State of New York
Office of the Inspector General

Investigation of Improprieties in the Issuance of Crane Operators' Certifications by the New York State Department of Labor

April 2008

Kristine Hamann
State Inspector General

Contents

I. Executive Summary 1
A. Improper Issuance of Crane Operators' Certifications 1
B. Department of Labor Officials Failed to Act on Improper Certifications 1
C. Appearance of Bias in the Certification of Crane Operators 2
D. Procedural Problems in the Administration of the Examination 2
E. Other Employee Misconduct 3
F. Recommendations 3
II. Background 5
A. Certification of Crane Operators in New York State 5
1. Crane Operating Examining Board 5
2. Qualifications of Crane Operators 6
3. Written Examination 6
4. Practical Examination 7
B. Allegations 7
1. Initial Allegation 7
2. Other Accusations 8
C. Scope of Report 8
D. Methodology 8
III. Findings of the Inspector General 9
A. The Crane Operator's Practical Examination 9
1. Location of Examination and Equipment Provided 10
2. Preparing for the Examination 10
3. Recording of Examination 11
4. Tasks Required During Examination 11
5. Grading of Examination 12
6. Members of the Crane Board 14
7. Hearings by the Crane Board 15
8. Renewal of Certifications 16
9. Union vs. Non-Union Passing Rates 16
B. Misconduct of Department of Labor Employee Frank Fazzio 17
1. Fazzio Improperly Issued Occupational Certificates to Himself 18
2. Fazzio Gave False Testimony at a Hearing of the Crane Board 19
3. Fazzio Usurped the Authority of the Crane Board 20
IV. Recommendations 24
A. The Practical Examination 24
B. Frank Fazzio 25
Response from the Department of Labor 27
Plan of Corrective Action 27
Additional Comments Regarding the Inspector General's Recommendations 28
Union-Affiliated Test Sites 28
Size and Composition of the Crane Board 29

I. Executive Summary

The Inspector General investigated a complaint by an applicant for a New York State crane operator's certification alleging that he had been unable to obtain the certification because he was not a member of the International Union of Operating Engineers (IUOE). The investigation did not substantiate the specific allegations of the applicant. However, the Inspector General found that the Department of Labor lacks formal written policies or regulations regarding the administration of the practical examination required to obtain a crane operator's certification, leaving the process open to abuse. The practices employed by the Department of Labor in the administration of the examination are unfair and give the appearance of bias in favor of members of the union. In addition, the Inspector General uncovered various instances of misconduct by Department of Labor employee Frank Fazzio, the most serious of which was the improper issuance of crane operators' certifications to more than 200 applicants.

A. Improper Issuance of Crane Operators' Certifications

The Inspector General has discovered that Department of Labor employee and former Crane Operating Examining Board (Crane Board) member Frank Fazzio was responsible for the issuance of crane operators' certifications to more than 200 individuals who were not approved for certifications by the Crane Board.

Investigators from the Inspector General's Office conducted an independent review of available files and identified 142 individuals who had received crane operators' certifications despite being awarded a failing grade on the practical examination. Although some of the 142 certifications had since lapsed, the majority had been renewed within the past three years, and therefore were still active. The Inspector General promptly notified the Commissioner of Labor of this finding, even though the investigation was still underway. During its own review, the Department of Labor identified 68 additional certifications issued to individuals who had not passed the practical examination. In November 2007, the Commissioner of Labor suspended 197 crane operators' certifications, pending a re-examination. As of the issuance of this report, 75 of the suspended crane operators had re-taken the examination; 38 had passed.

B. Department of Labor Officials Failed to Act on Improper Certifications

In 2002, two certifications were revoked when it was discovered that they had been issued despite the applicants' failure of the practical examination. No action was taken against Fazzio, who had issued the certifications. In 2004, officials at the Department of Labor were notified of an additional 42 individuals who had been issued crane operators' certifications improperly. When interviewed, Department of Labor officials claimed they could not recall having been informed of the problem.

C. Appearance of Bias in the Certification of Crane Operators

Outside of New York City, which has its own licensing process, a crane operator in New York State must obtain a certification from the New York State Department of Labor. Applicants must be in good health, have three years of experience operating a crane, and must pass both a written and practical examination. The final step in the process is the practical examination, in which the applicant must demonstrate his or her operating skill on an actual crane. The Crane Board, whose members are appointed by the Commissioner of Labor, evaluates the applicant's performance on the required tasks to determine which applicants are eligible for a certification.

The Inspector General's investigation revealed that the Department of Labor has no formal written policies or regulations regarding the administration or grading of the practical examination. There are no formal guidelines specifying which tasks should be performed during the examination, how much time should be allotted for each task, or how the examination should be graded. There is no minimum number of crane board members that must be present to grade an examination, and, although all parties interviewed agree that the passing score is either 65 or 70, there is no written guideline to this effect either. In the absence of such policies or regulations, the examination process is subject to abuse.

Several factors combine to benefit members of the IUOE in the administration of the practical examination:

- Most of the examinations are conducted at IUOE sites using equipment owned or borrowed by the union.
- Members of the union are permitted to practice on the equipment used for the actual test but non-members are only allotted five minutes immediately prior to the examination to become acquainted with the controls.
- At least two of the cranes used for the examinations function poorly and are missing control markings, further disadvantaging non-union members who do not have time to practice on the equipment.
- All of the current members of the Crane Board have a connection to the IUOE. Two of the four members are current members of the union. One is a retired member of the union, and another owns a business that has agreed to employ only union crane operators.

The extent of the Department of Labor's reliance on the IUOE for the administration and grading of the practical examination gives the appearance that the union has improper influence over the awarding of crane certifications.

D. Procedural Problems in the Administration of the Examination

The Inspector General identified additional problems with the administration of the practical examination that interfere with the applicants' rights to an open and fair process that is subject to review:

- Board members use their discretion in determining which applicants are permitted to exceed the time limit for performing certain tasks during the examination.

- Standards for grading applicants are inconsistent among board members.
- Crane Board members grade examinations in pencil.
- Video recordings of the examinations, which are to be used for appeals, are of poor quality and are maintained for only six months.
- The same board members who graded an applicant may decide an appeal of their decision.

E. OTHER EMPLOYEE MISCONDUCT

In addition to issuing crane operators' certifications to individuals who did not achieve a passing score on the practical examination, Fazzio issued crane operator and blaster certifications to himself. Fazzio was not qualified for either license. Fazzio also appeared as an "expert" witness in connection with an appeal of an applicant's failure of the practical examination, during which Fazzio used his improperly-issued crane operator's certification as evidence that he had obtained three years of experience as a crane operator.

F. RECOMMENDATIONS

The Inspector General makes the following recommendations to the Department of Labor regarding the crane operators' practical examination:

1. The practical examination should not be administered on cranes to which some applicants have greater access prior to the examination than others. The Department of Labor should make every reasonable effort to ensure that applicants have an equal level of familiarity with the test crane. Preferably the examination should be administered at a state-owned site on a state-owned crane, rather than the site owned by a union or private association. This could be accomplished, for example, by coordinating with the State Department of Transportation, which owns and utilizes cranes for its work within the state. As a first step and at a very minimum, applicants who have trained and practiced on a crane at a particular site should take the test at a different site.
2. Applicants should have the opportunity to take the examination on a well-functioning crane that would be capable of being employed at an actual worksite.
3. The Department should immediately begin to draft policies or regulations regarding the conduct and administration of the practical examination. Policies or regulations must specify the following:
    a. Tasks required for the exam.
    b. Standards for scoring applicants.
    c. Passing scores for each type of certification.
    d. A method by which the various scores of the Crane Board members should be combined to obtain a final score.
    e. That applicants be permitted sufficient time to acquaint themselves with the equipment.

f. The minimum number of Crane Board members that must be present to evaluate an applicant.

