L.1549, DC37& D. Miller v. City & DOT, 51 OCB 2 (BCB 1993) [Decision No. B-2-93 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceeding between

Local 1549, District Council 37, AFSCME, AFL-CIO, and Desiree Miller

Petitioners,

-and-

The City of New York, New York City Department of Transportation,

Respondents.
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Decision No. B-2-93

Docket No. BCB-1424-91

DETERMINATION AND ORDER

On September 30, 1991, Local 1549, District Council 37, AFSCME, AFL-CIO ("the Union") and Desiree Miller filed a verified improper practice petition alleging that the City of New York ("the City") and the New York City Department of Transportation ("the Department") violated § 12-306[1] of the New York City

[1] Section 12-306 of the NYCCBL provides, in relevant part:

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

(2) to dominate or interfere with the formation or administration of any public employee organization;

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization....

Section 12-305 of the NYCCBL provides, in relevant part: Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain

(continued...)

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collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all such activities....

Collective Bargaining Law ("NYCCBL"). The City, by its Office of Labor Relations, requested, and was granted, an extension of time in which to file an answer, which was filed on November 12, 1991. The Union requested, and was granted, four extensions of time in which to file a reply, which was filed on January 7. 1992.

At a pre-hearing conference on February 20, 1992, it was determined that a hearing would be held in April 1992. In April 1992, the Union requested an adjournment due to the ill health of a witness, and the hearing was adjourned to August 1992. In July 1992, the Union requested a second adjournment. The hearing was adjourned to September 1992, with an agreement between the parties that "any back pay which the Board might award in this case is waived for the period beginning August 3, 1992, and ending with the first day of hearing which will be hold in this matter."

A hearing was held before a Trial Examiner designated by the office of Collective Bargaining on September 25 and September 28, 1992. The parties submitted post-hearing briefs on November 30, 1992.

Background

Desiree Miller was employed by the Department in the title provisional Office Aide in February 1979, and progressed to the title provisional Office Aide III by 1989. In January 1987, Miller was chosen to serve as the Union's shop steward representing employees, including cashiers, at the Parking Violations Bureau Self-Help Center on Centre Street in Manhattan.

The cashiers at this facility work eight-hour shifts in a room known as "the cage." This is a small narrow room which is kept locked at all times and which has, according to witnesses, inadequate ventilation, heating and cooling. The Union received numerous complaints from cashiers that temperatures in the work room mirrored temperatures outside. Miller testified, "if it was cold outside, it was cold in there. [In summer] it had to be 100 degrees in there. The girls were stripped down to bodysuits." Representatives of the Union frequently called the Department's Labor Relations department to complain of conditions in the work room, and to ask that heaters be provided in winter or that the cashiers be moved to a more comfortable work area. The Union eventually filed a grievance regarding work conditions in the cashiers' cage.

On November 19, 1990, the cashiers on the first shift complained to the supervisor, Jeanette Holmes. They told her that the cold was so severe that they were compelled to wear coats and gloves while working. Two cashiers, Dolly Black and

Gwendolyn Turner, testified that they were being treated for respiratory illnesses and wished to go home. According to their testimony, Holmes asked them to stay until other cashiers arrived. When Miller arrived at the start of her shift, at about 1:00 P.M., there were seven cashiers on duty. They asked Miller whether they could go home. Miller told then that she would call the Union to ascertain whether they could leave.

Miller called the Union and spoke with Jon Ng, a staff member who was assigned to take emergency calls. According to Miller, Ng told her that the cashiers could leave only with the permission of management, and that they would need medical notes if they left for health reasons. Miller then went into Holmes' office. What happened next is a matter of dispute. According to Miller, she told Holmes that the cashiers wished to leave, and that the Union representative had told her that they required permission from management to do so. Miller testified that Holmes gave permission for the cashiers to leave, saying, "Sure, I understand. I was a little person once myself."

