

Sciarillo v. DOS & Matula, 59 OCB 23 (BCB 1997) [Decision No. B-23-97 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper :
Practice Proceeding :
 :
 - between - :
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 Michael Sciarillo, :
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 Petitioner, :
 :
 - and - :
 : Decision No. B-23-97
 New York City Department of : Docket No. BCB-1640-94
 Sanitation and John Matula, :
 :
 Respondents. :
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DECISION AND ORDER

On March 11, 1994, Michael Sciarillo ("petitioner"), appearing pro se, filed a verified improper practice petition against the New York City Department of Sanitation ("the Department") and John Matula, a Superintendent in the Department. The petitioner alleged that the Department and its agent, John Matula, violated § 12-306(a) of the New York City Collective Bargaining Law ("NYCCBL")¹ when they suspended him for defending his right to

Section 12-306a of the NYCCBL provides:

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

(continued...)

engage in protected union activity and because he was involved in a previous case before the Board of Collective Bargaining ("Board").

The Department, by the New York City Office of Labor Relations, filed a motion to dismiss on April 11, 1994. The petitioner, having obtained legal counsel, filed a reply in opposition to the City's motion to dismiss on June 15, 1994.

In Interim Decision No. B-15-94, dated September 27, 1994, to which the City members dissented, the Board found that the

(...continued)

the activities of any public employee organization;

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

Section 12-305 of the NYCCBL provides:

Rights of public employees and certified employee organizations. Public employees have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. However, neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; provided, however, that nothing in this Chapter shall be construed to: (1) deny to any managerial or confidential employee his rights under section 15 of the New York Civil Rights Law or any other rights; or (ii) prohibit any appropriate official or officials of a public employer as defined in this Chapter to hear and consider grievances and complaints of managerial and confidential employees concerning the terms and conditions of their employment, and to make recommendations thereon to the Chief Executive Officer of the public employer for such action as he shall deem appropriate. A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

petitioner had made an arguable claim of improper practice. It denied the motion to dismiss and ordered the City to answer the petition by October 12, 1994. The City was granted an extension of time in which to answer, and filed its answer on November 7, 1994. The petitioner was granted an extension of time in which to file a reply, and filed a reply on November 21, 1994.

At a pre-hearing conference on March 7, 1995, the parties raised and discussed the issue of whether the improper practice hearing should be deferred to a departmental disciplinary trial. By letter dated March 9, 1995, the City moved to defer. By letter dated March 13, 1995, the petitioner opposed the City's motion to defer. In Decision No. B-10-95, we denied the City's motion and directed that an evidentiary hearing be held before a Trial Examiner no later than June 30, 1995.

A hearing was held on July 10, 1995, July 25, 1995, January 5, 1996 and April 5, 1996, and a transcript of 724 pages was taken. The City filed a post-hearing brief on July 31, 1996. The petitioner filed a post-hearing brief on August 5, 1996.

Background

Michael Sciarillo is a sanitation worker assigned to the Brooklyn South 12 garage. He has been employed as a sanitation worker for more than ten years. Sciarillo was elected as a shop steward in 1992 and held that position on January 8, 1994, the

day when an altercation took place between him and his supervisor.

The practice in this garage is that sanitation workers must consult with the shop stewards when they want changes in work schedules or if they are having problems with a supervisor. In July 1992, Sciarillo had a conversation with Thomas Bruno, another sanitation worker assigned to that garage. Bruno was running for union office and wanted to change his schedule so that he worked the same schedule as the other candidates on his slate . When Sciarillo asked the supervisor's clerk to make the change, the clerk told him that there would be no difficulty and all he had to do was speak to the supervisor.

John Matula was the supervisor of Brooklyn South 12. Sciarillo said that until July 1992, he had a cordial relationship with Matula. However, he said, Matula refused to approve the schedule change for Bruno, saying that he did not want to help Bruno's slate. Sciarillo related this to Bruno. Shortly thereafter, Bruno filed an improper practice petition with the Office of Collective Bargaining.² Sciarillo agreed to testify on Bruno's behalf about his conversation with Matula.

