

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

NEW YORK STATE CORRECTIONAL OFFICERS
AND POLICE BENEVOLENT ASSOCIATION, INC.,
RICHARD HARCROW, Pres., CARL CANTERBURY,
Exec. V.P., MITZIE VILSAINT, V.P., GRANT
MARIN, V.P., ANTHONY FARDA, V.P. DANIEL
STUART, Tres., RICHARD ATKINS, Member
and on Behalf of all others similarly
situated

Index No: 14585/04
Motion Date: 8/18/04
Motion Cal. No: 33

Petitioners

-against-

HINMAN STRAUB, P.C., WILLIAM SHEEHAN, Esq.,
RICHARD CASAGRANDE, Esq., LAWRENCE
FLANAGAN JR., V.P. and DIANE DAVIS,
Rec. Secy.

Respondents

The following papers numbered 1 to 74 read on this motion by
petitioners for a declaratory judgment and preliminary injunctive
relief and counterclaim by respondents for declaratory judgment

	<u>PAPERS NUMBERED</u>
Order to Show Cause-Petition-Affidavits-Exhibits	1 - 12
Memorandum of Law in Support.....	13
Verified Answer-Affidavits-Exhibits.....	14 - 36E
Memorandum of Law in Opposition to Petition.....	37
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Upon the foregoing papers it is ordered that this petition
and counterclaims are granted in part and denied in part in
accordance with the annexed Memorandum Decision dated October 18,
2004 signed herewith.

Dated: October 18, 2004
D# 18

.....
J.S.C.

M E M O R A N D U M

SUPREME COURT : QUEENS COUNTY
IAS PART 2

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NEW YORK STATE CORRECTIONAL
OFFICERS AND POLICE BENEVOLENT
ASSOCIATION, INC., etc., et al.

INDEX NO. 14585/04

BY: WEISS, J.

- against-

DATED: OCTOBER 18, 2004

HINMAN STRAUB, P.C., et al.

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In this action for a declaratory judgment, petitioners seek an order granting a preliminary injunction and declaring the amendments to the Certificate of Incorporation, Constitution and Bylaws to be null and void.

Petitioner, New York State Correctional Officers and Police Benevolent Association (Association) is a labor union comprised of New York State employees in security services units, whose 23,000 members are located in nearly every county. This case involves a power struggle for control of the union pitting the union President, Richard Harcrow, the Executive Vice-President, Carl Canterbury, Vice-Presidents, Mitzie Vilsaint, Grant Marin, Anthony Farda, Sector Stewart, Richard Arkins, and Treasurer, Daniel Stuart, petitioners herein, against respondents, Lawrence Flanagan, Jr., a Vice-President of the union, and Diane Davis, the Recording Secretary of the union. Respondent law firm of Hinman Straub has represented the Association since 1998,

and respondents, William Sheehan, and Richard Casagrande, are partners in the law firm. Hinman Straub and the Association entered into a retainer agreement effective May 1, 2003, whereby the law firm would be paid an annual retainer of \$2,450,000.00 for the services of regional counsel, including lobbying services in the annual amount of \$150,000.00. At stake in this action is the command of a large union, a lucrative retainer agreement and the union's ability to provide continuous legal services to its members who are or may become parties to grievances, law suits and other matters which require legal representation.

Ordinarily the judiciary will not interfere in the internal affairs of a not-for-profit corporation, including a labor union, absent a showing of fraud or substantial wrongdoing (see Matter of Gilheany v Civil Serv. Employees Assn., 59 AD2d 834 [1977]; but see Simoni v Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, 133 Misc 2d 1 [1986]). However, it is clear that the instant controversy could paralyze the operation of this 23,000 member public employee union, to the detriment of its members and the general public. Consequently, declaratory relief is appropriate.

At present, the Association's Executive Board consists of 10 members, who are sharply divided six to four over the choice of counsel and the running of the union. Petitioners through the actions of several members of the Executive Board sought to discontinue the legal services provided by Hinman Straub, with the

exception of lobbying services, and to engage the law firm of Cronin & Byczek, LLP, as General Counsel to the Association. Respondents, in response, engineered a purported vote during an Executive Assembly session to amend the Certificate of Incorporation so that certain duties and responsibilities of the Executive Board, including that of hiring and firing legal counsel, were terminated or diminished, and the duties and responsibilities of the Executive Assembly were enlarged.