Miller returned to the cashiers' cage. She testified that she told the cashiers that they had permission from management to leave, and that they then filled out medical leave forms. She testified further that she also called Jon Ng at the Union to report that the supervisor had granted permission for the cashiers to leave. Both Black and Turner stated that Miller told them it was up to each cashier to decide whether or not to leave.

Miller returned to her work station, where she remained. According to Black and Turner, Holmes entered the cashiers' cage as they were preparing to leave, and told the cashiers that they were not allowed to go home. All seven cashiers then left the work site.

Holmes did not testify at the hearing. In a memo dated November 30, 1990, entitled "MHC Cashier Walk - Additional Information," she stated:

> I have read [Assistant Director] Ribakove's memo of November 21, 1990, regarding NHC cashiers walkout. The 3rd paragraph states that "little person" remark, but apparently made it under the impression that only one or two Cashiers wanted to leave early....
>
> When I made the above remark it was addressed to Ms. Desiree Miller in my office... [I]t is not correct that I was not under the impression that only one or two Cashiers were leaving the premises....
>
> I went into the cashiers room to advise them that if they left it was not approved by management. All Cashiers were present with the exception of Ms. Veronica Small who had not yet reported for work and shop steward Ms. Desiree Miller....

On November 20, 1990, the cashiers were interviewed by Assistant Director Ribakove and by Carol Gumbs, an organizer for the Union. Although no formal charges were filed against them, the cashiers who left the work site received written reprimands, and pay was deducted for the portion of the shift they did not work. On December 23, 1990, Miller filed grievances on behalf of those employees to recoup the deducted pay. A Step II conference was held concerning the grievance on April 4, 1991, at which time

there was a conversation between Gumbs and PVB Director Michael Philips which is a matter of dispute.

Gumbs testified that Philips raised the subject of Miller's involvement in the incident, and that he stated that he held Miller responsible for leading the cashiers on a "walk-out" and intended to file disciplinary charges against bar. On direct examination, Philips was asked if he had had a conversation with Gumbs about Miller on that day. He answered, "I guess Desiree was sort of like part of the conversation. Sometime during the end of the hearing, I told Carol Gumbs it was sort of her fault the cashiers walked out." Counsel for the Department asked, "Her fault, being Ms. Miller?" Philips answered, "No, actually Carol Gumbs. Well, I don't know if I said, 'It's your fault, Carol.'" Philips stated that he told Gumbs that the cashiers had been ill-served by the Union, and that he had contemplated bringing charges against Miller for her role in the incident. Philips stated that he "deliberately used the word 'contemplated' to Carol Gumbs ... to indicate to her the gravity with which we considered the situation."

Philips testified that he had considered bringing disciplinary charges against Miller because he believed that it was she who had advised the cashiers that they could leave. He stated that he had consulted with the Department's attorneys and determined that there were no grounds upon which to charge Miller.

On May 1, 1991, Miller was notified that her position had been targeted for a layoff due to the fiscal crisis, and that her employment with the Department would be terminated as of May 31, 1991. On the date an which the notice was issued, a Department of Personnel policy was in effect whereby provisional employees with five or less years of continuous service would be terminated before provisionals with longer service. This policy subsequently was rescinded on May 10, 1991.

Gumbs testified that she called the Department's Labor Relations office to remind them that Miller had more than five consecutive years of service as a provisional Office Aide, and thus was covered by the Department of Personnel policy. She stated that the Department informed her that it could terminate Miller because it was required to replace provisional employees with permanent employees on a special transfer list from the Department of Sanitation ("DOS"). Gumbs subsequently learned that a permanent DOS employee had declined such a transfer. She stated that she spoke with Epifanio Castillo, the Department's Chief Employee Relations Officer, and asked him to retain Miller in the vacant Office Aide position. Castillo testified that he did not recall mention of a transfer list during the conversation with Gumbs, but recalled that Gumbs characterized Miller's termination as "an anti-union act, which I rejected out of hand." The Department retained a provisional employee with less than

five years of continuous service instead of Miller. Miller's employment with the Department was terminated on May 31, 1991.

