City & DOJJ v. L. 371, SSEU, 61 OCB 3 (BCB 1998) [Decision No. B-3-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration between THE CITY OF NEW YORK and the DEPARTMENT OF JUVENILE JUSTICE Petitioners, and SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, AFSCME, AFL-CIO Respondents.	Decision No. B-3-98 Docket No. BCB-1922-97 (A-6692-97)

DECISION AND ORDER

On June 25, 1997, the New York City Department of Juvenile Justice ("DJJ") and the City of New York (hereinafter collectively referred to as "City"), appearing by its Office of Labor Relations, filed a petition challenging the arbitrability of a grievance filed by the Social Service Employees Union, Local 371, AFSCME, AFL-CIO ("Union"). The Union filed an answer on August 15, 1997, and on September 15, 1997, the City filed its reply.

Background

Tracey Hayes, ("Grievant"), was employed by the DJJ in the title of "Community Associate", a permanent, full-time, non-competitive civil service position, from June 30, 1991, until June 29, 1996. As of June 30, 1996, she was employed in the provisional title of Supervisor I(W) until January 17, 1997, on which date her employment was terminated.

On February 14, 1997, the Union filed a Step II grievance, alleging "Improper disciplinary action in that [her employment] was wrongfully terminated." On February 19, 1997, a Step II decision was issued, denying the grievance. On February 28, 1997, a Step III grievance was filed, which was denied on April 9, 1997.

The Union filed a request for arbitration on April 17, 1997, asserting a violation of the 1992-1995 Social Services Agreement ("Agreement"), Article VI, §1(h),[1] seeking reinstatement with full back pay from January 17, 1997.

Positions of the Parties

City's Position

In its petition challenging arbitrability, the City claims that the Union has not established a nexus between the alleged wrongful termination and the cited provision of the Agreement, nor does the Grievant have standing to assert her claim. The City asserts that, since the Grievant had been in the provisional title of Supervisor I(W) from June 30, 1996 until January 17, 1997, she has not served the required two years of provisional service before earning the right to grieve the instant matter. The City further contends that the time the Grievant spent as a Community Associate does not apply in the calculation of those two years. Therefore, the City maintains that under the terms of the Agreement, the Grievant has no standing to grieve the instant matter.

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[1] Article VI. §1(h) states, in relevant part,

> The term "Grievance" shall mean:
>
> (h) A claimed wrongful disciplinary action taken against a provisional employee who has served two years in the same or similar title or related occupational group in the same agency.

In its reply, the City states that issues advanced for the first time in the Union's answer, to wit, (i) a claimed violation of Article VI, §1(f)[2] of the Agreement; and (ii) the allegation that the Grievant had never resigned her previous position after being promoted to provisional Supervisor I(W), should not be considered by the Board at this time because, to permit the belated assertion of the new matters would be contrary to decisional law issued by this Board.[3] The City also claims that even if the claim under Article VI, §1(f) were considered, the Union has failed to demonstrate the required *prima facie* relationship between the Grievant's alleged rights under that section and her termination on January 17, 1997. The City states that an alleged violation of that contractual provision requires that a grievant be in a non-competitive title at the time of the disciplinary action, and the Grievant herein was not so employed at the time of her termination. Hence, the City maintains that it is of no consequence whether the Grievant had attained the right to grieve wrongful discipline as a non-competitive Community Associate, because that right was forfeited for another two years upon becoming a provisional Supervisor I(W). In its answer, the Union does not elaborate on the basis for its claim under Article VI, §1(h) of the Agreement, which was advanced and relied upon in the lower steps of the grievance procedure and in its request for arbitration.

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[2] Article VI, §1(f) of the Agreement states,

> The term "Grievance" shall mean:
>
> (f) A claimed wrongful disciplinary action taken against a full time non-competitive employee with six months service in title, except for employees during the period of a mutually agreed upon extension of probation.

[3] The City cites Decision Nos. B-28-97; B-30-94; B-29-91; B-40-88.