4. The Commissioner of Labor should re-evaluate the size and composition of the Crane Board. A larger Crane Board could help ensure that multiple members are present to evaluate each practical examination. Membership in the Crane Board should be balanced to avoid an appearance of bias towards union-member applicants, for example, by including a representative number of non-union-member crane operators or non-union-affiliated business owners.
5. In accordance with Public Officers Law § 74(3)(f), Crane Board members should recuse themselves from practical examinations in which their participation may give the appearance of improper influence. For example, a Crane Board member should not evaluate an applicant with whom he has a business relationship or significant personal relationship.
6. The Crane Board members who hear appeals should not be the same members who graded the original exam. A larger Crane Board may be required to accomplish this.
7. The quality of the video recordings of the examinations should be improved and recordings should be retained for at least one year to allow for proper oversight of the Crane Board.
8. Crane Board members should grade examinations in ink to eliminate the potential for altering scores.

In addition, the Inspector General recommends that the Department of Labor pursue appropriate disciplinary action against Fazzio, and is referring the matter of Fazzio's misconduct to the New York State Commission on Public Integrity.

II. Background

The New York State Legislature has declared that the "operation of cranes...involve[s] such elements of potential danger to the lives, health and safety of the citizens of this state and to their property that special regulations are necessary to insure that only persons of proper ability and experience shall engage in such uses and operations."[1] Outside of New York City, a crane operator in the state must obtain a "certificate of competence issued by the Commissioner of Labor."[2] As stated on the Department of Labor's website, the certification process is designed to "[protect] the public and coworkers from the hazards of cranes tipping over, dropped loads and other accidents that can occur from an unskilled person operating a crane."[3] The rules governing certification of crane operators are set out in the Official Compilation of Codes, Rules and Regulations of New York, Title 12.[4] The state's certification requirement does not apply to crane operators working within New York City, which has its own licensing process.[5]

In the past, New York State recognized licenses from other jurisdictions, including New York City. Crane operators were granted a New York State crane certification after demonstrating that they were licensed in another jurisdiction. Today, all crane operators must pass New York's written and practical examinations in order to receive a New York State certification.

A. Certification of Crane Operators in New York State

1. Crane Operating Examining Board

The members of the Crane Operating Examining Board (Crane Board) are appointed by, and serve at the pleasure of, the Commissioner of Labor. The primary responsibility of the Crane Board is "the examination of applicants and their qualifications, and the making of recommendations to the commissioner with respect to the experience and competence of applicants." This examination is known as the "practical" examination, and it is conducted on an actual crane. The Crane Board members observe the practical examination and assign a score to the applicant's performance. Although the certifications themselves are issued by the Department of Labor's Licensing and Certification Unit, in practice the Crane Board makes the final determination regarding which applicants receive certifications.

By regulation, the Crane Board must consist of at least three members, including a certified crane operator and a representative of crane owners. In addition to assessing

---

[1] McKinney's N.Y. General Business Law § 480 (1975).
[2] McKinney's N.Y. General Business Law § 482(1) (1975).
[3] Department of Labor website, http://www.labor.state.ny.us/workerprotection/safetyhealth/DOSH_LICENSING_CERTIFICATION.shtm (March 18, 2008).
[4] 12 NYCRR § 23-8.5 (1972).
[5] If a crane is located on state property located within the New York City, the operator must be certified by the state.

new applicants, the Crane Board may also conduct hearings involving appeals of certification denials, revocations and suspensions, and refusals to issue renewals.[6] In interviews, employees of the Department of Labor told investigators that regulations required the commissioner to appoint a member of the Department of Labor to the board. However, there is no such regulation.

Currently, the Crane Board is composed of four members, all of whom are associated, or formerly were associated, with the International Union of Operating Engineers (IUOE). The IUOE, with national membership of approximately 400,000, represents heavy equipment operators, among others, through 170 local chapters throughout the United States and Canada.

Until recently, an employee of the Department of Labor, Frank Fazzio, was a fifth member of the board. Fazzio was never a member of the IUOE. After the Inspector General informed the Commission of Labor of the preliminary findings of this investigation, Fazzio was removed from the Crane Board. Fazzio continues to work at the Department of Labor.

2. Qualifications of Crane Operators

An applicant for a crane certification must be at least 21 years of age and must have acquired at least three years of practical experience operating cranes.[7] The required necessary experience may be obtained in another jurisdiction or within New York State under the direct supervision of a certified crane operator. The IUOE offers an apprenticeship program to its members that allows crane operators to obtain the necessary experience. In the apprenticeship program, union members are trained on cranes owned by and located at the various local chapters of the union throughout the state.[8]

In addition to having the required experience as a crane operator, an applicant may not suffer "from a physical handicap or illness, such as epilepsy, heart disease, or an uncorrected defect in vision or hearing, that might diminish his competence."[9]

The application form furnished by the Department of Labor requires the applicant to certify that he does not have a physical handicap or illness that would impair his ability to operate a crane and to explain how he has acquired three years' experience as a crane operator.[10] The Department of Labor requires written confirmation of the applicant's experience or apprenticeship from the company or training facility.

3. Written Examination

Each applicant for a crane operator's certification must take a written examination. The exam is administered by the New York State Department of Civil

---

[6] 12 NYCRR § 23-8.5(g) (1972).
[7] 12 NYCRR § 23-8.5(f) (1972).
[8] The IUOE locals that are located in New York State and include crane operators as members are Local 014, Local 015, Local 017, Local 106, Local 137, Local 138, Local 463, Local 545, and Local 832. http://www.iuoe.org/link_system/local_links2.asp#bookmark (November 23, 2007)
[9] 12 NYCRR § 23-8.5(e) (1972).
[10] Department of Labor Form SH-830 (1-06): Application for Crane Operator's Certification of Competence

Service and consists of 60 multiple choice questions related to the operation of a crane. Applicants who pass the written examination may proceed to the practical examination, the final step in obtaining a crane operator certification.

4. Practical Examination

During the practical examination, the applicant operates a crane and is graded on his performance by the members of the Crane Board. During the exam, the applicant must perform a series of tasks within a limited amount of time. Depending on the type of crane for which the certification is sought, the tasks on the test vary slightly. For the majority of the classes of crane certification, there are four tasks to perform. The crane operator taking the exam is guided by a signal person employed by the Department of Labor. Another employee of the Department of Labor makes a video recording of the exam.

B. ALLEGATIONS

1. Initial Allegation

On April 13, 2007, the Inspector General was notified by the Department of Labor of a complainant who had alleged a pro-union bias in the administration of the practical exam. The complainant holds a valid New York City crane certification, but has failed the state practical examination three times. The complainant is employed in a small family business and is not a member of a union. The family business does not employ union laborers.

The complainant alleged that two union officials, one of whom is a member of the Crane Operators Examining Board, told him, in substance, that he would not be able to obtain a New York State Crane Operator certification if he did not join the International Union of Operating Engineers. Union officials allegedly interfered with him while he was practicing for the examination, and told him that if he joined the union he could practice at the test facility as often as he wanted.

The complainant further alleged that he witnessed non-union applicants treated with hostility at the site of the practical examination; that the crane he utilized to take one of his three practical examinations malfunctioned; and that a signal person directing the applicants was incompetent.

The complainant stated that he had contacted the Department of Labor several times regarding these issues but he received no response. According to the Department of Labor, it was notified initially of the complaint on February 22, 2007. The director of the Division of Safety and Health investigated the complaint and determined that it was unsubstantiated. When the complainant expressed his dissatisfaction with the Department of Labor's response on April 13, 2007, the allegations were forwarded to the Inspector General. On or about May 21, 2007, upon the hiring of the Executive Director of the Office of Special Investigations, the Department of Labor began an internal investigation of the Crane Board practices. The internal investigation was suspended at the Inspector General's request.

2. Other Accusations

During the course of the Inspector General's review of the crane operator's certification process, investigators interviewed other non-union applicants. In general, many non-union applicants felt that the test was biased in favor of members of the union.

In interviews with investigators of the Inspector General's Office, three current employees and one former employee of the Department of Labor who are familiar with the licensing process also indicated that there was a bias in favor of union members in the administration of the practical exam. One official and one former official both expressed that it would be preferable to administer the exams at non-union sites.