The law firm of Hinman Straub which had a valuable retainer agreement with the Association, is a party-respondent in this action and represents the respondents. The law firm of Cronin & Byczek represents the petitioners in this proceeding and seeks to maintain its recent appointment as the law firm for the Association.

Neither Hinman Straub nor Cronin & Byczek are neutral advocates for their respective clients and each has a substantial pecuniary interest in the outcome of this litigation.

The Association adopted its Constitution and Bylaws on August 18, 1998. Article IX(A) and (B) of the Constitution and Bylaws provides that "[t]he Executive Board shall be the managing body of the Association and shall consist of a President, an Executive Vice-President, a Treasurer, a Secretary and seven (7) Vice-Presidents..." and that "[t]he Executive Board shall have general supervision and control over the day to day affairs of the Association, and for the implementation of policies adopted by the

Executive Assembly. Except as otherwise provided in this Constitution and Bylaws, all decisions of the Executive Board shall require a vote of the majority of the Executive Board members at a meeting. Each Executive Board member shall have one (1) vote. A quorum of the Executive Board shall be seven (7) members." The Executive Board is required to meet "at least once monthly at the call of the President or by a majority of the Executive Board..." (Article IX[C]).

In August 2002, the Association was decertified as the bargaining representative for the police unit. The Executive Board Vice-President position that was held by a member of the police unit is vacant and cannot be filled under the terms of Article IX(F) of the Constitution and Bylaws. The Executive Board, therefore, now has ten members, rather than the eleven stated in the Constitution and Bylaws. Each member of the Executive Board has one vote, and each member is directly elected by the Association's general members (Article V).

Sector Stewards are elected by each sector and the sector stewards elect one steward from that sector as chief sector steward (Article VI). The 10 members of the Executive Board and the 83 chief sector stewards together constitute the Executive Assembly. Article X(D) of the Constitution and Bylaws provides that "[t]he Executive Assembly shall be the governing body of the Association with respect to its overall policies, aims and purposes" and that meetings shall be convened no less than

five times a year, with an interval of no less three months between Executive Assembly meetings. The "Executive Assembly shall be charged with aiding the Executive Board and the Collective Bargaining Committee in the development of contractual strategies, language and monetary proposals, and any other issues having a direct impact on the membership at-large. The Executive Assembly shall have the authority to interpret this Constitution and Bylaws and all controversies thereunder. Any interpretation adopted by majority vote of the Executive Assembly in good faith shall be binding upon all members, officials and officers" (Article X[D]).

Article XV sets forth a detailed procedure for amending the Association's Constitution and Bylaws. In general, proposed amendments are voted on by the Executive Assembly, and if adopted by a two-thirds vote, the entire membership of the Association is entitled to vote in favor or against the amendment.

On May 19, 2004, the Executive Board held a meeting, which was attended by President, Richard Harcow, Executive Vice-President, Carl Canterbury, Treasurer, Daniel Stuart, Vice-Presidents, Lawrence Flanagan, Lyndon Johnson, Paul Mikolajczyk and Mitzie Vilsaint. Recording Secretary, Diane Davis, and Vice-Presidents, Anthony Farda and Grant Martin attended via telephone. Also present was an attorney from Hinman Straub and two other guests from Hinman Straub. Linda Cronin, a partner with Cronin & Byczek was also present, although this is not reflected in the

Executive Board minutes.

At this meeting a motion was made to rescind or repeal the proposed 2004 budget for the Association and to adopt in its stead the original treasurer's proposed budget for 2004, to eliminate three union leave positions, to eliminate certain events, and to eliminate a regional office, due to a deficit of approximately \$500,000. Petitioners Canterbury, Stuart, Farda, Marin and Vilsaint all voted in favor of the motion. Vice-President, Lawrence Flanagan, and Recording Secretary, Diane Davis, respondents herein, and Vice-President, Paul Mikolajczyk, voted against the motion and Vice-President, Lyndon Johnson, was absent. The minutes do not record a vote by the President Richard Harcow and the minutes do not indicate whether he was present at the time the vote was taken.

A second motion was made to terminate the legal services of respondent Hinman Straub, P.C., and to retain Cronin & Byczek, LLP as General Counsel to the Association. The minutes of the meeting state that at the reading of the second motion, Flanagan and Mikolajczyk left the room and that Davis who had been attending via a telephone conference was no longer connected. Board Members Canterbury, Stuart, Farda, Marin and Vilsaint voted in favor of the motion to terminate the legal services of Hinman Straub. The minutes state that "by ruling of counsel" Johnson was absent and Flanagan, Davis and Mikolajczyk had abstained. The minutes do not state who made this "ruling". The minutes do not record a vote by

President Harcow and do not state whether he was present at the time this vote was taken.

