*., 49 N.Y.2d 451, 459 (1980); *see also Matter of Gruber*, 89 N.Y.2d 225, 231–32 (1996) ("judiciary need not accord any deference to the agency's determination" for questions of statutory interpretation); *Lewis Family Farm, Inc. v. N.Y. State Adirondack Park Agency*, 64 A.D.3d 1009, 1013 (3d Dep't 2009) (questions of "[p]ure legal interpretation . . . require[] no . . . deference" to agency). Accordingly, where—as here—the governing statute sets forth an unambiguous mandate, the agency is deprived of any discretion it might otherwise have, and the plain language of the statute is controlling on both the agency and the court. *See City of N.Y. v. Novello*, 65 A.D.3d 112, 117 (1st Dep't 2009) ("This Court may not disregard peremptory language that contains a plain, clear and distinct expression of mandatory legislative intent, absent a clearly contrary expression"); *Jiggetts v. Grinker*, 75 N.Y.2d 411, 421 (1990) (use of mandatory language in statute deprives agency of discretion). Any agency determination that "fails to comply with a mandatory [statutory] provision . . . will not be permitted to stand." *Novello*, 65 A.D.3d at 118.[6]

[6] Moreover, here, the Commissioner cannot credibly claim any specialized knowledge or expertise in recycling soft foam EPS, because the City has never before even attempted to recycle it.

Even where there is a question as to the proper application of a statutory term, that determination rests with the court, not the agency. *Belmonte v. Snashall*, 2 N.Y.3d 560, 566 (2004). Indeed, under Article 78, even an agency finding that is accorded deference must be set aside when it is "affected by an error of law or was arbitrary and capricious or an abuse of discretion," CPLR 7803(3), or where it represents an "irrational" application of the operative statute, *N.Y.C. Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 205 (1994). Agency action is "arbitrary," and thus unenforceable, where it is "without a sound basis in reason." *Nestle Waters*, 121 A.D.3d at 127.

Here, the lower court erred by declining to annul and vacate the Commissioner's second negative determination.

First, under Local Law 142, the Commissioner had no discretion to issue a negative determination given the undisputed record showing that Appellants' proposal would be "environmentally effective" and "economically feasible" for the City to implement. R.212 (Ex. 1 (LL142) § 16-329(b)); *see also Novello*, 65 A.D. at 118; *Jiggetts*, 75 N.Y.2d at 421.

Second, the lower court further erred by allowing the Commissioner to rely on an expanded administrative record and new erroneous arguments presented for the first time only after the statutory deadline of January 1, 2015. R.17–19 (2018

Order at 8–10); *see also Novello*, 65 A.D. at 116; *Centennial Restorations Co.*, 180 A.D.2d at 344.

Finally, the lower court erred in permitting the Commissioner to rely on entirely new and unsubstantiated speculation about the recyclability of EPS, while ignoring the many facts establishing that EPS is, indeed, recyclable. R.17–19 (2018 Order at 8–10).

For each of these independent reasons, this Court should reverse the lower court's decision, reinstate Appellants' Article 78 petition, and grant the relief requested therein by annulling and vacating the Commissioner's May 12, 2017 determination and ordering DSNY to adopt rules for recycling EPS food-service packaging pursuant to Local Law 142.

I. The Commissioner Did Not Have Discretion to Reject a Recycling Plan that Comports with Local Law 142.

Local Law 142 sets forth the City Council's clear mandate: if it is "economically feasible" and "environmentally effective" to do, the Commissioner "**shall** adopt and implement rules designating . . . polystyrene . . . as a recyclable material." R.212 (Ex. 1 (LL142) § 16-329(b) (emphasis added)); *see also Natural Res. Def. Council, Inc. v. N.Y. City Dep't of Sanitation*, 83 N.Y.2d 215, 220 (1994) ("use of the verb 'shall'" in local law requiring Department of Sanitation to establish recycling program "illustrates the mandatory nature of the duties contained therein. The clear import of the words used is one of duty, not

discretion."). The plain language of the statute is binding, and the Commissioner cannot take a position contrary to that language. *Novello*, 65 A.D.3d at 118 ("[W]here . . . an administrative body fails to comply with a mandatory provision that directly affects its determination, such a determination will not be permitted to stand."); *see also Kurcsics*, 49 N.Y.2d at 459 ("[O]f course, if [an agency action] runs counter to the clear wording of a statutory provision, it should not be accorded any weight."). Accordingly, after a showing of economic feasibility and environmental effectiveness is made, the statute deprives the Commissioner of discretion, instead "impos[ing] a duty on the Commissioner" to adopt and implement recycling rules. *See Jiggetts*, 75 N.Y.2d at 421; *see also Marcus v. Wright*, 225 A.D.2d 447, 449 (1st Dep't 1996) ("The Court of Appeals has found that when the legislative body wishes to impart discretion to an agency, it uses the word 'may', in contrast to the use of the verb 'shall', which evinces an intent to impose mandatory duties upon the agency.").

The Commissioner acknowledged as much in her 2017 Determination:

> If the Commissioner determines that Food-Service Foam can be recycled in a manner that is environmentally effective, economically feasible, and safe for employees, then the Commissioner **is required** by Local Law 142 to designate Food-Service Foam as a recyclable material to be collected in DSNY's residential recycling collection.

R.221 (Ex. 2 (2017 Determination) at 5 (emphasis added)). Yet the Commissioner failed to abide by this statutory mandate and instead exceeded her discretion by

declining to adopt a recycling program. On that basis, her determination should be annulled.

To be clear, the Commissioner **cannot dispute** that Appellants' comprehensive recycling plan satisfies the statutory definition of "environmentally effective," because Appellants have committed to ensuring that all of the City's collected EPS will be recycled. It is also not disputed that PRI would take the "dirty foam" received from Sims and turn it into "clean foam" to make new products with it, as required by the statute. R.347 (Ex. 20 (2015 Shaw Aff.) ¶ 16–20); *see also* R.399–400 (Ex. 27 (DSM Report) at 10–11). Moreover, there is no dispute that this comprehensive recycling plan will result in **less** polystyrene going to landfills than under a limited-scope soft foam ban—the unlawful policy selected by the Commissioner. R.509 (Ex. 35 (July 2015 Cantor Aff.) at 7). In other words, the industry's plan is even **more** "environmentally effective" than the soft foam ban advocated by the Commissioner, because it would cover more polystyrene than such a ban. R.505 (*Id.* ¶ 4).

Similarly, there is no dispute that this privately funded, comprehensive recycling plan is "economically feasible" for the City. As noted above, the statute defines "economically feasible" as "cost effective" in view of "whether the material is capable of being collected by the department in the same truck as other . . . recyclable material," and based on "consideration of [the] markets for the

material." R.210 (Ex. 1 (LL142) §16-329(b)). The Commissioner found that food-service foam could be collected on the same trucks as materials in the existing program, at no incremental cost. R.267 (Ex. 3 (2015 Determination) at 7). Furthermore, market participants—including Dart, a polystyrene manufacturer and supporter of recycling—would pay for 100 percent of the costs for the new infrastructure at the private recycling sorting facilities operated by Sims, the City's contractor. R.222 (Ex. 2 (2017 Determination) at 6); R.356 (Ex. 21 (2014 Dart Letter) at 2). In addition, Dart, PRI, and Sims reached a deal whereby PRI would buy all of the City's polystyrene from Sims for at least five years and recycle all of the City's collected polystyrene. R.356 (Ex. 21 (2014 Dart Letter) at 2). This plan, which costs the City nothing out of pocket, would reap a multi-million dollar windfall for the City and Sims. R.222 (Ex. 2 (2017 Determination) at 6); R.407, 415 (Ex. 29 (2016 BRG Report) at 2, 10). Here, because Dart guaranteed PRI's commitment to buy all of the City's polystyrene and to recycle it, a market was even assured. R.356 (Ex. 21 (2014 Dart Letter) at 2). In short, the economic feasibility of the comprehensive recycling plan is beyond dispute.

Any argument that the Commissioner's discretion should extend beyond the factors expressly enumerated in Local Law 142 should be rejected. The City Council intentionally chose, and carefully defined, the considerations falling within the Commissioner's purview, thereby depriving the Commissioner of discretion to

act outside the statutory bounds. *See* R.210 (Ex. 1 (LL142) § 16-329(a) (defining "economically feasible" and "environmentally effective")); *see also Matter of Gruber*, 89 N.Y.2d at 231 ("By defining the [subject matter] that the Law is designed to cover and by directing the manner in which the definitional provisions are to be applied, the Legislature has withdrawn that policy-laden determination from the agency."). The Commissioner thus has no discretion to consider points that do not relate directly to "environmental[] effective[ness]" or "economic[] feasib[ility]."

Nor does the Commissioner have the authority to determine the scope of statutorily defined terms or whether they encompass the (clearly extraneous) considerations the 2017 Determination takes into account. *See id.* at 231–32 (question as to definition of statutory term was "one of pure statutory reading and analysis dependent only on accurate apprehension of legislative intent," for which "the judiciary need not accord any deference to the agency's determination, and is free to ascertain the proper interpretation from the statutory language and legislative intent" (*quoting Kurcsics*, 49 N.Y.2d at 459)); *Belmonte*, 2 N.Y.3d 560, at 555–56 (holding that court had ultimate authority to interpret statutory definition and that agency's interpretation was not entitled to deference); *Lewis Family Farm*, 64 A.D.3d at 1013 (agency is accorded "no . . . deference" for questions of statutory interpretation). Here, the Commissioner's negative determination was

both beyond the discretion afforded to her and contrary to her statutory mandate, and should be annulled as such.

II. The Commissioner Was Required to Make a One-Time Determination by January 1, 2015 and Did Not Have Discretion to Expand the Record and Rely on New Points on Remand.

Regardless of the substance of her post-2014 inquiries, the Commissioner arbitrarily and capriciously conducted a *de novo* review, improperly expanding the administrative record assembled in 2014 and reaching beyond the statutory authority granted to her under Local Law 142. *See Foy v. Schechter,* 1 N.Y.2d 604, 612 (1956) (holding that the jurisdiction of an agency consists only "of the powers granted it by statute," such that "a determination is void . . . where it is made either without statutory power or in excess thereof"). This resort to "[p]ost hoc rationalization" to reach a predetermined outcome set by the mayor back in 2014 "cannot substitute" for the "considered" judgment the law required at the time. *See N.Y. State Chapter, Associated Gen. Contractors of Am. v. N.Y. State Thruway Auth*., 88 N.Y.2d 56, 75 (1996). When the text of the governing statute "limit[s] performance" by an agency to a "prescribed time frame," such as when it requires an agency to act by a particular date, it "indicates an unequivocal legislative intent that a specific time provision must be met, and is thus tantamount to an unmistakable limitation on the [agency's] authority to act once the time period has closed." *Novello*, 65 A.D.3d at 116. Here, the Commissioner admits

that she flouted that rule in order to conjure new reasons not to recycle. R.224 (Ex. 2 (2017 Determination) at 8).

