

**Ontario Civilian  
Police Commission**

Suite 605  
250 Dundas Street West  
Toronto ON M7A 2T3  
Tel.: 416-314-3004  
Fax: 416-314-0198

**Commission civile de l'Ontario  
sur la police**

Bureau 605  
250, rue Dundas ouest  
Toronto ON M7A 2T3  
Tél. : 416-314-3004  
Télééc. : 416-314-0198



<b>FROM: ONTARIO CIVILIAN POLICE COMMISSION</b>	<b>DATE: March 27, 2015</b>
<b>TO:</b> Mr. Joshua Phillips Mr. Ian Johnstone Ms. Joyce Tam	<b>FAX NUMBER:</b> 416-968-0325 416-546-2104 416-507-1850
<b>NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 17</b>	
<b>COMMENTS:</b>  <b>OCPC DECISION RE: DURHAM S. 116</b>	

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# ONTARIO CIVILIAN POLICE COMMISSION

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IN THE MATTER OF A JOINT APPLICATION UNDER S.116 OF THE  
POLICE SERVICES ACT, R.S.O. 1990, C.P.15, AS AMENDED

DURHAM REGIONAL POLICE ASSOCIATION AND DURHAM REGIONAL  
POLICE SENIOR OFFICERS' ASSOCIATION

APPLICANTS

-AND-

DURHAM REGIONAL POLICE SERVICES BOARD -and- DURHAM  
REGIONAL POLICE CHIEF MIKE EWLES -and- DURHAM COLLEGE

RESPONDENTS

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## DECISION

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Panel: David C. Gavsie, Associate Chair  
Zahra Dhanani, Member

Hearing Dates: July 16 and 17, 2014  
November 2, 24 and 25, 2014  
December 1 and 15, 2014

Submissions: Final written submissions received January 27, 2015

Hearing Location: Toronto, Ontario

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Ontario Civilian Police Commission  
250 Dundas Street West, Suite 605  
Toronto, ON M7A 2T3  
Tel: 416-314-3004  
Fax: 416-314-0198  
Website: [www.ocpc.ca](http://www.ocpc.ca)

## **Appearances:**

For the Applicants – Joshua Phillips and Adam Webbe

For the Respondent Board and Police Chief – Ian B. Johnstone and Alex Sinclair

For the Respondent Durham College – Joyce Tam

## **Introduction**

1. A joint application dated April 22, 2013 (the "Application") under s. 116 of the *Police Services Act*, R.S.O. 1990, c.P.15, as amended (the "Act"), was filed with the Ontario Civilian Police Commission (the "Commission") by both the Durham Regional Police Association ("DRPA") and the Durham Regional Police Senior Officers' Association ("SOA") for determination by the Commission as to whether the person occupying the position of Dean at the Police Education and Innovation Centre (the "PEIC"), namely Ms. June MacDonald-Jenkins, is a member of the Durham Regional Police Service (the "Service"), and if so, a member of the SOA.
2. The Applicants' position is that Ms. MacDonald-Jenkins is a member of the Service. In addition, the SOA takes the position she is also a member of the SOA.
3. The Respondents, the Durham Regional Police Services Board (the "Board"), the Chief of the Service (the "Chief") and Durham College (sometimes the "College") all take the position that Ms. MacDonald-Jenkins is not a member of the Service.
4. The Panel heard evidence over seven days and received closing submissions in writing.

## **Decision**

5. The Application is dismissed.

## **Submissions of the DRPA and SOA**

6. Mr. Phillips submitted that s. 2(1) of the Act defines "member of a police force" as "an employee of the police force...". Indicia of employment status are relevant whether an individual is an "independent contractor," a "seconded," the employee of a police service board, or something else.
7. He submitted the following factors are relevant to the determination of whether Ms. MacDonald-Jenkins is a member of the Service:
  - (a) her integration into the functioning of the Service;
  - (b) the fact she is included in the Service's organizational chart;
  - (c) her performance of "police work" contributing to the operation and functioning of the Service;
  - (d) the degree to which the Service can control and direct her work;
  - (e) the Service requires her to work on a specific schedule;
  - (f) she cannot reject work assigned to her by the Service;
  - (g) she uses the Service's equipment;
  - (h) her job title suggests that she is a member of the Service; and
  - (i) the length of time she has worked at the Service.
8. In making this submission, Mr. Phillips relied on the following cases: Regional Municipality of Niagara Police Services Board and Niagara Regional Police Senior Officers' Association, (January 16, 1996, OCCPS), Colchester South Police Association and the Colchester South Police Force, (November 30, 1989, OCCPS), and Peel Regional Police Association and the Peel Regional Police Services Board, (January 28, 2000, OCCPS).
9. Mr. Phillips submitted that s. 114 of the Act defines "senior officer" as "a member of a police force" who "is employed in a supervisory or confidential capacity." He argued that the Commission has