Sciarillo testified that Matula's behavior changed towards him after Matula received a copy of Bruno's petition. He said

² Docket No. BCB-1512-92.

that Matula refused to speak to him; he would not look him in the eye or talk to him. Rather than talk to him about problems in the section, Sciarillo said, Matula would talk to other shop stewards or to the men directly.

At the Brooklyn South 12 garage, there is an operations office that measures approximately 12 by 20 feet. The office is partitioned from an assembly area outside the office by walls, with two doors and a window. In the window of the partition is the set-up chart on which assignments are posted. The men's names and sections are visible from outside the office but assignments can only be seen from inside the office.

The Department pays shift differentials, depending on which duty is assigned to each sanitation worker. Assignment to recycling pays more than assignment to operating equipment such as snow plows. These assignments are supposed to be made on the basis of seniority. According to Sciarillo, a shop steward must determine whether assignments have been made correctly.

On January 8, 1994, there was an ice storm. Approximately fifty sanitation workers assembled before 8:00 A.M. to receive assignments for the day. Sciarillo said that some of the men approached him and asked him to make sure that the recycling assignments were being made according to seniority.

Sciarillo entered the office. Inside, he said, were eight foremen, including Matula and Benny Vultaggio, the garage fore-

man, and two sanitation workers, Wesley Paloscio and Jackie Behan. After Sciarillo entered, approximately ten other sanitation workers entered and more congregated at the doors. Sciarillo stood at the set-up board, where Vultaggio was posting assignments, assisted by Behan. Sciarillo testified that he said, indicating Behan, "this guy's not supposed to be touching the board, he's not authorized."

Matula was sitting at a desk which Sciarillo estimated was six feet away from where he was standing. According to the testimony of Sciarillo and fourteen other sanitation workers who were present, Matula stood up and shouted, "everybody get the fuck out of the office." Nobody left the office.

An argument between Sciarillo and Matula ensued. Sciarillo said that he told Matula that he had a right to look at the board because he was "an elected shop steward," and Matula told him he "didn't care what he was, either leave or sign out and go home." Sciarillo told Matula he would not leave the office until he finished checking the board and that he had a right as a shop steward to remain and do this. All of the bargaining unit members present witnessed the argument and the subsequent suspension of Sciarillo.

Matula made a phone call to his supervisor and then told Sciarillo that he was suspended. Sciarillo said that at all times during the argument, he and Matula were on opposite sides

of the desk. Sciarillo called a Union business agent, who spoke to Matula and then advised Sciarillo to sign out and go home.

The Department held a summary suspension hearing on January 10, 1994. Sciarillo and representatives of the Union were present, but Matula and other management representatives did not appear. The assistant borough supervisor ruled that the suspension would remain in effect.

After the hearing on January 10, Sciarillo was charged with misconduct. The Department charged that he told Matula, "[r]ight away you go for the phone. Let's settle this like men right now, you scumbag. I'll finish you right now." It alleged that Sciarillo took off his jacket, approached Matula in a threatening manner, and had to be restrained.

Sciarillo maintained that he did not threaten, menace or assault Matula during that incident, nor did he have to be restrained from assaulting Matula. He said that he did not make the statement attributed to him, but that he did call Matula a "scumbag" and told Matula that he treated members of the bargaining unit badly. He testified that he never approached closer to Matula than about seven feet and that he only took off his jacket when he was calling his Union representative. Sciarillo said that he has never refused the order of a supervisor or been disciplined for such an action before.

According to Sciarillo, no one left the office when Matula

ordered them all out and no one else was charged with misconduct for remaining in the office. Further, he said, his only reason for remaining in the office was to conduct his duties as shop steward.

Twelve sanitation workers from the garage testified for the petitioner. They were David Migdal, George Martinez, Ralph Cimmino, Kenneth Russo, Michael Giannone, Michael Tambrosino, Richard Galtieri, Edward Kehoe, Sebastian Friscia, Alex Pascone, Arthur Isaksen, and Thomas Bruno. All of them related substantially the same story about the altercation as Sciarillo, although some added additional details.

