Doctors Council, Local 10MD, SEIU, 9 OCB2d 2 (BCB 2016)

(IP) (Docket No. BCB-4101-15)

Summary of Decision: The Union alleged that HHC violated NYCCBL § 12-306(a)(1), (4), and (5) by unilaterally changing employee compensation for working on holidays. HHC argued that the Union failed to demonstrate the existence of a practice because HHC did not have the requisite actual or constructive knowledge of the practice and that the supervisors at issue lacked the authority to bind HHC. The Board found that HHC had unilaterally changed doctor's compensation, a mandatory subject of bargaining. Therefore, the improper practice petition was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

DOCTORS COUNCIL, LOCAL 10MD, SEIU,

Petitioner,

-and-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

DECISION AND ORDER

On March 15, 2015, Doctors Council, Local 10MD, SEIU ("Union"), filed an improper practice petition against the New York City Health and Hospitals Corporation ("HHC"). The Union alleges that HHC violated § 12-306(a)(1), (4), and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), by unilaterally changing how its members in the Obstetrics and Gynecology ("OB/GYN") Department of HHC's Kings County Hospital Center ("KCHC") were compensated for working on holidays. The Union argues that there was a practice of monetarily compensating Attending

Physicians for all hours worked on a holiday and that HHC unilaterally changed the compensation to a mix of monetary compensation and compensatory time. HHC argues that the Union failed to demonstrate the existence of an unequivocal practice because KCHC did not have the requisite actual or constructive knowledge of the practice. HHC further argues that, presuming some supervisors had knowledge of the practice, they lacked the authority to bind HHC to it. The Board finds that HHC made a unilateral change regarding compensation, a mandatory subject of bargaining. Therefore, the improper practice petition is granted.

BACKGROUND

The Trial Examiner held a one day hearing and found the totality of the record established the relevant facts to be as follows:

The Union is the certified bargaining representative of Attending Physicians employed by HHC in KCHC's OB/GYN Department.[1] At the time the events at issue occurred, the Union and HHC were parties to a 2008-2010 collective bargaining agreement ("Agreement"), which remained in effect pursuant to the *status quo* provisions of NYCCBL § 12-311(d).[2] KCHC has over 600 beds. Its OB/GYN Department consists of approximately 14 Attending Physicians and is managed by the Chief of OB/GYN ("OB/GYN Chief"), also referred to as the Chair of the OB/GYN Department. The OB/GYN Department is divided into units and has three Directors that report to the OB/GYN Chief. Attending Physicians, however, are often directly supervised by the OB/GYN Chief, and it is the OB/GYN Chief who signs off on their timesheets.

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[1] The title Attending Physician is used throughout HHC but in this decision refers solely to those employed in KCHC's OB/GYN Department.

[2] In May 2015, the parties entered into a new collective bargaining agreement covering the years 2010 through 2017.

The OB/GYN Chief reports directly to the Chief Medical Officer at KCHC. The parties have stipulated that the OB/GYN Chief is "able to influence and create policy" and was responsible for the OB/GYN Department's policies concerning the medications used to treat patients. (Stip ¶ 2) The OB/GYN Chief also determines necessary staffing. For example, an OB/GYN Chief instituted the requirement that two Attending Physicians always cover the labor floor, converted an Attending Physician line into two midwife positions, and combined two budget lines into one in order to increase the compensation for the Director of OB/GYN's Maternal Fetal Medicine Unit. The OB/GYN Chief has hiring authority and determines the budget line placement of an Attending Physician when hired, thereby determining their salary.[3]

The schedules of Attending Physicians are set by the OB/GYN Chief.[4] The regularly scheduled hours for Attending Physicians are currently from 8:00 am to 4:00 pm, Monday to Friday. However, the OB/GYN Department is staffed 24/7 and has a minimum staffing level of three Attending Physicians (two covering the Labor floor and one in Gynecology) for all days, including holidays.[5] Weekend hours and those hours worked by Attending Physicians outside of their regularly scheduled hours are known as "call" hours. There are 16 call hours on weekdays, from 4:00 pm to 8:00 am, and 24 call hours on each weekend day.

