SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** PART 35

Justice

Law Enforcement Employees

- v -

City of New York

INDEX NO. 119084/06

MOTION DATE 2/7/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of petitioner for an order, pursuant to CPLR Article 78, (1) reversing Decision No. 9-2006 of the Board and (2) granting leave to Health and Hospital Police employed by HHC permission to hold a representational election to determine the proper collective bargaining agent to represent them, is denied. It is further

ORDERED that the cross-motion of Respondents, the City and HHC, to dismiss the petition is granted. It is further

ORDERED that the petition is dismissed and the Clerk may enter judgment accordingly. It is further

ORDERED that counsel for Respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

Dated: 2/24/07

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION (LEEBA),

Petitioner,

-against-

CITY OF NEW YORK and NEW YORK CITY HEALTH AND HOSPITAL CORPORATION (HHC),

Respondents.

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Index No. 119084-2006

Sequence 001
DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Law Enforcement Employees Benevolent Association ("LEEBA") moves for an order, pursuant to CPLR Article 78: (1) reversing the Order of the Board of Certification of the City of New York Decision No. 9-2006, and (2) granting leave to the Health and Hospital Police ("Security Officers") employed by the respondent New York City Health and Hospital Corporation ("HHC") to hold a representational election to determine the proper collective bargaining agent to represent approximately eight hundred (800) Security Officers.

Respondents City of New York (the "City") and HHC cross-move to dismiss the petition on the grounds that: (1) to the extent that LEEBA's petition seeks to challenge Regulation § 1-02(g) (the "Contract Bar Rule"), it is time-barred; (2) in seeking to annul a determination of the Board of Certification (the "Board"), LEEBA failed to name the Board as a party to the instant proceeding, and cannot do so now because the statute of limitations has expired; and (3) LEEBA failed to name Local 237 as a party to the instant proceeding.

FACTUAL BACKGROUND

On April 18, 2006, the City and Local 237 signed a Memorandum of Agreement ("MOA"), setting forth the terms of a successor collective bargaining agreement effective as of August 7, 2005. On May 17, 2006, Local 237's membership ratified the terms of the MOA.

On July 14, 2006, LEEBA, filed a "Petition by Public Employees: Proof of Interest" with the New York City Office of Collective Bargaining ("OCB") ("Petition") seeking to replace Local 237 as the certified, exclusive collective bargaining representative for Security Officers employed by HHC. The Security Officers were covered by a contract between the City, HHC, and Local 237, effective for the period of April 1, 2003 to August 6, 2005. At the time the Petition was filed, the MOA was set to expire by its terms on September 22, 2006. The City, HHC, and Local 237 opposed the petition as being untimely. By letter dated August 18, 2006, the Director of Representation for OCB (the "Director") dismissed the petition as untimely under Rule § 1-02(g). The Director concluded:

> a petition seeking to represent employees subject to a contract expiring September 22, 2006, would be timely . . . if filed between March 26, 2006, and April 25, 2006. However, the 2005-2006 MOA did not come into existence until it was signed on April 18, 2006, seven days before the end of the prescribed window period. Accordingly . . . a timely petition could have been filed in the 30-day period following the execution of the 2005-2006 MOA, in other words, the period of April 19, 2006, to May 18, 2006. . . . Filed almost two months after the end of the applicable window period, LEEBA's petition is untimely . . . .

Thereafter, LEEBA filed an appeal with the Board, arguing, *inter alia*, that the Director erred in finding that the applicable period was 30 days after execution of the MOA, since the City conceded that as of August 2006, the MOA was not executed or registered. Without registration of the MOA, there is no notice of the agreement, and thus, no window for filing the petition. The City, HHC, and Local 237 opposed the appeal. By Board Decision 9-2006, dated December 4,

2006, the Board upheld the dismissal of the Petition as untimely, and dismissed LEEBA's appeal, because the Petition was not brought within 30 days of the signing of the new contract covering the Security Officer titles, as required by the Board's regulations (*i.e.*, between April 19, 2006 and May 18, 2006). The Board reasoned:

> . . .When a successor agreement is signed less than 150 days before its expiration, this Board has found that a petition could be filed in the one month period following the issuance of the successor agreement (citation omitted). . . . We have also stated that "employees and their representatives who intend to timely challenge the status of an incumbent have a responsibility to ascertain the existence of agreements and to be aware of the current status of the bargaining for renewal agreements and their execution or of Personnel Order which evidence such agreements." (Citations omitted). . . . We find that when a successor contract is signed during the otherwise applicable window period, rival petition is timely filed in the 30-day period following the signing of the contract. . . .No precedent supports LEEBA's assertion that that there is no window period when there is no notice of a successor agreement.[fn8] Notice is not determinative when calculating the applicable window period under OCB Rule § 1-02(g), which establishes filing periods in reference to the expiration date of an agreement and, in certain circumstances, to the signing date of an agreement . . . . While we are empowered to conduct elections in cases in which we have determined that they are appropriate, that authority in no way relieves a party of its obligation to file petition in a timely manner. . . . Finally, we find that LEEBA's arguments that the Director . . . relied on erroneous facts or displayed bias are completely unsupported by any factual evidence. To the contrary, the contract expiration and signing dates upon which the Director . . .relied are accurate, and her determination is consistent with OCB Rule § 1-02(g) . . . .
>
> [fn8] LEEBA's assertion is also unsupported by the facts as notice of the MOA . . . was provided to Local 237's members on April 26, 2006, and the members ratified the agreement on May 17, 2006.

(Decision, pp. 11, 13-14).

On December 27, 2006, LEEBA commenced the instant action.

Petitioner's Contentions

LEEBA contends that the determinations of the Director and the Board were arbitrary and capricious, and that the Petition was not untimely. According to LEEBA, two factors flawed the Director's decision. First, the City, in its Verified Answer to the Petition, admitted that the MOA

was "not yet fully executed." Such admission negates the Director's finding that the petition was not filed within the 30-day period "following the execution." The 30-day period could not have commenced to run until some time after the date of the City's Verified Answer, August 14, 2006.

Second, (2) the successor agreement "is not yet registered," where "registered" refers to the City register and an official publication site of the City of New York. LEEBA further contends that the 30-day window prescribed in section 1-02(g), Chapter 1, is arbitrary and impossible to meet because the parties to the agreement have no obligation to reveal when the execution of the agreement took place. And, where the City has granted itself 60 days to publish the execution in its registry, the 30-day period could expire before public knowledge of the event was available. As such, Rule § 1-02(g) is arbitrary and the time frame for filing a representation petition should commence upon publication in the city register and not upon execution of a successor agreement.

LEEBA also argues that the Security Officers are entitled to be granted a representational vote. Citing 12-309, Powers and duties of board of collective bargaining, LEEBA argues that the City has the unique power to grant a representational vote and to determine the bargaining unit that meets the criteria for exercising the freedom of rights for the Security Officers. However, by relying on an arbitrary time frame to deny the Petition, the City has denied the rights of the Security Officers to conduct a representational vote.

Respondents' Contentions

Respondents argue that the instant case must be dismissed for LEEBA's failure to timely join indispensable parties, namely, the Board and Local 237. The Board, and not the City, issued the determination being challenged, and since the Board is not a party to this action, there is no

effective challenge to Board Decision 9-2006. Further, since it is the Board's regulation which is at issue, the Board is a necessary party.

Respondents contend that pursuant CPLR § 217 and New York City Administrative Code § 12-308(a), an Article 78 proceeding to challenge a final determination of the Board must be filed within 30 days of the determination. Since 30 days has passed since the Board made its determination on December 4, 2006, LEEBA failed to sue the proper parties within the time permitted.