Miller's performance evaluations for 1989 and 1990 were introduced into evidence by the City. in 1989, Miller was rated "satisfactory" on three tasks, and "conditional" on a fourth. The supervisor commented, "Ms. Miller has a good general knowledge in a wide range of PVB services. She has been late 74 times this year. There have been 12 instances and 15 days of undocumented sick leave. Because of Ms. Miller's lateness and undocumented sick leave record, she has been given an overall rating of conditional."

In 1990, Miller received an overall performance rating of "good." She was rated "very good" in the performance of one task, and "good" in the performance of three others.[2] The supervisor's comments on the 1990 performance evaluation, dated March 7, 1991, note that Miller had four instances of undocumented sick leave, four instances of documented sick leave and seven instances of lateness in 1990. The supervisor adds that Miller "has been placed on Absence Control Stepping Chart for her undocumented sick leave Step 1. Ms. Miller has the capability of performing her job above average. She can also

[2]The 1990 evaluation form differed slightly from the one used in 1989, in that the term "good" replaced the term "satisfactory"; a rating of "good" in 1990, therefore, was the equivalent of a rating of "satisfactory" in 1989.

improve bar attitude towards the public and her attendance." Miller refused to sign the 1990 performance evaluation.

Philips testified that he was required to eliminate one provisional Office Aide position within the Department, and was given discretion to determine which employee would be terminated. He stated that a comparison of the six provisional employees in the title showed that Miller was the only one with a history of disciplinary action and poor evaluations, and the only employee recommended for layoff by the four supervisors who report to him. He testified that it was this information that formed the basis of his decision to terminate Miller.

Philips testified that, at the time that he made the decision to terminate Miller, sometime in April 1991, the cashiers' walk-out was "a forgotten event." On cross-examination, Philips was asked whether he recalled that a provisional Office Aide in Queens had had difficulties with supervisors. Philips testified that he could not remember a provisional Office Aide located in Queens, nor could he remember precisely when he made the decision to terminate Miller. He also stated that Miller was the only provisional employee under his supervision to be laid off.

Castillo testified that he called the Office of Labor Relations in early May 1991 to ascertain whether the five-year provisional policy concerning economic layoffs would be rescinded, but that his formal instructions in that regard first

came from the Department of Personnel ("DOP") in a memo dated May 10, 1991. Philips testified that he was not aware that the policy would be changed until the directive abolishing it came from DOP on May 10, 1992.

Positions of the Parties

Union's Position

The Union cites the Salamanca standard adopted by the Board in Decision No. B-51-87[3] for its contention that the Department committed an unfair labor practice when it terminated Miller's employment. The Union contends that Philips was aware of Miller's activities on behalf of the Union, including her service as shop steward and the events that occurred on November 19, 1990. The Union states that this is evidenced by his conversation with Gumbs in April 1991 and the fact that he received reports from Holmes and Ribakove on the events of November 1990.

The Union contends that the City's failure to adhere to its policy by terminating Miller, who had more than five years of service, manifests an intention to use the economic layoff as a pretext for retaliating against Miller's union activity. The Union argues that an employer's interference with an employee engaged in the exercise of protected activity constitutes an

[3]See, page 15, infra.

improper practice within the meaning of the NYCCBL. It cites Eastchester Union Free School District[4] for the proposition that a union agent's right to advise members about matters affecting the employment relationship is statutorily protected. The Union maintains that, in the instant case, Miller's actions in advising the cashiers about the best course of action available to them is similarly protected. The Union reminds the Board that the Department determined that there was no basis for the filing of disciplinary charges against Miller.

The Union maintains that the motivating factor in the Department's decision to terminate Miller was her union activity of November 1990. The Union alleges that Philips abandoned his plan to bring disciplinary charges against Miller when he discovered that she could be terminated by economic layoff. It contends, further, that Miller's work performance was not in question until the Department wished to find a pretext to terminate her, and that she received an overall rating of "good" on her 1990 evaluation.