Attending Physicians earn a basic annual salary for regularly scheduled hours (the "per annum" rate). Work performed by Attending Physicians for call hours is paid at a "per session"

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[3] An Attending Physician, Dr. Lisa Ricketts-Holcomb, testified that when she was hired by KCHC, she met only with the OB/GYN Chief.

[4] The OB/GYN Chief also sets the vacation schedules, determines how Attending Physicians request vacation time, how much vacation time can be taken, and demarcates certain high demand periods during which vacations are limited.

[5] It is undisputed that the Attending Physicians coordinate with each other to ensure that there is adequate coverage on nights, weekends, and holidays such that there has never been a need for KCHC to call in an Attending Physician to work due to lack of coverage.

rate. The OB/GYN Department's funding for per annum and per session work is under two different budgetary lines. HHC characterizes this as "dual employment," since the employee has both a full time and part time position, and states this is common in other departments at KCHC. Attending Physicians submit two timesheets, one for their regularly scheduled hours and another for their call hours. The OB/GYN Chief signs off on both timesheets. HHC conducts regular audits of dually employed physicians' payroll and timesheet records.[6]

The Agreement provides that Attending Physicians receive 12 paid holidays per year but does not address their compensation for call hours performed on a holiday. The parties stipulated that prior to April 21, 2014, Attending Physicians who worked on a holiday: (l) recorded the day on their per annum timesheets as a paid holiday and were monetarily compensated for one day at their per annum rate; and (2) recorded on their per session timesheets all hours worked on the holiday and were monetarily compensated for all those hours at their per session rate irrespective of whether those hours overlapped with their regularly scheduled hours. Thus, prior to April 21, 2014, if an Attending Physician worked a double shift on a holiday—8:00 am to 4:00 pm and 4:00 pm to 12:00 midnight—the total compensation that an Attending Physician received would be one day's pay at their per annum rate for the paid holiday plus 16 hours pay at their per session rate for the hours worked.

HHC stipulated that the practice described above existed since on or about May 2013. In addition, the record reflects that the practice was followed for at least ten years. Dr. Ricketts-Holcomb provided undisputed testimony that the same practice of recording the total number of holiday hours worked on the per session timesheet was unequivocally followed by her and other Attending Physicians since she began working at KCHC's OB/GYN Department in May 2004.

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[6] HHC provided examples of audits of Attending Physicians. (*See* Ans. ¶¶ 46-49; 68-70; 89)

Dr. Ricketts-Holcomb learned of this practice from other Attending Physicians. Dr. Ricketts-Holcomb never received formal instruction from an OB/GYN Chief, the KCHC Human Resources Department, or the KCHC Payroll Department as to how to complete her timesheets. Four different OB/GYN Chiefs between May 2004 and April 2014 signed off on Attending Physicians' timesheets, and there is no evidence that any Attending Physician's timesheets submitted in this manner were rejected.

As an illustrative example of the practice, the Union introduced the HHC Facility Profile Reports for Dr. Ricketts-Holcomb for Labor Day 2013, a paid holiday under the Agreement. Facility Profile Reports are generated by HHC and reflect the hours recorded on an Attending Physician's timesheets. Dr. Ricketts-Holcomb's Facility Profile Reports document that she worked from 8:00 am to midnight on Labor Day 2013; recorded 8:00 am to 5:00 pm on her per annum timesheet and 8:00 am to midnight on her per session timesheet.[7] The report shows she received eight hours pay at her per annum rate for the Labor Day 2013 holiday as well as payment at her sessional rate for all 16 hours she worked that day.

On April 21, 2014, the OB/GYN Chief sent an email to the Attending Physicians that reads, in pertinent part:

> Holiday[:] If you work a holiday you should include the day on your regular timesheet. After 4 pm report the remainder of the hours on the per session sheet. You will be given compensatory time as vacation time. You can't be paid extra for the regular hours during the day of the holiday (per session is as usual after regular hours)[.]