Migdal, who is also a shop steward, testified that Matula's order to leave the office seemed to be directed only at Sciarillo. Migdal said that Matula routinely disregarded seniority rules and relaxed other rules in order to reward favored workers. Migdal also testified that he had difficulties with Matula in the past, that Matula held a grudge against him and that he was more closely supervised than other workers in the garage because of this. Migdal related that when Sciarillo returned after his suspension, he was followed and watched with binoculars by officers from the Field Inspection Audit Team.

Several sanitation workers testified that they had seen worse infractions committed by other employees who had not been disciplined by Matula. None of the other sanitation workers who

were in the office that day and refused to leave were disciplined, although Sciarillo was the only individual who "verbally refused" to leave.

Matula testified that the operations office was crowded and hectic because of the storm. He said that Sciarillo entered and spoke to Vultaggio. When the conversation seemed to be over, he said, he asked Sciarillo to leave but Sciarillo cursed at him and refused. At that point, he said, Sciarillo called him a "scumbag" and said that he "treated the men like animals." He testified that when he called the borough office, Sciarillo taunted him, removed his jacket and said, "Let's go outside ... I'll finish you right now." At that time, he said, Sciarillo approached him and he felt menaced.

On cross-examination, Matula was shown the incident report made to the Department and the transcript of his testimony at a prior disciplinary hearing. In the incident report and his prior testimony, he claimed that "individuals" had to restrain Sciarillo from assaulting him, but in his testimony here he said that one Sanitation Worker came between him and Sciarillo and put his arm on Sciarillo's arm. At the previous hearing, Matula testified that Sciarillo was a witness against him in Bruno's proceeding, but in the present hearing he testified that he did not recall that.

Benny Vultaggio is a supervisor on the night shift. It is

his job to position assignments on the operations board. Although these assignments are usually made in advance, they change on the day of a snowstorm. He said that it is not easy to see the operations board from outside the office. According to Vultaggio, there are no rules for who is allowed inside the operations office; rather, it is a matter of each foreman's preference.

Vultaggio said that the garage office was hectic that morning because of the storm. He and Matula, three other supervisors and two sanitation workers were there. The two sanitation workers were helping out because of the storm.

Vultaggio said that Sciarillo came into the office between 7:00 and 7:30 A.M. and Matula asked him if there were any union problems. He said that Sciarillo spoke to him about the set-up board. On cross-examination, he was shown a transcript of an earlier hearing at which he testified that Sciarillo had not spoken to anyone after entering the office, saying "I don't know what he was doing in the office. He just came into the office that morning."

He said that Matula told Sciarillo to leave and Sciarillo refused. Then, he related, Sciarillo said that he wanted to see if the men were in the correct positions on the board, but Vultaggio does not recall whether Matula responded to that. Vultaggio also testified that Matula never used profanity during the incident and that Sciarillo made a threatening gesture

towards Matula.

Vultaggio related that Sciarillo was shouting loudly at Matula but that Matula did not shout back. On cross-examination, he testified that he did not remember testifying at the earlier hearing that Sciarillo was not shouting at Matula and then testified that the men had been shouting at each other. He said that he does not recall the day he testified at that hearing.

Vultaggio testified that, after Matula finished making his phone call, Sciarillo left the office. On cross-examination, he was shown the earlier testimony, in which he stated that Matula left first. After being shown the transcript, he testified that Matula, not Sciarillo, left the office first.

Vultaggio wrote an official account of the incident at Matula's request. When asked whether Matula had helped him prepare it, he first answered "yes" and then "no."

Joseph Perrone was a supervisor at the garage when this incident took place and was in the operations room at the time. His testimony as to that incident was the same as Matula's and Vultaggio's, except that he said that Sciarillo did not strike or attempt to strike Matula, as he was charged with doing in the disciplinary proceedings. He said that Matula's "favorites" on the job were people he knew from outside work.

Jackie Behan was one of the two unit members authorized to work in the operations office at the time of the incident. He

testified to the same events as Matula. On cross-examination, he admitted that he had had fistfights with the petitioner and that he had been transferred against his wishes because of complaints of other workers, of whom the petitioner was one. He also admitted that it was possible that someone had switched names on the operations board so that less senior men were assigned routes with more compensation.

