City v. Lieutenants Benevolent Ass., 45 OCB 34 (BCB 1990) [Decision No. B-34-90 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of Arbitration

-between-

THE CITY OF NEW YORK, DECISION NO. B-34-90

Petitioner, DOCKET NO. BCB-1224-89 (A-3249-89)

-and-

LIEUTENANTS BENEVOLENT ASSOCIATION,

Respondent.
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DECISION AND ORDER

On November 8, 1989, the City of New York ("City"), appearing by its Office of Municipal Labor Relations ("OMLR"), filed a petition challenging the arbitrability of a grievance initiated by the Lieutenants Benevolent Association ("LBA" or "the Union") on the behalf of Lt. John McKay. The Union filed an answer to the petition on December 4, 1989. The City filed a reply on January 5, 1990. On January 9, 1990, counsel for the Union contacted the Deputy Chairman and General Counsel of the Office of Collective Bargaining ("OCB"), to request permission to file a sur-reply in this matter. Based upon the circumstances alleged, and mindful of the Union's representation that counsel for OMLR was unavailable for consent, the Deputy Chairman granted the request. LBA filed a sur-reply on January 18, 1990. The City, in a letter

dated January 24, 1990, requested that the Union's "purported" sur-reply, which was filed without its consent, be disregarded.[1]

Background

The Grievant is a retired police lieutenant who was assigned to the Bronx Field Internal Affairs Unit ("FIAU"). During the course of his employment, the New York City Police Department ("the Department") instituted a "reserve system" in order to provide FIAU coverage of incidents occurring at night and on weekends. Under this system, "teams" of investigators were subject to call-in for cases that arose during the week that their team was "up" on a posted roster. Each team was commanded by a single lieutenant. Under the reserve system, members of the team were required to be available for call-in.

In an attempt to avoid incurring overtime liability, the reserve duty concept was replaced Department-wide by a "recall" system on November 15, 1984. The Department's decision to change the manner in which it provided off-hours coverage followed an arbitration award concerning reserve duty between the City and the Sergeant's Benevolent Association.[2] This award, issued by Arbitrator Maurice Benewitz on October 4, 1984, found that reserve

[1] Upon review of the document submitted, we find the substance of the sur-reply to be cumulative. Therefore, a specific ruling here is unnecessary.

[2] Case No. A-1227-81.

duty was ordered overtime within the meaning of Article III, Section 1(a) of the applicable collective bargaining agreement.[3]

As a result of Arbitrator Benewitz's award, the LBA initiated several grievances on behalf of lieutenants assigned to nine specialized units in the Department, claiming overtime for reserve duty performed during the months of July through November of 1984.[4] Lt. McKay was among the grievants in the case involving the Bronx FIAU.[5] The grievances were consolidated and heard by Arbitrator Margaret Leibowitz in 1986. During the hearings held in that matter, LBA raised its demand for inclusion of recall claims after it learned from a lieutenant's testimony that since November 15, 1984, the abuses of the reserve system had continued under the recall system. Arbitrator Leibowitz, however, decided on September 26, 1986, not to permit the claim before her to be expanded to include recall.

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[3] Article III, Section 1(a) of the Agreement provides:

> All ordered and/or authorized overtime in excess of the hours required of any employee by reason of the employee's regular duty chart, whether of an emergency nature or of a non-emergency nature, shall be compensated for either by cash payment or compensatory time off, at the rate of time and one-half, at the sole option of the employee. Such cash payments or compensatory time off shall be computed on the basis of fifteen (15) minute segments.

We take administrative notice that the language of this provision is virtually identical in all material respects, to the language at issue in the instant matter.

[4] Case Nos. A-2281-85; A-2282-85; A-2283-85; A-2284-85; A-2285-85; A-2286-85; A-2298-86; A-2299-86; A-2330-86.

[5] Case No. A-2284-85.