As Appellees conceded in the first Article 78 proceeding, Local Law 142 mandated a one-time determination by "[n]o later than January first, two thousand fifteen." *See* R.212 (Ex. 1 (LL142) § 16-329(b)); R.3337, 3342, 3349, 3379 (Ex. BBB (Respondents' 2015 Opp. Br.) at 1, 6, 13, 43). The parties acknowledged that by imposing this deadline, the City Council clearly indicated its intention to limit the Commissioner's "authority to act once the time period ha[d] closed," especially given that "[n]o other provision of the . . . statute gives an indication that the time limitation provided for [the Commissioner] to act was meant to be anything other than mandatory." *Novello*, 65 A.D.3d at 116–17. The Commissioner was thus required to base any determination solely on evidence compiled within the statutorily imposed deadline. By instead soliciting new evidence and engaging in a total "do-over," the Commissioner exceeded the constraints that the plain language of Local Law 142 placed on her discretion. *See Abiele Contracting, Inc. v. N.Y.C. Sch. Constr. Auth.*, 91 N.Y.2d 1, 10 (1997) (as a "creature of statute," an agency's powers are solely limited to that which are "granted to it by express or necessarily implicated legislative delegation" (internal quotations omitted)).

Appellees themselves have emphasized the "firm deadline" imposed by Local Law 142, R.594 (Ex. 42 (Respondents' Request for Leave to Appeal) at 5),

and it was only after Appellees recognized that the pre-2015 evidence did not support a recycling ban that they sought to improperly expand the record. After this Court allowed the lower court's remand order to stand, Appellees were confronted with the reality that the industry had satisfied the statutory requirements under Local Law 142 and that the record Appellees had assembled compelled the adoption of a recycling program. *See* R.278 (Ex. 4 (2015 Order) at 8); R.642 (Ex. 44 (Order Denying Appeal)). Only then did Appellees change their tune and claim for the first time that it would be proper to consider post-2014 evidence. But Local Law 142 always required that the determination on recyclability be made by January 1, 2015, R.212 (Ex. 1 (LL142) § 16-329(b)), necessitating that all materials to be considered would have to be gathered by that date.

The lower court erred by allowing the Commissioner to rely on information collected after 2014. The court's finding that it would be pragmatic for the Commissioner to consider evidence post-dating the temporal limitation imposed by the statute misses the point. *See* R.17 (2018 Order at 8). The question of whether imposing a deadline for decision is the best procedure is one reserved to the legislature; the question here is whether the Commissioner had authority to collect new materials, given that the legislature expressly set a deadline in Local Law 142. The answer is "no." *See N.Y. Skyline, Inc. v. City of N.Y.*, 94 A.D.3d 23, 27 (1st Dep't 2012) (explaining that the "starting point in any case of interpretation must

always be the language itself, giving effect to the plain meaning thereof" (internal quotations omitted)).

Moreover, New York's "long-standing policy of finality" counsels against allowing the Commissioner to solicit new input from whomever she pleases, whenever she pleases, in order to reinterpret Local Law 142's plain requirements however she likes, and to issue additional negative determinations on an iterative basis. *See Centennial Restorations Co.*, 180 A.D.2d at 344 (explaining that the policy of finality militates against an agency "reconsider[ing] its determinations"). Under New York law, a remand order is not an invitation to reinterpret the statute. The principle of administrative finality counsels that "[i]n the absence of any statutory reservation of discretionary agency authority to reconsider its determinations," agencies that "exercise judgment and discretion in the performance of their duties may not" review their prior determinations, regardless of how much they may "have erred in judgment." *Id.* (internal quotations omitted).

Here, the Commissioner was not given discretionary authority to expand the record upon which she was required to base her determination. In fact, as discussed above, Local Law 142 specifically limits the scope of evidence to be considered both in terms of subject matter ("environmental[] effective[ness]" and "economic[] feasib[ility]") and time (the decision is to be made no later than January 1, 2015). R.212 (Ex. 1 (LL142) § 16-329(b)). The Commissioner lacks

discretion to flout both of these limits by substituting entirely new materials for the evidentiary record that was properly collected by the January 1, 2015 statutory deadline, regardless of her dissatisfaction with the key evidence contrary to her conclusions contained in the record. Certainly, she has not pointed to any statutory authority to do so—only the lower court's erroneous post-hoc permission.

In holding that the Commissioner was "within [her] right to obtain new evidence on a remanded matter," R.17 (2018 Order at 8), the lower court relied on inapposite authority. Neither of the pre-CPLR cases cited concerned an agency acting pursuant to a time-limited statute with clear statutory definitions, such as Local Law 142. *See St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 64 (1936) (holding that Secretary of Agriculture had a "duty" under the Packers and Stockyards Act of 1921 to examine additional evidence in a second hearing on stockyard rates); *Yonkers R.R. Co. v. Maltbie*, 251 A.D. 204, 206 (3d Dep't 1937) (*citing St. Joseph Stock Yards* in a case involving Public Service Commission review of railroad rates); *see also* 6A N.Y. Jur. 2d, Article 78 § 398 (citing cases involving prison disciplinary proceedings, eviction proceedings, and determinations of maximum rent charges conducted under agencies' general grants of authority and not pursuant to a statutorily imposed deadline).

Indeed, when confronted with nearly identical facts, another New York court held that an order remanding a determination back to the agency for

reconsideration did not entitle the agency to conduct a *de novo* review. *A.F.C. Enters., Inc. v. New York City Transit Auth.*, 2013 WL 3948421, at *1 (Sup. Ct. N.Y. Cty. July 23, 2013) (annulling agency's redetermination and rejecting its attempt to "misinterpret" the original order to "conduct[] a de novo investigation," finding that the agency was only entitled to "re-evaluate the evidence the parties presented" before the original determination). Notably, the *A.F.C.* court used almost identical language ordering the remand as the lower court in its original decision in the instant case, *compare* R.284 (Ex. 4 (2015 Order) at 14 (remanding for "reconsideration and determination consistent with this court's decision")), *with A.F.C.*, 2013 WL 3948421, at *1 (remanding "for reconsideration and determination by [the agency] in a manner consistent forewith"), suggesting that the original Article 78 decision foreclosed the Commissioner's discretion to conduct a *de novo* review.

It is not surprising that the Commissioner could not issue a second negative determination without reference to untimely developed points; in fact, it is dispositive of this case. Rather than conducting a *de novo* investigation, reopening the record, and raising entirely new points in an attempt to justify the very same predetermined conclusion she reached previously, the Commissioner should have accounted for the evidence she overlooked in her original determination—evidence

that compelled the conclusion that EPS "can be recycled" under Local Law 142. *See* R.212 (Ex. 1 (LL142) § 16-329(b)); R.284 (Ex. 4 (2015 Order) at 14).

III. Even Considering the Commissioner's Expanded Record, This "New" Determination Reaching the Same Result As the Flawed First One Would Also Have to Be Vacated and Annulled As Arbitrary and Capricious

Even assuming *arguendo* the Commissioner had discretion on remand to reopen the record to consider new information and raise new arguments presented for the first time after the statutorily imposed deadline of January 1, 2015, the Commissioner's 2017 Determination would still have to be set aside as arbitrary and capricious, both because it rests on assertions that are speculative, unsubstantiated and demonstrably false, and because it failed to address much of the indisputable evidence supporting recycling here—evidence that caused the lower court to overturn the Commissioner's original decision and that the lower court recognized the Commissioner has continued to ignore. R.281, 283 (Ex. 4 (2015 Order) at 11, 13); *see also* R.19 (2018 Op. at 10).

An action is arbitrary if it is taken "without a sound basis in reason and generally without regard to the facts." *Nestle Waters*, 121 A.D.3d at 127 (*citing Pell*, 34 N.Y.2d at 231). The test for whether an agency acted arbitrarily and capriciously is "whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact." *Albany Manor Inc. v. N.Y. State Liquor Auth*., 57 A.D.3d 142, 144 (1st

Dep't 2008). A determination based on an unsettled dispute, or based on a spurious "finding" that is directly and completely contravened by the evidence, cannot be justified as having a "sound basis in reason." *Nestle Waters*, 121 A.D.3d at 127.

The Commissioner's 2017 Determination lacks the necessary "sound basis in reason" because it credits unsubstantiated "evidence" collected during the Commissioner's improper *de novo* review, which is directly contradicted by conclusive evidence that compels a finding of "environmental[] effective[ness]" and "economic[] feasib[ility]."

For example, the Commissioner claimed in the 2017 Determination that a paid consultant's report compiled at the behest of an anti-foam advocacy group, the National Resource Defense Council, somehow conclusively showed that there is no market for recycled food-service EPS. R.241–43 (Ex. 2 (2017 Determination) at 25–27). In so claiming, the Commissioner failed to consider the plethora of contradictory evidence provided by **actual purchasers** of recycled food-service EPS, including Appellant PRI, who all confirmed that there is, in fact, robust demand for such material once it is cleaned by processors like PRI. *See, e.g.*, R.289 (Ex. 6 (2017 Shaw Aff.) ¶¶ 10–11); R.347 (Ex. 20 (2015 Shaw Aff.) ¶¶ 22–23); R.360 (Ex. 22 (June 2014 PRI Letter)); R.476–77 (Ex. 31 (List of Interested Companies)); R.478–96 (Ex. 32 (Letters from Interested Companies)); R.500–02

(Ex. 34 (Sept. 2014 PRI Letter) at 2–4). The record also includes substantial evidence about particular end-uses that Appellants and other purchasers have for recycled EPS, R.478–96 (Ex. 32 (Letters from Interested Companies)), as well as an expert report by independent economic research firm Berkeley Research Group ("BRG"), which found that there are scores of domestic manufacturers who use clean recycled EPS (of the type PRI would produce) in their products, R.564 (Ex. 38 (2014 BRG Report) at 1); *see also* R.425–27 (Ex. 29 (2016 BRG Report) at 20–22).

In granting Appellants' first Article 78 petition, the lower court credited this evidence as reflecting a robust market for recycled post-consumer EPS. The lower court found that "Petitioners' evidence" regarding the number of end-use purchasers for recycled EPS "far outnumber[ed]" the City's, that it "directly contradict[ed] the facts relied upon by the Commissioner," and that the Commissioner failed to even mention "the BRG study, along with PRI's own list of twenty-one (21) purchasers with their monthly demand," in her 2015 Determination. R.281 (Ex. 4 (2015 Order) at 11). It was therefore arbitrary and capricious for the Commissioner to once again ignore that same evidence in her second determination. Indeed, these facts are never squarely addressed in the 2017 Determination, which is one-sided in its review of the record and, as such, arbitrary and capricious.

Such a one-sided review of the record undermines the Commissioner's claim to a rational basis for her determination. *See, e.g.*, *Guillo v. N.Y. State Emps.' Ret. Sys.*, 39 Misc. 3d 1208(A), *5 (Sup. Ct. N.Y. Cty. 2013) (vacating medical board's determination where board "fail[ed] to address" contradictory evidence and "merely summarized some of the . . . reports . . . that supported its determination"); *Rocco v. Scoppetta*, 15 Misc. 3d 1146(A), at *7 (Sup. Ct. Kings Cty. 2007) (setting aside administrative ruling where pension fund's medical board "considered only those tests and reports that supported its denial and ignored those tests and reports that contradicted its position without explanation"). In *Rocco*, as here, the agency "failed to set forth its reasoning as to why the evidence which supports its determination was more conclusive [than] the evidence to the contrary." *Id.* The 2017 Determination is arbitrary and capricious because it relies only on one set of alleged facts that support the mayor's position, while completely ignoring, without explanation, another set of compelling facts which oppose it.