Union's Position

In its answer, the Union claims, for the first time, that, as a result of her continuous employment with the DJJ, Grievant had acquired the right to grieve alleged wrongful discipline, pursuant to Article VI, §1(f) of the Agreement. The Union also argues that, when the Grievant was promoted to the position of provisional Supervisor I(W) on June 30, 1966, she did not resign her previous permanent position of Community Associate, and therefore retains the benefit of any time served in that position.

Discussion

We first address the City's contention that certain of the Union's claims were raised for the first time subsequent to the submission of the request for arbitration and should not be considered. The Union claims in its answer that the DJJ violated Article VI, §1(f) of the Agreement by denying the Grievant, a full time non-competitive employee with more than six months service in title, her right to grieve the termination of her employment. The City states that this claim should not be addressed because it was not raised in the grievance procedure or request for arbitration, but was first advanced in the Union's answer. We agree with the City's position. Requests for arbitration have consistently been denied with respect to issues raised for the first time after the request for arbitration has been filed,[4] and we dismiss those portions of the Union's claim alleging that the Grievant never resigned her previous position and that her termination violated Article VI, §1(f) of the Agreement.

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[4]Decision Nos. B-28-97; B-2-95. *See also*, Decision Nos. B-12-94, B-44-91, B-29-91 and B-55-89.

When a request for arbitration is challenged by the City, initially, this Board must determine whether the parties are in any way obligated to arbitrate controversies and, if they are, whether the act complained of by the Union is arguably related the cited provision of the parties' agreement.[5] Doubtful issues of arbitrability are resolved in favor of arbitration.[6] In the instant matter, the parties do not dispute that the alleged violation of the contract is an arbitrable grievance. However, the City asserts that the Grievant lacks standing to submit this grievance to arbitration under the terms of the Agreement.

The only remaining portion of the Union's claim asserts a violation of Article VI, §1(h) of the Agreement, which grants the right to grieve alleged wrongful discipline to "a provisional employee who has served two years in the same or similar title or related occupational group in the same agency." It is undisputed that the Grievant, at the time her employment was terminated, was serving provisionally in the Supervisor I(W) title and had been so employed for slightly over six months. It also is undisputed that the Grievant previously had been employed in the same agency in the permanent non-competitive title of Community Associate for a period of five years. The issue presented by the City's challenge to arbitrability is whether the Grievant's service in her former position of Community Associate can or cannot be added to her service as a provisional Supervisor I(W), for purposes of invoking rights under Article VI, §1(h) of the Agreement. The City argues that Article VI, §1(h) requires two years of provisional service, and that non-provisional service cannot be counted. This argument, as applied to the Grievant herein,

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[5] Decision Nos. B-19-89; B-65-88; B-28-82.

[6] Decision Nos. B-65-88; B-16-80.

is premised on the City's contention that the Grievant's time spent as a non-competitive Community Associate does not apply in calculating the two years needed pursuant to Article VI, §1(h) of the Agreement. We find that in the circumstances of this case, this argument goes to the merits of the grievance and not its arbitrability. [7] The issue here is whether the Grievant served the requisite amount of time to be entitled to rights guaranteed by the due process agreement between the Union and the City. The cited provision of the Agreement in the request for arbitration grants the right to grieve wrongful discipline to provisional employees having served two years "in the same or similar title or related occupational group in the same agency." Whether such period of service is required to have been provisional service involves an interpretation of the terms of the Agreement. Further, the question whether the Grievant, in her positions held during her tenure at the DJJ, served in the "same or similar title or related occupational group in the same agency," also is a question of contract interpretation. We find that there is at least an arguable nexus between the Union's claim of wrongful discipline and the cited provision of the Agreement. Therefore, we will submit to an arbitrator the threshold question of whether the grievant had completed two years of qualifying service within the meaning of Article VI, §1(h) of the Agreement and was entitled to disciplinary due process

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[7] *See*, Decision No. B-52-91, where the City also raised an issue which went to the merits of the grievance in its petition challenging arbitrability.

