City & Dep't of Juvenile. Justice v. L.237, IBT, 55 OCB 23 (BCB 1995)
[Decision No. B-23-95 (Arb)]

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

-between-

THE CITY OF NEW YORK and the
NEW YORK CITY DEPARTMENT OF
JUVENILE JUSTICE,
Petitioners,

DECISION NO. B-23-95

-and-

DOCKET NO. BCB-1733-95
(A-5832-95)

THE CITY EMPLOYEES UNION LOCAL 237,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,
Respondent.
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DECISION AND ORDER

Pursuant to the New York City Collective Bargaining Law ("NYCCBL"), § 12-312 (Grievance procedure and impartial arbitration), and to the Rules of the City of New York ("Rules"), § 1-06 (Arbitration), on March 17, 1995, the City of New York and the New York City Department of Juvenile Justice ("City," "Department," or "Petitioners") filed a petition challenging the arbitrability of a grievance submitted by the City Employees Union Local 237, International Brotherhood of Teamsters, ("Union" or "Respondent") concerning a claimed wrongful termination of a classified civil service employee. After two requests for an extension of time to file were granted, the Union filed an Answer on May 30, 1995. After being granted an extension of time, Petitioners filed a Reply on June 21, 1995.

Background

It is undisputed that Petitioner and Respondent are parties to a collective bargaining agreement ("Agreement") covering the time period

relevant herein.[1] It is also uncontroverted that Article VI of the applicable Agreement sets forth the grievance and arbitration procedure to be used for resolution of disputes arising thereunder.[2] Section 1 of Article VI of the Special Officers Agreement provides, in pertinent part, as follows:

> DEFINITION: The term "Grievance" shall mean:
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> * * *
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> (e) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status.

In addition, the following facts are unchallenged by the parties: Hafizul Momen Mollah ("Grievant") was employed by the Department of Juvenile Justice as a Special Officer at the Spofford Detention Center.[3] On August 3, 1992, Grievant sustained a compensable work-related injury while attempting to restrain a resident. He was placed on a medical leave of absence with pay

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[1] The applicable contract is the Agreement between the Health and Hospitals Corporation and the International Brotherhood of Teamsters, Local 237, entered into on January 31, 1992, for the term from July 1, 1990 through September 30, 1991.

[2] The Citywide Contract for the term from July 1, 1990, through June 30, 1992, provides in Article XV for the Adjustment of Disputes in a manner virtually identical to the Grievance Procedure for which the Special Officers Agreement provides.

[3] Jude Symanski, the Department's Director of Discipline and Labor Relations, states that the Grievant was hired by the Department as a Special Officer, effective August 26, 1991, from a preferred list. Previously, he held the title of Special Officer with the Human Resources Administration Bureau of Security Services from September 8, 1986, to June 28, 1991, at which time he was laid off.

pursuant to § 7.2(a) of the Citywide leave regulation.[4] A physician's report dated January 14, 1994, indicates that Grievant's disability was total.

By letter of January 26, 1994, James Johnson, the Department's Director of Human Resources, informed Grievant that his leave of absence with pay was due to expire on February 3, 1994, and that his employment would be terminated if he were unable to return to work. In a letter dated February 17, 1994, Grievant requested that the Department grant him an additional year of leave time. Also on February 17, 1994, Respondent filed a Step I grievance alleging

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[4] The leave regulation provides, in pertinent part, as follows:

> Upon a determination of a head of an agency that an employee has been physically disabled because of an assault arising out of and in the course of his employment, the agency head will grant the injured employee a leave of absence with pay not to exceed eighteen months. No such leave with pay shall be granted unless the Workmen's Compensation Division of the Law Department advises the agency head in writing that the employee's injury has been accepted by the Division as compensable under the Workmen's Compensation Law . . .
>
> The injured employee shall undergo such medical examinations as are requested by the Workmen's Compensation Division of the Law Department and his/her agency, and when found fit for duty by the Workmen's Compensation Board shall return to his/her employment. . . .

An identical provision is found in Article V (Time and Leave), § 10 (Line of Duty Injury Due to Assault), of the 1990-92 Citywide Contract. In addition, this section of the Citywide Contract provides that, if a permanent employee who has five or more years of service does not have sufficient leave credit to cover the employee's absence pending a determination by the Worker's Compensation Division of the Law Department, the agency head shall advance the employee up to forty-five calendar days of paid leave and, in the event that the injury is not accepted as compensable under Worker's Compensation, the employee shall reimburse the City for the paid leave advance.

wrongful termination of Grievant, failure to accommodate him and failure to grant him further leave of absence.