established a list of factors to consider in making a determination on this issue: see Jamie Saunders and the Niagara Regional Police Senior Officers' Association, (November 4, 2013, OCPC).

10. An individual does not need to meet all the criteria to gain or have senior officer status: see Saunders, *supra*.
11. Mr. Phillips submitted that calling the arrangement a "secondment" does not determine Ms. MacDonald-Jenkins' employment status. The true substance of her involvement with the Service must be analyzed. Persons on secondment may or may not be employees: see Vancouver (City) Police Board v. Vancouver Police Union (Pay Parking Grievance), [2014] B.C.C.A.A. No. 68, and Fullowka v. Royal Oak Ventures Inc., [2008] N.W.T.J. No. 27.
12. Ms. MacDonald-Jenkins can have employment relationships with both the College and the Service at the same time. Mr. Phillips submitted that using the term "secondment" in the Secondment Agreement dated July 11, 2012 (the "Secondment Agreement") avoided the violation of a hiring moratorium then in place at the Service.
13. Mr. Phillips submitted that the evidence adduced during the hearing establishes the following facts which support the Applicants' position that Ms. MacDonald-Jenkins is a member of the Service:
  - a) The Service created a job description for her position. The Service does not create job descriptions for positions occupied by persons who are not members;
  - b) Ms. MacDonald-Jenkins swore an oath of secrecy in which she identified herself as a member of the Service;
  - c) The Service includes Ms. MacDonald-Jenkins in its organizational charts and chain of command. She was the leader of the PEIC;
  - d) Ms. MacDonald-Jenkins performs duties that are integral to the functioning of the Service and which are central to the Service's daily policing operations;
  - e) She performs duties previously performed by staff sergeants;

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- f) Ms. MacDonald-Jenkins attends conferences as a representative of the Service;
  - g) Both she and the Service hold her out to be a member;
  - h) Ms. MacDonald-Jenkins performs police work which contributes to the operation and functioning of the Service. This work is unrelated to what she did previously at the College;
  - i) She leads a unit that provides training and education on policing matters;
  - j) Ms. MacDonald-Jenkins works exclusively for the Service and cannot take on secondary work;
  - k) The Service controls and directs her work. She is subject to Service directives and receives direction from senior officers;
  - l) The Service tracks Ms. MacDonald-Jenkins' schedule, attendance and days off and approves her vacation;
  - m) The Service funds Ms. MacDonald-Jenkins' salary and benefits. The College is only a conduit for the Service's payment;
  - n) The College's benefit plans contemplate the possibility of continued coverage while working for another employer;
  - o) Ms. MacDonald-Jenkins' salary at the Service is negotiated with the Service and unrelated to the terms of her employment at the College;
  - p) She uses the Service's tools and equipment in the course of her work at the Service;
  - q) Ms. MacDonald-Jenkins' tenure at the Service is indefinite. The College does not know when she will return to work for them;
  - r) The Service assumes liability and responsibility for Ms. MacDonald-Jenkins consistent with an employment relationship; and,

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- s) The College has no knowledge of nor any connection to Ms. MacDonald-Jenkins' work at the Service.