(Union Ex. 2) Accordingly, after April 21, 2014, if an Attending Physician worked a double shift on a holiday, they would receive: one day's pay at their per annum rate for the holiday,

[7] Currently, Attending Physicians' regular hours are 8:00 am to 4:00 pm. In September 2013, however, their regular hours were 8:00 am to 5:00 pm including a one-hour unpaid lunch break.

eight hours of compensatory time for the hours worked during their regular shift, and eight hours at their per session rate for the remaining hours worked after 4 p.m. on the holiday.[8]

The Facility Profile Reports for Dr. Ricketts-Holcomb also show that she worked from 8:00 am to midnight on Labor Day 2014. However, consistent with the OB/GYN Chief's April 21, 2014 instruction, Dr. Ricketts-Holcomb recorded 8:00 am to 4:00 pm on her per annum timesheet but, instead of recording all 16 hours on her per session timesheet as she had in 2013, she only recorded 4:00 pm to midnight on her per session timesheet. Accordingly, for Labor Day 2014, Dr. Ricketts-Holcomb received eight hours pay at her per annum rate for the Labor Day 2014 holiday, eight hours of compensatory time for her regular shift worked on Labor Day 2014, and eight hours pay at her per session rate for the remaining hours she worked.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that a change in an employee's compensation is a mandatory subject of bargaining and that HHC violated NYCCBL § 12-306(a)(1), (4), and (5) when it failed to bargain before changing how Attending Physicians were compensated for working on holidays.[9]

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[8] HHC policy limits the amount of all leave time an employee can cash out upon separation from service to 2,088 hours. In response to HHC's assertion that this cap had never been reached at KCHC, the Union introduced an arbitration award documenting that a doctor at KCHC had accrued over 2,500 hours of unused leave prior to his retirement.

[9] NYCCBL § 12-306(a) provides, in pertinent part, that:

> 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 [§] 12-305 of this chapter;
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> * * *

HHC's unilateral change, according to the Union, effectively reduced the amount of monetary compensation Attending Physicians received for working on a holiday and deprived them of an important benefit.

The Union argues that it has established the unequivocal practice of Attending Physicians recording all hours worked on a holiday on their per session timesheets, irrespective of whether those hours overlapped with their regularly scheduled hours, and then receiving monetary compensation at their sessional rate for all those hours. HHC stipulated as to this practice from May 2013 through April 2014, and Dr. Ricketts-Holcomb provided unrebutted testimony that the practice was in place since at least May 2004. The practice was ratified by a succession of OB/GYN Chiefs, who approved of the practice by "literally, signing off on each and every timesheet submitted." (Union Br. at p. 3) The OB/GYN Chief is the highest level supervisor in the OB/GYN Department, and HHC has stipulated that the OB/GYN Chief exercises policy-making authority. The Union argues that the OB/GYN Chief possessed authority over all aspects of employment within the OB/GYN Department, making hiring, staffing, and

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> (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;
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> (5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of [§] 12-311 of this chapter.

NYCCBL § 12-305 provides, in pertinent part, that: "Public employees shall 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."

disciplinary decisions. Thus, the Union argues, the record establishes that Attending Physicians reasonably expected the practice to continue.

Accordingly, the Union argues that HHC has violated the NYCCBL by unilaterally changing the compensation received by Attending Physicians for holiday work by replacing monetary compensation with compensatory time and refusing to pay the Attending Physicians sessional pay for some of their hours worked on a holiday. The Union seeks an order directing HHC to reinstate the former practice, prohibiting it from changing the former practice without bargaining, and awarding such other and further relief as may be just and proper.