Respondents also argue that Local 237, which was an intervenor before the Board, is a necessary party to this action. Local 237 is a party whose rights would be inequitably affected by a judgment in favor of LEEBA, and is thus, entitled to be heard. In the event the instant petition is granted, Local 237 would risk losing its status as sole and exclusive collective bargaining representative for the Security Officers, and would also become a smaller union as it would represent fewer employees. Moreover, Local 237 will be forced to expend money and resources to litigate issues before the Board to compete in the representative election.

Respondents contend that although necessary parties should be joined to the proceeding rather than dismissing that proceeding for want of necessary parties, joinder is disfavored where the statute of limitations has expired.

Finally, to the extent the instant petition seeks to challenge the Board's regulations, specifically Rule § 1-02(g), the Board's decision demonstrates that such Rule is long and firmly established. And, since no constitutional issue is to be decided herein, LEEBA's challenge to Rule § 1-02(g) must occur within four months of its promulgation, even though the rule did not have an impact on LEEBA until a date within four months of the commencement of the

proceeding.

Respondents further argue that the instant proceeding fails to state a cause of action, in that the Board's decision to set a time limit of 30 days after the execution of an agreement is not arbitrary and capricious. Respondents restate the Board's holding, that if a contract expires, and the members of that agreement sign a successor agreement, then a challenge may be brought within 30 days following the date the successor contract is signed by all parties.

Respondents argue that LEEBA's contention that it did not know when the time period to challenge began because the executed contract had not been made public, was addressed and rejected by the Board. Further, LEEBA fails to mention that the MOA was sent to the Local 237 members on April 26, 2006 and was ratified by Local 237 on May 17, 2006. Thus, LEEBA, which has a 30% interest level of the Security Officers, should have been aware, through due diligence, of the date that the contract was signed. LEEBA's failure to exercise due diligence and failure to ascertain the status of the contract, do not render the rule arbitrary or capricious or effect whether the rule is rational.

Petitioner's Opposition to Cross-Motion

LEEBA opposes Respondents' cross-motion, arguing that its instant proceeding challenging Rule § 1-02(g) is not untimely, since the Verified Answer of the City indicates that the 30-day period may have been added recently in 2006, and cannot be said to have existed since 1970.[8] Thus, the time to challenge Rule 1-02(g) has not passed.

LEEBA also opposes the 30-day time period for filing a petition, since the City and Local

[8] LEEBA contends that the reference to "respondents" in the City's cross-motion to dismiss is confusing, and is not one submitted by both "respondents" but by the City, as HHC is a separate entity and employer of the Security Officers.

237 had no obligation under New York City Charter §1175 to publish the MOA until 60 days after the signing of the MOA. The City predicated its decision to reject the Petition upon the signing of the MOA, and not the actual signing of the collective bargaining agreement. Thus, argues LEEBA, requiring LEEBA to file a petition showing interest within 30 days of the signing of the MOA and before the signing was made public was arbitrary and capricious.

Third, the Board decision at issue is dated December 4, 2006 and the instant proceeding was filed on December 27, 2006. Thus, LEEBA argues, the City's claim that the 30-day statute of limitations bars the instant proceeding is specious and confusing, given that CPLR § 217 provides fourth months to file an Article 78 petition.

Fourth, LEEBA asserts that Section 12-308, upon which the City relies, is silent has to who must be served with the Article 78 petition, and thus, it cannot be argued that the Board is a necessary party to this action. Further, the Board is a creation of the City. Further, under CPLR 7801(d) (*sic*), the Court is vested with the power to decide to whom notice of the Article 78 proceeding shall be given, and which interested persons to permit to intervene. And, the Court determines if the Board and Local 237 will be affected by a ruling that the City acted in an arbitrary and capricious manner.

LEEBA further argues that there is no basis for the City to oppose a representation vote where roughly 50% of the Security Officers signed a request. The City's purported policy against fragmentation is inconsistent with 12-309's requirement that public employees be granted the fullest freedom of exercising their collective bargaining rights. The City's motion suppresses the right of Security Officers and keeps them submerged in a clerical union while their police like functions mandate separate representation. Further, it is well settled that an affiliate of Local 237

maintains the rights of its members to employ a strike if necessary during the bargaining process, but the Administrative Code (CBL 1173) forbids organizations representing the police department to advocate the right to strike. Accordingly, the City is ignoring its own regulation, and insists that Local 237 represent the Security Officers, when LEEBA, a union dedicated to law enforcement employees, is being refused the right to trigger a representational vote.