C. Scope of Report

In addition to investigating the specific allegations of misconduct raised by the complainant and others, the Inspector General examined the Department of Labor's and the Crane Board's administration of the crane operators practical examination in general.

D. Methodology

The Inspector General interviewed more than two dozen past and present Department of Labor employees and all of the current members of the Crane Board. Dozens of crane operators whose certifications were suspended as a result of this investigation were also interviewed. Investigators also observed practical exams that were administered at two different sites in November and December 2007. Finally, investigators conducted an extensive review of departmental records, including more than 2,000 files related to applicants for certification as a crane operator. The Department of Labor cooperated fully with the Inspector General in its investigation.

III. Findings of the Inspector General

The Inspector General did not substantiate the specific charges alleging that a Crane Board member and another union delegate had threatened to interfere with the applications of non-union applicants for crane operators' certifications. Likewise, the allegations concerning specific incidents witnessed by the complainant at the test site were not substantiated.

However, a number of problems with the certification process were identified in the course of the investigation. Most importantly, the Inspector General determined that the manner in which the test is administered gives an advantage to members of the International Union of Operating Engineers. The absence of any formal written policies or regulations within the department regarding the administration of the test creates the opportunity for abuse of the process.

In a review of departmental records, the Inspector General identified 142 instances of crane operators' certifications being issued between October 1985 and April 2000, even though the Crane Board had given the applicants failing scores on their practical examinations. Of these, 129 certifications were still active at the time of the Inspector General's discovery. The Inspector General notified the Department of Labor of this finding on October 29, 2007, and after a brief internal investigation, on November 8, 2007, the Department of Labor suspended all 129 certifications. Following the suspensions, the Department of Labor completed a more extensive review of records on November 26, 2007, in which it identified additional certified crane operators who also had failed the practical examination. In total, the Commissioner of Labor suspended 197 crane operators' certifications.

All of the improper certifications were issued between 1985 and 2000 by Frank Fazzio or at his direction. Fazzio exercised broad discretion in the granting of certifications. Two of these improper certifications were discovered in 2002 by a subsequent supervisor of the Licensing and Certification Unit. The certifications were revoked. Another 42 improper certifications were detailed in a memo dated February 2004 by the same supervisor to an attorney in the General Counsel's Office and the director of the Division of Safety and Health. Nothing was done to address the problem until the Inspector General notified the Commissioner of Labor of the improperly-issued certifications in November 2007.

A. The Crane Operator's Practical Examination

Once an applicant has met the basic qualifications regarding age, health, and experience and has passed a written examination, he must demonstrate his ability to operate an actual crane during a practical examination before being awarded an operator's certificate. The Inspector General identified a number of problems with the administration of the practical examination. In particular, the Department of Labor never adopted any written rules or procedures regarding the conduct of the examination or the required passing scores, leaving the process open to the discretion of the Board Members and Department of Labor employees involved. The lack of formal standardization of procedures invites inconsistency and abuse in the administration of the tests and the

awarding of certifications. In addition, several aspects of the examination, including the identities of the board members who judge the performances of the applicants and the sites at which the test is administered, give union-member applicants an advantage in the awarding of crane certifications. At the very minimum, there is an appearance of bias in the administration of the practical examination. The majority of non-union applicants interviewed by investigators perceived such a bias.

Set forth below are the current details for administration of the practical examination. As none of these procedures are described in any regulation of the Department of Labor, the Inspector General gathered the information through interviews with knowledgeable officials and observations of the examinations themselves.

1. Location of Examination and Equipment Provided

There are currently eleven test sites throughout New York State. Seven of the sites are owned and operated by the IUOE. At these seven sites, the cranes utilized for the examination also are owned by the union. If the union does not own the type of crane required for an exam, the union will borrow one from a union-affiliated company. The testing sites are located at the Local 106 site in Albany, the Local 17 site in Buffalo, the Local 832 site Canaseraga, the Local 545 site in Constantia, the Local 137 in Montrose, the Local 14 site in Montrose, and the Local 138 site in Yaphank. Three additional sites, one in Syracuse and two in Hauppauge, are owned and operated by a second union, the International Brotherhood of Electrical Workers. There is one non-union testing location in Frankfort / Utica that is operated by the Empire State Bridge and Highway Contractors Association. Approximately 30 companies belong to the Empire State Bridge and Highway Contractors Association. The association also has an apprenticeship program.

Applicants for crane operators' certifications complained to the Inspector General that the equipment provided for the examination at some of the locations is old and unfamiliar compared to cranes they were accustomed to operating. In some instances, the markings on the controls have worn off. Since the state does not own any of the equipment used in the examinations, the Department of Labor could not provide information regarding the purchase dates of the cranes.

2. Preparing for the Examination

Although there is no formal policy or regulation to this effect, each of the applicants is allowed five minutes immediately prior to the examination to become acquainted with the controls of the test crane. The controls of a crane may vary greatly from one make of crane to another. Levers and controls may be completely reversed from those contained on a crane produced by another manufacturer, making these few minutes of familiarization very important to an individual who has never used that crane before. Allowing applicants to become familiar with the equipment is especially important at sites with older cranes, which may be even more unfamiliar to the applicant.

A non-union member will have only these five minutes on the crane prior to the test. However, at the union sites, applicants who are members of the union have additional access to the crane and even may have received their apprenticeship training on the test crane. At the site owned by the Empire State Bridge and Highway Contractors

Association, members of that association are permitted additional practice time on the crane during non-testing hours, but others are not.

3. Recording of Examination

All of the tests are recorded on videotape by an employee of the Department of Labor. The quality of the videotape varies greatly depending on the positioning of the camera and the efforts of the cameraperson. The Department of Labor retains the videos for only six months.

Prior to beginning the examination, the applicant approaches the video camera and states his name, the last four digits of his Social Security number, the date, and the time. After the examination the applicant returns to the video camera and identifies himself once more.

4. Tasks Required During Examination

As mentioned above, the Department of Labor maintains no formal written policies or regulations regarding the administration of the practical examination. Crane Board member Robert Olori took it upon himself to attempt to standardize and document the required tasks for the test. Olori provided these documents to the Inspector General. The following description of the crane test is based on Olori's documents, interviews with the supervisor of the Department of Labor's Licensing and Certification Unit, and observations of tests by investigators.

The Department of Labor offers several different crane certifications. The test varies somewhat depending on the type of certification sought by the applicant. The certification type depends of the type of crane to be operated and the maximum weight of the load it can carry.

Before the applicant mounts the crane he must perform an inspection of the equipment. This inspection is graded and is part of the applicant's overall score.

After he has inspected the equipment, the applicant must perform a series of timed tasks utilizing the crane. As the applicant proceeds through the test, a signal person leads the applicant through the tasks using hand signals. According to the rating sheet used by the Crane Board, the applicant must complete at least two tasks in order to pass the practical examination.

Depending on the crane type, the load to be manipulated during the exam is either a bucket filled with hardened concrete or a tire or tires. The test will include two to four of the following tasks:

1. Lifting a load and placing it on a platform
2. Manipulating the load through a maze of cones
3. Lifting the load and placing it "blind" behind a wall
4. Inserting the crane's hook, without a load, into an empty drum
5. Lifting a stack of tires and positioning it onto a pole

For the majority of crane certifications, four tasks are required. The supervisor of the Licensing and Certification Unit told the Inspector General that the short time allotted for each task impels the applicant to perform multiple tasks simultaneously, such as lifting the load and moving it laterally. The applicant must be sufficiently skilled in order to accomplish this task.

The applicant is allotted only 90 seconds for each task, except during the task in which the applicant must manipulate the crane's load through a maze of cones. The Crane Board members themselves time the tasks. Crane Board member Olori's documentation of the test requirements indicates that the maze task is timed, but Licensing and Certification Unit supervisor Martha Waldman told investigators that the maze task was not timed. In practice, Crane Board members use their discretion to decide how much time is allotted to each applicant performing the maze task. Applicants who are navigating the maze efficiently but slowly may be granted additional time. To a lesser extent, additional time is sometimes granted on the other timed tasks if the applicant has performed well and is near completion.

