L. 1180, CWA v. City & HHC, 63 OCB 19 (BCB 1999) [Decision No. B-19-99, (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
-between-	:	
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1180, BY ITS PRESIDENT, ARTHUR CHELIOTES,	:	
Petitioner,	:	DECISION NO. B-19-1999 DOCKET NO. BCB-2003-98
-and-	:	
CITY OF NEW YORK and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,	:	
Respondents.	:	

DECISION AND ORDER

On July 14, 1998, the Communications Workers of America, Local 1180, ("Petitioner," "CWA," or "Local 1180") filed a verified improper practice petition alleging that the New York City Health and Hospitals Corporation ("City," "Corporation," or Respondents") interfered with, restrained and coerced Union members because of their membership in the Petitioner Union and also alleging that the City failed to bargain in good faith over the layoff of employees represented by Petitioner, as well as over the effects of those layoffs. Petitioner alleges that the Respondents' conduct violates the New York City Collective Bargaining Law ("NYCCBL"), specifically, §§ 12-306(a)(1), (3), and (4) and 12-306(c).[1] After a request for an extension of time, which was granted, the City filed a verified answer on August 25, 1998. Following three requests for

[1] In the reply, Petitioner also asserts claimed violations of NYCCBL §§ 12-303(q), 12-306(a)(4) and (5), and 12-307(a).

extension of time, which were also granted, CWA filed a verified reply on October 14, 1998.

Background

By letter dated March 19, 1998, Labor Commissioner James F. Hanley informed Local 1180 President Arthur Cheliotes ("Cheliotes") that members of his Local, *inter alia*, who were employed by nine City hospitals and the Corporation's Central Office would be laid off or discharged.[2] The letter stated the action was for business reasons and would be effective April 20, 1998. The letter also invited each of the affected unions to schedule a meeting to discuss the matter. The names and titles affected by the announcement were listed in an attachment.

On or about April 1, 1998, representatives of CWA, the City and the Corporation met to discuss the proposed layoffs. They discussed layoff lists, seniority lists, preferred lists, and special transfer lists. The layoffs were delayed until May 1, 1998. Severance and redeployment were not discussed in detail. On April 6, 1998, Richard Yates ("Yates"), Assistant Commissioner of the Office of Labor Relations ("OLR"), and CWA Staff Representatives Gwen Richardson ("Richardson") spoke about the possibility of forestalling the layoffs further.

By letter dated April 13, 1998, CWA demanded that the Corporation follow the layoff procedures established by Article XVII, § 3, of the Citywide Agreement. That provision states that layoffs of the non-competitive class shall be made in inverse order of the original appointment date to the agency in the subject class of positions. CWA asserted that the

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[2] Members of the following unions were included in the action: the Doctors Council, the New York State Nurses Association ("NYSNA"), the Organization of Staff Analysts ("OSA"), and District Council 37 ("D.C.37").

Corporation incorrectly computed the seniority of those scheduled to be laid off. By letter dated April 14, 1998, William Herrmann ("Herrmann"), the Corporation's Director of Labor Relations, replied that the collective bargaining agreement permitted the Corporation to treat all competitive and non-competitive employees the same for purposes of seniority on layoff lists, *i.e.*, inverse order of original date of appointment to the Corporation on a permanent basis. On or about April 28, 1998, the City notified Cheliotes that it would provide a list of vacancies in various City positions and that employees scheduled to be laid off could ask to be considered for the vacancies. The list was delivered to CWA the next day.