The Commissioner's errors were only compounded by her decision to raise new points on remand. For example, the 2017 Determination states that Burrtec Waste Industries, Inc. ("Burrtec"), a California-based solid waste processing company like Sims, does not actually recycle the food-service EPS that it collects from the city of Riverside, California. R.242–43, 248 (Ex. 2 (2017 Determination) at 26–27, 32). The Commissioner relies on this as an example of a city that no

longer recycles EPS. R.242–43, 248 (*Id.*). The problem is that this claim is 100 percent false, resting on only the thinnest of reeds. The Commissioner bases her claim on "conversations" that DSNY officials purportedly conducted with unidentified Riverside municipal employees—but not with Burrtec, the entity that actually sorts Riverside's metal, glass, and plastic mix, which includes post-consumer EPS. R.248 (*Id.* at 32). In fact, the record below includes a series of letters from Burrtec itself, stating unequivocally that Burrtec successfully recycles foam received from Riverside and other communities and explaining the process in detail, as well as a supportive statement from another Riverside municipal employee—all of which was summarily disregarded by the Commissioner in favor of the alleged "conversations" between DSNY and anonymous Riverside officials. R.705–07 (Ex. 52 (2016 Burrtec Letter)); R.719 (Ex. 57 (2014 Burrtec Letter)); R.720–21 (Ex. 58 (2017 Burrtec Letter)); R.762 (Ex. 65 (Riverside Emails)).

That DSNY never had any real interest in Burrtec's evidence is clear, because DSNY never followed up with Burrtec for clarification about the allegedly conflicting information DSNY had received, even though DSNY's own retained consultant, Brendan Sexton, concluded that "if [Burrtec's] report[s] [of successful recycling in Riverside] were verified it would give some weight to the notion that used residential foam had a place in the recycling ecosystem since Burrtec is a

huge factor in the California waste-handling universe." R.788 (Ex. 67 (Sexton Report) at 8). Nor can the Commissioner claim to have been unaware of the need for diligence; in 2015, the lower court found that the Commissioner's failure to consider evidence proffered by Burrtec was arbitrary and capricious. *See* R.283 (Ex. 4 (2015 Order) at 13).

The Commissioner acted arbitrarily and capriciously by relying on an unsourced "conversation" over other statements by the same city and by the actual entity at issue. *See* R.248 (Ex. 2 (2017 Determination) at 32). In an analogous context, the Court of Appeals has rejected hearsay evidence as a rational basis for administrative decision-making when there is conflicting information that is more reliable: "While the [agency] is entitled to use hearsay reports . . . common sense and elemental fairness suggest that, if the contents of the report are controverted seriously, the otherwise unsupported reports may fail to provide a rational basis for adverse action." *125 Bar Corp. v. State Liquor Auth.*, 24 N.Y.2d 174, 179 (1969). Here, Burrtec's own assertions "controvert[] seriously" the hearsay presented by the Commissioner: Burrtec states that they "have been profitably recycling postconsumer EPS as part of" their California-based "operations for seven years now," including in Riverside. R.707 (Ex. 52 (2016 Burrtec Letter) at 3).

The Commissioner also erroneously relied on controverted or irrelevant evidence about the recycling plan itself. For instance, the Commissioner incorrectly asserts that PRI's Indianapolis recycling facility will not be ready for operation upon promulgation of rules enabling recycling. R.240–41 (Ex. 2 (2017 Determination) at 24–25). But this conclusion is based on the same April 2016 site visit during which DSNY recycling consultant Michael Schedler concluded that PRI was successfully recycling post-consumer food-service foam. R.375–76 (Ex. 24 (Schedler Report) at 7–8).

Once again, the Commissioner fails to address the clear and contradictory evidence—that the PRI facility "is best-in-class and will be able to recycle all of New York City's foam efficiently and without any significant amount of material being landfilled," R.385 (Ex. 25 (Firpo Aff.) ¶ 18), and that by the time of the 2017 Determination, PRI had reviewed all of the purported process-flow concerns raised as a result of the April 2016 visit and deemed them addressed in light of PRI's 2016 system upgrades. R.383–84 (Ex. 25 (Firpo Aff.) ¶¶ 8–13); *see also* R.289, (Ex. 6 (2017 Shaw Aff.) ¶¶ 5–9); R.647–48 (Ex. 46 (2016 PRI Letter)). As the lower court held in its 2015 opinion—yet inexplicably ignored in its 2018 decision—"the fact that PRI's facility was being expanded at the time of the Commissioner's consideration is not a negative factor." R.283 (Ex. 4 (2015 Order) at 13). So here, too, the Commissioner's finding was arbitrary and capricious,

clearly "ignor[ing] those . . . reports that contradicted [her] position without explanation," *see Rocco*, 15 Misc. 3d 1146(A) at *6, and misconstruing evidence about PRI's abilities in the relevant time frame.

Having opened the door to irrelevant and untimely raised arguments outside the scope of the statute, the Commissioner was nonetheless under an obligation to fairly consider the underlying factual issues. Because she did not, the 2017 Determination is arbitrary and capricious even on its own terms, and must be annulled and vacated.

CONCLUSION

For the reasons stated herein, this Court should reverse the lower court's decision, reinstate Appellants' Article 78 petition, and grant the relief requested therein, annulling and vacating the Commissioner's May 12, 2017 determination and ordering DSNY to adopt rules for recycling EPS food-service packaging pursuant to Local Law 142.

Dated: New York, New York
July 9, 2018

Respectfully submitted,

By: 

GIBSON, DUNN & CRUTCHER LLP
Randy M. Mastro
Mylan L. Denerstein
Paul J. Kremer
200 Park Avenue, 47th Floor
New York, New York 10166-0193
(212) 351-2400

Attorneys for Petitioners-Appellants Restaurant Action Alliance NYC, Cecilio Albayero, Jose Castillo, Maximiliano Gonzales, Andres Javier-Morales, Arismendy Jerez, Tony Juela, Ruperto Morocho, Astrid Portillo, Sergio Sanchez, Lucino Ramos, Esmeralda Valencia, Plastics Recycling Inc., Dart Container Corporation, Genpak LLC, and Commodore Plastics LLC

C. David Watson
(*pro hac vice* admission pending)
General Counsel,
Reynolds Consumer Products
1900 W. Field Court
Lake Forest, IL 60045
(847) 482-3155

Attorney for Petitioner-Appellant Reynolds Consumer Products LLC

Steven R. Karl
(*pro hac vice* admission pending)
Vice-President and General Counsel,
Pactiv LLC
1900 W. Field Court
Lake Forest, IL 60045
(847) 482-2113

Attorney for Petitioner-Appellant
Pactiv LLC

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 600.10(d)(1)(v)

The foregoing brief was prepared on a computer using a proportionally spaced typeface:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 11,083.

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

In the Matter of the Application of, RESTAURANT ACTION ALLIANCE NYC, CECILIO ALBAYERO, JOSE CASTILLO, MAXIMILIANO GONZALES, ANDRES JAVIER-MORALES, ARISMENDY JEREZ, TONY JUELA, RUPERTO MOROCHO, ASTRID PORTILLO, SERGIO SANCHEZ, LUCINO RAMOS, ESMERALDA VALENCIA, PLASTICS RECYCLING INC., DART CONTAINER CORPORATION, PACTIV LLC, GENPAK LLC, COMMODORE PLASTICS LLC, and REYNOLDS CONSUMER PRODUCTS LLC, Petitioner-Appellants, For Judgment Pursuant to CPLR Article 78 – against – THE CITY OF NEW YORK; KATHRYN GARCIA, in her official capacity as Commissioner of the New York City Department of Sanitation; the NEW YORK CITY DEPARTMENT OF SANITATION, a charter-mandated agency; and BILL DE BLASIO, in his official capacity as Mayor of the City of New York, Respondent-Respondents.	Index No. 100734/2015 IAS Part 33 Justice Margaret A. Chan Motion Seq. No. 003

PREARGUMENT STATEMENT

Petitioners Restaurant Action Alliance NYC, Cecilio Albayero, Jose Castillo, Maximiliano Gonzales, Andres Javier-Morales, Arismendy Jerez, Tony Juela, Ruperto Morocho, Astrid Portillo, Luciano Ramos, Sergio Sanchez, Esmeralda Valencia, Plastics Recycling Inc., Dart Container Corporation, Pactiv LLC, Genpak LLC, Commodore Plastics LLC, and Reynolds Consumer Products LLC ("Petitioner-Appellants") submit this Pre-Argument Statement pursuant

to Section 600.17 of the Rules of the Appellate Division of the Supreme Court of the State of New York, First Department.

1. Title of the Action.

The action's title is set forth in the caption above.

2. Full Names of Original Parties and Change in Parties.

The original parties are those identified in the caption above: Restaurant Action Alliance NYC, Cecilio Albayero, Jose Castillo, Maximiliano Gonzales, Andres Javier-Morales, Arismendy Jerez, Tony Juela, Ruperto Morocho, Astrid Portillo, Luciano Ramos, Sergio Sanchez, Esmeralda Valencia, Plastics Recycling Inc., Dart Container Corporation, Pactiv LLC, Genpak LLC, Commodore Plastics LLC, Reynolds Consumer Products LLC, The City of New York, Kathryn Garcia, the New York City Department of Sanitation, and Bill de Blasio.

3. Counsel for Petitioner-Appellants.

GIBSON, DUNN & CRUTCHER LLP

Randy M. Mastro
Mylan L. Denerstein
Paul J. Kremer
200 Park Avenue
New York, NY 10166-0193
Telephone: 212.351.4000
Facsimile: 212.351.4035
RMastro@gibsondunn.com
MDenerstein@gibsondunn.com
PKremer@gibsondunn.com

C. David Watson
General Counsel, Reynolds Consumer Products
1900 W. Field Court
Lake Forest, IL 60045
Telephone: (847) 482-3155
Mobile: (804) 937-0796
David.Watson@ReynoldsBrands.com

Steven R. Karl
Vice-President and General Counsel, Pactiv LLC
1900 W. Field Court
Lake Forest, IL 60045
Telephone: (847) 482-2113
Mobile: (224) 532-3985
skarl@pactiv.com

4. Counsel for Respondent-Respondents.

Corporation Counsel of the City of New York

Zachary W. Carter
Richard Dearing
Cecelia Chang
Damion K. L. Stodola
100 Church Street
New York, New York 10007
Telephone: 212-356-0828

5. Court and County From Which the Appeal is Taken.

This appeal is taken from an Order of the Supreme Court of the State of New York, County of New York (Honorable Margaret A. Chan) (IAS Part 33).

6. Nature and Object of Cause of Action.

On April 29, 2015, Petitioner-Appellants filed an Article 78 petition against Respondent-Respondents The City of New York, Kathryn Garcia, the New York City Department of Sanitation, and Bill de Blasio seeking to annul and vacate City Department of Sanitation Commissioner Kathryn Garcia's 2015 determination that expanded polystyrene is not recyclable pursuant to Local Law 142 of 2013, as well as an order compelling the City to implement expanded polystyrene recycling.

On September 21, 2015, the trial court granted Petitioner-Appellants' petition, finding that the Commissioner's determination was arbitrary and capricious, ordering it annulled and vacated, and remanding to the Commissioner for reconsideration consistent with the trial court's opinion. Respondent-Respondents moved for leave to appeal, but this Court denied the motion on

December 3, 2015.

On May 12, 2017, the Commissioner issued a second determination that expanded polystyrene is not recyclable pursuant to Local Law 142 of 2013. On September 11, 2017, Petitioner-Appellants filed a second Article 78 petition seeking to annul and vacate the Commissioner's second determination, as well as an order compelling the City to implement expanded polystyrene recycling.

7. Result Reached in Court Below.

On June 11, 2018, the Honorable Margaret Chan denied Petitioner-Appellants' petition, entering an appealable Order dated June 5, 2018 with the Clerk of the Supreme Court of the State of New York, County of New York. The Order denied Petitioner-Appellants' second Article 78 petition, holding that the Commissioner's 2017 determination was not arbitrary and capricious and refusing to vacate and annul the Commissioner's decision or compel the City to implement expanded polystyrene recycling.