Hence, on November 30, 1986, the LBA initiated a new grievance, concerning recall assignments for the period from November 15, 1984 through November 30, 1986. Lt. McKay was also among the grievants in that matter, docketed as Case No. A-2580-87 and heard by Arbitrator John E. Sands. Finding that the recall system operated and impacted on the Lieutenants in essentially the same way as did the reserve system, Arbitrator Sands issued an award on October 17, 1988 sustaining LBA's recall grievance. He also found that the Union's recall grievance was timely filed because LBA "reasonably learned for the first time on September 26, 1986, that it had a recall grievance not covered by its reserve grievance." Accordingly, Arbitrator Sands held that the City, by its failure to pay overtime to those lieutenants on the recall list, did violate Article III, Section 1(a) of the 1982-84 Collective Bargaining Agreement between the parties ("the Agreement").[6] As a remedy, the City was ordered to:

> [C]ompensate the grievants named in OCB case number A-2580-87 for all hours on recall duty as the first "up" team times the contractual rate mandated by Article III, Section 1(a), less all compensation previously received for such duty, for the period from November 15, 1984 through November 30, 1986.

On November 30, 1988, pursuant to the Sands award, Lt. McKay submitted a claim for 2180 hours and 15 minutes of recall duty allegedly performed. In February 1989, he learned that the City refused to pay him for 600 of the claimed hours. The 600 hours at issue, Lt. McKay alleges, were "spent on recall as Lieutenant-in-Command, while filling in for the Captain." The City denied the overtime pay on the grounds that for the hours at issue, Lt. McKay

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[6] See supra, note 3, at 3.

was designated as Lieutenant-in-Command rather than being listed on the Recall Roster as a member of "the first 'up' team." On February 10, 1989, LBA filed a grievance on behalf of Lt. McKay, alleging that the Department failed to compensate him for 600 hours of recall duty pursuant to the Sands award. In denying the grievance on March 16, 1989, the Department stated:

> Under the terms of the award, the grievants were entitled to overtime compensation for those hours during which they were listed as the first members to be notified on the "Recall Roster" utilized.... Lt. McKay was not so listed during the hours for which his claim was denied; he is not entitled to compensation for those hours [emphasis added].

In its request for reconsideration by the Commissioner of the Department dated April 3, 1989, LBA admitted that Lt. McKay was not listed on the Recall Roster. However, the Union argued, because Lt. McKay was on recall duty whenever he was designated as Lieutenant-in-Command, he should be appropriately compensated. The grievance was denied on August 16, 1989.

No satisfactory resolution of the dispute having been reached, on October 27, 1989, the Union filed the instant request for arbitration alleging:

> Failure to pay overtime to Lt. John McKay for all hours of recall assignment in Bronx FIAU (as Lieutenant-in-Command).

Positions of the Parties

City's Position

Initially, the City contends that the issue presented by the instant request for arbitration is the same as was litigated by these parties in the earlier arbitration proceeding (Case No. A-2580-87) and, therefore, relitigation is barred by the doctrine of res judicata. In support of its

contention, the City argues that the following three requirements of res judicata have been met: (1) Arbitrator Sands arrived at a final decision on the merits in Case No. A-2580-87; (2) there exists an identity between the two causes of action in that the grievant seeks compensation in connection with that arbitration award; and (3) Lt. McKay, LBA, and the City were parties in that matter.

The City also argues that by limiting the remedy to compensation for hours during which Lt. McKay was "on duty as the first 'up' team," the Arbitrator implicitly denied his claim for compensation for hours he spent designated as Lieutenant-in-Command. In this respect, the City asserts, the Union is attempting to relitigate a matter previously adjudicated on the merits.

Furthermore, the City argues, the instant grievance cannot be maintained because Lt. McKay signed a waiver in the dispute underlying Case No. A-2580-87. In so doing, the City argues, Lt. McKay is precluded from submitting another dispute concerning overtime compensation for recall duty to any other tribunal except for the purpose of enforcing an arbitrator's award.