On May 1, 1998, the day the layoffs were scheduled to take place, the City and Corporation held a meeting with representatives of the Municipal Labor Coalition ("MLC"). Representatives of CWA, D.C. 37, NYSNA, and OSA were present. They discussed removing the targeted employees from the Corporation's payroll and placing them on the payroll of the City's Department of Citywide Administrative Services ("DCAS") for thirty days while attempts were made to place them in vacant positions throughout the City. They also discussed the agreement by D.C. 37 to stay a lawsuit challenging the Corporation's planned layoffs. On or about May 4, 1998, CWA Representative Richardson spoke with OLR.[3]

On May 4 and 6, 1998, DCAS held a job fair for employees scheduled to be laid off. On May 7 and 8, 1998, meetings took place between representatives of OLR and the Corporation as well as D.C. 37, NYSNA, OSA, the Doctors' Council, and CWA. On May 11, 1998, Cheliotes and Yates spoke by telephone about whether Local 1180 would become a party to a

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[3] Neither party identifies the person or persons with whom she undisputedly spoke.

severance agreement being negotiated by the other unions. The City contends that Cheliotes told Yates that CWA would not sign that memorandum of understanding ("MOU"). CWA asserts that, to the extent that the severance issue was not a citywide one, there was a strong possibility that his Union would, indeed, agree to a severance arrangement but that Local 1180 wanted to negotiate an agreement, itself, with Respondents. The next day, another meeting took place between the City and MLC members. The City asserts CWA did not attend. The Union maintains that Cheliotes was in fact there. Among topics discussed were details of the draft severance agreement and an early retirement incentive pending before the New York State Legislature.

On May 15, 1998, Yates telephoned CWA and was told that Cheliotes, along with other officers, staff and shop stewards of Local 1180 were out of town at a conference. Located at the conference, Cheliotes told Yates late that afternoon that his Union would not sign the MOU negotiated by the MLC because Section Four of that MOU had been changed to its detriment.

The draft MOU memorializing the severance agreement as originally written stated, at Section Four ("Pendency of the Lawsuit"), "The legal proceedings commenced by DC 37 in New York County Supreme Court, docketed as 106673/98, shall be stayed for a thirty-day period. The parties shall make the necessary notifications to the Judge assigned to the case and execute all necessary documents to postpone the proceedings accordingly." The draft MOU as later amended stated, at Section Four, "The parties herein shall not seek to join as a party in the legal proceedings commenced by DC 37 in New York County Supreme Court, docketed as 106673/98, nor shall they seek to file any position in the lawsuit as *amicus curiae.*"

On or about May 18, 1998, the Corporation laid off 78 CWA members.

Positions of the Parties

Union's Position

CWA argues that the layoffs implemented by Respondents beginning on or about May 18, 1998, were for reasons other than because of lack of work or for other legitimate reasons. The Union denies that the Corporation experienced a budget crisis which required it to lay off employees. In fact, the Union contends that Respondents actually projected a budget surplus for the Corporation for the 1998 fiscal year. The Union also contends that there was no lack of work for the employees targeted for layoff. As for redeployment, the Union asserts that, of the job vacancies available throughout the City, only three were in the bargaining unit of Local 1180, resulting in the layoff of 78 members of Local 1180.

The Union contends that the layoffs were motivated by Respondents' knowledge of and animus towards those employees' membership in or activities on behalf of the Petitioner Union. The Union asserts that those employees were interfered with, restrained, and coerced because of their membership in the Petitioner Union. The Union also asserts that they were the target of discrimination for the purpose of discouraging membership in or participation in the activities of the Petitioner Union.

The Union disputes the Respondents' contention that it was encouraged to join in discussions over a severance/redeployment agreement. The Union further avers that "OLR's Yates refused to negotiate over Local 1180's proposal to use severance monies to forestall

layoffs," despite being told that the Citywide Agreement, to which the Union and the City were parties, required bargaining.

The Union also disputes the City's contention that, during a meeting on May 1, 1998, agreement was reached to stay litigation filed in response to the Corporation's layoff plans. The Union also denies there was any discussion at that meeting of opening up vacancies within the Corporation. The Union also contends that the invitation it received to join that meeting came, not from the City, but from the Executive Director of D.C. 37 in his capacity as authorized collective bargaining representative for Local 1180 under the Citywide Agreement.

As to the failure by CWA to attend the meetings on May 4 and 5, 1998, the Union maintains that it was never invited to any such meetings on those dates. The Union also denies that it gave its proxy for that meeting to Dennis Sullivan, Director of Research and Negotiations for D.C. 37, "or anyone else."