8. Grounds for Seeking Reversal.

The trial court erred in ruling that the Commissioner's 2017 determination was not arbitrary and capricious or an abuse of discretion and in declining to annul and vacate the City of New York Department of Sanitation Commissioner's May 12, 2017 determination.

9. Other Actions or Appeals Pending.

There are no other actions or appeals currently pending in this matter.

Dated: New York, New York
July 5, 2018

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: Mylan L. Denerstein

Randy M. Mastro
Mylan L. Denerstein
Paul J. Kremer

200 Park Avenue
New York, NY 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

Attorneys for Petitioner-Appellants Restaurant Action Alliance NYC, Maximiliano Gonzales, Arismendy Jerez, Tony Juela, Esmeralda Valencia, Plastics Recycling, Inc., Dart Container Corporation, Genpak LLC, and Commodore Plastics LLC

By: C. David Watson/mld

C. David Watson[1]
General Counsel, Reynolds Consumer Products
1900 W. Field Court
Lake Forest, IL 60045
Telephone: (847) 482-3155
Mobile: (804) 937-0796
Email: David.Watson@ReynoldsBrands.com

Attorney for Petitioner-Appellant Reynolds Consumer Products LLC

[1] *Pro hac vice* application forthcoming.

By: Steven R. Karl/mel

Steven R. Karl[2]
Vice-President and General Counsel, Pactiv LLC
1900 W. Field Court
Lake Forest, IL 60045
Telephone: (847) 482-2113
Mobile: (224) 532-3985
Email: skarl@pactiv.com

Attorney for Petitioner-Appellant Pactiv LLC

To: Corporation Counsel of the City of New York

Zachary W. Carter
Richard Dearing
Cecelia Chang
Damion K. L. Stodola
100 Church Street
New York, New York 10007
Telephone: 212-356-0828

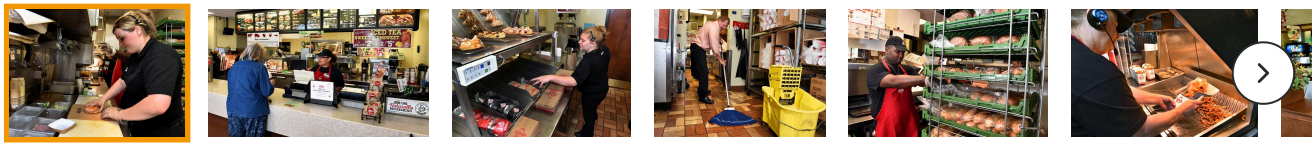
Attorneys for Respondent-Respondents

[2] *Pro hac vice* application forthcoming.

NEW YORK STATE

NY restaurants file objections to $15 fast-food minimum wage

Published: Aug. 17, 2015, 8:26 p.m.



Fast food workers at Arby's in Auburn

By **The Associated Press**

ALBANY, N.Y. -- Fast-food franchise owners in the state, in a prelude to a possible lawsuit, have filed objections to a proposal to raise the minimum wage of their workers to $15 an hour.

The increase, from the current $8.75 an hour, was endorsed last month by a state Wage Board and would be phased in over the next six years, starting with an increase at the end of this year. The increase now awaits approval by Democratic Gov. Andrew Cuomo's labor commissioner. Cuomo supports the increase, so its approval is considered a certainty.

While the complaints filed with the labor commissioner are unlikely to derail the pay hike, they foreshadow the legal arguments being considered by restaurant owners who warn it would force them to raise prices and possibly replace workers with automated service stations.

In a letter opposing the hike, a lawyer for the National Restaurant Association argues the increase unfairly applies to only national chain restaurants and infringes on the Legislature's authority to pass minimum-wage increases. The letter also notes that the three-member Wage Board had no representative from the fast-food industry.

Attorney Randy Mastro wrote that the increase would "improperly target only a sliver of a segment of a single industry, without support in data, logic or law" and that implementing the increase would be "arbitrary, capricious, irrational, unreasonable, invalid and contrary to law."

The letter was filed Friday. A similar complaint was announced on Monday by the Business Council of New York State. The letters were filed during a period of public comment required before the increase can be approved.

Franchise owners have said they are considering whether to challenge the increase in court, and the arguments laid out in the letters of objection are likely to underpin any eventual lawsuit.

The increase will impact an estimated 200,000 workers. Supporters say the industry can absorb the increase, which they say is needed to help workers struggling with ever higher costs of living.

The wage increase would apply to fast-food workers in restaurants with 30 or more locations. It would be phased in over three years in New York City and six years elsewhere in the state.

The current wage already is set to automatically rise to $9 for all workers at year's end.

Man accused of sexually abusing Central NY child arrested in Florida

syracuse.com

Former Syracuse football great and NFL son face fraud allegations in refiled lawsuit

syracuse.com

syracuse.com
THE POST-STANDARD

▼ About Us

About Us

Photo and Page Reprints

Advertise with us

Jobs at Advance Media New York

Contact Us

Newspaper Archives

Frequently Asked Questions

Accessibility Statement

Submit letter, commentary

▼ Subscriptions

syracuse.com

syracuse.com Orange Sports Insider

The Post-Standard

Email Newsletters

▼ Already a Subscriber

Manage your Subscription

Place a Vacation Hold

Make a Payment

Delivery Feedback

▼ syracuse.com Sections

News

Weather

Business

Sports

High School Sports

Betting

Entertainment

Living

Opinion

Obituaries

Jobs

Autos

Real Estate

Rentals

Classifieds

▼ Mobile

Tablet Apps

iPhone, Android apps

▼ More on syracuse.com

Videos

Sitemap

Sponsor Content

Archives

Sell your car

Post a job

Post a classified ad

Sell/rent your home

The New York Times https://www.nytimes.com/2015/05/07/opinion/andrew-m-cuomo-fast-food-workers-deserve-a-raise.html

OP-ED CONTRIBUTOR

Andrew M. Cuomo: Fast-Food Workers Deserve a Raise

By Andrew M. Cuomo

May 6, 2015

ALBANY — INCOME inequality is a national problem that leaders at all levels of government are grappling with. While American capitalism never guaranteed success, it did once guarantee opportunity. But today, too many Americans don't believe their children will have a better life than their own. The ideal of mobility has been replaced by the reality of stagnation.

Some argue that we can close the income gap by pulling down the top. I believe we should do it by lifting up the bottom. We can begin by raising labor standards, starting with the minimum wage.

In 2013, I raised New York State's minimum wage; it is now $8.75, up from $7.25 (and will rise to $9 at the end of the year). In my latest budget, I proposed raising it again, to $11.50 in New York City and $10.50 elsewhere in the state. But the Legislature rejected that proposal. So I am continuing the fight. While lawmakers delay, I am taking action.

State law empowers the labor commissioner to investigate whether wages paid in a specific industry or job classification are sufficient to provide for the life and health of those workers — and, if not, to impanel a Wage Board to recommend what adequate wages should be.

On Thursday, I am directing the commissioner to impanel such a board, to examine the minimum wage in the fast-food industry. The board will return in about three months with its recommendations, which do not require legislative approval.

President Franklin D. Roosevelt made the minimum wage a national law in 1938. Years earlier, he said, "By living wages, I mean more than a bare subsistence level — I mean the wages of a decent living." But minimum wages have not kept pace with the rising cost of living.

Nowhere is the income gap more extreme and obnoxious than in the fast-food industry. Fast-food C.E.O.s are among the highest-paid corporate executives. The average fast-food C.E.O. made $23.8 million in 2013, more than quadruple the average from 2000 (adjusting for inflation). Meanwhile, entry-level food-service workers in New York State earn, on average, $16,920 per year, which at a 40-hour week amounts to $8.50 an hour. Nationally, wages for fast-food workers have increased 0.3 percent since 2000 (again, adjusting for inflation).

Many assume that fast-food workers are mostly teenagers who want to earn extra spending money. On the contrary, 73 percent are women, 70 percent are over the age of 20, more than two-thirds are the primary wage earners in their family, and 26 percent are raising a child.

Fast-food workers and their families are twice as likely to receive public assistance compared with other working families. Among fast-food workers nationwide, 52 percent — a rate higher than in any other industry — have at least one family member on welfare.

New York State ranks first in public assistance spending per fast-food worker, $6,800 a year. That's a $700 million annual cost to taxpayers.

While workers in the fast-food industry are struggling, the industry is healthy, having taken in $551 billion in global revenues last year, a sum that is projected to grow to $645 billion by 2018. McDonald's brought in $4.67 billion last year; Burger King earned $291.1 million. The government is subsidizing these corporations, allowing them to keep their labor costs low and their profit margins high.

Industry leaders have argued that raising wages for fast-food workers would drive up the prices of burgers and fries beyond what many customers, themselves of modest means, can afford. But that hasn't been the experience in other countries. Australia set the minimum wage for adult fast-food workers at $16 an hour, but a Big Mac there costs only $4.32 on average, compared with $4.79 in the United States, according to The Economist's Big Mac Index. France, where the minimum wage is over $12, has more than 1,200 McDonald's.

More than 600 economists, including seven Nobel Prize laureates, have affirmed the growing consensus that raising wages for the lowest-paid workers doesn't hurt the economy. In fact, by increasing consumer spending and creating jobs, it helps the economy. Studies have shown that every dollar increase for a minimum-wage worker results in $2,800 in new consumer spending by household, and of the 13 states that have increased the minimum wage since 2014, including New York, all but one experienced employment growth.

Through the Wage Board, New York can set fast-food workers on a path out of poverty, ease the burden on taxpayers and create a new national standard.

Roosevelt, too, faced powerful opposition to the minimum wage. But he did not pull his punches as he said: "No business which depends for existence on paying less than living wages to its workers has any right to continue in this country."

A correction was made on May 13, 2015*: An Op-Ed article on Thursday about wages in the fast-food industry misstated the proportion of its workers who are raising a child. It is 26 percent, not more than two-thirds. The article also misstated the industry's global revenues. They were $551 billion last year, not $195 billion, and the number is projected to grow to $645 billion by 2018, not $210 billion.*

Andrew M. Cuomo, a Democrat, is the governor of New York State.

A version of this article appears in print on , Section A, Page 29 of the New York edition with the headline: Fast-Food Workers Deserve a Pay Raise

NELP NATIONAL EMPLOYMENT LAW PROJECT

Report | November 29, 2022

Ten-Year Legacy of the Fight for $15 and a Union Movement

By **Yannet Lathrop**, Matthew D. Wilson, T. William Lester

Download

Share

On November 29, 2012, a group of 200 fast-food workers in New York City—fed up with low pay and roadblocks to organizing—walked out of their jobs demanding a $15 hourly wage and a union. At the time, *The New York Times* described the strike as "the biggest wave of job actions in the history of America's fast-food industry."[1]

That "biggest wave of job actions," led by Black workers and other workers of color, would not stay contained to the fast-food industry for long. Over the course of the decade that followed, the Fight for $15—as the movement inspired by the strikes would come to be known—spread from coast to coast, animating workers across industries to join the demand for higher wages.

To date, 29 states and nearly five dozen cities and counties have raised their wage floors since 2012—many to $15 an hour or more. In addition, employers of all sizes—including some of the world's largest corporations employing tens of millions of workers—have been inspired or compelled to raise their pay scales.

As a result, **since 2012, more than 26 million workers have won higher pay to the tune of $150 billion.**[2] Nearly half (46 percent) of the benefiting workers are workers of color, whose additional earnings amount to slightly over 50 percent ($76 billion) of the estimated higher pay. In addition to higher pay, the Fight for $15 has brought workplace justice issues to the forefront and inspired worker organizing more broadly.