City's Position

The City contends that the Union has failed to demonstrate that the Department motivated by anti-union animus when it decided to terminate Miller. The City maintains that the only causal connection suggested by the Union between Miller's conduct

[4] 15 PERB ¶ 4543 (1982).

as a union representative and her subsequent termination is based on the statements made to Gumbs by Philips at the Step II hearing held in April 1991. Although the testimony differs as to the wording of Philips' statement to Gumbs, the City states, the idea conveyed was that Philips considered disciplining Miller for having authorized the cashiers to leave their work site. The City maintains that the Department had good reason to consider bringing disciplinary charges against Miller.

Regardless of the statements made by Philips to Gumbs, the City argues, the evidence shows that Miller's termination was not related to the events of November 1990. In fact, it maintains, the termination was a result of poor performance in comparison to employees serving in similar positions. The City alleges that the performance evaluations of Miller, compared to other provisional Office Aides who were candidates for layoff, "demonstrate that she was unable to perform her duties at even a satisfactory level." It further cites to Decision No. B-53-90 for the proposition that proximity in time alone between two events is insufficient to support a conclusion of anti-union animus.

The City states that in Decision No. B-8-91, the Board held that where an employer has been determined to have been improperly motivated, the burden shifts to the employer to establish that its actions were motivated by other, non-violative reasons. Even if the Union has demonstrated improper motivation

in the instant case, the City contends, credible evidence demonstrates that Miller was identified for layoff based on a comparison of her performance with that of other, similarly situated employees. The City argues that the testimony of Philips and Castillo shows that Miller vas the only provisional Office Aide identified by a supervisor as an employee who could be laid off. Terminating an employee because of low productivity during an economic layoff, the City maintains, is not prohibited by the NYCCBL.

The City cites Decision No. B-23-81 for the proposition that a violation of Section 12-306a(2) of the NYCCBL can only occur when the employer has taken action which prevents, hinders or in any way affects a union in representing present and future members of the bargaining unit. It maintains that the Board has previously held that disciplinary action alone is insufficient to constitute interference with the rights of an employee in the exercise of rights granted by the NYCCBL, and the same must be true of a public employee representative.[5] In the instant case, the City argues, the discriminatory action alleged vas not disciplinary in nature, but based on the Department's financial situation. Absent any allegation of a causal connection or knowledge of union activity, the City contends, Miller's

[5]Decision Nos. B-21-91; B-35-80.

termination for economic reasons lies within the Department's rights under Section 12-307b of the NYCCBL.[6]

Discussion

Personnel decisions concerning termination of employees because of economic or other legitimate reasons are within management's statutory right to direct its employees and maintain the efficiency of its operations. As such, these decisions are not normally reviewed in the improper practice forum.[7] It is well-settled, however, that acts properly within the scope of managerial prerogative may constitute improper practices if the

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[6] Section 12-307(b) of the NYCCBL provides:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies, determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency pf governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

[7] Decision Nos. B-1-91; B-25-89.

charging party can establish that such acts were motivated by reasons prohibited by the NYCCBL.[8]

The mere assertion of retaliation is not enough to prove an improper practice.[9] Petitioner must satisfy the test set forth by the New York State Public Employment Relations Board (PERB) in City of Salamanca[10] and adopted by this Board in Decision No. B-51-87. The Salamanca test requires petitioner to make a sufficient showing that:

1. the employer's agent responsible for the challenged action had knowledge of the employee's union activity, and,

2. the employee's union activity was a motivating factor in the employer's decision.

Respondent must refute petitioner's showing of such a causal relationship or produce evidence that its action would have occurred even in the absence of the protected activity.[11] If the respondent does not refute the petitioner's showing on one or both of these elements, it must establish that its actions were motivated by another reason which is not violative of the NYCCBL.[12]

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[8]Decision Nos. B-1-91; B-50-90; B-16-90; B-61-89; B-7-89; B-3-88; B-3-84; B-43-82; B-25-81; B-4-79.

[9]Decision No. B-61-89.

[10]18 PERB ¶ 3012 (1985).

[11]Decision Nos. B-67-90; B-24-90; B-17-89.