A physician's report of February 22, 1994, indicated that Grievant was still totally disabled. In a letter dated February 23, 1994, Grievant again wrote the Department, reiterating his earlier request for additional leave time and requesting further information about time in the leave bank to his credit. On March 9, 1994, Roger Fortune, the Department's Acting Commissioner, advised Grievant that, effective that date, his employment was terminated under § 71 of the Civil Service Law.[5]

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[5] Section 71 of the Civil Service Law ("CSL") states, in pertinent part, as follows:

> **Reinstatement after separation for disability.** Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the Workers' Compensation Law, he shall be entitled to a leave of absence for at least one year, unless his disability is of such a nature as to permanently incapacitate him for the performance of the duties of his position. Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he was eligible for transfer. If no appropriate vacancy shall exist to which reinstatement may be made, or if the work load does not warrant the filing of such vacancy, the name of such person shall be placed upon a preferred list for his former position, and he shall be eligible for reinstatement from such preferred list for a period of four years. In the event that such person is reinstated to a position in a grade lower than that of his former position, his name shall be placed on the preferred

(continued...)

Respondent filed a Step II grievance on behalf of Grievant on April 15, 1994, and, after receiving no response, filed a Step III grievance on May 2, 1994. A Step III hearing was held on August 4, 1994, at which time Respondent submitted reports of attending physicians dated May 25 and July 6, 1994, indicating that Grievant's disability continued to be total. The Step III hearing officer issued a decision on November 7, 1994, denying the grievance on the ground that the contractual grievance procedure is not the proper forum to appeal a termination under the Civil Service Law and, therefore, that a question of a violation of Article IX, § 9, of the Citywide Contract is moot.

On January 23, 1995, Respondent filed a Request for Arbitration of the matter with the Office of Collective Bargaining ("OCB"). Respondent cites several grounds for its Request: Article IV (Overtime), § 9, of the Citywide Contract[6]; Article VI, § 1(e), of the Special Officers Agreement[7]; Americans

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[5](...continued)
eligible list for his former position or any similar position. This section shall not be deemed to modify or supersede any other provisions of law applicable to the re-employment of persons retired from the public service on account of disability.

[6] This citation was amended in Respondent's Answer to read Article IX (Personnel and Pay Practices), § 9, which provides as follows:

> Any employee who is required to take a medical examination to determine if the employee is physically capable of performing the employee's full duties, and who is found not to be so capable, shall, as far as practicable, be assigned to in-title and related duties in the same title during the period of the employee's disability. If a suitable position is not available, the employer shall offer the employee any available opportunity to transfer to another title for which the employee may qualify by the change of title procedure followed by the New York City Department of Personnel pursuant to Rule 6.1.1 of the City Personnel Director's Rules or by noncompetitive examination offered pursuant

(continued...)

with Disabilities Act[8]; Article VI, § 1(b), of the Special Officers Agreement[9]; Article XII (Financial Emergency Act) of the Special Officers Agreement.[10] The demand for arbitration is sought under Article VI (Grievance Procedure) of the Special Officers Agreement as well as Article XV (Adjustment of Disputes) of the Citywide Contract. As a remedy, Respondent seeks assignment of Grievant to duties as Special Officer or other appropriate title; retroactive payment of salary and benefits from the date of employment termination to the present; or, alternatively, leave of absence for one year.[11]

It is undisputed also that the definition of a grievance in Article VI, § 1, of the Special Officers Agreement does not include an alleged violation

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[6] (...continued)
to Rule 6.1.9 of the City Personnel Director's Rules.

If such an employee has ten (10) years or more of retirement system membership service and is considered permanently unable to perform all the duties of the employee's title and no suitable in-title position is available, the employee shall be referred to the New York City Employee's Retirement System and recommended for ordinary disability retirement.

[7] See text at 2 above.

[8] Respondent amended the Request for Arbitration by withdrawing this claim.

[9] Respondent amended the Request for Arbitration by withdrawing this claim concerning alleged violation, misinterpretation or misapplication of various rules or regulations of the employer.

[10] Respondent amended the Request for Arbitration by withdrawing this claim.

[11] As Grievant already had been on medical leave for 19 months since the date of injury and as Grievant's correspondence to his employer requested an additional year's leave, we take this request to mean an additional year's leave of absence.

of the New York State Civil Service Law ("CSL"); nor do the parties dispute that they have not included alleged violations of the Civil Service Law within the range of matters which they have agreed to arbitrate.