"Since 2012, more than 26 million workers have won higher pay to the tune of $150 billion."

To commemorate the landmark 10-year anniversary of the Fight for $15, this report analyzes the movement's impact beyond wages. We focus on three measures: the movement's impact on the racial wealth gap (as measured by comparing the median net worth of white workers versus workers of color), its impact on unions (as measured by membership, coverage, and median hourly wages), and its impact on the overall economy (measured by the multiplier effect).

We find that:

- With regard to the median net worth and the racial wealth gap:
  - Between 2013 and 2019, **worker wealth grew faster in states that adopted a minimum wage higher than the federal rate** (74 percent increase, on average)

compared to states that applied the federal rate (55 percent).

- The increase in personal net worth was particularly strong for Black (174 percent) and Latinx workers (211 percent) in states that raised their minimum wages, and even more so for Black and Latinx workers in states on a path to $15 or more (186 percent and 233 percent, respectively).
- Although the racial wealth gap persists today, our analysis finds a strong association between the emergence of the Fight for $15 and the narrowing of the racial wealth gap. In higher-wage states, the Black-white wealth gap decreased by 40.3 percentage points during the period analyzed, and the Latinx white wealth gap decreased by 29.4 percentage points. In states on a path to $15 or more, the Black-white and Latinx-white gaps decreased faster: by 54.3 and 48.0 percentage points, respectively.
- Recent studies by economists from the University of California, Berkeley[3] found that minimum wage increases have historically had equitable impacts. In addition, an analysis by the Federal Reserve of Cleveland shows that racial income disparities impact the wealth building of Black people over time and suggests that income policies should be a main means of addressing the racial wealth gap.[4]

- With regard to impacts on union membership, coverage, and pay:
  - Between 2011 and 2021, union membership increased by 3.8 percent in states that raised their minimum wages but decreased by 9.9 percent in states that apply the federal minimum wage.
  - When narrowing the analysis to workers who earn at least $15 per hour, union membership grew much faster (18.4 percent) in higher-wage states, while it decreased by 3.5 percent in federal-rate states.
  - The median hourly wage of union members in higher-wage states increased more than three times as fast as their counterparts'in federal-rate states (16.7 percent compared to 5.2 percent).
  - In 2021, the union wage premium was $7 per hour in higher-wage states, and $5.87 in federal-rate states.
  - Assuming full-time, year-round work, that translates to approximately $15,000 in higher annual earnings for union workers in higher-wage states and $12,000

for union workers in federal-rate states.

- With regard to impacts on the economy:
  - We estimate that minimum wage policies since 2012 led to $87.6 billion in annual economic output.
  - That economic output supports an additional 452,000 jobs each year.

Download the full report to read more.

Endnotes

[1] Steven Greenhouse, "With Day of Protests, Fast-Food Workers Seek More Pay," *New York Times*, November 29, 2012, https://www.nytimes.com/2012/11/30/nyregion/fast-food-workers-in-newyork-city-rally-for-higher-wages.html.

[2] Yannet Lathrop, T. Willian Lester, and Matthew Wilson, "Quantifying the Impact of the Fight for $15: $150 Billion in Raises for 26 Million Workers, With $76 Billion Going to Workers of Color," National Employment Law Project, July 2021, 4, https://s27147.pcdn.co/wp-content/uploads/Data-BriefImpact-Fight-for-15-7-22-2021.pdf.

[3] See Jesse Wursten and Michael Reich, "Racial Inequality and Minimum Wages in Frictional Labor Markets," Institute for Research on Labor and Employment, IRLE Working Paper No. 1, February 2021, https://irle.berkeley.edu/files/2021/02/Racial-Inequality-and-Minimum-Wages.pdf; and Ellora Derenoncourt and Claire Montialoux, "Minimum Wages and Racial Inequality," *Quarterly Journal of Economics* 136, no. 1 (February 2021): 169–228, https://doi.org/10.1093/qje/qjaa031.

[4] Dionissi Aliprantis and Daniel R. Carroll, "What Is Behind the Persistence of the Racial Wealth Gap?,"
Federal Reserve Bank of Cleveland, February 2019,

https://www.clevelandfed.org/newsroom-andevents/publications/economic-commentary/2019-economic-commentaries/ec-201903-what-isbehind-the-persistence-of-the-racial-wealth-gap.

Related to Minimum & Living Wage

About the Authors

Yannet Lathrop

Areas of expertise: Living Wage & Minimum Wage

Matthew D. Wilson

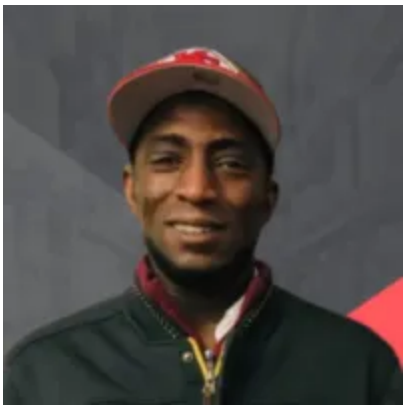
Associate Director for Economic and Workforce Development, Great Cities Institute at the University of Illinois Chicago

T. William Lester

Professor and Acting Chair of Urban and Regional Planning, San José State University

Related Resources

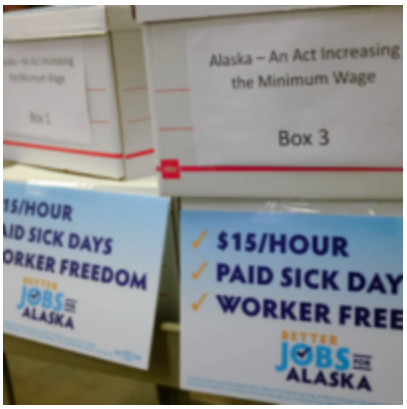
All resources →



Worker Voices

Terrence Wise

July 8, 2024



Fact Sheet

A $15 Minimum Wage in Alaska Would Lift the Wages of Nearly 31,000 Workers

June 3, 2024

Testimony

In Support of One Fair Wage In Massachusetts

March 12, 2024

CWED
Center on Wage and Employment Dynamics

POLICY BRIEF
March 2023

The Economic Effects of a $21.25 Minimum Wage in New York by 2026

Michael Reich*

*Chair, Center on Wage and Employment Dynamics (CWED) and Professor, University of California, Berkeley. Portions of this policy brief draw from Carl McPherson, Michael Reich and Justin Wiltshire, 2023. "High Minimum Wages: In Good Times and Bad," IRLE Working Paper, UC Berkeley. I am grateful to Carl McPherson, James Parrott, Paul Sonn and Justin Wiltshire for valuable comments and to the Institute for Research on Labor and Employment for supporting this research.

The Center on Wage and Employment Dynamics was established within UC Berkeley's Institute for Research on Labor and Employment in 2007. CWED focuses on academic research and policy analysis of wage and employment dynamics in contemporary labor markets.

A proposed increase of New York State's minimum wage to $21.25 by 2026 sounds large, but its level would be comparable to the inflation-adjusted $15 New York City fast-food minimum wage that took effect on December 31, 2018, and to the rate of fast-food minimum wage increases from $7.25 to $15 over the period December 31, 2013 to December 31, 2018. My recent research on the effects of $15 minimum wages in New York combines state-of-the-art statistical methods with administrative data from all fast-food employers in twenty-two New York counties. Minimum wage increases to $15 substantially raised the pay of low-wage workers without creating disemployment effects, both upstate and downstate. I also discuss why these minimum wage increases did not reduce employment and how high minimum wage increases can go without negative effects.

1. INTRODUCTION

A bill in the New York State Legislature (Raise the Wage Act, A02204/S01978) proposes to increase minimum wages to $21.25/hour. In New York City and in three suburban counties (Nassau, Suffolk and Westchester), the minimum wage would increase in three annual steps from the current $15 level—the New York City standard since December 31, 2018—to $21.25 on January 1, 2026. In the rest of the state, the minimum wage would increase from $14.20 ($15 for fast-food workers as of July 1, 2021), also in three steps, to $20 on January 1, 2026, and to $21.25 (plus indexing for 2026 inflation, likely to $22) on January 1, 2027.[1]

In this policy brief, I first show that the proposed increases are similar in magnitude to the recent increases of fast-food minimum wages to $15 in New York. The increases to $15 therefore provide an informative benchmark for analyzing the legislation. I then present evidence showing that the increases to $15 raised pay and did not reduce the number of jobs in the fast-food restaurant industry in the state. In the last section I discuss how high minimum wages can go without reducing job numbers.

1.1 Magnitude of the proposed increases

Level after accounting for inflation

Since 2018 fast-food prices have generally increased at the same rate as inflation, but the average wage of fast-food workers has not. Inflation from the end of 2018 through December 2022 decreased from the real level of the 2018 $15 minimum wage by about 17.2 percent (BLS, CPI monthly releases). Expected inflation by the end of 2026 would reduce the real value another 15 percent, according to the most recent CPI monthly release (November 2022).

[1]Subsequent mandated increases would reflect changes in the Consumer Price Index and in worker productivity, as advocated in a report from the New York State Division of the Budget (2022) and as New York State has already implemented. Such adjustments will protect workers from future inflation and begin to reverse the long-run decline in labor's share of income. Tip credits would continue at their current one-third ratio.

Survey of Professional Forecasters

In other words, if New York City's $15 minimum wage had been indexed to inflation since 2018, it would likely reach $20.22, or 95.2 percent of $21.25, by the beginning of 2026.

Percentage increases

The New York City and suburban minimum wages would increase by 41.7 percent over three years, or about 13.9 percent per year. The upstate fast food minimum wage would increase by a cumulative 33.3 percent over three years, or about 11.1 percent per year. The upstate overall minimum wage would increase 40.8 percent in four years, or about 10.2 percent per year. These increases fall well within the range of past moderate changes that have had minimal effects on employment (Cengiz et al. 2019).

Relative to median wages

The ability of an economy to absorb a minimum wage is often measured by the ratio of its minimum wage to its median wage. When New York State increased the fast-food minimum wage to $15 in 2021, the state's median wage was $24.45 (BLS Occupational Wage Surveys). The ratio of these two numbers in 2021 was .61. Using CBO's most recent wage forecast, the comparable ratio for 2023 is likely to be about .57. The projected ratio with a $22 minimum wage in 2027 would be .72, or 18 percent higher than its 2021 level.[2]

High-pressure labor market

In the low unemployment rate era of the past five years, the number of job vacancies has exceeded the number of job searchers, especially in low-paying industries. As a result, wages in low-paying industries have increased substantially faster than in high-paying industries and faster than inflation. Starting pay in restaurant occupations in New York reached nearly $17 in early 2022 (BLS, *Occupational Wages*) and likely will reach $19 in 2023. Such wage increases have slowed in recent months; their path in the next five years remains uncertain. Nonetheless, these wage increases will reduce the number of workers who would be affected by the proposed legislation. At the same time, minimum wage increases will make it easier for low-wage employers to recruit and retain workers.