In the alternative, the City argues that the grievance is barred by the doctrine of laches. The City contends that Lt. McKay failed to seek compensation for time during which he was designated as Lieutenant-in-Command until February 1989, over two years after the City denied all of LBA's claims concerning recall duty. This delay is inexcusable, the City asserts, because the Union "knew at the time that grievant McKay had not been paid overtime

compensation for hours spent as Lieutenant-in-Command" and should have litigated this issue in Case No. A-2580-87.[7]

In further support of the laches defense, the City contends that if LBA is allowed to arbitrate this matter despite the long delay, the City will suffer prejudice since two key witnesses have retired and are therefore unavailable. The City also alleges that "the lengthy delay in bringing this litigation has undoubtedly dimmed the memories of any other witnesses..., rendering potential testimony unreliable" and that documentary evidence may be lost.

Union's Position

LBA contends that although Lt. McKay's claim is closely intertwined with the case that was before Arbitrator Sands, the claim therein and his current claim are not identical. Moreover, the Union alleges, if the City maintains that no money is due for recall designations as Lieutenant-in-Command under the Sands award, "it is anomalous for the City to also argue [that Lt. McKay's] claim here is barred by res judicata." For the same reason, the Union asserts, the waiver defense asserted by the City clearly is inapplicable since the underlying dispute in the instant matter is not identical to the dispute that was litigated in Case No. A-2580-87.

On the issue of laches, the Union argues that the delay is neither inexcusable nor unexplained. In support of its position, the Union submits the affidavit of Lt. McKay, dated November 29, 1989, which states:

[7] The City cites Decision No. B-73-88.

> 1. I was employed by the [Department] as a Lieutenant from December 1979 until October 10, 1987, when I retired.
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> 2. I was a grievant in Case No. A-2580-87 which asked for overtime compensation for time spent on recall duty.
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> 3. After Arbitrator John Sands granted the grievance [on October 17,1988], I submitted my claim of 2180 hours, 15 minutes on November 30, 1988.
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> 4. In February, 1989, I learned that the City was refusing to pay the 600 hours I claimed for time spent on Recall as Lieutenant-in-Command while filling in for the Captain.
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> 5. I believed that, in the context of the recall case before Arbitrator Sands, I would be paid overtime for time spent on recall while Lieutenant-in-Command.
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> 6. When I learned that I would not be so compensated, I contacted the union, the LBA, and asked them to intercede.
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> 7. LBA filed this grievance on my behalf on February 10, 1989.

Because Lt. McKay viewed his recall duties as Lieutenant-in-Command as the "functional equivalent" of his recall duties as a team member, LBA argues, his belief that the instant dispute was subsumed under the dispute arbitrated before Arbitrator Sands was reasonable. Moreover, the Union asserts, Lt. McKay only learned that he had to litigate the instant claim in February 1989, after it became apparent that the City considered Lieutenant-in-Command recall assignments to be a separate issue. Therefore, the Union argues, the instant grievance was timely filed on February 10, 1989.

In an attempt to rebut the City's assertion of prejudice, the Union denies that retirement of two of the City's witnesses renders them unavailable. LBA submits that their attendance can be compelled by subpoena or, alternatively, it would be willing to permit deposition testimony.

Moreover, the Union alleges, the City exaggerates the amount of time which has passed since the relevant events.

Discussion

There is no dispute that the parties have agreed to arbitrate unresolved grievances as defined in their collective bargaining agreement. Nor do the parties deny that a claimed violation of Article III, Section 1(a) of the Agreement, concerning overtime entitlement, is within the scope of their agreement to arbitrate. Rather, the City is challenging arbitrability on the grounds that the instant grievance is barred by the doctrine of res judicata and on the basis that Lt. McKay is unable to execute an effective waiver in this dispute. Alternatively, the City contends that arbitration should be barred because the Union is guilty of laches.