[12]We held, in Decision No. B-67-90:

(continued...)

We recognize that it is difficult to prove that an employee's activity vas a motivating factor in the employer's decision to act; it requires that the Board ascertain the employer's state of mind. In the absence of an outright admission of improper motive, proof of this element must be circumstantial.[13] If petitioner demonstrates a sufficient causal connection between the act complained of and the protected activity, improper motive may be inferred.[14] Such offers of proof will be considered in light of all the circumstances.[15]

As a prerequisite for a finding of improper practice, the union activity in question must be protected by the relevant statutes.[16] The Union claims that the decision to terminate

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(... continued)

[I]f the employer attacks directly and refutes the petitioner's showing on the elements of the above test, the Board will find that the petition fails to prove improper motivation. If the employer fails to rebut the Union's showing that the employee's conduct was a "substantial" or "motivating" factor in the employer's decision, the employer could avoid being held in violation of the NYCCBL by putting forward evidence, unrefuted by the petitioner, proving that its actions would have occurred even'
in the absence of the protected activity. However, if the employer
fails to rebut the Union's showing of improper motivation and also
fails to persuade this Board that other legitimate reasons exist for the challenged action, then the employer will be found in violation of the NYCCBL.

See also, Decision Nos. B-24-90; B-36-89; B-1-89; B-46-88; B-58-87.

[13]Decision Nos. B-24-90; B-17-89.

[14]Decision No. B-61-89.

[15]Decision No. B-24-90.

[16]Decision Nos. B-16-92; B-4-92.

Miller was made in retaliation for her advice to the cashiers in November 1990. We must, therefore, first consider whether such activity is protected within the meaning of the NYCCBL. In Comsewogue Union Free School District,[17] a superintendent of schools reprimanded a union representative for giving advice of which he disapproved to a fellow unit employee in the course of his duties as a union representative. PERB held that, "[t]he reprimand of an employee because, as a union official, he advises a fellow employee as to what he believes his rights to be constitutes interference with a protected right...," and upheld:

> the right of a union representative to advise a unit employee to ignore a directive from his employer imposing what the official believes is not a proper working condition. The employee who follows that advice is exposing himself to the risk of being charged with insubordination, but the union official's right to give the advice is protected by the Taylor Law.

This decision was clarified shortly thereafter in North Tonawanda, in which PERB reaffirmed the decision in Comsewogue and added:

> the Board was seeking generally to protect the union representative's right to advise an employee... [I]t was ultimately determined in Comsewogue, that the employee was incorrectly advised as to his rights under the contract... [t]he right to freely advise would be jeopardized if its exercise was made contingent on an after-the-fact analysis of whether the advice was correct.

Applying these principles in the present case, we find that Miller's act of advising the cashiers concerning the course of

[17]15 PERB ¶ 3018 (1982).

action they should follow constitutes protected union activity under the NYCCBL.

It is clear that Philips, Castillo and the Department's Labor Relations office knew, prior to her termination, that Miller had engaged in protected union activity in November 1990, when she advised the cashiers in her capacity as shop steward. It is also clear that the Department was upset by this activity, as evidenced by Philips' testimony that he had contemplated bringing disciplinary charges against Miller because of "the gravity with which we considered the situation," but that the Department's attorneys advised him against bringing charges which could not be upheld. The testimony of Gumbs and Philips concerning their conversation in April 1991 differs as to whether Philips considered Miller, Gumbs or the Union responsible for the difficulties the Department encountered with the cashiers. It is plain, however, that Philips held one or all of them responsible for advising the cashiers to leave their work site.