1.2 Comparison to recent minimum wage increases in New York

New York State's minimum wage remained $7.25 from July 2009 to December 31, 2013, when it increased to $8. The state then increased the minimum wage in gradual steps, reaching $15 for workers in fast food restaurants in New York City on December 31, 2018 and in the rest of New York on July 1, 2021. The increases since 2013 amount to an 87.5 percent cumulative increase and average annual increases of 21.9 percent in New York City and 13.5 percent in the rest of the state. *These cumulative and annual increases are twice as large as those in the proposed legislation.* The experience of New York with $15 minimum wages thus provides informative lessons for how the proposed New York policies would be absorbed.

l therefore review here the effects of policies that raised fast food minimum wages to $15 on December 31, 2018 for New York City's fast food workers and on July 1, 2021 throughout New York State. To do so, I

[2]The 2019 ratio for New York City was about .56, also similar to the projected ratio in 2026 with a $21.25 minimum wage.

draw from McPherson, Reich and Wiltshire (2023, hereafter MRW), which uses state of the art statistical methods and data from fast-food employers to identify the causal effects of $15 minimum wage policies on pay and employment of low-wage workers in New York, California and elsewhere.[3]

2. STUDYING THE EFFECTS OF $15 MINIMUM WAGES IN NEW YORK

2.1 Data

The minimum wage research literature often focuses on the fast-food restaurant industry because of its high concentration of low-paid workers. Any effects of $15 minimum wages on jobs would be greater in this industry than in most any other low-paid industry. Conversely, the absence of any employment effect in fast food indicates that the number of jobs in other industries would also not change.[4]

MRW use fast-food pay and employment data on New York's twenty-two most populous counties from the U.S. Bureau of Labor Statistics' *Quarterly Census of Wages and Employment (QCEW).*[5] This data come from payroll reports that employers make every quarter to the New York State Department of Labor.[6] MRW's sample period begins in 2009 and ends in 2022q1 (the most recent available). The twenty-two counties account for over 85 percent of total New York State employment.

2.2 Method

The main challenge in identifying the causal effects of minimum wages involves estimating how pay and employment in New York would have evolved in the absence of minimum wage policies. To estimate this evolution, MRW deploy a widely-used statistical method called the synthetic control approach. This method compares pay and employment trends in fast-food restaurants since 2009 in New York State counties to the same trends in a matched set of counties in other states that have kept minimum wages at $7.25 since 2009. We first check whether New York's trends in the pre-policy period closely match those in the matched control group counties. We then compare the differences in the trends in the post-policy period.

[3]A Federal Reserve Bank of New York study (Bram et al. 2019) compared minimum wage effects in New York and Pennsylvania counties that straddle their common border. The fast-food minimum wage was then $13.75 in New York and $7.25 in Pennsylvania. Similar studies include Moe et al. (2019) and Lander (2022). Each of these studies finds pay increases but no disemployment effects. MRW study the effects in a much broader set of New York counties and they use a synthetic control method to more credibly identify the causal effects of minimum wages. MRW is also the first to study effects at $15 and higher.

[4]I focus here on the effects on the number of jobs. Economic Policy Institute (2022) examines the number and demographic composition of workers who would get pay increases and the size of the average increases. NELP (2022) examines the broader implications of the legislation. The proposed increases would also affect New York State's expenditures and tax revenue. I do not examine such effects here. For my analyses of such effects on California's budget and on the federal budget, see Allegretto, Reich and West (2014) and Reich (2021).

[5]We exclude Erie and Jefferson Counties because their proximity to Canada and fluctuations in the Canadian dollar.

[6]QCEW pay data measure average weekly pay over a quarter; they can diverge from hourly pay if average weekly hours vary. In practice, weekly working hours in the fast-food industry change very little over time, even after minimum wage changes.

The pre-policy period consists of the years when minimum wages did not change in New York and in the control group counties—2009q4 through 2013. The post-policy period consists of the period when New York's minimum wages began their increase—from 2014q1 to 2022q1 (the most recent data available).

MRW construct control groups for each of the 22 New York counties in our sample. To do so, we use the synthetic control method to identify a weighted average of the $7.25 counties that best match each New York county's pre-policy fast food pay and employment trends—and other important controls, such as unemployment rates.[7]

The estimated effects comprise a double difference: the difference between changes in fast-food pay and employment between the pre- and post-policy periods in each New York county and the difference in the pre- and post-policy periods in the control group. MRW then calculate a weighted average of the results for each county to estimate an overall effect.

The synthetic control approach works only if two conditions are met:

1) The method must successfully construct synthetic control groups with similar fast-food pay and employment trends during the pre-policy period;

2) The researchers must control for any confounding shocks during the post-policy period that affect the New York and control group counties differently.[8]

Under these conditions, the method can predict how New York's fast-food industry would have evolved in the absence of any minimum wage increases.[9]

3. RESULTS

More populated counties tend to have higher wage levels and are more urbanized than small counties. For these reasons, I discuss results separately for three sets of counties. I first present the results for seven larger New York counties, then for ten midsize New York counties, and, finally, for New York City.

3.1 Seven larger non-NYC counties

Figures 1A and 1B present the results of our synthetic control estimation for three downstate counties (Nassau, Suffolk and Westchester) and four metro upstate counties (Albany, Monroe, Onondaga and Rochester.[10] The blue line in Figure 1A displays average differences over time between weekly pay trends of fast-food workers in these counties and weekly pay trends of fast-food workers in the synthetic control

[7]In 2009 average pay levels in New York were higher than in the control group. The synthetic control approach compares only subsequent pay trends, not levels.

[8]To eliminate the confounding effects of the Covid pandemic on restaurant employment, which were greater in New York than in the $7.25 counties, MRW control for Covid-era changes in the control group on spending in restaurants and retail and on time spent at workplaces.

[9]MRW also use a variety of dynamic difference-in differences statistical methods. These methods produce very similar results to the synthetic control approach.

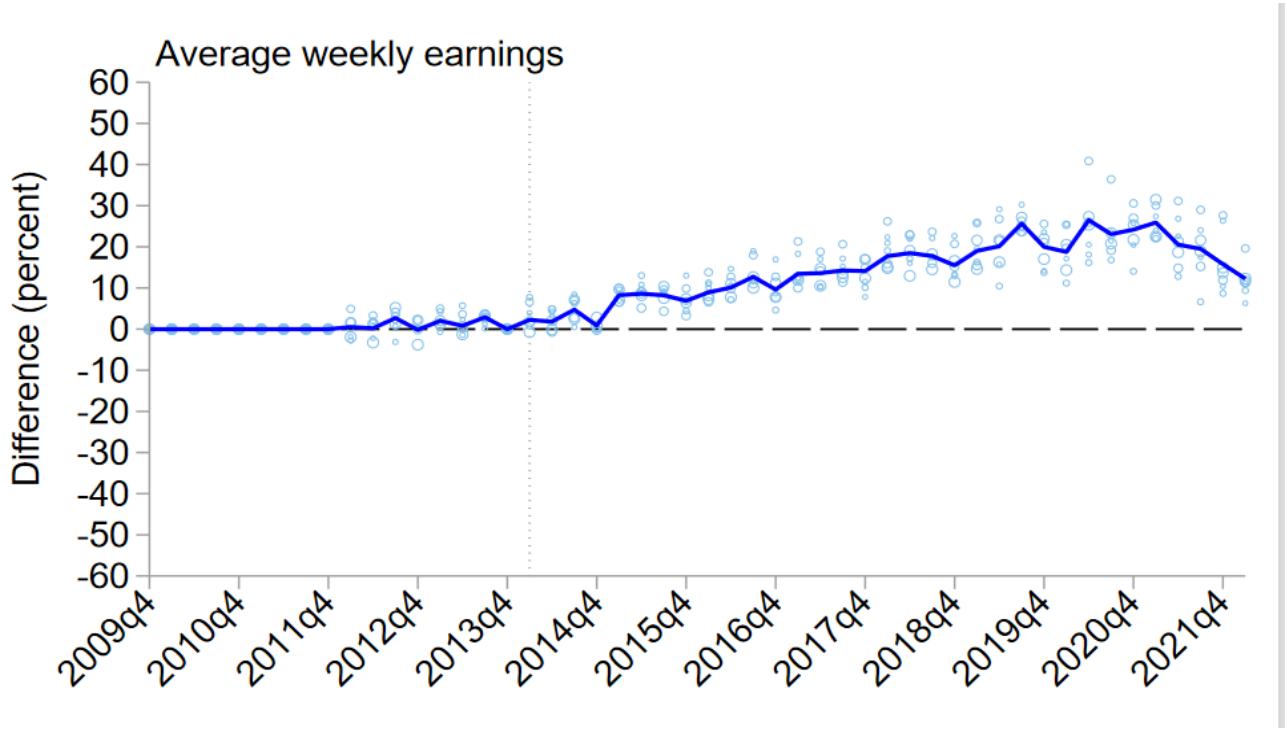
[10] Larger counties are those outside New York City with at least 5,000 restaurant workers.

groups. The lighter blue circles (some of which overlap) show the same estimates for each of the seven counties).

In the pre-policy period from 2009q4 to 2013q4, the blue line stays very close to the x-axis, indicating that pay trends are very similar in both groups of counties. The individual light blue circles are also all close to the x-axis. In other words, the figure shows an extremely close pre-policy fit between these New York counties and the synthetic control group. The synthetic control method successfully constructed a control group with pay trends that closely match those in these New York counties in the pre-policy period.

Figure 1A

Effects on fast food pay, larger non-NYC counties



In the post-policy period, which begins in 2014q1, the same blue line shows that fast-food pay began to grow faster in these New York counties than in the synthetic control group. This pattern holds in each of the individual counties, as the blue circles indicate. The difference between pay trends in these New York counties and in the control group then continues to increase as the fast-food minimum wage increases through 2019q4. This pattern shows that the minimum wage policies raise pay about 20 percent, similar to the results in national studies of more moderate increases (Cengiz et al. 2019).

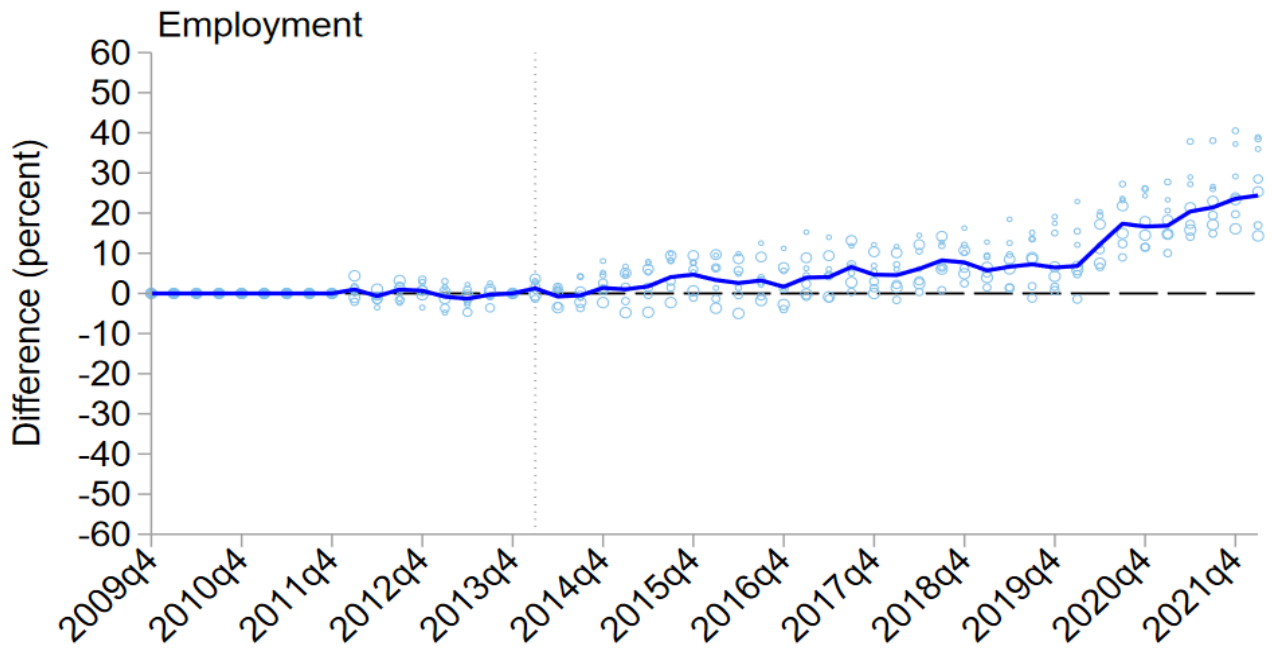
Between 2020 and 2022q1 the wage effect remains positive but decreases in magnitude. This reduction reflects both the end of the minimum wage increases and the unusual labor markets of the Covid pandemic years, when pay increases for low-wage jobs in $7.25 minimum wage states increased rapidly—and at rates greater than in higher minimum wage states.[11]

[11] Autor, Dube and McGrew (2022) find that wage increases for low-wage jobs were greater in minimum wage states in 2017 to 2019, but not in 2020 to 2022.