5. Grading of Examination

As noted above, Crane Board members are solely responsible for grading the examinations, although Department of Labor employees are also present to assist in the administration of the test. Although regulations call for the Crane Board to make recommendations to the Commissioner of Labor regarding the issuance of crane operator's certificates, in practice, the Crane Board is called upon to make the final determinations regarding issuance of certifications and adjudications of appeals or other hearings. The Licensing and Certification Unit within the Department of Labor is responsible for implementing the decisions of the Crane Board.

The Department of Labor does not require that a minimum number of Crane Board members be present to view the test. The result is that, over the past two years, applicants taking the practical examination may have been graded by as few as one board member or as many as four board members. Investigators identified two full days in which only one board member was present to grade practical examination. In both cases, the test site was owned by the board member's own union local chapter. In addition, certain board members are more likely to be present at examinations than others. Three board members attended the majority of the 414 exams administered during a recent 18-month period reviewed by the Inspector General, with attendance rates ranging from 61 percent to 76 percent. Of the remaining two board members, one attended 36 percent of the exams and the other, only 8 percent.

In general, the applicant is graded on his ability to maintain control of the load while quickly completing the tasks. The board members use a standardized sheet provided by the Department of Labor to record their evaluations of the applicants. The applicant is given a score for each task completed. In addition, the applicant is scored on his inspection of the equipment, whether he follows hand signals correctly, his ability to raise and lower the load, and the "overall smoothness" of the crane's operation. The applicant earns up to ten points for each category. For most examinations administered

by the board, in which four tasks must be performed, the applicant may earn up to 100 points.

Certain errors committed by the applicant are to result in automatic failure. In this case, a member of the board may signal the end of the examination by blowing a horn twice. In the case of an automatic failure, an applicant may be removed from the crane prior to completion of the examination.

According to documents provided by Olori, the causes for automatic failures are:

(1) losing control of the load,
(2) striking something with the load,
(3) dropping the load on the ground,
(4) placing the load on the ground in order to regain control,
(5) removing one's hand from the swing [side-to-side control],
(6) failure to follow hand signals, or
(7) failure to complete the first three tasks.

Except for the automatic failures listed on the rating sheet, the Department of Labor offers no guidance to Crane Board members on how to score each applicant within the categories listed. Crane Board members described varying approaches to scoring an applicant who takes longer than the allotted amount of time for any given task. While some said they would only deduct a few points if the applicant's overall performance was otherwise acceptable, others said that the applicant should get a zero for a task that was not completed within the allotted time.

Although no board member stood out as being an exceptionally easy or difficult grader, passing rates did vary somewhat among the board members. A review of 359 exams administered in 2006 and early 2007 revealed a range of passing rates. One board member passed only 15 percent of applicants, while another board member passed 33 percent.[11]

The Department of Labor also has no rule or regulation specifying the passing score for the practical examination or how to combine the individual scores of the board members. For the most part, scores of the individual board members are averaged, even if one of the board members has noted that the applicant has done something constituting an automatic failure. Sometimes the board members confer about the scores prior to making a final determination. Board members record their scores on the rating sheet in pencil.

Although there are no written policies or regulations regarding the passing score for the exam, the majority of the Department of Labor employees and Crane Board members interviewed during this investigation agreed that the passing grade for the tests requiring four tasks is 65 points out of a maximum of 100. One of the Crane Board members believed that the passing score was 70. All agreed that a score below 65 was not a passing score and that at no time in the past was the passing score less than 65.

[11] This review includes all examinations administered during the relevant time period, excluding 55 examinations that were administered for line truck or restricted boom truck certifications, which have disproportionately high passing rates. The passing rates for these tests are 83% and 48%, respectively.

6. Members of the Crane Board

As noted above, the Commissioner of Labor is entitled by statute to appoint a Crane Operating Examining Board. According to state regulations, the Crane Board "shall consist of at least three members, at least one of whom shall be a crane operator who holds a valid certificate of competence issued by the commissioner, and at least one of whom shall be a representative of crane owners."[12] Although not required by statute, the Department of Labor's website asserts that the Crane Board consists of three employees, one of whom represents the Department of Labor.[13] A senior official who supervised the Licensing and Certification Unit between 2000 and 2007 told investigators that the commissioner was required by law to appoint a union member to the Crane Board, although this assertion is also untrue.

Regulations state that the duties of the Crane Board members are as follows:

1. examination of applicants and their qualifications, and the making of recommendations to the commissioner with respect to the experience and competence of the applicants;
2. the holding of hearings regarding appeals following denials of certificates;
3. the holding of hearings prior to determinations of the commissioner to suspend or revoke certificates, or to refuse to issue renewals of certificates;
4. the reporting of findings and recommendations to the commissioner with respect to such hearings;
5. the acts and proceedings of the examining board shall be in accordance with regulations issued by the commissioner.[14]

Crane Board members are not compensated for their work, although they receive a "per diem" allowance for travel and meals.[15] As noted above, not every board member is present at every examination. The Crane Board supervises 250 practical examinations annually and conducts two to four hearings. Usually, multiple examinations are scheduled for a single day, and Crane Board members devote approximately 40 days per year to their duties.

Currently, there are four members of the Crane Board: Bruce Meringola, Robert Olori, Robert Alger, and Robert Jones. Until November 2007, Department of Labor employee Frank Fazzio also served on the board. Fazzio was removed from the board as a result of the findings of this investigation. The Inspector General's findings regarding Fazzio are discussed in the next section of this report.

Each of the four current Crane Board members is associated with the IUOE, either presently or in the past. Two of the members are current employees of the union. One is the owner and operator of a business that has agreed to employ only union members as

---

[12] 12 NYCRR § 23-8.5 (g) (1972),
[13] http://www.labor.state.ny.us/workerprotection/safetyhealth/DOSH_BOARDS.shtm (March 17, 2008).
[14] 12 NYCRR §23-8.5 (g) (1972).
[15] Pursuant to statewide rules, a per-diem allowance may include up to $69 for meals, plus 50.5 cents per mile driven in one's personal vehicle.

crane operators. The fourth is a former union member. Only Fazzio had no official relationship with the union, but several Department of Labor officials said that Fazzio favored union applicants.

Bruce Meringola: Meringola has been on the Crane Board since 1998. Meringola is the Training Director for IUOE Local 138. Meringola's career began in 1971 when he attended the union's apprenticeship program for four years. In 1975, he was certified as a crane operator and worked in that capacity for the next 20 years. In the early 80's, Mr. Meringola also became an instructor at the union's school and in the mid 80's was licensed by New York City as a crane operator. In 1996, Mr. Meringola began working full-time as the union's training director. In 1998, the IUOE nominated him for the Crane Board.

Robert Olori: Olori is owner of OCS Industries, a nationally-recognized company that performs a wide variety of rigging, plant design, and crane-related lifts. Olori served on the Crane Board for 15 years and is the required representative of the heavy construction industry. Olori has been in the rigging and crane operating business for approximately 50 years and has been certified in New York State as a crane operator for 20 years. OCS Industries employs exclusively union members as crane operators.

Robert Alger: Alger is a retired mechanic superintendent. As a member of the union, Alger worked in the contracting business for 50 years. Alger was certified by New York State as a crane operator for 20 years, but his certification has been expired for the past 10 years. Alger was a member of the Crane Board in the late 1980's. He returned to the board in 2002.

Robert Jones: Jones is the Business Manager for IUOE Local 106. He joined the Crane Board on January 1, 2006. Jones is certified as a crane operator in New York State.

7. Hearings by the Crane Board

By regulation, the duties of the Crane Board include "the holding of hearings regarding appeals following denials of certificates" and "the holding of hearings prior to determinations of the commissioner to suspend or revoke certificates, or to refuse to issue renewals of certificates." An applicant may request an appeal within 30 days of learning of a negative determination by the Crane Board.