As for the meeting on May 7, 1998, the Union admits that President Cheliotes attended along with other representatives of Local 1180 but denies that there were any negotiations regarding severance or redeployment. The issues discussed, the Union maintains, included the use of Work Experience Program ("WEP") participants, volunteers, and employees working out-of-title and on overtime in various unions' bargaining units in particular facilities of the Corporation. It was at this meeting, also, the Union maintains, that Cheliotes received a copy of the draft MOU, which contained language agreeing to stay litigation filed by D.C. 37. The Union denies that, in the meeting on May 8, 1998, there were any negotiations regarding severance or redeployment.

The Union admits that Cheliotes and Yates spoke about CWA's interest in joining the severance agreement.[4] The Union asserts that Respondents admit that layoffs, severance, and redeployment are a Citywide issue for which D.C. 37 is the only labor organization authorized by the Citywide Agreement to negotiate on behalf of Local 1180, pursuant to NYCCBL §§ 12-303(q)[5] and 12-307(a).[6] The Union also asserts, however, that Cheliotes told Yates that, to the extent that a severance agreement was *not* a Citywide issue, there was a "strong possibility" that his Union would in fact take part in such an agreement but only after negotiations between Local 1180 and Respondents.

The Union flatly denies the City's assertion that representatives of Local 1180 failed to attend another meeting on May 12, 1998. The Union argues that Cheliotes himself, as well as Local 1180 Vice President William Henning, did in fact attend.

As for the out-of-state meeting attended by Cheliotes and other Union representatives, the Union insists that the reason Cheliotes refused to sign the MOU faxed to him while he attended that out-of-town meeting was that language had been inserted by the City without bargaining with Local 1180. The language to which the Union objected prohibited any party to the

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[4] Respondents assert the conversation took place on May 11, 1998.

[5] Section 12-303(q) of the NYCCBL defines the term "designated representative" and "designated employee organization" for purposes specified in the paragraphs of § 12-307(a) relating to "Citywide" matters.

[6] Section 12-307(a) of the NYCCBL provides, in pertinent part, that public employers and certified or designated employee representatives shall have the duty to bargain in good faith over, *inter alia*, matters which must be uniform for all employees subject to the career and salary plan or matters which must be uniform for all employees in a particular department or matters involving pensions for employees other than those in the uniformed forces, *i.e.*, so-called "Citywide" matters.

agreement from joining D.C. 37's lawsuit challenging the use of WEP participants in Corporation facilities to perform the work of members of the bargaining unit represented by Local 420. The Union also objected to the language which prohibited any party to the agreement from filing an *amicus* brief. The Union further maintains that, when Yates told Cheliotes that the new language would not preclude Local 1180 from appearing as an *amicus* in the lawsuit, Yates refused to put that asserted representation in writing and refused an offer by Cheliotes to sign the original version of the MOU.

Finally, in its reply, the Union asserts, under the paragraph entitled, "Amendments," that beginning on or about April 1, 1998, and continuing, Respondents failed to apply the MOU to Local 1180 and the employees it represents at Corporation facilities who were subject to layoff in violation of NYCCBL §§ 12-303(q), 12-306(c),[7] and 12-307(a), and Article XVII of the Citywide Agreement. In the alternative, the Union argues that, to the extent that the bargaining and execution of the MOU is determined to encompass mandatory subjects of bargaining, Respondents have failed to bargain in good faith, beginning on or about April 1, 1998, and continuing to the present, in violation of NYCCBL §§ 12-303(q), 12-306(a)(4) and (5),[8] and 12-307(a).

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[7] Section 12-306(c) of the NYCCBL provides that public employers and certified or designated employee representatives shall bargain in good faith, *inter alia*, with respect to matters within the scope of collective bargaining.

[8] Section 12-306(a)(4) of the NYCCBL provides that it is an improper practice for a public employer to refuse to bargain in good faith over matters within the scope of bargaining. Subsection (5) provides, similarly, that it is violative for a public employer to make a unilateral change in a mandatory subject of bargaining as to any term and condition of employment established in a prior contract during the *status quo* period of negotiations as provided for in §12-311(d) of the NYCCBL.