Figure 1B shows the effects on fast-food employment. In the pre-policy period of 2009 to 2014, the blue line stays very close to the x-axis, indicating that employment trends in the upstate New York counties were very close to those in the control group counties. This pattern indicates that the synthetic control groups match pre-policy employment trends in these New York counties.

Figure 1B

Effects on fast food employment, larger non-NYC counties



Look next at the post-policy period. On the right side of the figure, the blue line shows a clear positive effect on fast-food employment. The blue circles show that employment increased in every one of these counties relative to the control. This finding suggests that large employers possessed significant monopsony power to hold down wages and employment. The minimum wage policies reduced their power.

3.2 Ten midsized non-NYC counties

Figures 2A and 2B present our results for ten mid-sized New York counties.[12] In Figure 2A the match is again very close in the pre-policy period. In the post-policy period, the effects on fast-food pay in these counties are positive and similar in magnitude to those for the larger counties displayed in Figure 1A. The blue line again dips in 2021, when fast-food minimum wages stopped increasing and the hot labor market increased fast-food pay in the control group counties.

[12]The midsized counties are those with between 2,000 and 5,000 restaurant workers. The data for counties with smaller numbers of restaurant workers are noisier and not adequate for statistical analysis. The ten mid-sized counties are Broome, Dutchess, Niagara, Oneida, Ontario, Rensselaer, Rockland, Saratoga, Schenectady, and Ulster.

Figure 2A

Effects on fast food pay, mid-sized non-NYC counties

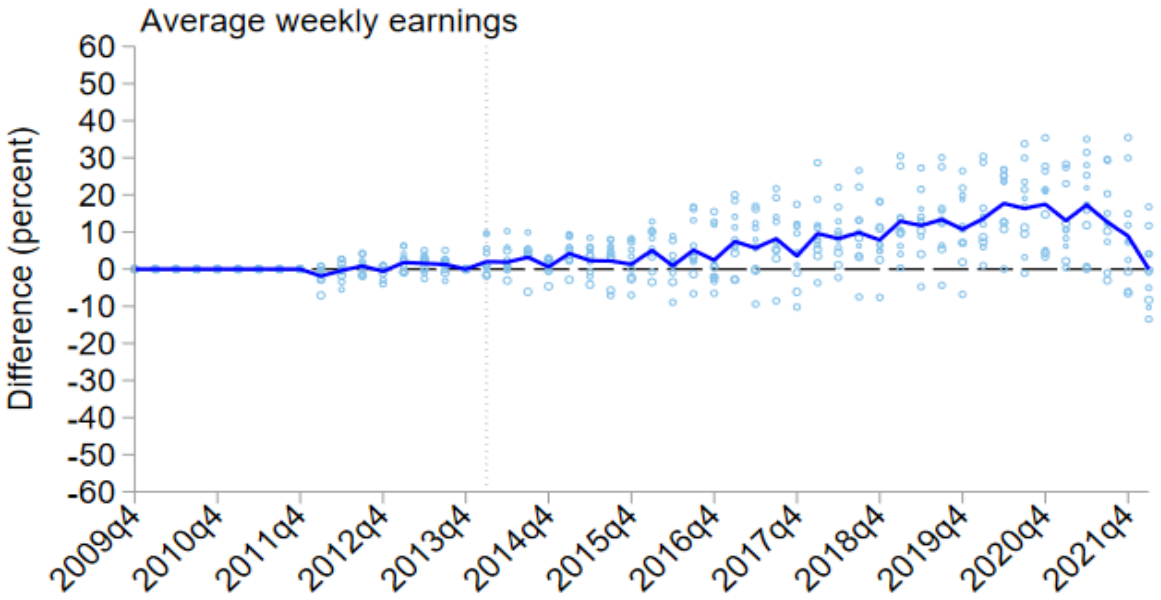
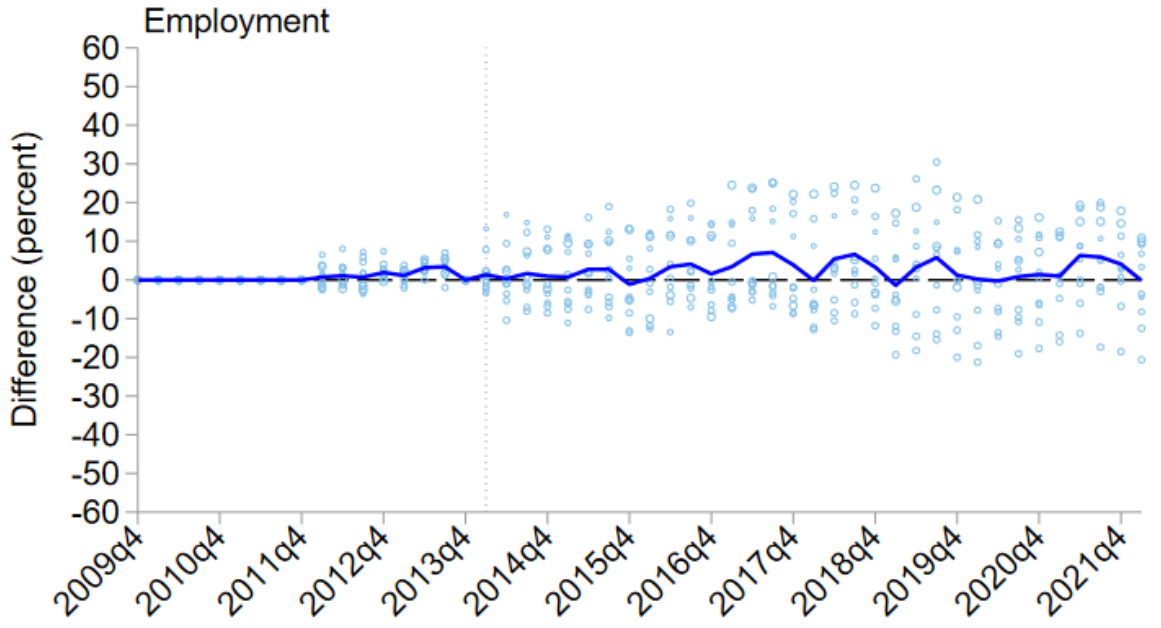


Figure 2B indicates that the $15 minimum wage on average did not have any effects on fast food employment in these counties.

Figure 2B

Effects on fast food employment, midsized non-NYC counties



3.3 Results for New York City

Figures 3A and 3B show our results for New York City. Here the blue lines again show the differences in pay and employment trends between New York City and its synthetic control group.

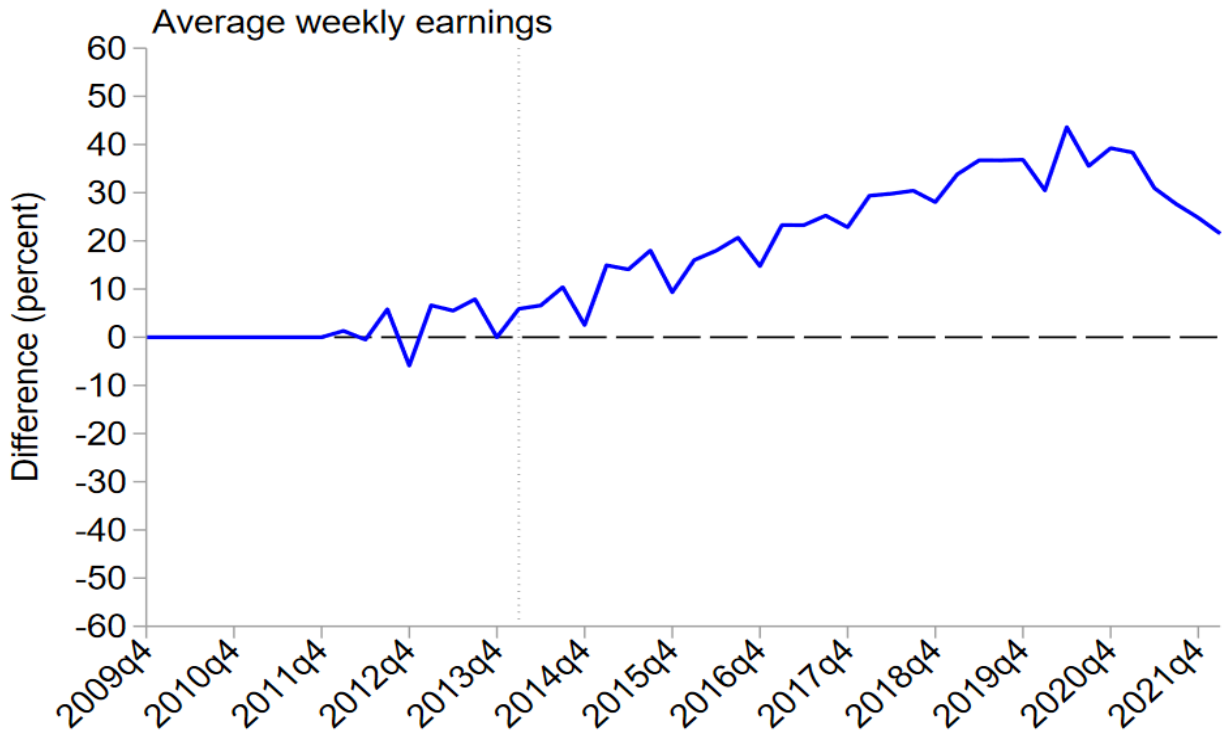
In Figure 3A, the blue line at first lies very close to the x-axis, indicating that the synthetic control provides an excellent match for fast-food pay trends in New York in the pre-policy period. The blue line then begins to increase above the x-axis during the post-policy period, indicating that minimum wage increased fast-food pay about 20 percent by 2016 and close to 40 percent by 2019. The increase between 2016 and 2019 is twice as large as in the non-NYC counties.

The greater pay increase in New York City is notable because pre-policy wage levels in the city were already higher than in the rest of the state. The greater pay increases may have been caused by change in immigration policy in 2016, which especially reduced the supply of low-educated labor in the city.[13]

The blue line then dips in 2020 to 2022, after minimum wages no longer increased in New York City and the hot labor market raised pay in the control group counties.