Positions of the Parties

Petitioners' Position

Petitioners raise several challenges to the arbitrability of Respondent's grievance. First, Petitioners state that Grievant's employment was not terminated due to disciplinary action, noting that no disciplinary charges were brought or served and that no accusations, supervisory conferences or disciplinary charges have been cited to support such a claim. Petitioners argue that Respondent presents only a bare allegation that the termination was disciplinary in nature and therefore that such a bare allegation of wrongful disciplinary action by management fails to satisfy Respondent's burden of presenting a substantial issue under the Contract. Since the termination was not carried out under Article VI, § 1(e),[12] Petitioners assert, the Request for Arbitration should be denied.

Second, Petitioners maintain that the gravamen of the grievance is not that the Grievant was subjected to wrongful discipline but that he was wrongfully terminated pursuant to CSL § 71. Petitioners support their view on this, by citing a letter dated March 7, 1994, from Respondent's Counsel to the Department's Director of Human Resources which "advised that this [employment termination] action with respect to Mr. Mollah is clearly improper. Pursuant to Civil Service Law, Mr. Mollah is entitled to a one (1) year leave of absence." Petitioners argue that there is no nexus between the discharge of the Grievant under Civil Service Law and the applicable Agreement.

Petitioners also maintain that Respondent states no arbitrable claim with respect to alleged violation of the following: Americans with

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[12] See text at 2 above.

Disabilities Act; rules of the Department of Personnel and of the Health and Hospitals Corporation; Article VI, § 1(b), of the Special Officers Agreement, which states a definition of a grievance; or Article XII of the Special Officers Agreement, which states that "provisions of this Agreement are subject to applicable provisions of law, including the New York State Financial Emergency Act for the City of New York as amended."

In addition, Petitioners contend that Respondent lacks standing to initiate arbitration proceedings under the Citywide Contract. They argue that only District Council 37, AFSCME, AFL-CIO, ("D.C. 37") has standing to do so and that Respondent has not sought to cure this putative procedural defect. Assuming, arguendo, that Respondent had standing to pursue an alleged violation of Article IX (Personnel and Pay Practices), § 9, of the Citywide Contract,[13] Petitioners assert that Grievant's physical condition would not permit him to perform either limited or full duty.

Further with respect to Article IX, § 9, of the Citywide Contract, Petitioners contend that, inasmuch as Grievant's employment with the City began on September 8, 1986, he did not have ten years of retirement system membership credit to his name as required under the New York City Employee's Retirement System in order to be considered for ordinary disability retirement under that section of the Citywide Contract.

Finally, Petitioners insist that the contractual clause allegedly violated does not provide for unlimited sick leave. They cite case law affirming an arbitrator's decision which rejected a claim that an "unlimited sick leave" provision of the contract therein barred an agency from resorting to medical separation pursuant to CSL §§ 71, 72 or 73.[14] In sum, Petitioners

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[13] See n. 6 and surrounding text at 6 above.

[14] Correction Officers Benevolent Association, Inc., v. The City of New York, 199 A.D.2d 12, 604 N.Y.S.2d 567 (1st Dep't 1993), affirming Matter of Arbitration Between COBA (continued...)

maintain that there is nothing in the Citywide Contract or the Special Officers Agreement which arguably bars the termination of Grievant's employment after his 18-month medical leave with pay which was already granted to him. Petitioners request that the Request for Arbitration be denied.

Respondent's Position

The Respondent Union denies Petitioners' argument that the discharge was not disciplinary and that the Grievant is not entitled to pursue his claim in arbitration. Without elaborating, Respondent argues that the Department's failure to serve charges is not dispositive of the issue as to whether the Grievant's employment termination disciplinary in nature. Similarly, Respondent argues that Department's contention that the termination was carried out under CSL § 71 does not negate the disciplinary nature of management's action. "[W]hether such is the case or whether in reality the termination was a wrongful disciplinary action is for an arbitrator to determine," Respondent declares.

Also for the arbitrator, in the Union's view, is the question of whether the Grievant was entitled to the benefits of Article IX, § 9, of the Citywide Contract. Respondent contends that Grievant's medical leave was granted pursuant to the Citywide leave regulations and that the Citywide Contract "provides for the same leave." The Union states, "The contractual rights of the grievant existed prior to his []termination and are the basis upon which the Request for Arbitration was filed, not Section 71."

On the question of standing to pursue a claim under the Citywide Contract, Respondent states that it has received authorization from D.C. 37 to proceed under that Contract. Appended to the Answer is a letter dated March

[14] (...continued)
and The City of New York, OCB Case No. A-3015-89 (June 25, 1991).

31, 1995, from Robert Perez-Wilson, General Counsel, D.C. 37, to Rory G. Schnurr, OCB Director of Representation, authorizing the Respondent Union to pursue the instant grievance in arbitration under the Citywide Contract.