As relief, the Union requests that the Board order Respondents to cease and desist from continuing to engage in their assertedly improper practices, bargain in good faith with Petitioner over the legitimacy of the need to lay off employees represented by Petitioner and the effects of any legitimate layoffs, and reinstate and make whole those employees represented by Petitioner who assertedly were improperly laid off.

The Union also requests that the Board of Collective Bargaining ("Board") direct Respondents to apply the MOU to Local 1180 and the employees it represented at the Corporation who were subject to layoff, or, in the alternative, restore the *status quo* until Respondents have bargained in good faith with Local 1180 over the May, 1998, layoffs and the effects of those layoffs.

City's Position

The City avers that, because patient use in City hospitals has declined resulting in a drop in income revenue, it experienced a financial crisis that caused it to downsize its operations and reduce the number of staff employees. The City asserts that non-union as well as union employees have been laid off as a result of this downsizing and that, at no time during this process, have Respondents demonstrated any anti-union animus. To the contrary, the City asserts, unionized employees of the Corporation had opportunities through their elected representatives to negotiate a severance/redeployment agreement which could have obviated most or all of the layoffs. The City asserts that CWA was part of the coalition of unions that negotiated a severance agreement. The City observes that the coalition included Locals 371, 786

and 1549 of D.C. 37, as well as the New York State Nurses Association, the Doctors' Council, and the Organization of Staff Analysists. CWA Local 1180, as well as Local 420, D.C. 37, were invited to take part, the City maintains, but they assertedly did not attend some of the meetings and "refused" to sign the agreement which was ultimately reached with the result that employees which they represented were laid off.[9]

In addition, the City adds, the Corporation's actions were carried out strictly for economic and financial concerns, *i.e.*, legitimate business reasons, and would have been taken even in the absence of the union. The fact that non-union employees were laid off before union employees is evidence of the legitimacy of the managerial action complained of here, Respondents contend.

Respondents also argue that the Union has failed to allege facts sufficient to support its contention that the City and Corporation failed to bargain in good faith over the layoffs. They assert that, in spite of their belief that the decision to lay off employees was not a mandatory subject of bargaining, the City conducted negotiations "on all issues surrounding the effects of the layoffs with the [Municipal Labor Coalition], which includes CWA, in an attempt to reach a final agreement." Demonstrating what it calls its "sincerity," the City points to the MOU which was signed by all affected parties except CWA and Local 420.

If any party failed to bargain in good faith, Respondents contend, it was CWA. They point to the absence of CWA representatives at a "crucial" meeting during a series of negotiations. It would be "unrealistic," the City argues, "to believe that the City should send a representative to meet with CWA's Executive Board at a resort in Bushkill, Pennsylvania,"

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[9] There is no dispute that the instant case does not concern Local 420.

where the CWA conference was under way. "Meetings were regularly held and CWA was always invited to attend," Respondents assert.

Respondents also contend that the City provided CWA with the information necessary to bargain on these matters and CWA has made no allegation that it asked for information but did not receive it. The City argues that, at the point when CWA President Cheliotes informed OLR that his Union would not enter into the MOU, the City's bargaining over a severance and redeployment agreement was concluded and the duty to bargain ended. For all these reasons, Respondents request that the instant petition be dismissed.

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.[10] However, action properly within the scope of managerial prerogative may constitute improper practices if the charging party can establish that it was engaged in activity protected within the meaning of the NYCCBL,[11] and also that the managerial action was taken with the knowledge of protected activity and was motivated by reasons prohibited by the NYCCBL.[12] In the absence of an outright admission of improper motive, proof

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[10] *Local 1549, D.C. 37, AFSCME, and Desiree Miller v. City of New York and New York City Department of Transportation*, Decision No. B-2-93 at 14.

[11] *Id.* at 17.

