City & FDNY v. UFA, 73 OCB 3 (BCB 2004) [Decision No. B-3-2004 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK and
THE NEW YORK CITY FIRE DEPARTMENT,

Petitioners,

-and-

UNIFORMED FIREFIGHTERS ASSOCIATION
OF GREATER NEW YORK,

Respondent.

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Decision No. B-3-2004
Docket No. BCB-2365-03
(A-10199-03)

DECISION AND ORDER

On October 30, 2003, the City of New York and the New York City Fire Department ("FDNY," "Department" or "City") filed a petition challenging the arbitrability of a group grievance brought by the Uniformed Firefighters Association of Greater New York ("UFA" or "Union"). The grievance asserts that FDNY, by reassigning firefighters to less active companies because they had used substantial service-connected medical leave, violated departmental policies and disciplined firefighters without providing contractual protections. The City argues that the grievance is not subject to arbitration under the collective bargaining agreement ("Agreement") because the Union failed to establish a nexus between the grievance and the provisions of the Agreement and the department policies allegedly violated. The Union contends that the grievance is arbitrable because its allegations – that the transfers violated FDNY's

regulations and are a pretext for discipline – fall within the Agreement's definition of a grievance. We find that the grievance is reasonably related to the disciplinary provisions of the Agreement but not to the invoked departmental policies. Accordingly, the petition challenging arbitrability is denied as to the claim that the transfers violated Article XVII of the Agreement and granted in all other respects.

BACKGROUND

FDNY's policy regarding assignment and transfer of firefighters, All Units Circular ("AUC") 297, permits the Department "to assign, reassign and transfer firefighters as deemed appropriate."[1]

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[1] AUC 297 has been in effect since August 27, 1995. It provides, in relevant part:

> It is the policy of the Fire Department to assign and transfer firefighters in a manner that will insure optimum levels of service to the public. In the execution of this policy, the needs and convenience of the individual shall be taken into consideration, but the safety and welfare fo the public will take priority. In order to provide this level of service, an efficient, capable and experienced firefighting force is necessary. Therefore, it shall be the policy of the Department to assign, reassign and transfer firefighters as deemed appropriate.
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> Performance on the job should always be considered in making assignments. Therefore, firefighters are subject to assignment, transfer and reassignment, as deemed appropriate by the Commissioner, to insure efficient Department operations.
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> Teamwork, order and reliability are essential to the Fire Department's ability to fulfill its responsibilities for the safety of the citizens of New York city. . . . If the firefighter fails to contribute to the efficient performance of the unit e.g., through performance attitude or lack of commitment or if, in the judgment of superior officers, the firefighter's work performance would improve under different supervision or in a different setting, the firefighter may be reassigned.
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> When in the judgment of superior officers unacceptable behavior or performance in violation of the regulations is of such a serious nature as to affect the administrative or operational effectiveness of a unit, a member may be temporarily reassigned or detailed

On August 25, 2003, FDNY Chief of Operations issued a memo to all borough commanders and special operations command indicating that 20 firefighters had a history of service-connected medical leaves, in other words, time lost due to injuries sustained in the line of duty, "that indicates a detail to a less active unit would be in the members' best interest." The memo provided that, effective September 2, 2003, eight firefighters were to be transferred from a ladder company to an engine company and 12 were to be transferred from one engine company to another.

According to the City, those firefighters who were detailed from one engine company to another were reassigned to companies that are less active than the firefighters' previous engine companies. Regarding the transfers from ladder companies to engine companies, the City states that ladder companies allow for individual action, which can increase a member's susceptibility to injury, whereas in engine companies the members work in a group under direct supervision during firefighting operations. According to the Union, ladder companies and engine companies are equally dangerous. While ladder companies operate above the fire floor, engine companies place water on the fire and perform certified first responder/defibrillation runs during which a variety of injuries can be sustained.

In selecting firefighters for the detail, FDNY borough commanders, according to the City, reviewed the firefighters' medical leave records, sought the advice of battalion and unit

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> pending the outcome of formal disciplinary proceedings. In these instances members may be detailed or reassigned, with the approval of the Chief of Department, until the final resolution of the disciplinary proceedings.

In the section addressing applications for assignment upon promotion, AUC 297 asserts that "[t]he Fire Commissioner retains the sole and exclusive right to assign Firefighters when, in the Commissioner's opinion, such assignments best serves [sic] the Department."

commanders who had personal knowledge of each firefighter, and asked them about any extenuating circumstances. The City states that the firefighters' disciplinary records were not considered.