In considering whether the Union should be barred from pursuing this dispute further, we must first determine whether the doctrine of res judicata is applicable. It is the responsi-bility of this Board to decide questions of issue preclusion.[8] Res judicata is employed to prevent vexatious and oppressive relitigation of previously arbitrated disputes.[9] We have long held that "repeated attempts to arbitrate one underlying dispute constitute an abuse of this Board's processes, discourage labor-management relations, and contravene the purpose of the NYCCBL's waiver provision."[10]

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[8] Decision Nos. B-65-88; B-25-88; B-27-82.

[9] Decision Nos. B-25-88; B-27-85; B-16-75.

[10] Decision No. B-16-75.

In determining whether the doctrine should apply to this dispute, we must find that three essential elements have been met: (1) a final adjudication on the merits in the earlier suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of the parties or their privies in the two suits.[11] In order for a party to be precluded from raising a claim, we must be persuaded that the identity of the causes of action is clear and obvious.[12] We have held that when the claims, though factually close, are not identical, the doctrine of res judicata will not be applied as a bar to arbitrability.[13] It is well-settled that we resolve doubtful issues of arbitrability in favor of arbitration.[14]

While it is clear that the present litigants were parties to the dispute in Case No. A-2580-87, they disagree as to whether the recall claim at issue here was before Arbitrator Sands and, therefore, whether there was a final adjudication of this dispute on the merits. The City claims that because Lt. McKay seeks compensation "in connection with" the recall duty arbitration award, there exists a sufficient identity between the two causes of action to bar relitigation. The Union argues that, although closely intertwined, the claims are not identical.

Based on close examination of the instant pleadings and the record in connection with Case No. A-2580-87, we are persuaded that the instant claim

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[11] E.g., Decision No. B-22-86.

[12] Decision Nos. B-65-88; B-25-88; B-22-86; B-3-86; B-27-82.

[13] Decision No. B-27-82.

[14] Decision Nos. B-65-88; B-15-80; B-20-79.

was not before Arbitrator Sands. The record reveals that the issue submitted in Case No. A-2580-87, as defined by the parties, was whether the City violated Article III, Section 1(a) of the parties' Agreement when it failed to pay the grievants overtime "while they were on the recall list [emphasis added]."[15] In other words, there is no indication that Arbitrator Sands was asked to decide any issue other than whether compensation was due to lieutenants assigned, by means of a posted roster, to the investigatory "team" that was due to be called in the event of an incident at night or on weekends. Consequently, Arbitrator Sands, in finding that the City had violated the Agreement, only awarded the grievants compensation "for all hours on recall duty as the first 'up' team."[16]

In support of this conclusion, we note from the Opinion and Award, that Arbitrator Sands heard and considered testimony concerning the alleged restrictions imposed on lieutenants "when their 'teams' were up on the posted roster."[17] There is no indication whatsoever that the Arbitrator admitted evidence, discussed or reached the merits of a claim for overtime compensation concerning hours Lt. McKay allegedly filled in for the captain when he was designated as Lieutenant-in-Command. Therefore, the City's argument that Arbitrator Sands considered this question on its merits and dismissed the claim is unsupported by the record.

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[15] See Case No. A-2580-87, "Opinion and Award," at 1.

[16] Id, at 7.

[17] Id., at 6.

Moreover, the instant grievance was brought when the City refused to pay for the 600 hours here in question on the ground that recall as Lieutenant-in-Command was not covered by the Sands award, which dealt only with recall pursuant to listing on the Recall Roster as a member of "the first 'up' team." Having maintained that position in justification of its refusal to pay for the 600 hours, the City may not now be heard to claim that the issue of payment for recall as Lieutenant-in-Command is the same issue dealt with in the Sands award.