In the hearing of an appeal, the Crane Board reviews the video of the practical examination. Some of these videos are of poor quality and parts of the test cannot be seen at all on the video. As noted above, the tapes are retained for only six months. The same Crane Board members that denied the certification may also hear the appeal. A hearing involving suspension or revocation of a certification generally involves a review of an accident involving a crane. There are no written policies or regulations regarding the conduct of these hearings.

Hearings of the Crane Board are officiated by an adjudication officer of the Department of Labor. The Crane Board makes the determination regarding the issuance or maintenance of a certification.

8. Renewal of Certifications

Crane operators must renew their certifications every three years. No additional examination is required. To renew a certification, the crane operator submits a form to the Department of Labor. In addition to personal identifying information, the crane operator must provide information regarding his physical health, crane accidents in which he was involved, and the number of months of operating experience he has had since his previous application. Licensing and Certification Unit Supervisor Martha Waldman told the Inspector General's investigators that, although the renewal applicants must disclose their history of crane operation in the previous three years, operators who have not operated a crane at all in the 36-month period nonetheless may renew their certification.

While processing renewal applications in 2002, Waldman discovered that two applicants applying for renewals scored less than 65 on their practical examinations, but had nonetheless received certifications. These renewals were not granted. Following her discovery and reportedly on the advice of an associate counsel at the Department of Labor, Waldman reviewed a sample of files. Waldman completed this review in early 2004. She summarized her findings in a memo that identified an additional 42 individuals who had obtained crane certifications despite receiving a score of less than 65. The improper granting of certifications is discussed in the next section of this report.

9. Union vs. Non-Union Passing Rates

The Inspector General's review of practical examinations administered during a recent 18-month period shows that IUOE members are almost twice as likely to pass the practical examination as applicants who are not members of a union. Although all applicants for crane operators' certifications must have three years' experience, union applicants participate in an apprenticeship program sponsored by the union. It is possible that union applicants are simply better trained, and that their experience in the apprenticeship program accounts for the higher passing rates. It is also possible that union applicants pass at a higher rate because they are advantaged by taking the test on the crane on which they have received their training. Non-union members have the added difficulty of taking the test on an unfamiliar crane.

Investigators from the Inspector General's office reviewed records maintained by the Department of Labor related to practical examinations administered in spring 2006, fall 2006 and spring 2007. During this time, the Department of Labor gave 414 exams to 338 separate individuals. Seventy-six individuals took the test twice. The IUOE provided its membership list to the Inspector General so that investigators could determine which applicants were members of that union.

Files for all 414 examinations were reviewed. Of the 414 practical examinations administered during the time period in question, 146 were taken by union members (including seven by members of the International Brotherhood of Electrical Workers) and 268 were taken by non-union members. The Inspector General found that IUOE members were almost twice as likely to pass the practical examination as non-IUOE members. Specifically, 53 IUOE members passed out of 139 attempts, a passage rate of 38 percent. Of the 268 non-union members' exams, only 53 passed, a passage rate of just

under 20 percent. Seven examinations were administered to members of a separate union, the International Brotherhood of Electrical Workers.

B. MISCONDUCT OF DEPARTMENT OF LABOR EMPLOYEE FRANK FAZZIO

In the course of reviewing the Department of Labor's certification procedures, the Inspector General learned of instances of misconduct by Department of Labor employee Frank Fazzio. Fazzio has been an employee of the Department of Labor since 1970. As an Associate Safety and Health Inspector beginning in 1984, Fazzio directed the Licensing and Certification Unit, which, among its other responsibilities, issues crane certifications. Shortly after assuming responsibility for the Licensing and Certification Unit, Fazzio was appointed to the Crane Board.

The Inspector General has discovered that Fazzio was responsible for issuing crane operators' certifications to more than 200 individuals who had not attained a passing score on the practical examination. Fazzio either issued the certifications himself, or directed a former subordinate to do so after Fazzio was no longer responsible for issuing certifications. Officials at the Department of Labor were notified of 42 such instances in early 2004, but no certifications were revoked at that time.

The Inspector General's investigators conducted an independent review of available files and identified 142 individuals who had improperly received crane operators' certifications. The majority of these certifications were still active at the time of this discovery. The Inspector General promptly notified the Commissioner of Labor of this finding, even though the investigation was still underway. During its own review, the Department of Labor identified 78 additional certifications issued to individuals who had not passed the practical examination. The certifications were suspended by the commissioner and applicants were required to re-take the practical examination if they wished to re-activate their certifications.

The Inspector General also identified other instances of misconduct by Fazzio. Fazzio attempted to maintain control of the Licensing and Certification Unit after he was transferred to another position; he issued himself licenses for which he was unqualified; and, on one occasion, he gave false testimony at a hearing of the Crane Board.

The remainder of this report details the Inspector General's findings regarding Fazzio's misconduct. Fazzio has been removed from the Crane Board as a result of the preliminary findings of this investigation, but he continues to be employed by the Department of Labor.

Between 1994 and 1997, Fazzio, as the supervisor of the Licensing and Certification Unit, was responsible for issuing crane operators' and other certifications pursuant to Department of Labor regulations. He also was a member of the Crane Board during this time. In 1997, Fazzio was promoted to a Program Manager within the Public Employee Safety and Health Bureau,[16] but maintained his position as a member of the

[16] "The Public Employee Safety and Health Bureau (PESH) was created in 1980 under the PESH Act to provide occupational safety and health protection to all public sector employees at the state and local level. PESH enforces all safety and health standards promulgated under the United States Occupational Safety

Crane Board. After Fazzio's transfer, Kevin Kilrain, who had been Fazzio's assistant, became the head of the Licensing and Certification Unit. Although Fazzio was no longer part of the unit, he retained some the responsibilities he had exercised as supervisor. For example, as head of Licensing and Certification, Fazzio was responsible for collecting the rating sheets from the board members after the practical exam, calculating the final scores, and approving the issuance of certifications. After moving to the Public Employee Safety and Health Bureau, Fazzio continued to collect the rating sheets from the other Crane Board members and to calculate the final scores on his own. If Fazzio was not present at a particular exam, the Crane Board members would send their rating sheets to him. Fazzio told Kilrain which applicants had passed and Kilrain proceeded to issue certifications to those specified by Fazzio. Kilrain never questioned Fazzio's authority to perform the final calculation, and although he had access to the original score sheets, he never questioned Fazzio's results.

Fazzio and Kilrain continued working in this fashion until October 2000. Records indicate that Martha Waldman was placed in charge of the Licensing and Certification Unit in July 2000, and Kilrain was promoted to Supervising Inspector. Prior to her assignment to the Licensing and Certification Unit, Waldman had worked for Department of Labor for 23 years and was a Senior Safety and Health Inspector in the On-Site Consultation Bureau. Waldman was aware that it was her responsibility, not Fazzio's, to collect and tally the rating sheets from the Crane Board members. One day in October 2000, after Waldman took over the unit, Fazzio proceeded, as usual, to attempt to collect the score sheets after the administration of a practical exam. According to Waldman, she challenged him and after an argument between the two, Fazzio agreed that Waldman would collect the sheets.

1. Fazzio Improperly Issued Occupational Certificates to Himself

During the course of the investigation, the Inspector General became aware that, while head of the Licensing and Certification Unit, Fazzio had issued himself a crane operator's certificate and a blaster's certificate.[17] Fazzio did not possess the experience required for either of these certificates.

Fazzio's crane operator's certificate was issued in 1988. Fazzio renewed the certification at least twice, although, according to the Department of Labor's computer records, he let it lapse for a period in the early 1990's. In 2000, then-director of the Licensing and Certification Unit Waldman refused to renew the certification. When interviewed by investigators of the Inspector General's office, other officials at the Department of Labor acknowledged having known that Fazzio had improperly issued himself a crane operator's certificate, but no action was taken other than the non-renewal.

Fazzio's blaster's certificate was issued in 1991. It was renewed twice, but also lapsed in 2000. Fazzio's certificate permitted him to "supervise and perform the preparation for and detonation of any blast." Like a crane operator, a certified blaster must also have 3 years of experience.