Respondents' Reply[9]

Respondents contend that LEEBA cannot challenge the a decision of the Board without suing the Board, which is composed of three neutral members, neither union nor governmental appointed. And, there is no statute or precedent for holding that the City and the Board are the same juristic entity.

Further, the Administrative Code specifies that orders of the Board may be reviewed under Article 78 if the challenge is brought within 30 days of the decision. LEEBA filed a petition without naming the correct parties and did not amend its petition within the 30-day statute of limitations provided in the Administrative Code. As previously noted, when a necessary party has not been joined, and the statute of limitations has run, the petition must be dismissed. Thus, the failure to sue the correct party is fatal to the instant proceeding.

Respondents also maintain that a challenge to Rule § 1-02(g) must be brought within four months of the regulation's promulgation. Rule 1-02(g) was amended on December 3, 2003, and became effective on January 2, 2004, two years before the instant proceeding was commenced. The amendment is a matter of public record, published in the City Record, and accessible to all.

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[9] Respondents' contend that LEEBA's opposition papers are untimely. Respondents also state that the cross-motion was on behalf of all Respondents since the Office of the Corporation Counsel for the City of New York represents both HHC and the City.

Thus, LEEBA's challenge to the Rule § 1-102(g) is time-barred.

Further, Charter § 1175 and Rule § 1-02(g) are not intertwined. That Charter § 1175 requires collective bargaining agreements to be published does not require that the Board apply such publication date to Rule § 1-02(g). As noted by the Board, LEEBA has an obligation to keep itself abreast of the progress related to a new contract.

Lastly, the City does not generally take a position favoring one union over another. And, application of the Contract Bar Rule preserves the balance between the need for stability in labor relations and for challenges to union representation. Additionally, the merits of whether there should be a representational vote were never litigated before the Board and are not now before the Court. Further, the arguments concerning the rules proscribing unionization of members of the New York City Police Department, which do not appear to apply to HHC Security Officers, were not litigated before the Board. Finally, LEEBA cited case law that has no relevance to the Contract Bar Rule.

DISCUSSION

Although the instant case was brought by LEEBA for the purpose of reversing Decision 9-2006 of the Board, it is imperative that the court first address Respondents' cross-motion as it challenges the procedural viability of LEEBA's right to Article 78 relief.

I. Failure to Join Necessary Parties

The joinder provisions of CPLR § 1001(a) apply to Article 78 proceedings (*see 27th Street Block Association v Dormitory Authority of the State of New York*, 302 AD2d 155, 160, 752 NYS2d 277, 281 [1st Dept 2002], *citing Matter of Ayres v New York State Comm. of Taxation and Fin.*, 252 AD2d 808, 810, 675 NYS2d 678, 680 [3d Dept 1998]). CPLR § 1001(a) states

that necessary parties are those "who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action" (CPLR § 1001 (a)).

In an Article 78 proceeding, the governmental entity that performed the challenged action *must* be a named party or else a court cannot adjudicate the dispute (*see Solid Waste Services, Inc. v New York City Dept. of Environmental Protection*, 29 AD3d 318, 319, 814 NYS2d 151, 152 [1st Dept 2006], *citing Matter of McNeill v Town Bd. of Ithaca*, 260 AD2d 829, 688 NYS2d 747 [3d Dept 1999], *aff'd.* 93 NY2d 812, 695 NYS2d 540 [1999]) (emphasis added). Thus, since the Board is the governmental entity that performed the challenged action, the Board is a necessary party to this action.