In an August 29, 2003, letter, FDNY Labor Relations Director, Lillian Rivera-Inzerillo, advised UFA President, Stephen Cassidy, that FDNY would continue to monitor medical leave use, would analyze medical leave statistics "to identify those members who suffer illness and/or injury at a higher rate than their peers," and, in some cases, would direct a change in assignment or a detail. She stated that "[a] lower level of activity, change in branch of service, or change in supervision may be effective in reducing exposure, and consequently, Medical Leave." She stated that some changes in work locations would occur on or about September 15, 2003.

On September 4, 2003, the UFA President filed a grievance with FDNY at Step III of the grievance procedure on behalf of "himself, all consenting grievants, and for all other firefighters similarly situated." The grievance asserts that the reassignments constitute discipline without the contractual protections and violate: (1) the grievance provisions of the Agreement, specifically Article XVIII, §§ 1, 3;[2] (2) the disciplinary protections afforded by Article XVII of the

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[2] The Agreement, effective June 1, 2000, through May 31, 2002, is in *status quo*. Article XVIII, § 1, sets out the grievance procedure and provides, in relevant part:

> A grievance is defined as a complaint arising out of a claimed violation, misinterpretation or inequitable application of the provisions of this contract or of existing policy or regulations of the Fire Department affecting the terms and conditions of employment.

Article XVIII, § 3, states, in relevant part:

> It is understood and agreed by and between the parties that there are certain grievable disputes which are of a department level or of such scope as to make adjustments at Step I and Step II of the grievance procedure impractical, and, therefore, such grievance shall be instituted at Step III of the grievance procedure.

Agreement and numerous FDNY regulations;[3] (3) FDNY's medical abuse procedure, PA/ID 2/95;[4] and (4) FDNY's supervised medical leave program ("SMLP"), PA/ID 3-96.[5] The

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[3] Article XVII sets out the individual rights of employees subject to interrogations, interviews, trials, and hearings conducted by authorized representatives of FDNY. The Union does not specify which FDNY regulations regarding discipline were allegedly violated.

[4] The chronic absenteeism policy, PA/ID 2-95, has been in effect since July 20, 1995. The purpose of the policy is to "define Departmental criteria for determining whether a member has been chronically absent and to describe the action the Department may take should a member meet those criteria."

PA/ID 2-95 states, in relevant part:

> This policy will not affect members seriously injured in the line of duty who require extensive medical leave. Rather, the focus is on members with attendance problems that indicate to the Department that the member may be incompetent and unable to perform the duties of a firefighter or a fire officer.
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> Chronic absenteeism is defined as excessive medical leave or light duty, based on Departmental standards set forth below. Chronic absenteeism is not to be confused with absenteeism associated with members eligible for inclusion in the Supervised Medical Leave Program (SMLP). Chronic absenteeism may or may not be associated with medical leave abuse.
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> Members with objective medical leave findings may have such incidents or calendar days lost excluded from the average or count.
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> The records of members presumed to be chronically absent based upon the above criteria will be reviewed by the Department to identify any mitigating factors and to determine the appropriate course of action. The review will include the member's medical profile, performance evaluations, workload considerations and any other relevant factors.
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> If the review indicates that chronic absence renders the member incompetent and unable to perform the full duties of a firefighter or fire officer, proceedings may be instituted to terminate the member as provided by Section 75 of the Civil Service Law. In this case, the member will be served with formal charges of incompetence and will be entitled to a Section 75 hearing before the New York City Office of Administrative Trials and Hearings.

[5] The supervised medical leave program, PA/ID 3-96, has been in effect since July 11, 1996. The program is "a mechanism by which the Department ensures appropriate treatment for members with unacceptable medical leave usage." When monitoring medical leaves, the absence control unit "will subtract from the total any medical leaves for which the primary reason was

grievance seeks to maintain the *status quo* by preventing the firefighters from being reassigned. A Step III hearing was not conducted. The UFA President filed a request for arbitration with the Office of Collective Bargaining on September 29, 2003. The request for arbitration seeks to prevent reassignment and to have firefighters reassigned already returned to their original companies.

On September 5, 2003, the newspaper, *The Chief,* reported FDNY's intent to transfer the firefighters. *See* Mark Daly, *FDNY Transfers 19 Chronic Absentees*, The Chief, Sept. 5, 2003, at 1. The article stated, in relevant part:

> The Fire Department is cracking down on medical leave abuse by scrutinizing firefighters' records and transferring suspected malingerers, Fire Commissioner Nicholas Scoppetta said last week.
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> The transfers are intended to exploit the social stigma among firefighters of working in a "slow" company, as opposed to the "busy" companies in neighborhoods where fires are more common, the Commissioner explained.
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> "Our hope is that if they have fewer fires to go to, that will help them reduce their medical leave," said Commissioner Scoppetta.
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> "I take [Mr. Cassidy] at his word and say it's management's responsibility," Mr. Scoppetta said last week. "This is a great bunch of people; I just think we need a little bit more accountability."
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> "There is almost an incentive" for firefighters to request leave, the Commissioner said, since there is no time limit for recovery and a firefighter's salary while on leave is exempt from city, state and Federal taxes.