In attempting to show that no causal relationship existed between the cashiers' walk-out in November 1990 and the subsequent termination of Miller in May 1991, the City correctly argues that the mere proximity in time between two events,, without more, is insufficient to support a conclusion that the Department harbored anti-union animus.[18] Proximity of time, however, may be considered in conjunction with other relevant

[18]Decision Nos. B-41-91; B-53-90; B-38-88.

evidence when determining whether timing is probative as to motivation. In other cases, we have considered evidence of interaction between a petitioner and employer during the interim period leading up to the event which formed the basis of an improper practice petition;[19] and evidence that the employer's actions were motivated by a desire to discourage union members in the exercise of protected rights.[20]

Miller engaged in protected union activity, and that union activity caused consternation to the employer. In November 1990, all seven cashiers left their work site because of what they considered to be inadequate working conditions. Miller and/or her union were believed by management to have been responsible for this action. Management stated that it was considering bringing disciplinary charges against Miller as a consequence of this incident, but no charges were filed. In December 1990, Miller filed related grievances on behalf of the cashiers. Less than six months after the cashiers walked out, and five months after the related grievances were filed, Miller was terminated, ostensibly for economic reasons. At the time she received notification of termination a policy was in effect concerning the layoff of provisional employees which should have protected Miller's job because she had more than five years of service as a provisional employee. At the same time, the Department retained

[19]Decision No. B-24-90.

[20]Decision No. B-38-88.

another provisional employee in the same title who had less than five years of provisional service. Based upon ell of the above circumstances, we find that the Union has satisfied its burden of making a prima facie showing of the elements of the Salamanca test.

The City does not dispute that the Department had knowledge of Miller's protected union activity. The City attempts to rebut the Union's showing on the element of a causal connection by relying on Philips' testimony that in April 1991, when he made the decision to terminate Miller, he considered the cashiers, walk-out to be "a forgotten event." However, the record shows that the decision to terminate Miller was made within weeks of a conversation with Gumbs at a grievance conference on April 4, 1991, during which, both parties to the discussion recall, Philips expressed hostility towards Miller and the Union for the job action. In light of these circumstances, we do not credit the statement of Philips relied upon by the City, and find that the Union has demonstrated a sufficient causal connection between the act complained of and the protected activity so that an improper motive may be inferred.

We must next consider the City's defense that the Department's actions were motivated by another reason which is not violative of the NYCCBL. The City claims that Miller was terminated for legitimate economic reasons. It maintains that a provisional employee had to be laid off, and that Miller's poor

performance and low productivity, in comparison with other provisional office Aides, made her the most logical and likely candidate for a layoff.

In support of its contention, the City alleges that the performance evaluations of Miller, compared to other provisional Office Aides who were candidates for layoff, "demonstrate that she was unable to perform her duties at even a satisfactory level." In evaluating this contention, we note that Miller's 1990 performance evaluation, rendered on March 7, 1991, rated her overall performance as "good." Her supervisor noted on the evaluation that Miller "has the capacity of performing her job above average." It was also noted that Miller could improve her attendance, but, in this regard, we observe that since the previous year's evaluation, Miller's undocumented instances of sick leave dropped from twelve to four, and her instances of lateness dropped from 74 to seven. We also observe that the City failed to produce the performance evaluations of the other five provisional candidates for layoff, including the candidate with less than five years of provisional service who was retained instead of Miller.

On the record before us, we do not find any substantial evidence to support the City's claim that Miller was selected for layoff because of poor performance. The City's failure to establish this defense leaves undisturbed our finding that the Union demonstrated that Miller's selection for layoff was

motivated by displeasure over her union activity. Accordingly, for all the above reasons, we find that the Department committed an improper labor practice in violation of the NYCCBL when it terminated Miller.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Lew, it is hereby

ORDERED, that the improper practice petition filed by Local 1549, District Council 37, APSCME, AFL-CIO and Desiree Miller, is granted; and it is further

ORDERED, that petitioner Desiree Miller be reinstated to her position as provisional Office Aide III with back pay, interest thereupon, and all rights and privileges, as if she had not been terminated, except that the above remedy is waived for the period beginning August 3, 1992, and ending September 24, 1992.

Dated: New York, New York
January 12, 1993

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL COLLINS
MEMBER

JEROME E. JOSEPH
MEMBER

GEORGE B. DANIELS
MEMBER

STEVEN WRIGHT
MEMBER