After this meeting, respondents Lawrence Flanagan and Diane Davis, as well as Executive Board members Lyndon Johnson and Paul Mikolajczek met with Hinman Straub, and sought legal advice concerning the quorum requirement, and the vote to terminate Hinman Straub as legal counsel, as well as other issues.

The Executive Assembly held a two day meeting on June 16-17, 2004. Petitioners allege that on June 16, 2004, during a recess and outside of the presence of a majority of the Executive Board and outside of the presence of a majority of the Executive Assembly, respondents Flanagan and Davis met inside a conference room and with the assistance of respondents Hinman Straub, Sheehan and Casagrande, created an amendment to the Certificate of Incorporation. Respondents assert that at the Executive Assembly session on June 16, 2004, a motion was made by Chief Section Steward, Louis Giampaglia, to amend the Certificate of Incorporation, as regards the powers and authority of the Executive Board and Executive Assembly, and that President Harcow ruled the motion out of order. Respondents allege that the Executive Assembly then voted to overrule Harcow, that Harcow attempted to recess the meeting, that Davis called for a voice vote on the amendment and commenced a roll call vote, and that Harcow succeeded in turning off the microphone and ordered the stenographer to stop taking minutes and stop recording the meeting.

It is asserted that 54 of the 93 members of the Executive Assembly who were present voted in favor of the amendment to the Certificate of Incorporation. The amended Certificate of Incorporation was filed with New York State Division of Corporations on June 16, 2004, and states that the provision added "is intended to clarify certain internal procedures by adding Article 10 to the Certificate of Incorporation, the full text which reads as follows:

"10. The Executive Board, as the board of directors of the corporation, shall manage the day-to-day affairs of the corporation subject, however, to the authority of the Executive Assembly, comprised of the elected representatives of the members chosen in accordance with the Bylaws, as follows:

(a) The Executive Assembly shall have final authority with respect to all budgetary matters, including the adoption of the corporation's budget.

(b) The Executive Assembly shall approve all contracts, purchases or expenditures having an aggregate value of Twenty-Five Thousand (\$25,000) or more.

(c) The Executive Assembly shall have final authority with respect to the approval of professional agreements and the retention of professional advice and services.

(d) The Executive Assembly shall have final authority with respect to the hiring and dismissal of all employees, consultants and staff.

(e) The actions and proceedings of the Executive Assembly shall not be subject to annulment or supersession by the board of directors."

The amended certificate states that the undersigned were

authorized to execute and file the Certificate of Amendment by "the concurring vote of a majority and quorum of the Executive Assembly comprised of the representatives of the members and exercising all the rights, powers and privileges of members pursuant to Section 603(d) of the Not-For-Profit Corporation Law..." and is accompanied by an affidavit executed by Flanagan and Davis.

The Executive Assembly on June 17, 2004, in response to a dispute as to what constitutes a quorum for the Executive Board adopted the following resolution: "...that the Executive Assembly interprets Article IX(B) of the Constitution, which states that 'a quorum of the Executive Board shall be seven (7) members to mean that a quorum of the Executive Board shall be seven (7) members". In addition, on June 17, 2004, the Executive Assembly unanimously passed a motion "to direct our retained attorneys (sic) to bring any appropriate legal action necessary against any Executive Board members who fail to follow the direction of the Executive Assembly". Respondents also assert that the Executive Assembly passed a resolution stating that "a representative of our retained law firm, Hinman Straub, P.C., shall be present at all Executive Assembly meetings and shall be available to members of the Assembly for advice and counsel as requested."

Respondents now allege that as the Certificate of Incorporation had been amended, the Executive Board lacked the authority to terminate Hinman Straub's retainer and to replace this

law firm with another law firm.

Petitioners commenced this special proceeding on June 25, 2004 by way of an order to show cause and also sought a temporary restraining order enjoining respondents from taking any actions based upon the amended Certificate of Incorporation. The court signed the order to show cause, granted the temporary restraining order, and set a return date of August 18, 2004, which was necessitated by the summer recess. The respondents thereafter sought to accelerate the hearing date in order to modify or vacate the temporary restraining order and after a hearing held for that purpose on July 9, 2004, the court fashioned a new temporary restraining order, which was placed on the record. The issues raised by the parties regarding the language and provisions of the temporary restraining order have now been resolved and will not be revisited here.