> The City now asks us to allow the opponent of arbitration to raise a question of substantive arbitrability before this forum and, in so doing, also raise an issue going to the merits of the grievance, giving it two opportunities to have the issue resolved in its favor. We view this as an abuse of a process that was instituted to accommodate the parties. *Id.* at 9-10.

rights. If that issue is resolved in the grievant's favor, it will remain for the arbitrator to decide whether the termination of her employment constituted a wrongful disciplinary action.

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 challenge to arbitrability raised herein by the petitioners be, and the same is granted with respect to claims relating to alleged violations of Article VI, §1(f) of the Agreement, and it is further

ORDERED, that the Request for Arbitration filed herein by the Union in all respects be, and same is hereby, granted with respect to claims relating to the grievant's position as a Community Associate and alleged violations of Article VI, §1(h) of the Agreement.

Dated: December 18, 1997
New York, N.Y.

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

MEMBER

MEMBER

DISSENT

We respectfully dissent for the reasons set forth below.

In Decision B-28-97 (June 16, 1997) this Board reiterated its long-standing position that "any alleged violation of the parties' collective agreement should have been raised at the time of, or prior to, the filing of the Union's request for arbitration ...." (p.3) Noting that the Union [had] failed to do [so], the Board reiterated the underlying rationale for this rule as stated by it in Decision B-2-95 at pp. 14-15:

> "We have 'consistently denied the arbitration for claims raised for the first time after the request for arbitration has been filed. Permitting arbitration of such claims would frustrate the purpose of a multi-level grievance procedure, which is to encourage discussion of the dispute and at each step of the procedure.' " (Emphasis added.)

See B-12-94, B-44-91, B-29-91 and B-55-89 which were also cited in B-28-97 to support this proposition.

It is with this preface that we turn to the text of the grievance itself, the written responses of the City at each step of the grievance procedure and the text of the demand for arbitration, none of which are set forth in the majority's opinion.[8] Plainly, such a review is required if we are to determine whether arbitration of the grievance in issue here "would frustrate the purpose of a multi-level grievance procedure, which is to encourage discussion of the dispute at each step of the procedure." In the absence of such multi-level discussions (which are not evident here at any level), the substantial issue to be arbitrated would be raised for the first time

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[8] The record does not contain any argument made or rationale advanced by the Union during the course of the grievance procedure. The only Union-generated documents in the record are the grievance, the request for arbitration and its answer to the City's petition.

in arbitration without the beneficial effect of the screening mechanism provided by the grievance procedure which often results in settlement or some other disposition short of arbitration. All this is particularly important for an orderly and manageable municipal arbitration process given the more than 100,000 employees under collective agreements, the multiplicity of bargaining units and the many different labor organizations involved.

The grievance was filed on February 12, 1997. It stated:

> "Improper disciplinary action in that member was wrongfully terminated. Remedy sought grievant should be returned to work with full back pay from 1/17/97."

It is undisputed that at the time the grievant was employed in the provisional title of Supervisor I(W) and had been so employed from June 30, 1996 until January 17, 1997 when her employment was terminated. The alleged contract violation was specified as a violation of Article VI § I (h) which states in relevant part that a grievance encompasses:

> "A claimed wrongful disciplinary action taken against a provisional employee who has served two years in the same or similar title or related occupational group in the same category."

On its face, the grievance thus alleged an improper disciplinary action and wrongful termination as a result thereof. And, the remedy sought was a return to work with back pay as a Supervisor I(W) (the only job title identified anywhere in this grievance). Nowhere was there any reference to grievant's prior service from June 30, 1991 until June 29, 1996 as a Community Associate. Nor is there any assertion that that position was in the same or a similar title or in a related occupational group to Supervisor I(W), the position for which the grievant was terminated. Nor was a claim of any kind made that the grievant was somehow entitled to that job or for some reason retained a residual right to return to it.

As we note below, the grievance proceeded through all steps of the grievance procedure and the request for arbitration without those allegations being made.