---

and Health Act (OSHA)." http://www.labor.state.ny.us/workerprotection/safetyhealth/DOSH_PESH.shtm (November 20, 2007)

[17] The Licensing and Certification Unit is also responsible for issuing blaster's licenses.

Fazzio gave a number of contradictory statements to the Inspector General about whether he was ever a certified crane operator and the reason he had a crane operator's certification. First, when asked if he was a certified crane operator, Mr. Fazzio stated, "I was never a crane operator and I am not now." When asked a second time, he said that he was a certified operator for a short period because he chose to take the test and passed it. He stated that the Crane Board judged him during the exam, but soon after, he either forfeited the certification or he was unable to renew it because he didn't have the qualifications.

Later, Fazzio said that the Department of Labor had "bounced" his crane certification because the Commissioner did not think it was appropriate for him to have a certification. However, he maintained that he took the practical exam in the early 1990's and operated the crane at a test site after everyone was gone for the day, in spite of knowing that he did not have the necessary three years' experience. He said that two Crane Board members at the time had graded his performance. There is no record of Fazzio's taking the practical examination or of his being graded by any members of the Crane Board. He said that he administered the written examination to himself and graded his own performance, but never filled out an application for a certification.

Fazzio also claimed that, although he felt he was qualified for a crane certification because of his experience on the Crane Board, he never actually obtained a certification because the Licensing and Certification Unit, under the supervision of Kevin Kilrain, rejected his application in the late 1990's. As noted above, the Department of Labor's records show that Fazzio did have a crane operator's certification. Fazzio acknowledged that he wanted a crane certification because he "thought it would be a trophy," but claimed, "I didn't give myself the license."

Regarding Fazzio's blaster's certificate, he admitted to having issued it to himself. His justification for having issued himself this certificate was that an assistant director at the Department of Labor told Fazzio to issue him a blaster's certificate. Fazzio felt that he was just as qualified as the assistant director to have a blaster's certificate and decided to issue one to himself. An official at the Department of Labor informed the Inspector General that the documentation in the file of the assistant director indicated that the assistant director had the necessary experience and qualifications to obtain a blaster's certificate.

Fazzio stated that it was not his intention to violate the law. Although these licenses were issued unlawfully, there is no evidence that Fazzio used the licenses to obtain work as a crane operator or blaster.

2. Fazzio Gave False Testimony at a Hearing of the Crane Board

On February 9, 1999, Fazzio testified at a hearing of an appeal of an applicant's failure of the practical examination. Fazzio testified under oath that he was a certified crane operator and indicated that he had obtained the three years' experience required to obtain the certification. When asked about his experience with cranes, Fazzio testified, "Well, other than the 15 years I have been working for the Department as an expert

witness to OSHA, I would say the three years that's required to become certified."[18] Fazzio proceeded to answer questions about the configuration of controls on cranes in general and those specifically on the crane used by the appellant during his examination.

3. Fazzio Usurped the Authority of the Crane Board

During the investigation, the Inspector General learned of allegations that applicants who had not obtained a score of at least 65 on the practical examination were nonetheless issued crane operators' certifications. As discussed above, although the Department of Labor has no written policies or regulations regarding the passing score on the practical exam, every witness interviewed, including all of the members of the Crane Board, testified that the passing score was at least 65. Although the majority of improperly-issued certifications were issued to applicants with an average score of between 60 and 64, six individuals scored less than 60; of these six, one individual scored 44, and another scored 49.

In order to investigate the allegation, the Inspector General conducted a review of the Department of Labor's files. Upon request, the Department of Labor's Information Technology Department provided the names of 2,348 individuals who were issued new and renewal crane certificates between January 1, 1998 and August 30, 2000. Using the list provided, investigators attempted to locate and examine all 2,348 files. Some records relating to the practical examinations of individuals obtaining renewals during that period were unavailable to the Inspector General because they were currently under review for renewal. Others were not relevant to this investigation either because the applicant had a license from another jurisdiction and was not required to take a practical examination at the time, or the practical exam was given prior to 1983 under a different grading system.

Investigators were able to examine 958 files. Review of the 958 applicants' records showed that 142 individuals were certified as crane operators by the Department of Labor even though the average of the scores awarded to them by the Crane Board was less than 65. In many of these cases, at least one board member had recommended disapproval on his rating sheet. In five of the 142 cases, at least one board member wrote on the rating sheet that the applicant had committed an error, such as dropping the load, that should have resulted in an automatic failure. In addition, there was another case in which one board member wrote that the applicant "lost control of rig during test and if the load had been heavy, it could have caused an accident." In yet another example, a board member wrote that the individual "ran the machine in an unsafe way."

a. Certifications Suspended

The Inspector General notified the Commissioner of Labor of these findings prior to the completion of the investigation to avert the possibility that unqualified or unskilled individuals were continuing to operate cranes in New York State. Of the 142 improperly-issued certifications identified, a small number were no longer active. On November 8, 2007, the Commissioner of Labor announced the suspension of the 129 improperly-issued crane operator's certifications that were still active, and required the suspended individuals to re-take the practical exam if they wished to have their certifications

[18] Transcript of Hearing of the Crane Board regarding Appellant Jack Ribble, February 9, 1999, p. 57.

reinstated. According to the Department of Labor's press release regarding the suspensions, five of the 129 suspended crane operators had been involved in accidents. The Department of Labor determined that four of the accidents were "mechanical in nature," but one was the fault of the crane operator, whose license was suspended for three months as a result of the accident.[19]

Shortly after the announcement, the commissioner suspended an additional 68 certifications.

As of the writing of this report, 75 individuals with suspended certifications had re-taken the practical examination, and 38 passed. The Inspector General's investigators observed many of these examinations. As with new applicants, many of the crane operators re-taking the test had difficulty with the examination because the equipment utilized for the test was outdated relative to the equipment to which they were accustomed and the controls lacked markings. Many applicants could not become sufficiently comfortable with the unfamiliar controls within the five minutes allotted.

b. Fazzio's Role

All of the improper certifications were issued during the period when Frank Fazzio was head of the Licensing and Certification Unit, or when Kevin Kilrain was head of the unit, but Fazzio was still collecting rating sheets and tallying scores.

Investigators attended re-testing examinations on November 27, November 29, December 11 and December 12, 2007. In an attempt to determine why Fazzio had issued certifications to individuals who did not qualify, investigators interviewed 46 applicants for re-testing at the test sites. Although two individuals said that someone they knew had made a phone call to Fazzio on their behalf and two additional individuals were issued certifications after sending letters to Fazzio protesting their failed exams, the Inspector General could not determine Fazzio's motive for issuing certifications to individuals who did not achieve a passing score on the practical examination. There is no evidence, for example, that Fazzio was favoring union applicants, or that he was accepting gratuity or other tangible benefit in exchange for issuing certifications.

When interviewed by investigators from the Inspector General's office, Fazzio could not explain why he had issued the certifications. He gave a number of hypothetical explanations, as set forth below. Fazzio emphasized that the above explanations were merely possibilities, and that he could not give a definite explanation for any of the specific cases. Fazzio also repeatedly stated that he did not make any of the decisions on his own, but that he always had the approval and participation of either the Crane Board or his supervisors at the Department of Labor.

- Fazzio said that if an applicant had received a high score from all board members except one, he would discount the low score because he believed it was unfair if the applicant failed because of one score. Fazzio said that the Crane Board members found this practice acceptable. Fazzio stated, "I always ran it through the Crane Board, I never did it on my own."

[19] Department of Labor press release, http://www.labor.state.ny.us/pressreleases/2007/Nov08_2007.htm

- Fazzio said that some of the improper certifications may have been errors or oversights.
- Fazzio said that he may have passed applicants whose scores were below, but close to, 65. He said that he would only do this with the approval of the Crane Board members.
- Fazzio said that his supervisors may have received pressure from politicians, unions, or contractors. He said his supervisors may have responded by telling him to pass certain individuals.
- Fazzio said that he may have had discussions with board members about applicants after the examinations, and that board members may have changed their minds, although Fazzio could not provide any records of these conversations or re-evaluations.
- Fazzio said that his supervisors at the Department of Labor gave him the authority to pass individuals who had achieved a score between 60 and 65. When asked, the other Crane Board members said that they were unaware Fazzio had any such authority.