HHC's Position

HHC argues that that the Union failed to demonstrate the existence of an unequivocal past practice because the Union has not established that KCHC had the requisite actual or constructive knowledge of the practice. Although HHC has stipulated that the practice was in effect since May 2013, it argues that "there is not a shred of evidence" indicating that KCHC was aware of the practice prior to April 2014. (HHC Br. at p. 3) Dr. Ricketts-Holcomb conceded that she only asked her colleagues, other Attending Physicians, how to complete timesheets. The Attending Physicians did not ask their supervisor, the Human Resources Department, or the Payroll Department how to complete their timesheets and, thus, according to HHC, "deliberately avoided discussing how to complete timesheets with anyone responsible." (*Id.* at p. 4)

HHC distinguishes caselaw holding that an extended period of time can be sufficient to demonstrate an employer's knowledge of a practice, as the alleged practice here was "difficult to detect" due to the "secretive nature of the OB/GYN physicians conduct" and comparative small number of instances as the practice concerned only 14 employees a dozen times per year in a facility that employs thousands. (HHC Br. at p. 3) HHC argues that constructive knowledge

cannot be presumed from the fact that OB/GYN Chiefs had signed off on the timesheets as there "is no evidence that these timesheets were being cross-referenced, vetted or reviewed in any way other than entered for processing." (*Id.* at p. 4) Thus, HHC claims, KCHC did not know that the "OB/GYN physicians were recording their time differently from all other physicians covered by the [Agreement]." (*Id.*) (emphasis deleted)[10]

HHC further argues that the OB/GYN Chiefs are "first line supervisors and do not have the requisite authority to bind the facility to a payroll practice and policy of this nature." (HHC Br. at p. 5) According to HHC, the OB/GYN Chief's policy authority is strictly limited to patient-care situations within OB/GYN. The OB/GYN Chiefs do not have the authority to determine an Attending Physicians' per session salary rates, and an Attending Physician's per annum rate is determined by the open line into which they were hired. Thus, HHC argues, there is no evidence that the OB/GYN Chiefs had the authority to bind KCHC to a payroll practice.

HHC further argues that the Attending Physicians did not have a reasonable expectation that the practice would continue because "[t]hey deliberately avoided addressing the issue with those . . . who could tell them how to properly complete their timesheets." (HHC Br. at p. 5) HHC argues that if such "unilateral actions" were found to constitute a binding and unequivocal past practice, there would be nothing preventing other employees from doubly recording their hours. (*Id.* at 6) According to HHC, the "exact same rationale underpinning the instant matter would apply" to employees recording and being paid for sick leave or annual leave while simultaneously working and being paid the same hours. (*Id.*) Thus, HHC argues, to find that these "unilateral actions" were unequivocal would mean that "[a]s long as employees can get

[10] HHC does not allege that the practice violated the Agreement, nor does it rely upon the Agreement for any of its arguments.

away with something for long enough, it will become binding on an employer who otherwise had no knowledge it was taking place." (*Id.*)

DISCUSSION

The Union claims that HHC violated NYCCBL § 12-306(a)(1), (4), and (5), and its duty to bargain over a mandatory subject of bargaining, by unilaterally changing the compensation Attending Physicians received for working in KCHC's OB/GYN Department for all hours worked on a holiday. We find that the record establishes that HHC made a unilateral change regarding compensation, a mandatory subject of bargaining, and, accordingly, grant the petition.

NYCCBL § 12-306(a)(4) makes it an improper practice for a public employer or its agents "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." Matters within the scope of collective bargaining include those "concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *MLC*, 7 OCB2d 6, at 15 (BCB 2014) (quoting *CEU, L. 237, IBT*, 2 OCB2d 37, at 11 (BCB 2009)); *see also* NYCCBL § 12-306(a). "As a unilateral change in a term and condition of employment accomplishes the same result as a refusal to bargain in good faith, it is likewise an improper practice." *DC 37, L. 420*, 5 OCB2d 19, at 9 (BCB 2012); *see also PBA*, 63 OCB 4, at 10 (BCB 1999). In order "[t]o establish that a unilateral change constitutes an improper practice, the petitioner must demonstrate the existence of such a change from the existing policy or practice and establish that the change as to which it seeks to negotiate is or relates to a mandatory subject of bargaining." *Local 1182, CWA*, 7 OCB2d 5, at 11 (BCB 2014) (quotation and internal editing marks omitted) (quoting *DC 37*, 4 OCB2d 19, at 22 (BCB 2011));