The Step II response to grievant states:

> "Your services as a provisional Supervisor I (Welfare) with the NYC Department of Juvenile Justice were terminated, effective as of the close of business on Friday, January 17.
>
> "Your Step II labor grievance claiming wrongful termination (citing a violation of SSEU Local 371 Contract - Article VI, Section 1, Subparagraph h.) was received by First Deputy Commissioner Edward J. Allocco on February 14, 1997 [see attached copy]. Commissioner Allocco has asked me to respond to your Step II grievance on behalf of the agency.
>
> "Please be advised that Article VI, Section 1, Subparagraph h. of the SSEU Local 371 Contract is applicable to 'a provisional employee who has served for two years in the same or similar title or related occupational group in the same agency'. At the time of your termination, you were a provisional employee with less than two years in the Supervisor I (Welfare) title and were subject to termination without cause.
>
> "There was no wrongful termination and your Step II grievance is denied. (I would also note that I can find no record of a Step I grievance being filed on your behalf in this matter.)

The Step III response states:

> "This will acknowledge receipt, on February 28, 1997, of the above-indicated matter in which the union and the grievant claim that the termination of the grievant's employment was an 'improper disciplinary action.'
>
> "I have reviewed the record in this matter and have determined that, as the grievant was provisionally appointed to the title of Supervisor I(W) on June 30, 1996, she had less than two (2) years of provisional service on January 17, 1997

when her employment was terminated. Therefore, the termination of her employment does not represent an improper disciplinary action as claimed.

"Accordingly, the grievance is denied and OLR File No. 30144 is hereby closed.*" (Footnote omitted)

Citing Article VI Section 1-H (without explication), the demand for arbitration describes the grievance to be arbitrated as "Improper disciplinary action in that member was wrongfully terminated. Addressing remedy, it states: "Grievant should be returned to work with full back pay from 1/17/97.

The facts set forth in the Petition challenging arbitrability (which were subsequently admitted by the Union) are set forth below:

"4. The Grievant was employed by the Department of Juvenile Justice in the title of a community associate from June 30, 1991 until June 29, 1996. A copy of the job description for Community Associate is attached hereto as Exhibit A.

"5. From June 30, 1996 until January 17, 1997, the Grievant was employed in the provisional title of Supervisor (W).

"6. On January 17, 1997, the Grievant was terminated.

"7. On or about February 14, 1997 the grievance herein was filed. A copy of the grievance is attached hereto as Exhibit B.

"8 A Step II decision was issued on or about February 19, 1997. A copy of the Step II Decision is attached hereto as Exhibit C.

"9. The Step III grievance was denied on April 9, 1997. A copy of the Step III decision is attached hereto as Exhibit D.

"10. The Request for Arbitration was filed on or about April 17, 1997. A copy of the Request for Arbitration was filed on or about April 17, 1997. A copy of the Request for Arbitration is attached hereto as Exhibit E.

"11. In the Request for Arbitration, the Grievant requested that she be reinstated and receive full back pay from the date she was terminated."

Further, the Petition asserts that the Request for Arbitration fails to establish either standing to grieve this termination or a nexus between the act complained and the sources of the alleged right, because the Grievant's contract claim based on Art. VI § I (h) excludes provisional employees who have fewer than two years of service from challenging a disciplinary action.[9]

More particularly, the Petition asserts in paragraph 14:

> "This provision clearly requires that the Grievant have two or more years of provisional service in order to grieve a claimed wrongful disciplinary action. Here, the Grievant has not met this threshold requirement. From June 30, 1991 until June 29, 1996 the Grievant held the non-competitive title of Community Associate which, as a **non-provisional title,** does not count for purposes of calculating two years of service as a provisional. A copy of the job description for Community Associates is attached hereto as Exhibit A. the Grievant's length of