Tom Bruno testified about the incident involving his election campaign. He testified to the same events as Sciarillo, and added that Matula had said that he would not make chart changes for any of the men on the slate. He said that, after he ran for the office, Matula treated him unfairly in comparison with other unit members by giving what amounted to retaliatory discipline and refusing leave time that was granted to other sanitation workers in similar circumstances.

Bruno testified that there was a change in the relationship between Matula and both himself and Sciarillo after the improper practice petition was filed. According to him, Matula ceased to speak to both of them at that time.

When asked about Bruno's petition, Matula said that he was aware of "some legal process" in which he had been involved by Sciarillo and Bruno and that it was possible that he had discussed it with an attorney. He said that he doesn't know what happened to the improper practice petition because he was not

interested enough in it to inquire and that he harbors no ill will against Sciarillo because of it. On cross-examination, he was shown a transcript of the disciplinary hearing at which he testified that he knew that Sciarillo had been a witness against him in Bruno's action.

Several sanitation workers testified that they were aware of the events surrounding Bruno's election bid. Eddie Kehoe said that before Bruno ran for election, there was no problem between Matula and Sciarillo. After Sciarillo asked to have Bruno's chart changed, he said, the relationship "changed drastically." This was evidenced, he said, by "no good mornings -- dirty looks, no eye contact" and "if Mikey Sciarillo wanted a chart change, it wouldn't get past [Matula's] desk," although he could not recall any specific incidents. Alex Pascone and Arthur Isaksen testified to the same events.

Sebastian Friscia, who is Sciarillo's partner, recalled the day when Bruno asked Sciarillo to intercede with Matula on his behalf so that he could campaign with others on the slate. He remembers that the relationship between Matula and Sciarillo changed after that day. Friscia also testified that the use of profanity in interchanges between supervisors and sanitation workers is considered "normal conversation." He is unaware of any employee being disciplined for using profanity.

Migdal and Martinez said that it was common knowledge in the

garage that Matula was angry at Sciarillo because he had agreed to testify on behalf of Bruno in the improper practice case. Martinez was on the slate with Bruno in 1992 and said that routine chart changes were not approved by Matula when they were requested for members of the slate. He recalled that Sciarillo asked Matula to change Bruno's shift so that Bruno could campaign, which he characterized as a routine occurrence, and that Matula refused. After Sciarillo made the request on behalf of Bruno, Martinez said, Matula also began to treat him badly. He related that in June 1992, when Matula refused to give him a day off so that he could attend his son's graduation, he was forced to call the Hispanic Society. In contrast, Martinez testified, Matula freely granted chart changes and vacations to those he favored.

Frischia testified that Matula tried to avoid having Sciarillo as a shop steward in his unit by encouraging other employees to run for that position. Bruno also recalled hearing of this. Matula testified that it was possible that he might have done that.

When asked about Bruno, Matula replied that he did not allow Bruno a chart change because Bruno was trying to avoid an assignment. He said that denial of Bruno's request had nothing to do with the union election. Matula said that he had a longstanding personal relationship with the incumbent union's business agent

who he said was attacked and beaten by insurgent union members.

On January 5, 1996, Matula was questioned about the veracity of a report he had filed about a missing or stolen radio which later was recovered; about his alleged participation in an illegal pyramid scheme that was conducted at the work site; and whether he had assigned Department mechanics to work on his personal vehicles during work hours. Matula asked the Trial Examiner whether he should be represented by private counsel. The Trial Examiner stopped the proceedings while Matula phoned an attorney and then excused him until he had had an opportunity to speak to counsel. When the hearing resumed on April 5, 1996, Matula was represented by counsel and declined to answer the questions on the grounds that doing so might incriminate him.

Positions of the Parties

Petitioner's Position

The petitioner argues that the Department's actions violated Section 12-306(a)(1) and (3) of the NYCCBL; that they were inherently destructive of important employee rights³ and also constituted an improper practice under the Salamanca test.