Petitioners seek to have the court declare the June 16, 2004 amendment to the Certificate of Incorporation and attempted amendment to the Constitution and Bylaws null and void. Petitioners assert that the June 16, 2004 amendment to the Certificate of Incorporation usurped the responsibilities and powers of the Executive Board and illegally transferred these responsibilities and powers to the Executive Assembly, in violation of Article X of the Constitution, and the provisions of the Not-For-Profit Corporation Law. Petitioners further seek to enjoin the respondents from taking any further actions based upon the amended

Certificate of Incorporation.

After the within action was commenced, Richard Harcow, Carl Canterbury, Daniel Stuart, Grant Marin, Anthony Farda and Mitzie Vilsaint attended a meeting of the Executive Board on July 7, 2004 and unanimously passed a motion to terminate Hinman Straub's legal services retainer, with the exception of lobbying services. It was provided that Hinman Straub would remain on retainer through August 8, 2004, in order to provide the members with continuous legal services. These six members of the Executive Board also unanimously passed a second motion to retain Cronin & Byczek, L.L.P, to provide full legal services, with the exception of lobbying. In addition, they voted to cancel the August 2004 meeting of the Executive Assembly. On July 7, 2004, these six members of the Executive Board sent a letter to Hinman Straub stating that its legal services had been terminated for cause. The motion to terminate Hinman Straub's services, as well as the letter of termination, specifically cited the assistance provided by Hinman Straub in obtaining and filing amendment to the Certificate of Incorporation and its conduct at the Executive Assembly sessions of July 19-27, 2004.

Petitioners assert that as a majority of the Executive Board members were present at the meetings of May 19, 2004 and July 7, 2004 the actions taken at these meetings were proper and valid. Respondents assert that as fewer than the required quorum of seven were present, petitioners' actions were

illegal, and without effect.

Respondents served an answer to the petition and interposed seven counterclaims. The first counterclaim seeks a declaration to the effect that the amended Certificate of Incorporation is valid and in full force and effect, and that as the Association's governing body, the Executive Assembly has the final and ultimate authority for budgetary matters, employment matters, professional services agreements and the approval of all contracts in excess of \$25,000.00. The second counterclaim seeks a declaration to the effect that pursuant to a validly executed retainer agreement, dated May 1, 2003, and resolutions of the Executive Assembly dated October 3, 2002 and June 17, 2004, Hinman Straub, P.C. is the general counsel for the Association. The third counterclaim seeks a declaration that a quorum of the Executive Board means that seven members must be present. The fourth counterclaim seeks to declare null and void all actions taken by petitioners in the name of the Association's Executive Board at the meetings of June 15, June 25 and July 7, 2004. The fifth counterclaim seeks a declaration that this action was wrongfully commenced using union funds. The sixth counterclaim seeks to enjoin the petitioners and to direct them to follow all motions and resolutions passed by the Executive Assembly, including the amended Certificate of Incorporation. The seventh counterclaim seeks a declaration that the petitioners violated the Association's Constitution and Bylaws by commencing this action.

The first issue to be determined is whether a quorum was present at the time the Executive Board acted on May 19, 2004, and on subsequent dates. At issue is whether a quorum consists of six or seven members of the Executive Board in light of the fact that the police unit has been decertified, thereby permanently reducing the number of Executive Board members from 11 to 10. Not-For-Profit Corporation Law § 707 is entitled "Quorum of directors" and provides as follows:

"Unless a greater proportion is required by this chapter or by the certificate of incorporation or by a by-law adopted by the members, a majority of the entire board shall constitute a quorum for the transaction of business or of any specified item of business, except that the certificate of incorporation or the by-laws may fix the quorum at less than a majority of the entire board, provided that in the case of a board of fifteen members or less the quorum shall be at least one-third of the entire number of members and in the case of a board of more than fifteen members the quorum shall be at least five members plus one additional member for every ten members (or fraction thereof) in excess of fifteen."

Here, the Association's Constitution and Bylaws specifically provide for an Executive Board consisting of 11 members, and unequivocally states that a quorum consists of seven members of the Executive Board. The fact that the Executive Board now consists of 10 members due to the decertification of one unit does not affect the number of members needed to form a quorum. The Constitution and Bylaws do not permit the Vice-President from the decertified unit to be replaced by an individual from any other unit, and do not permit a reduction in the number needed to form a quorum.