For all the above reasons, Respondent requests that the Petition challenging arbitrability of the grievance be denied.

Discussion

Where, as here, the parties do not dispute that they have agreed to arbitrate their controversies, the question before the Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the parties' agreement to arbitrate.[15] When challenged to do so, a union requesting arbitration has the burden of showing that the contractual provision which it claims has been violated is arguably related to the grievance sought to be arbitrated.[16]

The question of whether an employee has been disciplined within the meaning of a contractual term is ordinarily one to be determined by an arbitrator.[17] Also, the fact that no written charges of incompetency or misconduct have been served on a grievant will not invariably bar the arbitrability of a claimed wrongful disciplinary action,[18] because the issue of whether an act constitutes discipline may depend on circumstances

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[15] City of New York v. D.C. 37, L. 375, Decision No. B-12-93, aff'd sub nom. N.Y.C. Dep't of Sanitation & City v. Malcolm D. MacDonald, et al., __ A.D.2d __, 627 N.Y.S.2d 619 (1st Dep't 1995), mot. for lv. to appeal granted, __ N.Y.2d __ (Sept. 7, 1995) (No. 910); see, also, B-2-95, B-47-92 and B-15-90.

[16] Decision Nos. B-2-95, B-50-92, B-47-92 and B-29-91.

[17] Decision Nos. B-54-91, B-52-89, B-40-86 and B-5-84.

[18] Decision Nos. B-2-95, B-12-93, B-54-91 and B-76-90.

surrounding the act.[19]

Applying these standards to the present case, we find that the Union has failed to meet its burden with respect to one of the contractual provisions cited as the basis for its claim; we find a nexus is stated with respect to the other contractual claim. Our reasoning is as follows:

Concerning the charge that termination of the Grievant's employment constituted wrongful disciplinary action in violation of Article VI, § 1(e), of the Special Officers Agreement, we find that the Union has not alleged any facts or circumstances which are traditionally characteristic of disciplinary action. In fact, the record is devoid of facts alleging that accusations of any sort of culpability were made.

As to circumstances surrounding the discharge, we find that the Union offers nothing more than conclusory statements that it constituted wrongful termination. There is no supporting documentation or any statement or allegation of fact other than the Union's conclusory allegation of disciplinary action which would indicate a punitive motivation by the employer for denying the Grievant's request for an additional leave of absence beyond the year and a half that he had already received at that time. In the absence of evidence supporting the Union's conclusory assertion of disciplinary motive, Respondent herein has failed to establish a nexus between the Grievant's termination and the wrongful discipline provisions of the Special Officers Agreement as set forth in Article VI, § 1(e).

As to Respondent's claim that the employer violated Article IX, § 9, of the Citywide Contract, we find as a preliminary matter that, contrary to Petitioner's charge, Local 237 does possess standing to pursue this claim. We have held that only the Citywide representative and the City have standing to initiate arbitrations under a Citywide collective bargaining agreement but that a unit representative may seek permission from the Citywide

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[19] Decision Nos. B-2-95, B-12-93, B-57-90 and B-5-84.

representative to process a grievance through the arbitration procedures.[20] This rule applies to the instant proceeding. Our determination that Local 237 possesses standing to arbitrate the claim of a violation of Article IX, § 9, of the Citywide Contract, is based on the fact that Respondent sought and received authorization by letter from the General Counsel of D.C. 37 specifically permitting Respondent to proceed herein. The standing issue was addressed in Question 1(d) of the Request for Arbitration when Respondent stated that the authorization letter was "TO FOLLOW" with regard to its putative claim under the Citywide Contract.

As to the substantive issue which this claim raises, Respondent's position is unclear. The Answer states unequivocally, "The contractual rights of the grievant existed prior to his []termination and are the basis upon which the Request for Arbitration was filed, not Section 71." The pleading identifies those "contractual rights" as "the benefits of Article IX, Section 9 of the citywide contract." A review of that section of the Citywide Contract reveals that those "benefits" include assignment "as far as practicable" to in-title and related duties in the same title during the period of the employee's disability and, if a suitable position is not available, then an offer to transfer to another title for which the employee may qualify. This section of the Contract also permits that an employee may be considered for disability retirement under the proper factual circumstances, i.e., permanent disability to perform all the duties which the employee's title requires, no availability of a suitable in-title position, and a minimum of ten years' credit for membership in the New York City retirement system.