### **Submissions of the Board and Chief Ewles**

- 14. Mr. Johnstone submitted that the Secondment Agreement states in several places that during her secondment with the Service, Ms. MacDonald-Jenkins remains an employee of the College.
- 15. He submitted that the College pays her annual salary and benefits, and invoices the Service each month for a twelfth of the total. Ms. MacDonald-Jenkins receives earnings statements and T4 tax slips from the College.
- 16. Mr. Johnstone argued that the secondment is intended to provide a leadership development opportunity for a member of the College. Ms. MacDonald-Jenkins' title, Dean of the PEIC, describes her role at the Service, namely, providing academic education and training to members of the Service. Her role is that of a coordinator in preparing a budget for the PEIC and preparing reports on various policing issues. She relies on the expertise of members of the Service to provide policing knowledge.
- 17. Mr. Johnstone submitted that the Applicants had misstated or mischaracterized evidence in a number of places. Examples include:
  - a) The oath of secrecy signed by Ms. MacDonald-Jenkins was a form document. It was not drafted by her;
  - b) There is no evidence that the Service has held out Ms. MacDonald-Jenkins as being a member. Her own C.V. describes her role with the Service as being a secondment;
  - c) Ms. MacDonald-Jenkins' salary was not negotiated with the Service. Mr. Blakey, Vice-President of Administration ("VPA") at Durham College, testified that he assessed what he thought was a reasonable amount, put that amount to Mr. MacLellan, Chief Administrative Officer ("CAO") of the Service, who agreed. There was no negotiation;

- d) Ms. MacDonald-Jenkins was not involved in discipline at the Service. The Service has a specific directive which involves human resources staff in discipline matters;
- e) Ms. MacDonald-Jenkins cannot have employment relationships with both the College and the Service at the same time. Mr. Blakey said if she is found to be an employee of the Service, she will no longer be an employee of the College; and
- f) the secondment was arranged and started in 2012. The hiring moratorium at the Service was in effect from June 2013 until July 2014. Therefore, the secondment was not an attempt to get around the moratorium.

18. Mr. Johnstone referred to the Arbitration Board's decision in Algonquin College v. OPSEU, [2001] O.L.A.A. No. 145. The grievor took the position that he was an employee of Algonquin College in Ottawa. He had been seconded to teach there from Fanshawe College in London commencing in May 1994. In August 1995, the grievor was advised the secondment would not be continued. The grievor proposed options for continuation of employment at Algonquin College, none of which materialized.

Algonquin College took the position that the grievor was never its employee. Fanshawe College took the position that while the grievor was its employee, none of the grievances alleged any material violation of the collective agreement.

The Board said in paragraph 9: "...there was never any factual or legal doubt about the fundamental nature of the grievor's legal status while at Algonquin. He was a Fanshawe employee on secondment at Algonquin."

19. The Board also described its view of the relationship:

The grievor was, during the entire relevant period of time, an employee of Fanshawe working pursuant to a secondment arrangement under the control and direction of Algonquin. The grievor was paid by Fanshawe, received his benefits through Fanshawe... When the



secondment ended, the grievor continued, as he had been for twenty years, as an employee of Fanshawe.

20. A secondment position is one in which the seconded employee performs "a special duty of a temporary nature." Secondment is defined as "the detachment of a person from his regular organization for temporary assignment elsewhere": see Alberta Union of Provincial Employees v. Farron, (1980), 110 D.L.R. (3rd) 183.
21. Courts have held that in secondment situations salary due on termination of employment is the responsibility of the original employer: see Atkinson v. Gulf Canada Ltd., [1986] O.J. No. 8, and Snead v. Agricultural Development Corp. of Saskatchewan, [1990] S.J. No. 300.

### **Submissions of Durham College**

22. Ms. Tam submitted that since 2002, Ms. MacDonald Jenkins has been and continues to be a full-time faculty member of the College and a member of the Ontario Public Service Employees Union. She is only seconded to the Service for a defined period of time.
23. Ms. Tam submitted that the Commission has not previously considered the issue of an individual's employment status while seconded to a police service.
24. Ms. Tam argued that the nature of a secondment means that the relationship between a seconded individual and a seconded employer will necessarily contain a number of traditional indicia of employment.