Rather, the Constitution and Bylaws fix a precise number of members to form a quorum and does not utilize a mathematical formula to determine the number of members necessary to form a quorum.

Therefore, contrary to petitioners' assertions, the number of Executive Board directors needed for a quorum cannot be reduced to six, using a proportional formula of 2/3 of the number of the members of the Executive Board. It is noted that although the police unit was decertified in 2002, the Constitution and Bylaws was not amended to alter the number of Executive Board members necessary to form a quorum. It is, therefore, the declaration of this court that seven members of the Executive Board must be present at an Executive Board meeting in order to form a quorum at the time a vote is taken.

Section 708(d) of the Not-For-Profit Corporation Law is entitled "Action by the board" and provides that "[e]xcept as otherwise provided in this chapter, the vote of a majority of the directors present at the time of the vote, if a quorum is present at such time, shall be the act of the board." A review of the minutes of the Executive Board meeting of May 19, 2004 reveals that at the time the motion to "rescind/repeal" the 2004 budget was presented and voted upon, seven members of the Executive Board were physically present and an eighth member was present via a conference call. Therefore, a quorum was present at the vote on the budget.

However, at the time the motion to terminate the legal

services of Hinman Straub was read and taken, only five members of the Executive Board were present and actually voted. Diane Davis was no longer connected and available via a conference call, and Flanagan and Mikolajczyk had left the room where the meeting was held. It is undisputed that Mr. Johnson was not present at this meeting. Therefore, as seven members of the Executive Board were not present at the time the vote to terminate Hinman Straub was taken, a quorum was not present and the decision to terminate Hinman Straub was not a valid act of the Executive Board.

The court rejects the "ruling by counsel" that Flanagan, Mikolajczyk and Davis abstained from voting, which is cited in the minutes of the meeting. Such a ruling, by an unidentified attorney, was not authorized by the Association's Constitution and Bylaws or the Not-For-Profit Corporation Law and, therefore, is without force and effect.

Petitioners' assertion that Diane Davis, Larry Flanagan, Lyndon Johnson and Paul Mikolajczk, deliberately and consistently absented themselves from Executive Board meetings in an attempt to prevent a quorum and stop the Board from carrying out its duties, is unsubstantiated. The court notes that the minutes of the May 19, 2004 meeting reveal that although Flanagan and Mikolajczyk left the Board room for some 40 minutes, they left their personal belongings in the Board room, which evidences an intention to return to the meeting.

The court recognizes that the issue of which law firm

will be the recipient of a valuable retainer, worth in excess of two million dollars per year, is at the heart of this litigation. Control of the Executive Board of this 23,000 member union was crucial. The possibility that either counsel, for its own benefit, influenced the actions of Executive Board members to either absent themselves or to force a vote is not inconceivable. Nevertheless, the court finds that petitioners' mere allegation is insufficient to establish that Board members intentionally and deliberately absented themselves from a portion of the May 19, 2004 meeting so as to deprive the Board of a quorum necessary to vote on the motion to terminate the legal services of Hinman Straub (cf. Gearing v Kelly, 11 NY2d 201 [1962]).

As regards the Executive Assembly, it is undisputed that the Executive Assembly meeting of June 16-17, 2004 was a highly contentious session. The question to be decided here is whether the actions taken by the Executive Assembly comported with the provisions of the Constitution and Bylaws and the provisions of the Not-For-Profit Corporation Law. The Executive Assembly is purported to have voted to amend the Certificate of Incorporation. The amendment clearly was designed to limit the powers of the Executive Board and to increase the powers of the Executive Assembly to include the hiring and firing of legal counsel. The paramount issue to be determined is whether such changes pertaining to the governance of the Association can be effectuated by amending the Certificate of Incorporation, or whether

an amendment to the Constitution and Bylaws is required.