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[9] The requirement that a nexus be established where a grievance is denominated "disciplinary" is clearly spelled-out in B-2-95 at pp. 14-15. There we stated, among other things, that "When challenged to do so [as is the case here], a union requesting arbitration has the burden of showing that the contractual provision which it claims has been violated is arguably related to the grievance sought to be arbitrated. Moreover, when Management's statutory right is implicated, not only is the burden on the union, ultimately, to prove that allegation, but also, initially, to establish to the satisfaction of the Board that a substantial issue is presented. This showing requires close scrutiny by the Board on a case-by-case basis. The fact that no written charges of incompetency or misconduct have been served on a grievant will not invariably bar the arbitrability of a claimed disciplinary action. Whether an act constitutes discipline depends on circumstances surrounding the act. Applying these standards to the present case, we find that the Union has failed to demonstrate the required nexus between the subject of the grievance and the contractual provisions cited as the basis for its claim. Our reasoning is as follows: Concerning the charge that termination of the grievant's employment constituted wrongful disciplinary action in violation of Article VI(D) of the Contract, we find that the Union has not alleged any facts or circumstances which are traditionally characteristic of disciplinary action. In fact, the record is devoid of facts alleging that incompetence or misconduct were made or served or that accusations of culpability were made."

This rationale applies here. The grievant was in essence a probationary employee in the position of Supervisor I(W), having been in that position for less than seven months. The notion of a wrongful disciplinary action against such a person is not encompassed within the terms of Article VI § I (h). And, indeed, no analysis of the "discipline" on the merits was ever offered by the Union in any of its papers in this matter to explain why the grievant should have been reinstated pursuant to Article VI § I (h).

service as a provisional is insufficient to confer the rights to grieve pursuant to Article VI Section 1(h). As the Board has previously pointed out, while the employment status of the Grievant may be irrelevant for the purposes of certain types of grievances, e.g., where there is a claimed violation of the rules, regulations, written policies or orders of the employer, the availability of the grievance procedure may be limited to certain employees for other purposes, i.e., disciplinary rights. SEE BCB Decisions No. B-18-90, B-64-91. In this instance, Article Section I(h), which is cited as the source of the claimed right, limits the availability of the grievance procedure to provisional employees who have served for two years in the same or similar title or related occupational group in the same agency. The Grievant has not served in any provisional title or titles for two years as required by this contract provision. Thus, for purposes of an alleged wrongful disciplinary action, the grievance procedure is available only to a class of employees that does not include the grievant. Accordingly, there is neither necessary nexus between the act complained of and the alleged source of the right no standing to grieve. Therefore, Petitioners' Challenge to Arbitrability should be granted and Respondent's Request for Arbitration dismissed in its entirety."

While the Union denied the assertions in Paragraph 14 of the Petition, **it admitted the allegations in Paragraph 4** which appended the Community Associate job description to the Petition as Exhibit A. The description states on page 2 under **"Line of Promotion": "None**. This class of position is classified in the Non-Competitive Class." (Emphasis added). As noted above, it is for the Union to establish nexus here and it has obviously failed to do so. In the absence of a nexus there is nothing to be decided on the merits.

The text of the Union's Answer to Petition Challenging Arbitrability (the only Union pleading in this matter) is set forth below. It makes no reference to Article VI § I (h) although that was the only contractual provision cited in the Union's demand for arbitration, the grievance itself and the grievance Step 2 and 3 response documents quoted above. Nor did the Union (apart from a denial of Paragraph 12-14 of the Petition) explain how or why the demand for arbitration (which refers only to Art. VI § 1 (h)) is somehow arbitrable. And, more important, at no time did the Union claim that the argument made by the City in Paragraph 14 of the Petition somehow suffices to make the grievance as actually filed and subsequently processed arbitrable under Art. VI § I (h).

Instead, the Union admits Paragraphs 1 through 11 of the Petition, denies Paragraph 12-14 of the Petition without explication and continues:

> "ADDITIONAL RELEVANT FACTS
>
> "3. The position of Community Associate held by the Grievant, Tracey Hayes, in the Petitioner DJJ during the period on or about June 30, 1991 through on or about June 29, 1996, was a permanent, full-time, noncompetitive, civil service position.
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> "4. Upon information and belief, upon her promotion to the position of provisional Supervisor I(W) in DJJ, on or about June 30, 1996, the Grievant did not resign her permanent non-competitive position of Community Assistant.
>
> "5. Article VI, Section l(f) of the Social Service Collective Bargaining Agreement between Petitioners and Respondent for the period 1992-1995 (hereinafter the "CBA"), by which the Grievant was covered, defines the term "Grievance" to include -
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> 'A claimed wrongful disciplinary action taken against a full-time non-competitive employee with six (6) months service in title, except for employees during the period of a mutually agreed upon extension of probation.'
>
> A copy of the CBA is annexed hereto as Exhibit "A".
>
> "BASES UPON WHICH THE PETITION SHOULD BE DENIED
>
> "6. During the period of her employment in the full-time permanent, non-competitive position of Community associate in the Petitioner DJJ, from June 30, 1991 until June 29, 1996, the Grievant acquired grievance rights under Article VI, Section 1 (0 of the CBA.
>
> "7. Since the Grievant did not resign her permanent position of employment as Community Associate upon her promotion to the position of provisional