The petitioner claims that Matula acted out of animus that was caused by Sciarillo's support of Bruno's improper practice

³Decision No. B-26-93.

petition. In addition, he argues, his suspension and disciplinary complaint were the direct consequence of his actions in the capacity of shop steward. He asserts that he has met his burden of persuasion and that the Department has failed to show that its actions were motivated by another reason which is not violative of the statute.

City's Position

The Department maintains that the petitioner has failed to establish that the employer's agent who authorized the suspension was aware of the petitioner's protected activity. It claims that Matula did not have the authority to suspend Sciarillo, that discipline was taken by the borough supervisor after Matula called him and had him listen over the telephone to Sciarillo shouting. Therefore, the Department maintains, the borough supervisor had no knowledge of Sciarillo's protected activity and suspended him only because of what he heard on the telephone.

The Department argues that the petitioner has not established that he engaged in activity protected by the NYCCBL. Where the collective bargaining agreement provides a grievance and arbitration procedure, the City asserts, no form of self-help is protected as the means of settling a dispute⁴ and the axiom

⁴Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

that an employee should "obey now and grieve later" holds true. The Department contends, therefore, that Sciarillo's decision not to obey the order to leave the office is unprotected.

In addition, the Department argues, there has been no showing that the Department's actions were taken because of anti-union animus. It maintains that the petitioner did not establish that the borough supervisor was motivated by anti-union animus rather than responding to the petitioner's insubordinate tirade. The Department also suggests that the inference to be drawn from Matula's refusal to answer questions regarding criminal activity is that Matula's alleged involvement in such activity contributed to an atmosphere of hostility and resulted in the petitioner's tirade and threats. However, it asserts, this does not evidence anti-union animus.

Further, the Department contends that the petitioner was suspended for legitimate business reasons that are not violative of the NYCCBL. It argues that the need to maintain discipline under hectic conditions in a storm motivated Matula's actions and that this does not violate the statute.

Discussion

Under our statute, management has the right to "direct its employees, take disciplinary action ... and exercise complete

control and discretion over its organization...."⁵ It is well-established, however, that acts properly within management's statutory prerogative may be improper public employer practices if they are taken for prohibited purposes.⁶ The NYCCBL prohibits employers from acting to retaliate for or discourage protected union activity.⁷

To establish improper motivation under the Salamanca test,⁸ a petitioner must show that the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity and that the employee's union activity was a motivating factor in the employer's decision. If the petitioner satisfies both parts of this test, the employer must present evidence that attacks directly and refutes the evidence put forward by the union, or it may present evidence that it had other, legitimate and permissible motives which would have caused it to take the action complained of even in the absence of the protected activity.⁹

The Department argues that the petitioner has not established that he engaged in activity protected by the NYCCBL. The

⁵NYCCBL Section 12-207b.

⁶See, e.g., Decision Nos. B-19-95; B-26-93; B-2-93.

⁷NYCCBL Section 12-306a.

⁸City of Salamanca, 18 PERB 3012 (1985).

⁹See, e.g., Decision Nos. B-16-92; B-63-91; B-50-90.

protected activity that concerns us in this case is making a request as a shop steward on behalf of a unit member, acting as a shop steward by checking work assignments, and assisting in the prosecution of an improper practice claim. These activities are protected under the statute.¹⁰

We find that the events culminating in this proceeding began when Tom Bruno ran for union office. Sciarillo, in his capacity as shop steward, asked Matula for a chart change for Bruno so that Bruno could campaign effectively. When the request was denied, Bruno filed an improper practice petition in which Sciarillo was named as a witness against Matula. The petition was served on Matula. Many witnesses testified that the relationship between the two men changed after the petition was filed and that Matula shunned Sciarillo and made it difficult for him to act as a shop steward. Unit members testified that they were aware that this behavior was related to the protected activities of running for union office and filing improper practice charges. Almost every witness testified that it was clear in the operations office that Matula's order to leave the office was directed at Sciarillo alone and that when Sciarillo protested that he was performing his duty as a shop steward, Matula replied, "I don't care what you are."