Figure 3A

Effects on fast food pay, New York City

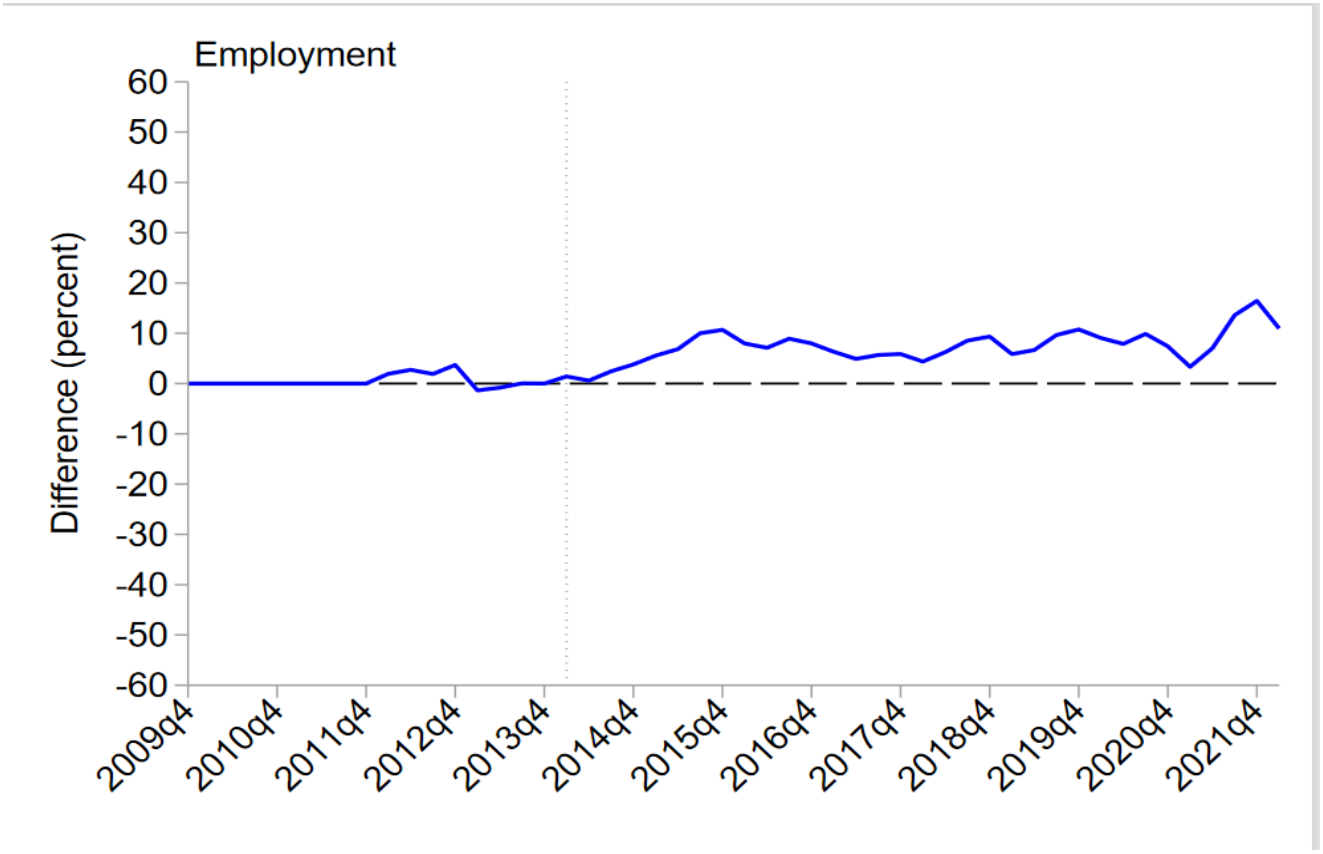


[13]In 2013 immigrants comprised about 47 percent of all New York City workers and about 60 to 80 percent of workers in food-preparation occupations, approximately double the percentage in New York State as a whole. Immigrant percentages began a swift decline with the change in immigration policy that began early in 2017.

In Figure 3B, the blue employment line again lies very close to the x-axis during the pre-policy period. It then rises somewhat above the x-axis during the post-policy period. This pattern indicates a small positive employment effect on fast-food employment in New York City.

Figure 3B

Effects on fast food employment, New York City



In summary, these results show that minimum wages increased fast-food pay without reducing employment in New York. In some areas, fast-food employment increased because the minimum wage reduced the power of employers to hold down wages and headcounts.

4. HOW HIGH CAN MINIMUM WAGES RISE WITHOUT REDUCING THE NUMBER OF JOBS?

Why did the $15 minimum wage not cause job losses? In the textbook model of a perfectly competitive labor market, employers facing higher labor costs reduce their employee headcounts and hours and substitute technology for labor. Nonetheless, the best minimum wage studies find that moderate minimum wage increases do not reduce employment (Cengiz et al. 2019).

Studies of fast-food restaurants do not observe any relationship between automation and minimum wage levels (Aaronson and Phelan 2019). Ashenfelter and Jurajda (2022) collected data from thousands of McDonald's restaurants in the U.S. They found that McDonald's restaurants in states that increased their

minimum wages were no more likely to implement touchscreen ordering systems than states that did not increase minimum wages.

The minimum wage research literature identifies three main mechanisms that lead businesses to absorb labor cost increases without reducing employee headcount or hours. First, restaurants pass on the cost increases to consumers in small price increases (Allegretto and Reich 2018; Cooper et al. 2020). Since consumer demand for fast food responds very little to modest price increases, businesses are better off increasing prices than by reducing their workforce. The estimated price increases suggest that the proposed minimum wage increases in New York would raise the price of a $5.15 Big Mac by about 1.9 percent per year over three years (Ashenfelter and Jurajda 2022).

Second, wage increases substantially reduce employee turnover and make it less costly for businesses to fill their vacant positions (Dube, Lester and Reich 2016). The cost savings are especially important in low-wage industries, where turnover exceeds 100 percent per year, and when the number of job openings is greater than the number of workers searching for jobs, as is the case at present.

Third, many low-wage employers possess the power to set their own wage and employment levels (Card 2022). They use that power to set their pay and employee headcounts below those that would pertain in a competitive labor market. In other words, low-wage labor markets are far from perfectly competitive. Higher minimum wages reduce these employers' labor market power, raising pay and employment levels (Wiltshire 2022). These employers can raise wage and employment while remaining profitable.

Could minimum wages higher than $15 nonetheless cause job losses? McPherson, Reich and Wiltshire do not find job losses in cities that already had minimum wages above $16 and $17 in 2022, such as Los Angeles, San Francisco, San Jose and Seattle. Another study (Godoey and Reich 2021) found that minimum wages did not reduce employment even in the lowest-wage quartile of U.S. counties, where the ratio of minimum wages to median wages reaches as high as 82 percent. These studies and the findings in MRW indicate that economists have not yet identified the level at which minimum wages would reduce jobs numbers.

5. CONCLUSION

Reich et al. (2016) analyzed a proposal to increase minimum wages to $15 in New York State by 2021. The report predicted that a gradual increase to $15 would not reduce the number of jobs. The results reported here both confirm the accuracy of that forecast. They also suggest that the proposed further increases to $21.25 will raise pay of low-wage workers and not reduce the number of jobs in New York.

REFERENCES

Aaronson, Daniel and Brian Phelan 2019. "Wage Shocks and the Technological Substitution of Low-Wage Jobs." *Economic Journal* 129, 617: 1-34.

Allegretto, Sylvia and Michael Reich 2018. "Are Local Minimum Wages Absorbed by Price Increases? Evidence from Internet-Based Restaurant Menus." *ILR Review* 71, 1: 35-63. https://irle.berkeley.edu/are-local-minimum-wages-absorbed-by-price-increases-estimates-from-internet-based-restaurant-menus/

Allegretto, Sylvia, Michael Reich and Rachel West 2014. "Ten Dollars or Thirteen Dollars? Comparing the Effects of State Minimum Wage Increases in California." CWED Policy Brief. https://irle.berkeley.edu/files/2014/Ten-Dollars-or-Thirteen-Dollars.pdf

Ashenfelter, Orley and Stepan Jurajda 2022. "Minimum Wages, Wages and Price Pass-through." *Journal of Labor Economics* 40, 51:

Autor, David, Arindrajit Dube and Annie McGrew 2022. "The Unexpected Compression: Competition at Work in the Low Wage Economy." Presentation to the Markus Academy. December 8. https://bcf.princeton.edu/events/david-autur-on-the-unexpected-compression-competition-at-work-in-the-low-wage-economy/

Bram, Jason, Fatih Karahan, and Brendan Moore 2022. "Minimum Wage Impacts along the New York-Pennsylvania Border." Federal Reserve Bank of New York *Liberty Street Economics*. https://libertystreeteconomics.newyorkfed.org/2019/09/minimum-wage-impacts-along-the-new-york-pennsylvania-border.html.

Card, David 2022. "Who Set *Your* Wage?" (Nobel Prize Lecture) *American Economic Review* 112, 4: 1075-90.

Cengiz, Doruk, Aridrajit Dube, Attila Lindner and Ben Zipperer 2019. "The Effect of Minimum Wages on Low Wage Jobs." *Quarterly Journal of Economics* 134, 3: 1405-54.

Cooper, Daniel, Maria Luengo-Prada and Jonathan Parker 2020. "The Local Aggregate Effects of Minimum Wage Increases." *Journal of Money, Credit and Banking* 52, 1: 5-35.

Dube, Arindrajit, William Lester and Michael Reich 2016. "Minimum Wage Shocks, Employment Flows, and Labor Market Frictions." *Journal of Labor Economics* 34, 3:

Economic Policy Institute 2022. "Proposed New York state minimum wage legislation would boost wages for nearly 2.9 million workers." EPI Blog, December 14.

Lander, Brad 2022. "New York by the Numbers." No. 69. New York City Comptroller. https://comptroller.nyc.gov/newsroom/newsletter/new-york-by-the-numbers-monthly-economic-and-fiscal-outlook-no-69-september-12th-2022/

McPherson, Carl, Michael Reich and Justin Wiltshire 2023. "High Minimum Wages in Good Times and Bad?" IRLE Working Paper, UC Berkeley.

Moe, Lina, James Parrott and Yannet Lathrop 2019. "New York City's $15 Minimum Wage and Restaurant Employment and Earnings." http://www.centernyc.org/new-york-citys-15-minimum-wage

NELP 2022. "Why New York Needs to Raise Its Minimum Wage." https://s27147.pcdn.co/wp-content/uploads/2023-1-12-Fact-Sheet-Why-New-York-Needs-to-Raise-Its-Minimum-Wage.pdf

New York State, Division of the Budget 2022. "2023 Minimum Wage Report." New York State Division of the Budget. https://dol.ny.gov/system/files/documents/2022/10/minimum-wage-2023.pdf

Reich, Michael, Sylvia Allegretto, Ken Jacobs and Claire Montialoux 2016. "The Effects of a $15 Minimum Wage in New York State." CWED Policy Brief. Institute for Research on Labor and Employment, University of California, Berkeley https://irle.berkeley.edu/files/2016/The-Effects-of-a-15-Minimum-Wage-in-New-York-State.pdf

Reich, Michael 2021. "Effect of a federal minimum wage increase to $15 by 2025 on the Federal budget." CWED Policy Brief, Institute for Research on Labor and Employment. UC Berkeley. https://irle.berkeley.edu/files/2021/01/Reich-15-MW-Budget-Impacts-January-28-2021.pdf

Wiltshire, Justin 2022. "Walmart Supercenters and Monopsony Power: How a Low-Wage Employer Impacts Local Labor Markets." https://justinwiltshire.com/walmart-supercenters-and-monopsony-power

CENTER ON WAGE AND EMPLOYMENT DYNAMICS

Institute for Research on Labor and Employment
University of California, Berkeley
2521 Channing Way #5555
Berkeley, CA 94720-5555
http://cwed.berkeley.edu