### **Analysis and Reasons**

25. Section 116 of the Act allows "any affected person" to apply to the Commission to hold a hearing and decide whether "a person is a member of a police force or a senior officer".
26. The answer to the question raised in this application is which prevails: the Secondment Agreement between the College and the

- Service, or the functions performed by and the responsibilities of Ms. MacDonald-Jenkins at the Service during the secondment? The Applicants take the latter position, whereas the Respondents take the former position.
27. We find this to be a straightforward issue: is Ms. MacDonald Jenkins an employee of the Service?
  28. Section 2 (1) of the Act defines a "member of a police force" as "an **employee** of the police force." (emphasis added)
  29. Section 114 of the Act defines a "senior officer" "as member of a police force who is **employed** in a supervisory or confidential capacity". (emphasis added)
  30. The guiding decision of the Commission on reclassification of civilian members in senior roles to "Senior Officer" is that of Re: Metro Toronto Police Association (ORC, February 17, 1975), which has been referred to in Guelph Police Association (OCCPS, May 4, 1984), Dryden Police Association and Dryden Police Service Board, (OCCPS, December 17, 1998), Cornwall Police Association (OCCPS, September 14, 2006) and most recently in Saunders, supra.
  31. All of these cases, starting with Metro Toronto Police Association, supra, contain the list of factors to be considered when deciding whether a civilian employee is a Senior Officer. In all of the cases, the lists identify the starting point, namely that the civilian is an "employee" of the Service. They then proceed to consider the factors of that employment. In all of the cases listed above the civilian employees were contracted as an "employee" of the respective Service. In the most recent case Saunders, supra, Mr. Saunders had been employed with the police service for upwards of 20 years.
  32. In the present case, in July of 2012, the Service and the College signed a Memorandum of Understanding (the "MOU") (Ex. 2, tab 1). Generally the MOU called for a mutually beneficial working relationship between the parties, seizing opportunities to share resources as needed, providing opportunities for staff of each to develop joint research projects, giving students at the College an opportunity to apply theoretical knowledge by gaining insight using practical opportunities at the Service, etc.

33. Examples of joint opportunities were set out in the MOU, one of which reads as follows:

Expanding the current secondment program to enhance development opportunities for both Service and College staff with the intended outcome of sharing expertise, the development of new skills and to provide both organizations insight that otherwise may be unavailable in supporting and enhancing the mission of each organization.

34. The Secondment Agreement (Ex. 2, tab 3) was entered into shortly after the MOU. It provides for the secondment of Ms. MacDonald-Jenkins from the College to the Service for a two year period commencing September 1, 2012.

35. The following principles of the secondment were clearly spelled out in the Secondment Agreement:

- a) Ms. MacDonald-Jenkins, an employee of the College, was to be **temporarily assigned** from the College to the Service for 100% of her employment time for the two year period. She is referred to as the "**Secondee**" in the Secondment Agreement;
- b) Ms. MacDonald-Jenkins would **remain an employee** of the College and continue to receive her pay and benefits. During the second year, her rate of pay would increase using a percentage applied to all **other College administrators**; and
- c) the Service was to "remunerate" the College 100% of Ms. MacDonald-Jenkins' wages and benefits. The College would **invoice the Service monthly**. (emphasis added)

36. Paragraph 8 of the Secondment Agreement is precise and leaves no room for confusion. It reads as follows:

At all times during the term of this Agreement the Secondee shall remain an employee of the College and be subject to the policies and procedures of Durham College.

37. We find that it is clear from the Secondment Agreement that the College and the Service intended that Ms. MacDonald-Jenkins would remain an employee of the College during the term of the Secondment Agreement.
38. It is also clear from the Secondment Agreement that Ms. MacDonald Jenkins is not an employee of the Service.
39. Mr. Phillips' argument is that during her secondment Ms. MacDonald-Jenkins' duties, functions and responsibilities with the Service changed or altered the nature of the intended relationship to that of employer-employee. With respect, the Panel does not agree.
40. There was no change during the secondment in the functions Ms. MacDonald Jenkins was brought to the Service to provide. She was seconded into a senior leadership position. That was the nature of the agreed contract.
41. The very reason that Ms. MacDonald Jenkins was seconded to the Service was to provide senior level leadership in an area that the Service felt it did not have the expertise internally. She was brought in to the Service to develop education and innovation initiatives using her vast expertise, well developed teaching methodologies and her ability to educate beyond the College community.
42. The MOU provides that the purpose of secondments between the Service and the College is to share expertise. If the Service is to benefit from professionals employed with the College, who have special expertise, many of these secondments will be into senior level positions. This does not mean that they will then automatically become employees of the Service, re-classified as "Senior Officers", and then included in the SOA.
43. In his submissions Mr. Phillips raised numerous arguments in support of his position that Ms. MacDonald-Jenkins is a member of the Service. While many of those arguments might be important in deciding whether a person is an employee or an independent contractor for income tax purposes, they do not overcome the clear intention of the parties to the Secondment Agreement as stated therein, namely that Ms. MacDonald-Jenkins would remain during its term an employee of the College.

