UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

REGENCY HERITAGE NURSING AND
REHABILITATION CENTER

Respondent

and Case 22-CA-074343

1199 SEIU, UNITED HEALTHCARE WORKERS EAST,
NEW JERSEY REGION

Charging Party

THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Bert Dice-Goldberg
Counsel for the Acting General Counsel
National Labor Relations Board
Region 22
20 Washington Place – Fifth Floor
Newark, NJ 07102
Bert.dice-goldberg@nlrb.gov
(973) 645-3536

I. STATEMENT OF THE CASE

Based upon a charge filed by 1199 SEIU, United Healthcare Workers East, New Jersey Region, "the Union," on February 2, 2012 (GCX 1(a)),[1] in Case 22-CA-074343 the Regional Director for Region 22, on behalf of the Acting General Counsel of the National Labor Relations Board, issued a Complaint and Notice of Hearing on October 2, 2012, alleging that Regency Heritage Nursing and Rehabilitation Center, "Respondent," engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, " the Act" (GCX 1(c)).

The Complaint alleged, in substance, that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing the rate of pay for employees hired after the expiration of the collective bargaining agreement between the parties. Respondent, in its Answer, denied the substantive allegations of the Complaint (GCX (1)(e)).

Pursuant to the Notice of Hearing, a hearing in this matter was held before Administrative Law Judge Steven Fish, "the ALJ," on December 5, 2012. The ALJ issued his Decision in this matter on June 6, 2013, finding that Respondent violated the Act as alleged. Respondent filed Exceptions to the ALJ's Decision and an Exceptions brief in support thereof on July 31, 203. The Acting General Counsel now files this brief to Answer Respondent's Exceptions.

---

[1] Reference to "GCX___" denotes documents offered into evidence at the administrative hearing by the Acting General Counsel, "CP___" denotes documents offered into evidence by the Union, "RX___" denotes documents offered into evidence by Respondent, "Tr.__" denotes pages in the hearing transcript, "ALJD__" denotes pages in the ALJ's Decision and "RE __" denotes pages in Respondent's Brief in support of its Exceptions.

II. FACTS

The salient facts of this matter are substantially not in dispute.[2] Respondent operates a nursing home providing inpatient and outpatient care from a facility in Somerset, New Jersey (GCX(1)(c) and (e)). The Union represents a bargaining unit of non-professional employees (GCX 3 at pg. 1). The most recent collective bargaining agreement between the Union and Respondent covered the period from March 1, 2008, through February 28, 2011 (Tr. 20; GCX 3.)[3] Of note, the agreement contained a clause that provided for a gradually increasing minimum wage rates for employees in each classification. On specified dates, the minimum wage rates rose, and all employees below the new minimum wage rate had their pay raised to the minimum (GCX 3 at pgs. 14-15). Once a newly hired employee passed his or her probationary period, the employee's wage rate was set at the minimum for that classification (Tr. 47).

On May 31 the parties began negotiations for a successor agreement (Tr. 22). McCalla served as the main spokesperson for the Union (Tr. 19). Morris Tuchman, Counsel for the Respondent, was Respondent's spokesperson (Tr. 22-23). The Union broadly laid out its goals for a successor agreement, including wage increases, improvements to benefit funds and bringing the standards at the facility in line with other facilities operated by Respondent and represented by the Union (Tr. 23-24). The parties did not discuss the contractual minimum wage rates (Tr. 25). The parties had their next bargaining session on August 8. At this session the Union made its initial written proposal (Tr. 25; GCX 4). Again, the parties did not discuss the contractual

---

[2] The record evidence in this matter consisted of the unrebutted testimony of the Acting General Counsel's witness, Union Organizer Ron McCalla, and documents whose authenticity was unchallenged. Respondent in its Brief in support of its Exceptions states, as fact, that witnesses at the hearing were sequestered and that Union Vice President Roy Garcia was present but did not testify, citing page 17 of the hearing transcript (RE 5, lines 10 - 16.) While the record reflects that witnesses were sequestered, nothing in the record supports Respondent's contention regarding Garcia. The Acting General Counsel therefore moves to strike the portions of Respondent's brief regarding Garcia as they are unsupported by record evidence.