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line-of-duty burns, fractures, lacerations, or contusions." If placed in the SMLP, a member is subject to the following restrictions:

> A. Member is restricted to home residence while on medical leave.
> B. Member shall be subject to home visitation and/or telephone calls while on medical leave.
> C. Member is restricted from working 24 hour and self mutuals.
> D. Member may lose their eligibility for supplemental transfer points based on their medical leave records.

Effective October 11, 2003, 19 firefighters were detailed to other branches of FDNY. According to the City, the firefighters had significantly higher than average service-connected medical leave in each of three consecutive years. The City states that the details are for an indefinite duration so that there is sufficient time to evaluate the effects of the details on the members' frequency of injury. The City also states that reassignment back to the member's original location is not foreclosed.

The transferred firefighters did not go through contractual disciplinary procedures. The firefighters, all of whom had less than ten years with FDNY, worked full duty prior to transfers and continue to work full duty with their new companies. The Union states that the transfers create a stigma against the transferred firefighters, negatively impact the morale of FDNY (since firefighters who are injured in the line of duty may be reassigned to less active positions), and shakes the core of firefighters' aggressiveness in fighting fires and saving lives.

POSITIONS OF THE PARTIES

City's Position

The City argues that the grievance must be dismissed because the Union has not established a nexus between the detailing of its members based on service-connected medical leave and Articles XVIII, §§ 1, 3, and XVII of the Agreement, PA/ID 2-95, and PA/ID 3-96. According to the City, § 12-307(b) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") guarantees the City the unilateral right to assign and direct its employees, to determine the duties its employees will perform, and

to allocate duties among employees, unless the right has been limited by the parties' Agreement.[6] The grievance procedure set forth in Article XVIII, §§ 1, 3, does not limit FDNY's right to detail firefighters based on service-connected leave. Article XVII addresses interrogations, interviews, trials, and hearings conducted by FDNY but does not address details to another assignment. PA/ID 2-95, the chronic absenteeism policy, focuses on attendance problems that indicate that a member may be incompetent and unable to perform firefighter duties but does not address the member's work location or restrict management's right to assign its employees. Similarly, PA/ID 3-96, the supervised medical leave program that restricts certain members on medical leave to their home residence and subjects them to home visitation and/or telephone calls while they are on leave, does not mention the location of the member's assignment or restrict FDNY's managerial right to detail a member to another assignment. While PA/ID 2-95 and PA/ID 3-96 consider both service- and non-service-connected medical leave in determining whether a firefighter has been chronically absent or is eligible for SMLP, the reassignments here are based solely on service-connected medical leave. The provisions do not provide a right to remain in a given assignment and not be subject to the details at issue. Therefore, the Union has failed to establish a *prima facie* relationship between the act complained of and the source of any alleged right, and the grievance is not arbitrable.

The City also argues that the Union has failed to establish that the details amounted to

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[6]NYCCBL § 12-307(b) provides:
It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; . . . maintain the efficiency of governmental operations; . . . and exercise complete control and discretion over its organization and the technology of performing its work.

disciplinary action, which would require the service of charges. According to the City, the Union has failed to meet its burden to present a substantial issue as to whether the reassignments were intended to discipline the firefighters. Instead of offering facts or circumstances characteristic of disciplinary action, the Union alleged that the firefighters were embarrassed and stigmatized. The cases cited by the Union are distinguishable because in this case there was no prior disciplinary action taken against the detailed firefighters, there is no conflict between the cited policies, and the details are not permanent transfers.[7]

Union's Position

The Union argues that the City has failed to demonstrate that the grievance is non-arbitrable. The Agreement permits group grievances and defines a grievance as "a claimed violation, misinterpretation or inequitable application of the provisions of this Contract or of existing policy or regulations of the Fire Department." The Union filed a proper grievance because its claims – that the transfers violated the Agreement and FDNY regulations – fall within the Agreement's broad definition of a grievance. Whether the cited contractual provisions and regulations were violated is for the arbitrator to determine.