Accordingly, we conclude that the precise claim that was presented before the arbitrator in Case No. A-2580-87 and the claim presented in the request for arbitration herein are not identical and that, in any case, the City is precluded from asserting otherwise in light of its stated position regarding the scope of the matter before Arbitrator Sands and of his award. Thus, the legal requirements for the application of the res judicata defense have not been met.[18]

Similarly, and for the same reason, we find that the waiver provision of the NYCCBL,[19] which is also designed to prevent repeated litigation of the

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[18] See Decision Nos. B-25-88; B-27-82.

[19] Section 12-312(d) of the NYCCBL provides:

> As a condition of the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

same "underlying dispute,"[20] does not serve to bar arbitrability of the instant matter. Inasmuch as the City has failed to establish that Lt. McKay's alleged claim for overtime for hours designated as Lieutenant-in-Command was before Arbitrator Sands in Case No. A-2580-87, it cannot be said that the underlying dispute here was fully litigated and disposed of in that proceeding. In Decision No. B-7-90, we held:

> It is only upon the rendering of a judgment on the merits of a dispute that the election of the judicial forum becomes irreversible for purposes of Section 12-312(d).[21]

The remaining issue which must be addressed, raised in the alternative by the City, is whether the request for arbitration submitted should be barred under the equitable doctrine of laches. The City alleges that because Lt. McKay knew at the time the recall grievance was filed that he was not paid overtime for the hours he was designated as Lieutenant-in-Command, the delay is inexcusable. The City also claims that because "witnesses may be unavailable, documents may have been destroyed and memories have undoubtedly dimmed because of the delay," it will suffer prejudice sufficient to support a defense of laches.

LBA claims that the circumstances herein do not warrant application of the remedy of laches. The Union alleges that because Lt. McKay believed his recall duty as Lieutenant-in-Command was equivalent to recall duty as the first "up" team, and did not learn otherwise until after the City denied

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[20] Decision Nos. B-72-89; B-35-88; B-10-85; B-13-76; B-9-74.

[21] See also, Decision Nos. B-72-89; B-35-88; B-19-86.

compensation for these hours, he could not be guilty of belatedly asserting a known right. In any event, LBA asserts, the City has failed to demonstrate prejudice from the alleged delay.

The defense of laches is founded on the lapse of time and the intervention of circumstances which render it unjust, on equitable principles, for a grievant to be permitted to maintain a claim.[22] We have previously held that the submission of an otherwise arbitrable claim may be barred by laches where the following elements have been established: (1) the claimant was guilty of significant delay after obtaining knowledge of the claim; (2) such delay was unexplained and/or inexcusable; and (3) that such delay caused injury and/or prejudice to the defendant's ability to present a defense against the claim.[23]

Inasmuch as laches is an equitable doctrine, we must determine whether there are any compelling circumstances which justify the alleged delay and whether allowing arbitration of the matter despite the delay would unfairly prejudice the defendant.[24] In previous decisions, we have found that a lapse of two years may constitute a delay sufficient to support a finding of laches.[25] However, we have also held that an alleged delay of five years did

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[22] Decision Nos. B-73-88; B-17-84.

[23] Decision Nos. B-83-88; B-32-87; B-14-87; B-46-85; B-23-83; B-20-79.

[24] E.g., Decision Nos. B-28-88; B-26-85; B-26-82; B-20-79.

[25] See e.g., Decision Nos. B-9-76; B-29-75; B-6-75.

not warrant a similar result.[26] It is clear, therefore, that the determination in each case is based upon the prevailing circumstances.[27]

Given the facts alleged in the instant matter, we are not persuaded that laches should be applied to bar arbitration of this claim. Because the delay in filing the grievance herein was not unreasonable, as discussed below, and because there is no substantial evidence of harm or prejudice suffered by the City as a result of the delay, we do not find that the extraordinary remedy of laches is warranted.