With respect to the second basis for joinder under CPLR § 1001 (a), it is well settled that "'[t]he possibility that a judgment rendered without [the omitted party] could have an adverse practical effect [on that party] is enough to indicate joinder." Local 237's current status as the present, sole bargaining representative of the Security Officers would be inequitably affected by a judgment in this action that favored LEEBA. Thus, Local 237 is also a necessary party to this proceeding.

However, the issue is whether LEEBA's failure to join the Board and Local 237 is fatal to the instant proceeding.

The "[n]onjoinder of a [necessary] party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provision of that section" (CPLR § 1003). CPLR § 1001 distinguishes between a necessary party "subject to the jurisdiction of the court" and one over

whom jurisdiction can be obtained only by consent or appearance. In the latter regard, continuance of the action without a necessary party beyond the court's jurisdiction lies within the Court's discretion (CPLR § 1001 (b)). When a necessary party can be joined only by consent or appearance, a court must engage in the CPLR 1001 (b) analysis to determine whether to allow the case to proceed without that party (*Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards and Appeals*, 5 NY3d 452, 805 NYS2d 525 [2005]).[10]

CPLR 1001 (b) lists five factors for the court's consideration in determining whether justice requires an action to proceed in the absence of a necessary party: whether the plaintiff has another effective remedy if the action were to be dismissed for nonjoinder; the prejudice that may accrue from nonjoinder to the defendant or to the person not joined; whether and by whom prejudice might have been avoided or may in the future be avoided; the feasibility of a protective provision by order of the court or in the judgment; whether an effective judgment may be rendered in the absence of the person who is not joined (CPLR 1001 (b) (1)-(5)). No single one is determinative; and while the court need not separately set forth its reasoning as to each factor, the statute directs it to consider all five (*Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards*, 5 NY3d 452, *supra*).

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[10] In *Red Hook/Gowanus Chamber of Commerce*, (*supra*)"the question is an open one as to whether expiration of the statute of limitations with respect to an absentee should be treated the same as lack of jurisdiction for purposes of CPLR 1001(b). . . .But assume CPLR 1001(b) must be read literally: If an absent necessary party were subject to jurisdiction but her joinder would be a futile act because she would be entitled to a limitations dismissal of the claim against her, would the court be compelled to treat the situation as though there were no CPLR 1001(b) and dismiss the entire case without further inquiry? Should courts fill the gap by applying CPLR 1001(b) whenever jurisdiction cannot effectively be exercised, for whatever reason, over the absent necessary party? The Court declined to answer these questions in *Red Hook* because the litigants assumed a limitations bar in favor of the absentee was equivalent to lack of jurisdiction and argued the case accordingly. Setting to one side the foregoing conceptual conundrum, *Red Hook* contains an important lesson for lower courts: All of the listed factors in CPLR 1001(b) must be considered in determining whether an action may fairly proceed without an absent necessary party who is beyond the jurisdiction of the court." (Vincent C. Alexander, McKinneys CPLR § 1001).

The first factor in CPLR 1001(b) tips in favor of LEEBA in that LEEBA has no other effective remedy if the action were to be dismissed. However, the second factor weighs heavily against proceeding in the absence of the Board and Local 237, in that such parties would be prejudiced if the action proceeded in their absence. Further, since the identity of the Board and Local 237 were clearly known to LEEBA at the time the Board's decision was issued, LEEBA's failure to join the Board and Local 237 to the instant proceeding might have been easily avoided *(see Solid Waste Services, Inc. v New York City Dept. of Environmental Protection*, 29 AD3d 318, *supra; Llana v Town of Pittstown*, 245 AD2d 968, 667 NYS2d 112 [3d Dept 1997] [failure to join subdivision applicants should not be excused in the interest of justice since they were relatively few in number and easily identifiable by access to public records]). Nor is a protective provision in favor of the Board and Local 237 feasible. Moreover, given the nature of the relief sought in the petition, including invalidating the Board's decision and directing a representative election, no effective judgment may be made in the absence of the Board (*see Llana v Town of Pittstown, supra*).