¹⁰Cf., Decision Nos. B-8-95; B-12-84.

Assessing the credibility of the witnesses, we note first that the sanitation workers in this garage obviously do not like Matula. Their testimony was replete with bitter comments about his perceived lack of fairness. It was also evident that they were eager to support Sciarillo with their testimony, and that Sciarillo's style as a shop steward is to be vigilant, vocal and adversarial.

However, we cannot credit the testimony of the City's witnesses. On cross-examination, Matula was shown the incident report made to the Department and the transcript of his testimony at a prior disciplinary hearing, both of which contradicted parts of his testimony in the instant hearing. Vultaggio related that Sciarillo was shouting loudly at Matula but that Matula did not shout back. On cross-examination, he was shown a transcript of an earlier hearing at which he first testified that Sciarillo was not shouting and then testified that the men had been shouting at each other. Vultaggio's testimony about this incident was impeached several more times by prior inconsistent statements made during his previous testimony. As for the testimony of Perrone or Behan, both men were evasive or forgetful about major points in dispute.

On the other hand, the accounts by the other witnesses were consistent and were unshaken by cross-examination. Therefore, we accept the petitioner's account of the incident in the operations

office. This leaves only the question of whether the actions taken by Matula and the Department were taken for prohibited reasons.

If the incident in the operations office had occurred alone, without the surrounding and preceding circumstances, it is possible that we might have found that "the outburst, by itself, was insufficient evidence from which an inference of improper motivation might be drawn."¹¹ That is not the case, however. We find that Matula's retaliation for the protected actions involving the union election and the subsequent filing of the improper practice petition is linked to his order to Sciarillo to leave when Sciarillo entered the operations office to check the scheduling board.

The animosity between Sciarillo and Matula arose because Sciarillo performed his duties as a shop steward on Bruno's behalf and then assisted Bruno in prosecuting an improper practice claim. Matula again attempted to interfere in protected activity when he encouraged other unit members to run against Sciarillo for the job of shop steward. Had it not been for the earlier protected union activity, Matula would not have interfered with Sciarillo's duties as a shop steward during the incident in the operations office.

¹¹See, Decision No. B-16-94 at 29.

We find that Matula's behavior constituted an improper practice according to the Salamanca standard. The Department maintains that the petitioner has failed to establish that the employer's agent who authorized the suspension was aware of the petitioner's protected activity. This argument is disingenuous. The employer's agent who initiated the action that resulted in discipline was Matula, not the borough commander.

When Matula ordered Sciarillo to leave the operations office, Sciarillo told him he was there in his capacity as shop steward. Matula said, "I don't care what you are." This was said in front of approximately 20 members of the bargaining unit. It is hardly credible that Matula did not calculate the effect of his action on the union members for whom Matula served as shop steward.

The Department also argues that the need to maintain discipline under hectic conditions in a storm motivated Matula's actions and that this is a legitimate business reason that does not violate the statute. We agree that maintaining discipline is a necessary goal and, indeed, we remind the members of this bargaining unit of the old adage that one must "obey first and grieve later."¹² However, we conclude that Matula's intent was not to maintain discipline, but to force Sciarillo to submit to

¹²Decision Nos. B-15-93; B-53-87.

his order in the presence of members of the bargaining unit. Therefore, this ruling is based upon its facts and is not intended in any way to change existing law.

Accordingly, the instant improper petition is granted. We order the Department to rescind all disciplinary penalties received by the petitioner in connection with the incident on January 8, 1994 and to expunge all references to that incident from his record.

DECISION AND ORDER

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

ORDERED, that the improper practice claim docketed here as BCB-1640-94 be, and the same hereby is, granted; and it is further,

DIRECTED, that the Department of Sanitation rescind all disciplinary penalties received by the petitioner in connection with the incident on January 8, 1994 and expunge all references to that incident from his record.

Dated: New York, New York
May 14, 1997

Steven C. DeCosta
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Decision No. B-23-97
Docket No. BCB-1640-94

24

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

Richard A. Wilsker
MEMBER