[3] All dates herein are 2011, unless otherwise noted.

minimum wage rates. At this session the Union requested an extension of the collective bargaining agreement (Tr. 26). Respondent indicated that they would consider the Union's request (Tr. 27).

On August 24, the parties met again. Respondent, for the first time, made an economic proposal: a wage freeze and a decrease in the contractual minimum wage rates (Tr. 28).[4] The Union responded that they "had no intention of agreeing to any reduction of the minimum rates" (Tr. 28). Critically, while Respondent proposed decreasing the contractual minimum rates, none of its representatives indicated that it had already reduced those rates for new hires (Tr. 29). The Union reiterated its request for a contract extension. Again Respondent indicated only that it would consider the Union's request (Tr. 29).

The parties held their fourth bargaining session on September 14. At this session the parties devoted substantial time to a discussion of health insurance. Once again the Union asked for an extension of the expired agreement. Tuchman stated that Respondent was unwilling to agree to an extension, stating that Respondent did not want to be subject to the agreement's arbitration clause (Tr. 31).

At the next bargaining session, on September 27, during a discussion of economics, both Tuchman and David Gross, Respondent's Owner, stated that they could not agree to a contract extension because it would bind the employer to contractual minimum hiring rates for individuals hired during bargaining (Tr. 34). The Union asked whether the Respondent thought it could disregard the contractual minimums. Tuchman answered that the contractual minimums likely applied only to employees who had been employed prior to the expiration of the contract,

[4] Respondent proposed the following minimum wage rates: LPNs $22/hour, CNAs $10/hour, Dietary, Housekeeping and Recreation employees $8.50/hour (Tr. 48). The contractual minimum rates at that time were $24, $11 and $10 respectively (GCX 3 at pg. 15).

and cited a section of the Act in support of this position (Tr. 34, 50.) Tuchman emphasized that he was not certain that Respondent would be able to avoid applying the contractual minimum rates to employees hired after contract expiration (Tr. 34, 36, 50). This was the first time Respondent asserted that the contractual minimum wage rates might not apply to new employees (Tr. 36.) Both McCalla and Union Vice President Roy Garcia asked whether the Employer was, at that moment, paying sub-minimum rates to employees. Tuchman evaded the question. Tuchman then indicated that he saw what the Union was doing; trying to engage him in a game of "gotcha," getting him to admit that Respondent was violating the agreement (Tr. 35, 51).

On November 10, at the parties' next bargaining session, the Union again asked whether employees hired after expiration of the contract were being paid in accordance with the contractual minimum rates (Tr. 37). At first Tuchman refused to reply. After the parties caucused the Union again asked directly if Respondent was paying employees hired after contract expiration the contractual minimum wage rates. Tuchman gave a one word answer, "No" (Tr. 37, 53). The Union representatives immediately stated that Respondent did not have the right to alter the minimum pay rates, that the parties were still bargaining and were not at impasse (Tr. 38). The Union then made an oral information request for the wage rates of all employees doing bargaining unit work, so it could ascertain what Respondent was paying unit employees (Tr. 38).[5]

Subsequently, the Union investigated the workplace and found that the Employer was not applying the contractual minimum rates to employees hired after the expiration of the contract. On February 7, 2012, the Union filed the instant unfair labor practice charge alleging that the Employer violated Section 8(a)(5) by unilaterally changing the rates of pay for new hires (GCX

[5] As the ALJ indicated in his Decision, Respondent finally provided the information requested by the Union in response to the Acting General Counsel's trial subpoena.

1(a)).

The parties had not, and at the time of the hearing still had not, reached impasse (Tr. 39). Nor did the Union agree to reduce the minimum wage rates paid to employees hired after the contract's expiration (Tr. 38, 51).

While the Acting General Counsel and the Charging Party objected to its inclusion in the record on relevancy grounds, Respondent introduced documentary evidence regarding an arbitration between the parties over Respondent's failure to make contractually required raises to the minimum wage rates in December, 2010 (RX 1-5). In December 2010, the contractual minimum wage rates rose (GCX 3 at 14-15). After the Employer failed to implement the required increase, in January 2011, the Union filed a grievance alleging that the Employer had failed to implement the increases (CP 3). The grievance sought to compel the Employer to pay the contractual wage increases and to provide retroactive pay to the affected employees.