> Supervisor I(W) on June 30, 1996, the Grievant retained her grievance rights under Article VI, Section I (f) of the CBA, and her grievance herein alleging wrongful discharge is arbitrable thereunder."

The majority has concluded that this material raised for the first time a claim under Article VI §l(f) and precluded that claim in its entirety Significantly, although the demand for arbitration summarily pleads Article VI § I (h), no mention of that provision is made in this Answer although its last heading is entitled "BASES" upon which the Petition should be denied.

In these circumstances, the Petition Challenging Arbitration should be granted.

At no time during the course of the grievance proceedings were the facts and allegations pleaded in paragraph 3-7 of the Answer raised pursuant to Article VI § I (h) or (f) and they certainly were not raised nor otherwise articulated in the demand for arbitration. When one looks at the grievance papers filed by the Union and responded to by the City, the grievance is in stark simplicity a disciplinary termination grievance filed by a provisional employee with less than two years of service as such, and nothing more. Indeed, the remedy sought reinstatement to the provisional position from which the grievant was terminated, Supervisor (W), further emphasizes this state of affairs as does the demand for arbitration which does not specify any other remedy.

The majority disregards all this and ignores what really occurred during the grievance procedure by stating that the grievance somehow becomes arbitrable under Article VI § I (h) (regardless how it was presented at all steps of the grievance procedure and the demand for arbitration) because of the attempt made in the Petition filed by the City to anticipate and dispose of an argument that in fact was never: (1) made at any stage of the grievance procedure, nor (2) in the demand for arbitration, nor (3) in the Union's answer; namely, that the grievant's long-time service as a Community Associate (a non competitive title) should somehow (never explained in any fashion at any time by the Union) be aggregated to satisfy the two years of service requirement for provisional services referred to in Article VI § 1 (h).

In fact, the only "seniority" argument ever made by the union with respect to the grievant's service as a Community Associate is set forth in Paragraphs 3-7 of its Answer which the majority in all respects purports to disregard. And, as important, at no time did the Union argue in its Answer that the City had somehow established the grievance arbitrable based on its Petition Challenging Arbitrability. Rather it sought in its answer to change theories because a nexus had not been established under Article VI § I (h).

Simply put, the majority's decision renders arbitrable a grievance that never existed in substance at any stage of the grievance procedure and was never set forth in substance in any of the Union's post-grievance papers. This turns the law on this subject on end. In these circumstances, we merely note in passing that it is obvious that the non-competitive Community Associate title and the provisional competitive Supervisor I(W) title cannot be considered to be in the same or similar title or related occupational group under Article VI § I (h) and that at no time has the Union so argued in connection with that provision, although it attempted to do something similar under Article VI § 1 (f).

When all is said and done, a simple due cause grievance seeking reinstatement to the position from which the termination was made (a provisional competitive position) will be turned into something never substantively dealt with below simply because an argument was anticipated in the City papers that was never made by the Union in any context. This does violence to the notion that is important to this Board and to the municipal grievance processes; namely, that there should not be frustration of the multi-level grievance procedure which is intended to encourage discussion of the substance of the dispute to be arbitrated if it cannot be otherwise disposed of. And, it is particularly troubling that the majority reached this result on the basis it did when it was not urged in any fashion to do so on that basis by the Union.

Dated: January 27, 1998
New York, New York

Saul G, Kramer
MEMBER

Richard A. Wilsker
MEMBER