The clarity of Respondent's position in the Answer is clouded by a letter dated March 7, 1994, from Grievant's counsel to the Department's Director of Human Resources, appended to Petitioner's Reply and also filed

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[20] Decision No. B-45-91.

with the Request for Arbitration. The text of the letter refers to Grievant's termination and advises the Department that "this action . . . is clearly improper. Pursuant to Civil Service Law, Mr. Mollah is entitled to a one (1) year leave of absence." One possible interpretation of this letter is that Grievant's counsel believed the termination to be improper under the Civil Service Law which governs the granting of medical leaves of absence. Based upon Counsel's further advice to the Department -- that "[s]hould you decline to grant this leave to Mr. Mollah we are fully prepared to litigate this matter[]" -- it is reasonable to infer that the litigation contemplated for the purpose of vindicating a claimed violation of Civil Service Law is arbitration. Indeed, this letter is attached to the Request for Arbitration.

We are persuaded, however, by the Request form itself, as amended by the Answer, that the Grievant actually relies upon Article IX, § 9, of the Citywide Contract as the source of Respondent's right to arbitrate. The Request form does not cite the Civil Service Law as a source of the right to arbitrate. We find, therefore, that Respondent has demonstrated that it intends to proceed under the Citywide Contract.

We further find that Respondent has stated an arguable claim that the Department violated Article IX, § 9, of the Citywide Contract by allegedly denying to the Grievant the benefits of that Article. Our reasoning is as follows:

The provision which the Union claims the Department violated is Article IX, § 9, of the Citywide Contract. As we read the Special Officers Agreement (specifically, Article IX, "Citywide Issues"), that contract is "subject to the provisions, terms and conditions of the Agreement which has been or may be negotiated between the City and the Union recognized as the exclusive collective bargaining representative on Citywide matters which must be uniform for specified employees, including the employees covered by this Agreement. . . ." Not only has the Department agreed to submit to arbitration

questions concerning contractual interpretation of the Special Officers Agreement but also questions concerning the Citywide Contract. Because Local 237 has authorization from D.C. 37 to pursue a claim under the Citywide Contract, we find that the claimed violation of Article IX, § 9, of the Citywide Contract is within the scope of the agreement of the parties hereto to arbitrate matters of contractual interpretation.

Having determined that the contractual obligation is broad enough to include the act complained of by the Union, we turn to the question of whether Respondent has established a nexus between the Department's action and the contract provision which Respondent claims has been breached.[21]

We find that Respondent herein has met its burden of establishing a nexus between the termination of the Grievant and the applicable provision of the Citywide Contract. That provision states:

> Any employee who is required to take a medical examination to determine if the employee is physically capable of performing the employee's full duties, and who is found not to be so capable, shall, as far as practicable, be assigned to in-title and related duties . . . If a suitable position is not available, the employer shall offer the employee any available opportunity to transfer to another title for which the employee may qualify . . . If such an employee has ten (10) years or more of retirement system membership service and is considered permanently unable to perform all the duties of the employee's title and no suitable in-title position is available, the employee shall be referred to [NYCERS] and recommended for ordinary disability retirement.[22]

Here, the Union alleges that rather than complying with the requirements of the above provision, the Department acted to terminate the Grievant's employment. Therefore, the instant grievance arguably states a violation of the Citywide Contract. Our determination in no way reflects this Board's opinion on the merits of the respective parties' claims and defenses in the underlying grievance. These are matters for determination by the arbitrator.

Having found that the City's objections bar arbitration of the Union's

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[21] Decision No. B-13-93, B-2-91 and B-70-90.

[22] See full text, n. 6 at 6 above.

claim relating to Article VI, § 1(e), of the Special Officers Agreement, we grant the Petition Challenging Arbitrability. Having found that the City's objections do not bar arbitration of the Union's claim relating to Article IX, § 9, of the Citywide Contract, we deny the Petition Challenging Arbitrability and grant the Request for Arbitration as it relates to this claim only.

Respondent has withdrawn claims relating to Articles VI, § 1(b), and XII of the Special Officers Agreement and relating to the Americans with Disabilities Act; therefore, we need not address these issues.

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that, with respect to a claimed violation of Article VI, § 1(e), of the Special Officers Agreement, the challenge to arbitrability raised herein by the City of New York and the New York City Department of Juvenile Justice be, and the same is hereby, granted in all respects, and it is further

ORDERED, that with respect to a claimed violation of Article IX, § 9, of the Citywide Contract, the challenge to arbitrability raised herein by the City of New York and the New York City Department of Juvenile Justice be, and the same is hereby, denied, and it is further

ORDERED, that the Request for Arbitration filed herein by the City Employees Union Local 237, International Brotherhood of Teamsters, with respect to a claimed violation of Article IX, § 9, of the Citywide Contract, in all respects be, and the same is hereby, granted.

Dated: November 28, 1995
New York, N.Y.

STEVEN C. DeCOSTA
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