44. It was clear from the evidence that Ms. MacDonald-Jenkins cannot be an employee of both Durham College and at the same time an employee of the Service. Scott Blakey, VPA at the College, testified that if Ms. MacDonald-Jenkins was found to be an employee of the Service, she would no longer be an employee of Durham College. Stan MacLellan, CAO of the Service, said Ms. MacDonald-Jenkins was not an employee of the Service and remained an employee of Durham College. Neither principal administrative officer testified that it was possible Ms. MacDonald-Jenkins could simultaneously be an employee of the College and the Service.
45. The Panel found all of the witnesses credible and sincere. Their testimony gave the Panel insight into the workings of the PEIC and the work of Ms. MacDonald-Jenkins. None of this evidence however, contradicted or undermined the clear intent of the Secondment Agreement.
46. Furthermore, we find that the evidence established it was the understanding of the management at both the College and the Service that Ms. MacDonald-Jenkins is a secondee to and not an employee of the Service.
47. Sgt. Chesson testified that his understanding was that Ms. MacDonald-Jenkins came to the Service on a secondment to be an academic advisor for members. The intention was that at the end of the secondment, Ms. MacDonald-Jenkins would return to Durham College.
48. Again Mr. Blakey, testified that Ms. MacDonald-Jenkins "is a Durham College employee who is on secondment to" the Service. He testified that she was on a secondment contract for the past two years and the contract was recently renewed for one more year.
49. Mr. Blakey confirmed that Durham College pays Ms. MacDonald-Jenkins and once a month sends an invoice to the Service for one-twelfth of her salary and benefits. Contributions to her pension continue to be deducted by Durham College and the College continues to contribute to the pension plan for her.
50. Mr. Blakey testified that his understanding of the secondment is that Ms. MacDonald-Jenkins is a Durham College employee on loan to the Service, and that when the secondment is over, she will return to

- the School of Health as a full time faculty member. He testified that if she was found to be an employee of the Service in this case, she would no longer be an employee of Durham College.
51. Ms. Sproul, Dean of the School of Health and Community Services at the College, testified that Ms. MacDonald-Jenkins is an employee of Durham College in her department. Ms. Sproul confirmed that Ms. MacDonald-Jenkins is on Secondment to the Service but that she expects her to return to her work at Durham College.
  52. Mr. MacLellan, testified that there were basically three reasons the Service engaged Ms. MacDonald-Jenkins. First, she had exposure to members of the Service and that is how the Service became aware of her. Second, she demonstrated an ability to work outside the education sector. Third, the push for hybrid education within the Service had not proceeded as quickly as hoped. Mr. MacLellan referred to Ms. MacDonald-Jenkins' Curriculum Vitae. Mr. MacLellan stated her employment history showed that she had a level of expertise and had been recognized for it in the academic world many times. She had experience in online learning and hybrid learning which were very important to the Service.
  53. In reference to the Secondment Agreement, Mr. MacLellan testified the expectation was that at the completion of the Agreement, Ms. MacDonald-Jenkins would return to Durham College and that she will remain an employee of Durham College during the secondment period. She was not an employee of the Service, but while at the Service she was to adhere to Service standards. All benefits are derived from her employer, Durham College who also pays her WSIB premiums. The Service had no authority to discipline Ms. MacDonald-Jenkins. Mr. MacLellan is responsible for enforcing the terms of the Secondment Agreement.
  54. Mr. Phillips submitted that calling the arrangement a "secondment" does not determine Ms. MacDonald-Jenkins' employment status. The true substance of her involvement with the Service must be analyzed.
  55. We do not agree. The factors set out in Metro Toronto Police Association, supra, and Dryden Police Association, supra, that help

to decide whether someone is a Senior Officer, are not relevant in this case because one must first be an employee of the Service.