On May 5, the parties arbitrated the grievance. The issue of the wage rates Respondent was paying to new hires was not addressed in the arbitration (Tr. 67, 68). The Arbitrator orally ruled in favor of the Union, affirmatively ordering the Employer to apply the contractual wage rates to all employees. He also ordered the Employer to produce a spreadsheet indicating the amounts owed to those employees on whose behalf the Union filed the grievance. On June 17, pursuant to Counsel's request, Respondent sent to the Union a list of employees hired as of September 1, 2010 (RX 4). The list contained the names of four employees hired after the contract expired. However, between the date the contract expired and June 17, Respondent hired 21 unit employees (GCX 8).[6]

---

[6] The 21 employees were: Fata Amara, Date of Hire ("DOH,") 6-1-11; Daniela Blake, DOH 5-7-11; Ashley Brown, DOH 5-26-11; Maria Castro, DOH 5-30-11; Michael Charlemagne, DOH 6-11-11; Nifeasia Clark, DOH 3-10-11; Salamatu Coker, DOH 5-26-11; Rosetta Cole, DOH 5-26-11; Lorenzo Contreras, DOH 3-24-11; Nicole Hacket, DOH 3-24-11; Steven Harmon, DOH 4-7-11; Isater John, DOH 3-24-11; Maria Vergara, DOH, 4-13-11; Paris

On August 4, the Employer sent the backpay spreadsheet to the Union (RX 4). It listed all employees hired prior to the expiration of the contract who had received wage rates below the contractual minimums, and calculated backpay owed to each affected employee through June 11. Except for the four employees hired on March 10 , it did not list the employees (approximately 17 others) who were hired after expiration of the contract (RX 2).

On November 18, the Arbitrator issued his written Opinion. It ordered the Employer to correct the wage rate for all affected employees; set forth the amounts owed to employees, based on the Employer's spreadsheet, for retroactive pay from December 2010 through June 11, 2011; retained jurisdiction over any future disputes regarding wages paid to these individuals in the period after June 11, 2011; and reaffirmed his oral ruling requiring the Employer to apply the contractual wage increases to all employees (RX 1).

III. ARGUMENT

Point 1 Respondent's assertion that its newly hired employees are "not yet hired" applicants has no basis in law or fact.

It is axiomatic that employee wages are mandatory subjects of bargaining and terms and conditions of employment which survive the expiration of a collective bargaining agreement. See, i.e., *Diplomat Envelope Corp.*, 263 NLRB 525, 541 (1982). It is also well settled that an employer violates its duty to bargain under Section 8(a)(5) of the Act when it institutes changes in mandatory subjects of bargaining without bargaining with a Union. *NLRB v. Katz*, 369 U.S. 736 (1962). In *Katz,* even though the employer was engaged in bona fide contract negotiations with the union, the Court held that it nevertheless violated its duty to bargain by simultaneously instituting changes in mandatory subjects of bargaining without consulting the union first. *NLRB*

Davis, DOH 4-13-11; Luz Graybush DOH, 3-10-11; Nicole Hackett, DOH 3-24-11; John Quinsaat, DOH 4-18-11; Reggie Reyes, DOH 3-10-11; Dauna Roper, DOH 4-7-11and Serrilia Sandy, DOH 3-24-11 (GCX 8). Only Reyes, Graybush, Clark and Regina Obeng appear on Respondent's June 17 list (RX 4).

v. Katz, 369 U.S. 736 (1962). In the instant matter, Respondent had not even committed to bargaining for a successor agreement when it unilaterally changed the minimum wage rates.

Respondent admits that it made the unilateral change (Tr. 37, 53; GCX 6). However, it advances the novel theory that the change is somehow permissible because the employees were hired after contract expiration. Board law grants no such exception to Respondent's duty to bargain. In a case with remarkably similar facts to the case at hand, the Board found the Employer's conduct violated the Act when it reduced wage rates for employees hired after the agreement expired. *Triple A. Fire Protection, Inc.,* 315 NLRB 409 (1994).