[12] *Id.* at 14-15; *see*, also, *Joseph Bowman and D.C. 37, AFSCME, v. City of New York, et al.*, Decision No. B-51-87, citing *City of Salamanca*, 1018 PERB 3012 (1985).

of this element often must be circumstantial.[13] It is well settled that allegations of improper motivation must be based on statements of probative facts rather than recitals of conjecture, speculation, and surmise.[14]

In the instant proceeding, the Union contends that the layoff of 78 of its members was motivated by Respondents' knowledge of and animus towards those employees' membership in or activities on behalf of the Petitioner Union. The Union also asserts that those employees were interfered with, restrained, and coerced because of their membership in the Petitioner Union. The Union further contends that they were the target of discrimination for the purpose of discouraging membership in or participation in the activities of the Petitioner Union.

The record herein is devoid of any evidence that the City's actions were intended to or that they did, in fact, interfere with or diminish any rights of the petitioning Union or its members under the NYCCBL. The Union's assertions that anti-union animus motivated the City to layoff the targeted individuals because they are members of the Union are unsupported by any facts. Nothing more than a conclusory allegation supports the contention that they were targeted in order to discourage them from taking part in protected activity. There are no facts alleged to indicate which activity was at issue or how they might have been discouraged from taking part in

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[13] *Local 1549,* Decision No. B-2-93 at 16.

[14] *Id.* at 15; *see*, also. *Darren Baker and City Employees' Union, Local 237, I.B.T,v. Lacy C. Johnson, New York City Department of Investigation and New York City Department of Juvenile Justice*, Decision No. B-61-89 at 12; *Liebold v. Uniformed Sanitationmen's Association, Local 831, I.B.T. and New York City Department of Sanitation*, Decision No. B-42-97 at 8; *Communications Workers of America, Local 1180, v. New York City Police Department*, Decision No. B-28-86 at 11-12; *Peshkin v. Anthony Basilio, Sr., and New York City Department of Social Services*, Decision No. B-30-81 at 8-9.

such activity. Nor does the Union dispute the City's contention that the managerial action which was taken also targeted non-union employees for layoffs. In the absence of a showing of discriminatory intent on the part of the employer, we find that no violation of the NYCCBL has been stated with respect to these claims. We also find no factual support for any independent claim of retaliation, interference, or coercion. We shall dismiss so much of the instant petition as asserts violations of NYCCBL § 12-306(a)(1) and (3).

With respect to the Union's claim that the City failed to bargain in good faith over the layoffs and the "effect" of those layoffs, we have long held that the decision whether to lay off employees is within the scope of the employer's express management rights, but that its exercise of its right to lay off gives rise to a *per se* practical impact on the laid-off employees, requiring immediate bargaining.[15] Here, the Union has not specifically alleged that the layoffs to which it objects have resulted in a *per se* practical impact, nor does it specify what it means when it demands bargaining over the "effects" of the layoffs, but there is no dispute that the unit members at issue were laid off. Based on our longstanding precedent, we find that the layoffs in the case before us necessarily created a *per se* impact on the laid off employees and that this *per se* impact required bargaining.

However, the record is quite clear that the parties did engage in at least some bargaining

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[15] *D.C. 37, AFSCME, Locals 983 and 1062, and Local 371, Social Service Employees Union, AFSCME, v. City of New York and Office of Municipal Labor Relations*, Decision No. B-6-90 at 27; *see*, also, *City of New York v. D.C. 37, AFSCME, AFL-CIO*, Decision No. B-21-75 at 20; *D.C. 37, AFSCME, AFL-CIO, v. City of New York*, Decision No. B-18-75 at 23; and *City of New York v. MEBA, District No. 1, Pacific Coast District*, Decision No. B-3-75.

over the practical impact[16] of the layoffs. The Union concedes that it met with representatives of the City and the Corporation on April 1, 1998, to discuss the layoffs, and, particularly, to discuss layoff lists, seniority lists, preferred lists, and special transfer lists. The Union also acknowledges that, as part of an MLC coalition, representatives of CWA met with employer representatives on May 1, 1998, to discuss removing the targeted employees from the Corporation's payroll and placing them on the payroll of the City's DCAS for thirty days while attempts were made to place them in vacant positions throughout the City. The Union also does not dispute that representatives of CWA, as well as representatives of other unions, met with employer representatives on May 4 and 6, 1998. It even claims that, contrary to the City's assertion, its representative attended a meeting between the MLC unions and the City on May 12, 1998. All of this took place before the layoffs of CWA's members occurred on May 18, 1998.