see also PBA, 73 OCB 12, at 17 (BCB 2004), *affd.*, *Matter of Patrolmen's Benevolent Assn. v. NYC Bd. of Collective Bargaining*, No. 112687/04 (Sup. Ct. N.Y. Co. Aug. 8, 2005), *affd.*, 38 A.D.3d 482 (1st Dept. 2007), *lv. denied*, 9 N.Y.3d 807 (2007).

In the instant matter, it is undisputed that the alleged change relates to compensation, a mandatory subject of bargaining. Accordingly, the issue is whether there was a unilateral change to an existing policy or practice regarding that subject. In order to establish a unilateral change to a mandatory subject of bargaining, we look at whether the "practice was unequivocal and existed for such a period of time such that unit employees could reasonably expect the practice to continue unchanged." *DC 37, L. 461 & 508*, 8 OCB2d 11, at 15 (BCB 2015) (quoting *Local 621, SEIU*, 2 OCB2d 27, at 12 (BCB 2009); *County of Nassau*, 38 PERB ¶ 3005 (2005)); *see also UFT*, 4 OCB2d 2, at 10-11 (BCB 2011) (noting that there "is no requirement in the [NYCCBL] that the change evince the kind of regularity and duration needed to establish a formal 'past practice' in the context of arbitration or contract interpretation").

We find the record establishes that HHC unilaterally changed the compensation Attending Physicians received for hours worked on a holiday. HHC stipulated that from May 2013 until April 21, 2014, Attending Physicians were monetarily compensated for their regularly scheduled hours at their per annum rate and were monetarily compensated for all hours they worked on that holiday at their per session rate. *See UFT*, 4 OCB2d 2, at 11 (BCB 2011) (employer's "admission of the existence of the practice renders the practice sufficiently unequivocal"). This practice was corroborated by the Facility Profile Reports. In addition, Dr. Ricketts-Holcomb's unrebutted testimony establishes that the same practice existed since at least May 2004. Indeed, there is no evidence in the record that OB/GYN Department Attending Physicians were compensated in any other manner prior to HHC's unilateral change. *See UFT*, 3

OCB2d 44, at 10 (BCB 2010). Accordingly, we find that the practice of monetarily compensating these Attending Physicians for all hours worked on holidays at the per session rate in addition to their per annum holiday pay existed long enough for the employees to reasonably expect that it would continue unchanged. *See DC 37, L. 436 & 768*, 4 OCB2d 31, at 16 (BCB 2011) (nine years sufficient to establish practice); *Local 621, SEIU*, 2 OCB2d 27, at 13 (three years sufficient to establish practice); *City of Rochester*, 21 PERB ¶ 3040 (1988), *affd., City of Rochester v NYS Pub. Empl. Relations Bd.*, 155 A.D.2d 1003 (4th Dept. 1989) (13 months sufficient to establish practice).

We reject HHC's arguments that the OB/GYN Chiefs lacked the authority to bind HHC to the practice and that it did not have knowledge of the practice. It is undisputed that the OB/GYN Chiefs were responsible for staffing the OB/GYN Department. They are the Attending Physicians' direct supervisors and are responsible for reviewing and approving their timesheets. *See UFOA*, 1 OCB2d 17, at 13 (BCB 2008) (finding a practice based upon actions of supervisors even where those actions contradicted written policies). In addition, when HHC decided to change how the OB/GYN Attending Physicians were paid for their holiday work, the change was announced by, and at the direction of, the OB/GYN Chief. Based on the record, we find that the OB/GYN Chiefs were responsible for staffing, scheduling, and were authorized to and did approve the Attending Physicians timesheets.