56. Mr. Phillips made his case by relying on the argument that Ms. MacDonald-Jenkins position meets those factors. That is the evidence he put forward to the Commission.
57. Again, while it is clear that Ms. MacDonald Jenkins position while on secondment is a senior one that may meet many of the criteria in the test for a "Senior Officer" reclassification, this does not negate the stipulations in the Secondment Agreement, particularly those that provide clearly that she is not an employee of the Service.
58. Mr. Phillips presented case law that provides employees on secondment may or may not be employees of the host institution: see Vancouver (City) Police Board v. Vancouver Police Union (Pay Parking Grievance), [2014] B.C.C.A.A. No. 68, and Fallowka v. Royal Oak Ventures Inc., [2008] N.W.T.J. No. 27.
59. Mr. Phillips referred to the Vancouver (City) Police Board, *supra*, in support of his argument that employees on secondment can be considered employees of the employer to which they are seconded. A grievance was raised by members of the Vancouver Police Union ("VPU") under their collective agreement. Under that agreement they were entitled to park their personal vehicles in Vancouver at a low cost. However while seconded to the RCMP in Surrey, they had to pay slightly more than double for parking.
60. Vancouver (City) Police Board, *supra* is distinguishable from the one before us. In deciding that the grievors had a valid case, the Arbitrator made the following finding at para. 24:

I therefore conclude, for the very limited purpose of interpreting Schedule "E" between the VPD and the VPU...that the RCMP is in a position of "qua employer" to the seconded VPD officers...

This case is about the proper interpretation of the collective agreement regarding the cost of parking to members of the VPU members, where the VPU was a party to the agreement. On this one issue the Arbitrator found that the RCMP had to reimburse the VPU members for the difference in parking cost by finding that the

- RCMP was in the position of an employer, not that the VPU members were employees of the RCMP.
61. It is to be noted that the terms of the secondment agreement in Vancouver (City) Police Board, *supra*, contained the following provisions in clauses 3.2, 3.3 and 3.4:
- 3.2 The Seconded at all times during the secondment will remain a member of the Vancouver Police Department (VPD) and an employee of the Vancouver Police Board (VPB).
  - 3.3 The Seconded will continue to receive pay, benefits and other entitlements pursuant to the applicable collective bargaining agreements in place with the VPB.
  - 3.4 The Seconded shall neither become a member, nor an employee of the RCMP, and shall return to duty with the VPD at the end of the secondment.
62. A clear intention was expressed in the foregoing provisions as to the relationship between the RCMP and members of the VPD seconded to the RCMP. Those clauses are very similar to clauses in the Secondment Agreement regarding Ms. June MacDonald-Jenkins. The decision of the Arbitrator did not change the employment status of the VPD members while on secondment with the RCMP.
63. Mr. Phillips also cited Fallowka v. Royal Oak Ventures Inc., *supra*, in support of the position that seconded employees can be considered employees of the entity they are seconded to. The Court at para. 154 made the observation that if a seconded employee commits a tort in the course of his employment, the seconded entity should generally be liable. However this risk is normally covered by an insurance requirement on the seconded entity under the secondment agreement, and does not by itself change the employment status of the parties to the secondment arrangement.
64. We find that it was clearly established that during her secondment Ms. MacDonald-Jenkins is not an employee of the Service. Mr. Phillips did not bring forward any evidence that contradicted the clear language and intent of the Secondment Agreement.



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65. While many of Mr. Phillips witnesses confirmed that Ms. MacDonald-Jenkins performed managerial duties, we find that that would be expected of the high-level position that she was seconded into and it does not change the nature of the secondment arrangement between the College and the Service.
  66. In response to the questions set out in the application before us, we find that Ms. MacDonald-Jenkins is not a member of the Service, and consequently cannot be a member of the SOA.
  67. Accordingly, the Application is dismissed.

**Dated at Toronto, Ontario this 27th day of March, 2015.**



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David C. Gavsie  
Associate Chair



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Zahra Dhanani  
Member