The Court also notes that joinder of a necessary party is greatly disfavored where the statute of limitations has expired as to the necessary party (*see Solid Waste Services, Inc. v New York City Dept. Of Environmental Protection*, 29 AD3d at 319, *supra* [the failure to join an indispensable party within the statutory period does not militate in favor of allowing proceeding to continue in absence of indispensible party]; *Ferrando v New York City Board of Standards and Appeals*, 12 AD3d 287, 288, 785 NYS2d 62, 63 [1st Dept 2004] ["Since the applicable statutory period has expired and the owner can no longer be joined, and proceeding in his absence would potentially be highly prejudicial to him, the proceeding was properly dismissed"];

Matter of Lodge v D'Aliso, 2 AD3d 525, 526 [2d Dept 2003] [police officers already promoted to rank of sergeant were "necessary parties," and once the statute of limitations expired, petitioner's application to add such individuals as party respondents was properly denied], *lv. denied* 2 NY3d 702 [2004]; *Matter of Mount Pleasant Cottage School Union Free School Dist. v Sobol*, 163 AD2d 715, 716, 558 NYS2d 713 [3d Dept 1990] [in petition challenging failure to appoint petitioner as principal, current principal was "necessary party" and failure to join him mandated dismissal of proceeding], *aff'd.* 78 NY2d 935, 573 NYS2d 639 [1991]). Where the petitioner knew of the necessary party's identity prior to the expiration of the statute of limitations the dismissal of a proceeding will generally be upheld (*see Red Hook/Gowanus Chamber of Commerce v New York City Board of Standards and Appeals*, 5 NY3d 452, 464, [2005] [G.B. Smith, J. dissenting]). Moreover, CPLR § 1001 (b) should not circumvent the protections offered by the statute of limitations, except in rare cases (*see Red Hook/Gowanus Chamber of Commerce v New York City Board of Standards and Appeals*, 5 NY3d 452, 460, 805 NYS2d 525, 529 [2005]).

An Article 78 proceeding must be commenced within four months after the administrative determination to be reviewed becomes final and binding upon the petitioner unless a shorter time is provided in the law authorizing the proceeding (*Yarbough v Franco*, 95 NY2d 342, 717 NYS2d 79 [2000]; CPLR 217[1]; *New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 165, 573 NYS2d 25). And, Administrative Code § 12-308 (a) provides that a challenge to a final order of the Board by an aggrieved party must be filed within thirty days of such order (*see* NYC Admin Code, § 12-308). Thus, LEEBA's time within which to challenge the Board's decision dated December 4, 2006, expired January 3, 2007. Since thirty days has

passed, the time within which to join the Board and Local 237 as parties to the instant proceeding has expired. Furthermore, as Rule 1-02(g) became effective on January 2, 2004, two years before the instant proceeding was commenced, LEEBA's challenge to Rule 1-02(g) is also untimely.

As the statute of limitations against the Board and Local 237 has expired, and they have not consented to appear, joining them as party Respondents under these circumstances is disfavored, warranting dismissal of the action (*Mount Pleasant Cottage School Union Free School Dist. v Sobol*, 163 AD2d at 716). Nor does analysis of the five factors noted above justify permitting LEEBA to proceed in this action in the absence of the Board and Local 237.

In light of the statute of limitations bar to this proceeding, the Court does not reach the merits of whether the petition fails to state a cause of action.

Based on the foregoing, it is hereby

ORDERED that the motion of petitioner for an order, pursuant to CPLR Article 78, (1) reversing Decision No. 9-2006 of the Board and (2) granting leave to Health and Hospital Police employed by HHC permission to hold a representational election to determine the proper collective bargaining agent to represent them, is denied. It is further

ORDERED that the cross-motion of Respondents, the City and HHC, to dismiss the petition is granted. It is further

ORDERED that the petition is dismissed and the Clerk may enter judgment accordingly. It is further

ORDERED that counsel for Respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of the Court.

Dated: February 26, 2007

Hon. Carol Robinson Edmead, J.S.C.