Respondent's characterization of the new hires as "applicants" make its actions no less unlawful (Tr. 11; GCX 6). The relevant individuals were on Respondent's payroll, working in its facility and taking direction from Respondent's supervisors. Once they passed their probationary period the only difference between these individuals and other bargaining unit employees was their date of hire. The Board makes no distinction between these sets of employees in terms of whose terms and conditions of employment the Employer can change. *Triple A. Fire Protection, Inc.,* 315 NLRB at 416.

The cases relied upon by Respondent to suggest that the new hires were "applicants" and therefore not subject to Respondent's bargaining obligation are inapposite to the facts of this case. Respondent's labeling these individuals as "not yet hired employees" is nonsensical. These are post-probationary new hires; subject to all the terms and conditions laid out in the contract as any other unit employee. Thus *USPS*, 308 NLRB 1305 (1992); *Star Tribune*, 295 NLRB 543 (1989) and *Laney & Duke Storage Warehouse Co.*, 151 NLRB 248 (1965) have no relevance to the case at hand. Instead the cases upon which it relies turn Respondent's arguments on its head.

Thus new hires are not "individuals *outside the bargaining unit*"[7] or "applicants."[8] Nor are new hires retired employees or applicants who "perform no service for the Employer" and "are paid no wages."[9] Nor is the Board precluded from finding that Respondent violated the Act by unilaterally changing the wage rates of new hires because Respondent's change was, as it argues, akin to changing the conditions of hire, such as applicant drug testing.[10] Rather, it is clear that Respondent could not unilaterally change the contractual wage rates paid to new hires once they passed their probationary period and the ALJ was correct in so finding. *Triple A. Fire Protection, Inc.,* 315 NLRB 409 (1994). Respondent's exception should be denied.

Point 2 **Respondent has not met its burden to show the Union's charge was not timely filed.**

Respondent defends against the allegations against it by claiming the Union's charge was not timely filed (RE 14; Tr. 12, 72; GCX 1(e) and 6). The ALJ was correct in finding that the instant charge is not barred by Section 10(b) of the Act because Respondent failed to meet its burden of proving that the Union had either actual or constructive notice of its unlawful conduct outside the 10(b) period.

Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge . . . and the service . . . thereof." However, the six month period does not begin to run until the charging party has actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *Castle Hill*

---

[7] RE 9, citing *USPS*, 308 NLRB 1305 (1992).

[8] RE 10, citing *Star Tribune*, 295 NLRB 543 (1989).

[9] RE 10, citing *USPS*, 308 NLRB 1305 (1992) and *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 US 157 (1971).

[10] RE 11, citing *Laney & Duke Storage Warehouse Co.*, 151 NLRB 248 (1965).

Health Care Center, 355 NLRB No. 196, slip op. at 36 (Sept. 28, 2010). Notice must be clear and unequivocal, and the burden of showing that an allegation is time-barred is on the party raising Section 10(b) as a defense. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), *enf'd. sub nom.*, *East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007). There is no "clear and unequivocal" notice where an employer gives "mixed signals" as to whether or not it has unilaterally changed terms of employment. *Taylor Warehouse Corp.*, 314 NLRB 516, 526 (1994), *enf'd.* 98 F.3d 892 (6th Cir. 1996) (Respondent gave employees mixed signals about its decision to transfer unit work outside the unit by telling unit employees that the work belonged to non-unit employees while continuing to assign unit employees the work).

The Board will find constructive notice where the party should have discovered the violation, either because it was "open and obvious" or because "the filing party would have discovered the conduct in question had it exercised reasonable or due diligence by investigating suspicious circumstances." *Broadway Volkswagen*, 342 NLRB at 1246. In determining what qualifies as suspicious, the Board considers whether the parties have failed to draw obvious inferences from any documents that they have received. See *Castle Hill Health Care Center*, 355 NLRB No. 196, slip op. at 37 (where union received copy of a letter from a benefits fund returning uncashed employer contribution checks, and the most recent check was dated 21 months prior to the letter, the union was held to have constructive notice that the employer had ceased making required contributions).