Fazzio's statements that his activities were sanctioned by his supervisors or the Crane Board were not verified by the Inspector General. Two of the supervisors who Fazzio said were aware of his activities are now deceased. A third former supervisor, James Barber, said that he never authorized Fazzio to issue certifications to individuals who did not achieve a passing score from the Crane Board on the practical examination. Likewise, Crane Board members said that they never told Fazzio to pass individuals who had obtained failing scores. In fact, they exhibited outrage when they heard of Fazzio's activities.

Some of the improper certifications were issued by Kevin Kilrain, who supervised the Licensing and Certification Unit immediately after Fazzio. During Kilrain's tenure as supervisor of the unit, Fazzio continued to collect the score sheets, calculate the final scores, and direct Kilrain regarding which applicants should be certified. When questioned about two cases in particular in which applicants' files indicated they had failed their practical exams, Kilrain said that Fazzio told him that he and the other board members had reviewed the recordings of the exams and changed their minds. Fazzio did not provide Kilrain with any documents indicating such a re-evaluation. Kilrain did not question Fazzio, nor did he make a record of the conversation.

c. Officials at Department of Labor Ignored Evidence of Fazzio's Misconduct

As discussed above, in 2002, head of the Licensing and Certification Unit Martha Waldman reviewed the files of two applicants who were seeking to renew their crane operator's certifications. Waldman discovered that neither of the applicants had obtained a passing score on the practical examination. One of the individuals had achieved a score of 43, well below the passing score of 65. Each of the files contained only one score sheet, which indicated that the applicant had failed. Both practical exams were taken on May 25, 1999 and the certifications were both issued on September 20, 1999.

Waldman sought the advice of Associate Counsel Christine Timber.[20] As part of her responsibilities, Timber was a liaison to the Licensing and Certification Unit. The two certifications identified by Waldman were revoked, and Waldman told investigators that Timber suggested that Waldman review additional files to determine whether there was a more extensive problem.

Waldman conducted a limited study, and identified another 42 applicants who had been certified despite receiving a score of less than 65 on the practical examination. In early 2004, Waldman drafted a memo to Timber detailing her findings. According to Waldman, she provided the memo to Timber, who instructed Waldman to bring the findings to Waldman's supervisor, Anthony Germano, who was in the best position to address the problem. Waldman told the Inspector General that she informed Germano as requested by Timber, and according to Waldman, Germano replied, "Now I have to do something about this." When interviewed, Germano denied making this statement.

Neither Timber nor Germano took any additional action. The Inspector General obtained copies of the memo, one addressed to Timber, and one addressed to Germano.

When interviewed, both Timber and Germano denied ever having seen the memo or having been aware of the problem. Timber said that she could not recall ever having been aware than any applicants had been certified improperly, including the two whose certifications were not renewed in 2002. Germano recalled the two crane operator's certifications that were not renewed but claimed that he thought it was an isolated incident. Germano stated, in substance, that had he known about the other cases he would have taken action. A current Crane Board member contradicted Germano's testimony, saying that he recalls having a conversation with Germano regarding the 42 individuals who were certified without passing the practical examination. Germano no longer works at the Department of Labor.

Timber said that, had she seen the memo from Waldman, she likely would have shown it to the then-General Counsel Jerome Tracey. When interviewed by investigators, Tracey stated that a memo of this importance likely would have been drawn to his attention, but he could not recall learning of the 42 improper certifications.

Investigators also interviewed Senior Attorney Jeff Shapiro, who was supervised by Timber at the time. Shapiro drafted letters for Waldman's signature informing the two improperly-certified crane operators discovered in 2002 of the revocation of their certifications. Although the Inspector General obtained a copy of an email to Waldman from Shapiro with the letters attached, Shapiro told investigators that he could not recall the two cases of revocation. Shapiro said that he searched his computer and paper files, but could not find any records related to the two revocations. Shapiro also said that he could not recall having seen Waldman's memo identifying the additional 42 improper certifications.

[20] In an unrelated investigation, the Inspector General found that Christine Timber had performed work for her private law practice on state time. Timber resigned effective June 8, 2008. View the IG's report.

IV. Recommendations

A. THE PRACTICAL EXAMINATION

The Inspector General finds that a number of aspects of the crane operator's practical examination raise concerns, particularly with regard to fairness to applicants, as well as protection of the public from unqualified crane operators.

The lack of formal written procedures regarding conduct and grading of the practical examination creates problems in every aspect of the testing. There is no assurance that the test is administered in a consistent manner to every applicant, and variations in grading criteria by board members may create wide disparities in the qualifications of individuals who receive certifications from one day to the next. In addition, simple averaging of the scores of multiple board members is inappropriate given the various complexities in the grading process, such as the effect of exceeding the time limit or the fact that certain individual mistakes should lead to automatic failure.

The appearance of bias towards union members is prevalent in nearly every aspect of the test. The majority of the tests are administered on union property, where union applicants have more opportunities to practice on the test crane than non-union applicants. Half of the four current Crane Board members are active members of the IUOE, one owns a business with a cooperative relationship with the union, and the fourth is now retired, but was a longtime member of the union. Although Crane Board members said that they did not necessarily know who was in the union, investigators observed that union members were easy to identify at the practical examinations, with some even wearing shirts or hats with the union logo. The higher passage rate of union members, while not proof, may indicate that union members have an unfair advantage.

Regardless of the actual benefit obtained by union members, the Department of Labor's heavy reliance on the IUOE to provide the means to administer the practical examination and to staff the Crane Board gives the appearance of bias in favor of union members. Certification of crane operators in New York State should be fair, and should be perceived as fair by the parties involved.

Accordingly, the Inspector General makes the following recommendations to the Commissioner of Labor regarding the administration of the practical examination:

1. The practical examination should not be administered on cranes to which some applicants have greater access prior to the examination than others. The Department of Labor should make every reasonable effort to ensure that applicants have an equal level of familiarity with the test crane. Preferably the examination should be administered at a state-owned site on a state-owned crane, rather than the site owned by a union or private association. This could be accomplished, for example, by coordinating with the State Department of Transportation, which owns and utilizes cranes for its work within the state. As a first step and at a very minimum, applicants who have trained and practiced on a crane at a particular site should take the test at a different site.
2. Applicants should have the opportunity to take the examination on a well-functioning crane that would be capable of being employed at actual worksite.

3. The Department should immediately begin to draft policies or regulations regarding the conduct and administration of the practical examination. Board members should receive training to ensure that they are familiar with the policies or regulations. The policies or regulations must specify the following:
    a. Tasks required for the exam.
    b. Standards for scoring applicants.
    c. Passing scores for each type of certification.
    d. A method by which the various scores of the Crane Board members should be combined to obtain a final score.
    e. That applicants be permitted sufficient time to acquaint themselves with the equipment.
    f. The minimum number of Crane Board members that must be present to evaluate an applicant.
4. The Commissioner of Labor should re-evaluate the size and composition of the Crane Board. A larger Crane Board could help ensure that multiple members are present to evaluate each practical examination. Membership in the Crane Board should be balanced to avoid an appearance of bias towards union-member applicants, for example, by including a representative number of non-union-member crane operators or non-union-affiliated business owners.
5. In accordance with Public Officers Law § 74(3)(f), Crane Board members should recuse themselves from practical examinations in which their participation may give the appearance of improper influence. For example, a Crane Board member should not evaluate an applicant with whom he has a business relationship or significant personal relationship.
6. The Crane Board members who hear appeals should not be the same members who graded the original exam. A larger Crane Board may be required to accomplish this.
7. The quality of the video recordings of the examinations should be improved and recordings should be retained for at least one year to allow for proper oversight of the Crane Board.
8. Crane Board members should grade examinations in ink to eliminate the potential for altering scores.