The Union alleges that the transfers were punishment for being hurt in the line of duty and that FDNY did not afford affected members due process rights, disciplinary procedures, or the right to appeal. The Union suggests that the City's reasons for the transfers are entirely pretextual. As evidence, the Union notes that the firefighters continue to work full duty, all

[7] In a footnote, the City also asserts, upon its information and belief, that the Union has hired a law firm to explore the possibility of filing a federal lawsuit to stop the reassignments in this case. Since, to our knowledge, the Union has not filed a federal lawsuit, we do not address this issue.

medical leaves were promptly investigated and approved by FDNY, and the FDNY Commissioner was quoted in *The Chief* as referring to the transferred firefighters as malingerers. The Union asserts that removing firefighters who are performing at their current assignments to positions of lesser activity and referring to them as malingerers is punitive, creates a negative stigma and personal embarrassment, and is perceived as discipline.

The Union also alleges that FDNY created an unwritten and unspecified policy that does not inform firefighters of the sick leave standards with which they are expected to comply and that is arbitrarily enforced against firefighters with less than ten years on the job. According to the Union, the creation of this new policy violates existing policies and regulations concerning punishment for excessive use of sick leave. Transfers based upon utilization of medical leave are unprecedented and do not fall within FDNY's other rules and procedures. Although the SMLP specifically exempts serious service-connected injuries from consideration, FDNY determined that it can detail firefighters who suffer illness and/or injury at a higher rate than their peers. The transferred firefighters had not violated the sick leave provisions set forth in the Agreement, the SMLP, or the chronic absenteeism policy. They were transferred without a specific finding that the work required at their new company would be different from the work required at their original company. The unsubstantiated conclusion that a change in work location would reduce injuries was arbitrary and capricious.

The Union asserts that the transfer policy enunciated in AUC 297 is not dispositive because it provides standards for the transfer of firefighters upon their request and does not justify the instant transfers. Although the policy states that "teamwork, order and reliability" are essential, transferring a firefighter to a new and unfamiliar environment does not assist

"teamwork, order and reliability" in the both the firefighter's original company or newly assigned company. The policy's discipline provision makes reference to "unacceptable behavior or performance," but the transfers in question were based on the use of job-related medical leave, not the firefighter's performance or violations of FDNY regulations. There is no evidence that the transferred firefighters have not performed their jobs professionally, heroically, and within FDNY's traditions. In addition, the policy lists multiple criteria – not solely medical leave records – to be considered when evaluating a transfer application.

DISCUSSION

The policy under NYCCBL § 12-302 is to favor and encourage impartial arbitration as the selected means for the resolution of grievances between municipal agencies and certified employee organizations. To determine arbitrability, this Board decides first whether the parties are contractually obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions; and, if so, whether "the obligation is broad enough in its scope to include the particular controversy presented," *Social Service Employment Union*, Decision No. B-2-69 at 2; *see District Council 37, AFSCME*, Decision No. B-47-99 at 8-9, or, in other words, whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement. *New York State Nurses Ass'n*, Decision No. B-21-2002 at 7.

Here, the first prong of the test has been met. The parties are contractually obligated to arbitrate controversies regarding violations of the Agreement or of Department policies through the Agreement's grievance procedures, and the City does not allege that arbitration of this

grievance would violate public policy.

Therefore, we turn to the second prong of the test: whether the transfers are reasonably related to (a) the invoked Department policies and (b) the disciplinary provisions of the Agreement.

We find that the Union has not shown that the transfers at issue were reasonably related to PA/ID 2-95, the chronic absenteeism policy, and PA/ID 3-96, the supervised medical leave program. Both policies have co-existed with AUC 297, the policy regarding assignment and transfers of firefighters, for several years. AUC 297 repeatedly states that firefighters are subject to assignment, transfer and reassignment as deemed appropriate by the FDNY Commissioner. Neither PA/ID 2-95 nor PA/3-96 limits the Department's right to transfer members. PA/ID 2-95 permits the Department to review records and determine an appropriate course of action for members whose use of medical leave or light duty satisfies the criteria for chronic absenteeism. While proceedings may be brought to terminate a chronically absent member, PA/ID 2-95 does not state that termination proceedings are the only appropriate course of action. Similarly, PA/ID 3-96 provides that the SMLP is "a mechanism" for treating members with unacceptable medical leave use. On its face, this policy does not foreclose alternative mechanisms. Therefore, there is no nexus between the transfers and the cited departmental policies and regulations. *See Correction Officer's Benevolent Ass'n*, Decision No. B-23-2000 at 7 (finding no nexus when the cited rules did not clearly govern involuntary transfers); *District Council 37, Local 1795*, Decision No. B-18-89 at 10 (finding no nexus when the cited rule did "not generally or specifically limit management's right to transfer an employee on its own initiative").