While CWA contends that the City and the Corporation refused to bargain over the layoffs and the "effects" thereof, it is evident from the pleadings that CWA was a party to bargaining on these issues, but that it did not conclude an agreement with the employer representatives. Although most of the other MLC unions did, in fact, reach an agreement with the City and the Corporation, which was embodied in the MOU, CWA did not join in that agreement. Thus, the gravamen of the Union's charge seems to be that the Corporation implemented the layoffs before it reached a separate agreement with the CWA.

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[16] Bargaining over "practical impact," *per se* or otherwise, is a term of art under the NYCCBL. We assume that the Union refers to practical impact when it uses the terms "effects," since that is the term used in a long line of private sector cases dealing with the same concept. *See, e.g.,City of New York v. D.C. 37, AFSCME, AFL-CIO*, Decision No. B-21-75, at 6, citing *NLRB v. Transmarine Navigation Corp.*, 380 F. 2d 933 (CA 9, 1967).

Based upon the above, we conclude that the City and the Corporation did not fail or refuse to bargain over the practical impact resulting from its managerial decision to lay off employees, including members of the CWA. It is true that the Corporation implemented the layoffs of CWA's members before the bargaining culminated in any agreement with CWA. However, this action by the Corporation was the exercise of a statutory management right. The duty to bargain in a layoff case extends to alleviating the impact of the layoffs, not to the decision whether to lay off employees. Although the duty to bargain over alleviating the *per se* practical impact that results from layoffs arises immediately, prolonged bargaining does not limit management's discretion to implement its right to lay off. Therefore, this part of the improper practice charge also must be dismissed.

However, because layoffs give rise to a *per se* practical impact, the employer has a *continuing* duty to bargain over steps to alleviate that impact, upon request by the Union, until either an agreement or an impasse is reached. Here, while there already has been bargaining between these parties, no agreement has been reached. Accordingly, while we will dismiss the refusal to bargain charge, we reiterate that the City and the Corporation have a continuing duty to bargain, upon a request by the Union, over the *per se* impact on the employees who were laid off, to the extent that that issue has not been foreclosed by Citywide bargaining. If, at the Union's request, such bargaining resumes, the parties shall bargain, not over the managerial decision to lay off the employees at issue, but over the alleviation of the impact of that decision on the laid off employees. Failing a mutual agreement to alleviate that impact, the parties may avail themselves of the impasse procedures provided for in § 12-311(c) of the NYCCBL.

Finally, with respect to the Union's argument that mandatory subjects of bargaining are implicated in its suggestions (i) that "monies from PCA Training funds and managed care waiver funds" should have been used to avert layoffs and (ii) that laid off employees should have been moved into "positions opened by attrition at HHC," this argument is raised for the first time in the Union's reply. So is the Union's claim that the City failed to apply the MOU to the Union and its members who were laid off.[17] Also in the reply, the Union asserts that the City violated the NYCCBL by unilaterally changing terms or conditions of employment established in a prior contract during the *status quo* period pursuant to NYCCBL § 12-311(d). There is no assertion by the Union that these belatedly asserted arguments were raised in response to new information presented by the City in its answer. Therefore, we find that these arguments were untimely raised, and we shall not consider them in reaching our decision herein. In the event that bargaining resumes, we note that these and any other arguments may be raised at the bargaining table.

[17] Without commenting on the merit of this claim, we note that the record reflects that CWA did not sign the MOU.

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 instant improper practice petition docketed as BCB-2003-98 be, and the same hereby are, dismissed in all respects; and it is further

DIRECTED, that the parties herein resume bargaining, upon demand by either party, over alleviation of the *per se* practical impact that results from the layoffs of members of CWA, Local 1180, to the extent that that issue has not been foreclosed by Citywide bargaining.

Dated: June 7, 1999
New York, N.Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

THOMAS J. GIBLIN
MEMBER

RICHARD A. WILSKER
MEMBER