In support of our conclusion that the circumstances herein do not warrant application of the doctrine of laches, we note that the following similar circumstances compelled the same result in the recall grievance before Arbitrator Sands:

The recall grievance arose when LBA first learned in September 1986, through testimony adduced at their reserve duty arbitration, that recall operated in essentially the same way as reserve duty. Arbitrator Leibowitz, in finding that the two issues, while factually similar, were not quite the same, refused to extend the matter before her to include any recall claims. When LBA initiated a new grievance for recall duty on November 30, 1986, the City challenged that part of the grievance which covered a period of more than 120 days prior to November 30, 1986. Arbitrator Sands found that the first time LBA "reasonably" had knowledge that recall duty was not covered by the reserve duty grievance was the day on which Arbitrator Leibowitz refused to

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[26] See e.g., Decision No. B-43-87.

[27] Decision No. B-4-85.

entertain it. He held, therefore, that that was the day on which the LBA's period to file a new grievance began to run. Accordingly, when Arbitrator Sands found that recall duty was reserve duty by another name, he awarded overtime for such duty performed during the entire period the recall system was utilized by the Department.

Similarly, we find that the day on which Lt. McKay reasonably learned that recall duty as Lieutenant-in-Command, while factually similar to recall duty as the first "up" team, was not the precise claim that was before Arbitrator Sands, was the day on which the City refused to compensate him for those hours under the award. Drawing a parallel between the circumstances here and those considered by Arbitrator Sands, we conclude that Lt. McKay was not guilty of significant delay after having knowledge of the claim and that, in any event, the delay involved was both explainable and excusable.

Having found that the Union has met its burden of demonstrating a reasonable excuse for the delay, we turn to the question whether the City has been unduly prejudiced as a result of the delay. Contrary to the City's assertions, we find that it has failed to allege probative facts demonstrating the existence of any form of recognizable prejudice attributable to the delay.[28]

In this connection, we note that the City alleges "witnesses may be unavailable, documents may have been destroyed, and memories have undoubtedly

[28] E.g., Decision No. B-43-87 (City exposed to increased potential liability from the delay); Decision No. B-3-79 (City changed its position to its detriment in reliance on claimant's silence); see also, Decision No. B-11-77 (Delay resulting in the loss of evidence which would support the City's position).

dimmed because of the delay [emphasis added]."[29] Although the City claims that two "key" witnesses have retired, it does not specifically allege that these witnesses are, indeed, unavailable. In response, LBA asserts that the attendance of these witnesses could be compelled by subpoena. In Decision No. B-17-84, we were not convinced that the City had demonstrated prejudice by alleging the non-availability of a former employee. We reached that conclusion because the City offered us "no reason to believe that this individual would not appear and testify if subpoenaed." In the instant matter, LBA correctly points out that mere retirement does not render these witnesses unavailable. Moreover, the City does not allege that it has attempted to locate these witnesses and found them to be unavailable. Therefore, we find that the City's conclusory allegations with respect to these witnesses are insufficient to meet its burden.[30]

Furthermore, although the City claims to have suffered other forms of prejudice, i.e., the loss of documentary evidence and unreliable testimonial evidence,[31] we find that the City again fails to allege facts to substantiate its claims. It is well-settled that we will not apply the laches defense absent sufficient proof that the delay occasioned some prejudice.[32] Finally, we note that there is no allegation that the City changed its position to its

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[29] City reply at ¶9.

[30] See Decision Nos. B-43-87; B-4-85; B-17-84.

[31] E.g., Decision No. B-26-85.

[32] Decision Nos. B-28-88; B-7-88; B-26-85; B-4-76.

detriment or that it has been exposed to increasing potential liability as a result of the delay.

For all these reasons, we shall not apply the doctrine of laches to bar the Union's request for arbitration herein. Accordingly, inasmuch as we also find that the doctrine of res judicata is inapplicable here and that the statutory waiver requirement has been satisfied, we deny the City's petition challenging arbitrability in its entirety.

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 petition of the City of New York be, and the same hereby is, dismissed; and it is further

ORDERED, that the request for arbitration of the Lieutenants Benevolent Association be, and the same hereby is, granted.

DATED: New York, New York
June 27, 1990

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
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