The Union has, however, shown that the transfers were reasonably related to the wrongful

disciplinary provisions of the Agreement, Article XVII. When the City challenges arbitrability by asserting that it had a legal duty or a statutory right to take an action – such as transfer, reassignment, or termination of employees – but the union contends that management's action was punitive and thus subject to the contractual grievance procedures, the Board examines the pleadings to ascertain whether a reasonable relationship, though not apparent, indeed exists between the subject matter of the dispute and the contract. *Social Service Employees Union*, Decision No. B-34-2002 at 5; *Social Service Employees Union, Local 371*, Decision No. B-27-2002 at 6; *see also New York State Nurses Ass'n*, Decision No. B-21-2002 at 7. Under these circumstances, when a union alleges that the City's action was pretextual, we scrutinize the sufficiency of the specific allegations.

In *Uniformed Firefighters Ass'n of Greater New York*, Decision No. B-76-90, the Board evaluated a grievance concerning a policy that required interviews of firefighters with the largest number of medical leave requests. Expressly stating that the interviews were not disciplinary, the policy declared that the stated purpose of the interviews was "to determine if members with an unusual number of medical leave requests may have a health problem which could be exacerbated by continued assignments to a line unit." *Id.* at 2. The Board permitted an arbitrator to determine if the interviews were actually disciplinary because the language of the collective bargaining agreement limited the Department's right to conduct interviews without representation and did not specifically exclude sick leave use interviews. *Id.* at 7-8. In so ruling, the Board noted that "[t]he results of sick leave usage interviews leave open the express possibility that 'members with an unusual number of medical leave requests . . . [may have] continued assignments to a line unit [discontinued].'" *Id.* at 7.

The Union has "the burden of showing, by factual allegations, that the transfer[s] in question [were] *intended* as a disciplinary action." *Local 621, Service Employees Int'l Union*, Decision No. B-2-2001 at 16 n.17 (emphasis added); *see Social Service Employees Union, Local 371*, Decision No. B-39-2000 at 8; *District Council 37*, Decision No. B-52-89 at 8-9. Standing alone, the fact that the firefighters perceive the details as punitive would not be indicative of whether the Department intended the transfers to be disciplinary.

However, the Union has also alleged that the FDNY Commissioner publicly denounced the transferred firefighters as malingerers. This suggests that the Department might consider the firefighters to have committed an offense that would merit discipline and contradicts the Department's asserted reason for the transfer. *See Fire Alarm Dispatchers Benevolent Ass'n*, Decision No. B-33-88 at 17 (grievance arbitrable when Department memoranda indicated management's dissatisfaction with the performance of the transferred grievants). Although the Board is mindful that "newspaper articles are not probative evidence of the information reported therein and judicial notice is taken of a commonly accepted fact that all that is reported, even if repetitively, in a newspaper is not true and accurate," *Hyde Park Cent. Sch. Dist. v. Hyde Park Teachers' Ass'n*, 30 PERB ¶ 4591, at 4695 (1997), we leave it to the arbitrator to assess the admissibility, reliability and probative value of this evidence. *See Detectives Endowment Ass'n*, Decision No. B-10-98 at 15 (noting that it is not our function to interpret the likelihood that there will be admissible evidence to support the claim before the arbitrator), *aff'd sub nom.*, *City of New York v. Detectives Endowment Ass'n*, No. 401478 (Sup. Ct. N.Y. Co. Oct. 23, 1998).

In reaching this conclusion, we reiterate that "[d]oubtful issues of arbitrability are resolved in favor of arbitration." *See District Council 37, Local 1549*, Decision No. B-18-99, at

7. Thus, while we refrain from determining if there is sufficient evidence to conclude that the transfers are intended to be and actually are disciplinary actions, we find that the Union has asserted sufficient factual allegations based upon the specific facts in this case to have the question resolved by an arbitrator. Accordingly, we grant the petition challenging arbitrability in regard to the claim that the transfers violated Department policies and regulations and deny the petition in regard to the claim that the transfers violated the disciplinary provisions of the Agreement.

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 City of New York and the New York City Fire Department's petition challenging arbitrability docketed as BCB-2365-03 be, and the same hereby is, denied as to the claim that the transfers violated Article XVII of the Agreement and granted as to the all other claims; and it is further

ORDERED, that the request for arbitration filed by the Uniformed Firefighters Association of Greater New York , and docketed as A-10199-03, be, and the same hereby is, granted as to the claim that the transfers violated Article XVII of the Agreement and denied as to all other claims.

Dated: January 29, 2004
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER

I dissent. RICHARD A. WILSKER
MEMBER

I dissent. M. DAVID ZURNDORFER
MEMBER