B. FRANK FAZZIO

With regard to the improper certifications issued by former head of the Licensing and Certification Unit Frank Fazzio, the Department of Labor has already taken action to ensure the qualifications of certified crane operators in New York State. The Inspector General recommends that the commissioner pursue appropriate disciplinary action against Fazzio, who usurped the authority of the Crane Board to make determinations regarding issuing of crane certifications, who gave false testimony at a hearing of the Crane Board, and who abused his position to award himself undeserved certifications.

Fazzio's conduct was in violation of New York State's Code of Ethics, in that Fazzio used his position to secure unwarranted privileges for himself and others. The Inspector General refers this matter to the New York State Commission on Public Integrity.

The Inspector General found evidence indicating that Fazzio may have committed criminal acts in improperly issuing licenses to himself and others, and in giving false testimony under oath at a hearing of the Crane Board. However, at this point, charges for the applicable statutes appear to be time barred. In addition, the Department of Labor no longer has complete records regarding Fazzio's issuance of licenses to himself, and a prosecution for Fazzio's granting of crane certifications to others would impeded by the Department of Labor's lack of written policies or regulations dictating the passing score for the examination.

Response from the Department of Labor

In a letter to the Inspector General, the Commissioner of Labor responded to this report with a plan of corrective action, as well as some comments regarding the difficulty of implementing two of the Inspector General's recommendations. The pertinent sections of the commissioner's letter are quoted below:

PLAN OF CORRECTIVE ACTION

Safety & Health Licensing & Certification Unit

You make eight recommendations in your report. With regard to your recommendations numbers three and eight, after receiving authority in November 2007, from the Inspector General to commence our own internal investigation the Department's Internal Audit unit examined the operations of the Crane Examining Board and its issuance of Crane Operators Certificates. After this review and in consultation with senior management the following changes have been made or are in the process of implementation. Several are consistent with your recommendations; another goes beyond your recommendations. As to recommendation numbers four and seven, we will conduct further review of our policies as you suggest.

A. Procedures Manual

The License and Certification Unit (Unit) currently has documented informal policies and procedures for the administration of the practical portion of the crane certification exam. The Unit is in the process of finalizing written policies and procedures in consultation with the Crane Examining Board (Crane Board). These policies/procedures will address the following items:

- Tasks required for each crane exam
- Standards for scoring the applicants
- Passing scores for each type of certification
- Description of the method Crane Board members utilize to develop the final score for each candidate
- Minimum number of Crane Board members required at each type of crane test.
- The amount of time each applicant will have to familiarize themselves with the equipment before the exam.

B. Crane Operator's Examining Board Appeal Process

The Unit will develop written procedures for candidates who have failed the crane practical exam but wish to appeal the score to a higher level.

C. Minimum number of Crane Board Members

The Unit will develop policies/procedures stating the minimum expected number of Crane Board Members who must be present before a practical exam can be conducted. The Inspector General's report noted that there were occasions when only one Crane Board member was present for the exam due to circumstances beyond the Department of Labor's control. Canceling an examination incurs expense and inconvenience for the applicants who often travel great distances and put aside their work to take the exam. Therefore, for each of the above examinations, if a situation arises whereby there is less than the legally required minimum number of Crane Board Members present, we are considering a rule that a video of the test will be sent to the other Crane Board Members to review and score. This may avoid having to cancel the examination and provide complete recommendations for the Commissioner.

D. Oversight Controls over Score Sheets Completed by the Crane Board Members.

The Unit will implement policies/procedures regarding the oversight of score sheets completed by the Crane Board Members that will encompass the following:

- Each Crane Board Member will complete the score sheets in ink
- Each Crane Board Member will sign and date the completed score sheet, as well as initial any score changes
- Two independent employees from the Department of Labor will verify math calculations, check for overall completeness and initial and date the score sheets.

Recommendations Regarding Employee Frank Fazzio

The charges against Department employee Frank Fazzio are of serious concern. The Department has stood ready for some time to take action in this regard once the Inspector General issued her Report. Now that we have these findings, we intend to move expeditiously to take appropriate steps to address the allegations made in the Report.

ADDITIONAL COMMENTS REGARDING THE INSPECTOR GENERAL'S RECOMMENDATIONS

Union-Affiliated Test Sites

The Department is sensitive to the perception that it is unfair to the applicants to hold practical tests at union training facilities. Several years ago, in an effort to address this perception, the Department was able to add the non-union, Empire State Bridge and Highway Contractors Association facility to the locations where test were administered. Your report seems to indicate that any privately sponsored site may create perception problems. Again in March and April of 2007, the Department explored the feasibility of conducting tests using rented equipment at state sponsored sites. A number of logistical problems arose such as finding locations, the cost of insurance, the rental of equipment and being able to coordinate all of these variables and still provide tests with the frequency and accessibility we currently provide.

Our preliminary study examined the cost to administer a one-day test for a lattice boom crane if the Department rented the equipment. The cost of the crane would be $2,000 per day. It takes one day to set up and one day to take down for a total of $6,000. There is a 10% charge for fuel to get it to and from the site, totaling $400 (one day going and one day coming). Added to that is the cost of a certified operator ($1,100 per day for three days) and an oiler ($900 per day for three days), which brings the cost to $12,400. These types of cranes come in pieces and require a hydraulic crane to set up and tear down. The rental for this type of crane is the same $2,000 per day plus 10% fuel cost. Assuming that we used the same operator and don't have to pay a rental on this device on the test day it would add another $4,400 bringing the cost of one day of testing at one location to $16,800 for only the equipment. We are currently providing between 9 and 10 such tests per year. This would result in an annual equipment rental cost to the Department for one type of crane only of between $151,200 and $168,000. This cost would be multiplied several times over as we typically allow applicants to test on their choice of a number of crane types based upon the type of certification they seek.

The above cost estimate does not include pay for the extra day for the hydraulic crane and does not include insurance costs and possible site rental fees. Given the various types of cranes that we test on, it is not unreasonable to expect the costs to administer these exams could exceed half a million dollars a year. The present Department of Labor budget could not support such expense.

Please also note that in 1996, the Department of Labor received a favorable ruling in a federal lawsuit on this issue, holding that the plaintiff had failed to show that testing at a union facility was a violation of an applicant's Constitutional rights including his Due Process rights. *See, Percesepe v. N.Y. State Department of Labor, Frank Fazzio, et. al.*, 1996 U.S. Dist. LEXIS 22390 (E.D.N.Y. 1996), *app. den.* 125 F.3d 844 (2d Cir. 1997). An affidavit was submitted by the Department of Labor, and un-refuted by the plaintiff, showing that the union apprenticeship training accounted for the higher pass rates.

Size and Composition of the Crane Board

The Crane Board is currently composed of four members, with a fifth member (Frank Fazzio) having been relieved of his duties by the Commissioner. The current number of incumbents meets the provision found in the code rule specifying that the Crane Examining Board "shall consist of at least three members". The membership of the Board is, therefore, indeterminate. While it must have a minimum of three members, there is no maximum number set. Nor does the regulation establish a quorum for the conduct of business. With respect to the composition of the board, section 23-8.5(g) provides that, in addition to having at least three members, at least one of the members shall be a crane operator who holds a valid certificate of competence issued by the Commissioner, and at least one shall be a representative of crane owners. There is no specific requirement or prohibition regarding a Department of Labor employee serving as a board member.

Although the regulation does not establish a quorum for the Crane Examining Board, General Construction Law, Section 41, specifies that "[W]henever three or more public officers are given any power or authority, or three or more persons are charged with

any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of them, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held…shall constitute a quorum and not less than the majority of the whole number may perform and exercise such power, authority or duty." Since the number of board members is indeterminate, we view the quorum as being a majority of all appointed members. Based on the current Board membership, a majority of the Board would be three members. We recognize that to the extent that the size of the Board is increased, it will increase the size of the quorum, which will make it more difficult to schedule business for a larger Board, including examinations. As noted in your report, the current Board members volunteer approximately 40 days of their time annually to fulfill their responsibilities. We will consider regulatory and statutory changes to address these issues.