In this case, the ALJ was correct in finding that the evidence demonstrated, notwithstanding Respondent's claims to the contrary, that the Union had neither actual nor constructive notice of the Employer's unlawful conduct. First, it is undisputed that Respondent did not actually tell the Union until the parties' November bargaining session, within the Section

10(b) period, that it was refusing to pay the contractual minimum wage rates to employees hired after the contract expiration. Second, contrary to the Respondent's contention, the fact that the employee list and backpay spreadsheets, which Respondent provided to the Union, contained a handful of employees hired post-contract expiration, while omitting the bulk of those employees, did not put the Union on constructive notice that it was thereby refusing to apply the contractual minimum wage rates to them. The Arbitrator ordered the spreadsheet for a specific purpose, i.e., to determine and liquidate the backpay amounts owed from December 2010 through June 11, 2011 to employees for whom the Union filed its grievance. The contractual arbitration procedure did not cover disputes as to the wage rates of individual employees hired after contract expiration. See generally *Nolde Bros., Inc. v. Bakery Workers*, 430 U.S. 243 (1977) (duty to arbitrate only survives expiration of a contract with respect to disputes that arose under the contract while it was in effect). The grievance was filed in January, prior to the contract's expiration, on behalf of existing employees whose contract rights had been violated by the Employer's failure to implement the contractual wage rates. Since employees hired after contract expiration were not the subject of that grievance, there was no reason for them to be listed and thus the Union did not expect them to be on the spreadsheet.

There also was no other basis for the Union to suspect that Respondent was treating the spreadsheet as a complete list of the employees to whom it intended to provide the contractual minimum wage rates. Since the arbitration award itself ordered Respondent to "apply the collective bargaining agreement's wage increases to all employees," the Union reasonably expected Respondent prospectively to do so. Further, Respondent did not otherwise alert the Union to its unlawful conduct by objecting to the Arbitrator's award or asserting any theory as to why it should not apply to new employees. To the contrary, it went through the motions of

complying with the award by, *inter alia*, preparing the backpay spreadsheets. Moreover, contrary to Respondent's contention, the fact that it had previously violated the same term of the contract did not impose a due diligence requirement on the Union to be "on the lookout" for potential future violations (RE 21; GCX 6). *Broadway Volkswagen*, 342 NLRB at 1247 (a union representative's knowledge of another employee's unilateral wage increase, without more, was insufficient to impose a due diligence requirement on the union to investigate other possible wage increase or change in working conditions). Additionally, due to the non-public nature of the unilateral change in minimum rates for newly hired employees, there was no way for the Union's stewards, or employees who were not personally affected by the change, to know that it had taken place (RE 20, 26.) See *Broadway Volkswagen*, 342 NLRB at 1246 (employees who benefited from unilateral wage increases and promotions "knew nothing about the wage increases and promotions received by others"); *Duke University,* 315 NLRB 1291, 1291, n.1 (1995) (employer's unilaterally-implemented policy of replacing full-time drivers with non-unit part-time drivers was "subtle and evolving" and "the full impact ... could not readily be appreciated by the employees outside the 10(b) period"); *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995) (individual employee paychecks are not subject to general observation). *Compare Courier-Journal*, 342 NLRB 1093, 1103 (2004) (union charged with knowledge where employer's unilateral change in health care premiums directly affected shop steward's own take-home pay). Finally, the unexplained inclusion in the spreadsheet of four employees hired in March, right after contract expiration, did not amount to "clear and unequivocal" notice that the list included all the employees to whom Respondent planned to provide their unilaterally changed minimum rates; at most their inclusion sent a "mixed signal" as to Respondent's unlawful conduct. *Taylor Warehouse Corp.*, 314 NLRB 516, 526 (1994), *enf'd.* 98 F.3d 892 (6th

Cir. 1996).

In sum, the spreadsheets and surrounding circumstances did not provide the Union with clear and unequivocal notice of the Employer's unlawful conduct outside the 10(b) period. The ALJ was correct in so finding and Respondent's exception should be denied.