We also reject HHC's argument that the alleged practice was not binding because it did not have knowledge of the practice for a sufficient amount of time due to "unique circumstances," specifically that the practice was "difficult to detect" due to the "secretive nature of the OB/GYN physicians conduct," a small sub-set of KCHC employees. (HHC Br. at p. 3) A unilateral change to a mandatory subject of bargaining that affects only a sub-set of bargaining

unit employees does not eliminate or obviate the employer's duty to bargain. *See DC 37, L. 461 & 508*, 8 OCB2d 11, at 18 (practice found applicable to a subset of employees in a title); *DC 37*, 4 OCB2d 43, at 11 (BCB 2011) ("A unilateral change [that] provides a benefit to some[,] but not all[,] unit members remains actionable by the union representing both the beneficiaries of the change as well as those who are not."); *UFT*, 3 OCB2d 44, at 10; *see also County of Nassau*, 35 PERB ¶ 3036, at 3104 (2002) ("There are practices [that] affect all employees in a bargaining unit and there are practices that are limited to certain titles or circumstances."); *NYC Transit Auth.*, 24 PERB ¶ 3013 (1991) (elimination of parking for a portion of an employee population in one location constituted a violation).

Further, the existence of the established practice in only the OB/GYN Department does not mean that the practice was secretive, concealed, or difficult to detect. To the contrary, the record shows that at least four OB/GYN Chiefs were responsible for reviewing and certifying that the Attending Physicians' timesheets were accurate. In addition, according to HHC, all Attending Physician timesheets were regularly subject to audit, and indeed some of the Attending Physicians' timesheets were audited. Further, there is absolutely nothing in the record to support a finding that the Attending Physicians were secretive or did anything to hide the practice. Thus, we reject HHC's argument that it lacked actual or constructive knowledge of the practice for a sufficient period of time.

Accordingly, we find that HHC breached its duty to bargain in violation of NYCCBL § 12-306(a)(4). Further, because its unilateral change altered the *status quo* during a period of contract negotiations, HHC also violated NYCCBL § 12-306(a)(5). *See MLC*, 7 OCB2d 6, at 20-21. When an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). *See DC 37, L. 461 & 508*, 8 OCB2d 11, at 21.

For the reasons stated above, the Unions' improper practice petition is hereby granted, and we order HHC to rescind the email sent on April 21, 2014; restore the practice for compensating Attending Physicians for working on holidays as it existed prior to April 21, 2014; cease and desist from unilaterally changing how OB/GYN Attending Physicians are compensated for hours worked on holidays until such time as the parties reach a negotiated agreement or exhaust the statutory impasse procedures; and to make whole any Attending Physician affected by the unilateral change found here.

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 petition filed by Doctors Council, Local 10MD, SEIU, against the New York City Health and Hospitals Corporation, docketed as BCB-4101-15, hereby is granted; and it is further

DETERMINED, that the New York City Health and Hospitals Corporation violated its duty to bargain over a mandatory subject of bargaining, in violation of NYCCBL § 12-306(a)(1), (4), and (5), by unilaterally changing the compensation that Attending Physicians in Kings County Hospital Center Obstetrics and Gynecology Department received for hours worked on a holiday; it is further

ORDERED, that the New York City Health and Hospitals Corporation rescind its April 21, 2014 email advising Attending Physicians that they would receive compensatory time for some hours worked on a holiday and restore the practice for compensating Attending Physicians for working on holidays as it existed prior to April 21, 2014; it is further

ORDERED, that the New York City Health and Hospitals Corporation cease and desist from unilaterally changing how Attending Physicians are compensated for hours worked on holidays until such time as the parties reach a negotiated agreement or exhaust the statutory impasse procedures; and it is further

ORDERED, that the New York City Health and Hospitals Corporation make whole any Attending Physician impacted by its unilateral change.

Dated: February 23, 2016
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
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PAMELA S. SILVERBLATT
MEMBER

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