Point 3 **Deferral of the instant matter is inappropriate.**

The ALJ was correct in finding that deferral of the instant matter would not be appropriate. Respondent's exception to this ruling should be denied.

Under Board and Court precedents, the Board does not defer to the parties' grievance-arbitration procedure when a contract has expired, as the arbitration clause does not survive contract expiration. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991). In *Litton,* after the agreement expired, the employer laid off ten union employees with no notice to the Union. The Union subsequently filed grievances on behalf of the laid off employees claiming violations of the agreement. The company refused to submit to the grievance and arbitration procedure, claiming they were no longer bound by these conditions since the contract had expired. The Court held that since the grievances in dispute did not arise under the agreement, the employer was fully within its rights to refuse to submit to arbitration. "The object of an arbitration clause is to implement a contract, not to transcend it." *Litton Financial Printing Div.*, 501 U.S. at 205.

In *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987), the Board interpreted the Court's holding in *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977), and held that a party's presumptive contractual duty to arbitrate grievances about post-contract expiration events or conduct extends only to rights that "arise under" the contract because they are "capable of accruing or vesting to some degree during the life of the contract and ripening or remaining

enforceable after the contract expires." *Indiana & Michigan Electric Co.*, 284 NLRB at 60. Even though the Respondent's failure to pay contractual minimum wage rates to a different class of employees began during the term of the contract, the failure to pay those rates to new hires that passed their probationary period since the contract expired is not presumptively arbitrable under the rationale of *Indiana & Michigan*. This is so because these employees' right to receive the minimum rates post-expiration did not accrue or vest until after the contract expired. *15th Avenue Iron Works, Inc.*, 301 NLRB 878, 879 (1991).

The *Michigan Electric* Board held that parties to an expired collective-bargaining agreement have no contractual obligation to adhere to the agreement's arbitration procedure in processing grievances arising after the agreement's expiration date. In affirming its earlier holding in *Hilton-Davis Chemical Co.*, the Board presumed that the employer had no contractual obligation to follow the arbitration procedure after the expiration of the contract. *Indiana and Michigan Electric Company*, 284 NLRB at 55; *Hilton-Davis Chemical Co.*, 185 NLRB 241, 242 (1970). In such a situation, as in the instant matter, deferral under the Board's *Collyer* doctrine is therefore inappropriate. *W. H. Froh, Inc.*, 310 NLRB 384 (1993)(deferral to arbitration for grievances for two employees laid off post-contract expiration was inappropriate); *Indiana and Michigan Electric Company*, 284 NLRB at 55.

Where, as in the case at hand, there is no contractual language indicating that an arbitration clause survives contract expiration and it is clear that the parties did not intend the clause to survive, the arbitration clause expires with the contract. *Indiana and Michigan Electric Company*, 284 NLRB at 55; *American Sink Top & Cabinet Co., Inc.*, 242 NLRB 408 (1979). Here it is clear that Respondent did not consent to be bound by the arbitration clause post-expiration; in fact it asserted its desire to avoid arbitration as the rationale for its refusal to sign a

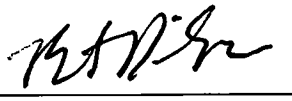
contract extension. Respondent's assertion that the dispute should be remanded to Arbitrator Sheinman is not only inconsistent with the positions it took at bargaining, but is also therefore, disingenuous. Nor is the instant dispute addressed by the Arbitrator's decision. The Arbitrator addressed a grievance filed on behalf of unit members who were incumbents in December, 2010; not newly hired after February, 2011. Therefore, deferral of the instant matter would be inappropriate and Respondent's exception should be denied.

IV. CONCLUSION

Based on the foregoing, the Acting General Counsel respectfully requests that the Board deny Respondent's exceptions, affirm the ALJ's decision on all counts and find that Respondent violated the Act as alleged, order the *status quo ante* restored and make bargaining unit employees whole for Respondent's unlawful unilateral changes.

Dated at Newark, New Jersey this 24th day of September, 2013.

Respectfully submitted,



Bert Dice-Goldberg
Counsel for the Acting General Counsel