Petitioners' argument that only the Executive Board has the power to select legal counsel for the Association, is based upon Section XIX of the Constitution and Bylaws. This section provides that: "Attorneys shall be available to the membership for arbitrations, negotiations, administrative agency and state and federal court litigation and other services, including disciplinary proceedings, which the Executive Board may deem necessary, based upon the guidelines recommended by the Grievance/Legal Assistance Committee and adopted by the Executive Assembly." This provision sets forth discrete legal services that are provided to members of the Association, and gives the Executive Board the power to determine the circumstances under which legal services will be provided to members, based upon guidelines that were adopted by the Executive Assembly. This provision, however, is silent as to which governing body within the Association is charged with deciding who to retain as legal counsel. However, the retainer agreement with Hinman Straub was signed by President Harcow, and the Constitution and Bylaws provides that the president "with the consent of the Executive Board, signs all agreements for the Association" (Article XVI, section A.4.). The retainer agreement was approved by the Executive Board and was not presented to the Executive Assembly for its approval. The Executive Board is charged with running the daily affairs of the union, and there is nothing in the Constitution and Bylaws that requires the

Executive Assembly to approve a retainer agreement, or any other agreement, that the president may enter into with the consent of the Executive Board. The Executive Board, thus, has the authority to determine who the Association will contract with, including the choice of General Counsel for the Association.

Section 801 of the Not-For-Profit Corporation Law permits a not-for-profit corporation to amend its Certificate of Incorporation provided that "such provisions as might be lawfully contained in an original certificate of incorporation filed at the time of making such amendment" (N-PCL § 801[a]) and in particular may "strike out, change or add any provision not inconsistent with this chapter or any other statute relating to the affairs of the corporation, its rights or powers or the rights or powers of its members, directors or officers, including any provision required or permitted to be set forth in the by-laws...." (N-PCL § 801[b][3]).

Section 802 of the Not-For-Profit Corporation Law provides that: "(a) Amendment or change of the certificate of incorporation shall be authorized: (1) If there are members entitled to vote thereon, by majority vote of such members at a meeting as provided in paragraph (c) of section 613 (Vote of members)... (b) Notwithstanding any provision in the certificate of incorporation or by-laws, members of a class shall be entitled to vote and to vote as a class upon the authorization of an amendment and, in addition to the authorization of the amendment required by paragraph (a)(1), the amendment shall be authorized by majority

vote of the members of the class, when the proposed amendment would exclude or limit their right to vote on any matter except as such right may be limited by voting rights given to members of an existing class or of a new class." (d) This section shall not alter the vote required under any other section for the authorization of an amendment referred to therein, nor alter the authority of the board to authorize amendments under any other section."

Not-For-Profit Corporation Law § 603(d) states that a corporation may provide that its members elect representatives or delegates who when assembled exercise all of the powers, rights and privileges of members of the corporation. Although some 23,000 people belong to the Association, the Constitution and Bylaws provide that the Executive Board may call for statewide general membership meetings. In addition, the Constitution and Bylaws provide that each sector which is defined as a work site or facility where Association members are employed shall elect sector stewards, and the sector stewards, in turn, elect a chief sector steward from each sector. The chief sector stewards along with the members of the Executive Board make up the Executive Assembly. Each member of the Executive Assembly has one vote except where 20% of the voting membership requests voting by weighted votes. When such a request is made those sectors who have a greater number of members at their work site or facility have a greater number of votes. Clearly this is a delegate system in which the chief sector

stewards are the representatives of the union rank and file.

The court, however, finds that even if the roll call vote on the motion to amend the Certificate of Incorporation comported with the voting procedures established by the Executive Assembly, the amendment could not be filed absent the consent of the Industrial Board of Appeals. Section 404 (j) of the Not-For-Profit Incorporation Law provides that "[e]very certificate of incorporation which includes among its purposes the organization of wage-earners for their mutual betterment, protection and advancement; the regulation of hours of labor, working conditions, or wages; or the performance, rendition or sale of services as labor consultant, labor-management advisor, negotiator, arbitrator, or specialist; and every certificate of incorporation in which the name of the proposed corporation includes 'union,' 'labor,' 'council' or 'industrial organization,' or any abbreviation or derivative thereof in a context that indicates or implies that the corporation is formed for any of the above purposes, shall have endorsed thereon or annexed thereto the approval of the industrial board of appeals. The board shall make such inquiry into the purposes of the proposed corporation as it shall deem advisable and shall order a hearing if necessary to determine whether or not such purposes are in all respects consistent with public policy and the labor law. Notice of the time and place of hearing shall be given to the applicants and such other persons as the board may determine." Section 804(a) of the Not-For-Profit

Corporation Law provides that "[a] certificate of amendment shall not be filed if the amendment adds, changes or eliminates a purpose, power or provision, the inclusion of which in a certificate of incorporation requires consent or approval of a governmental body or officer...unless such consent or approval is endorsed on or annexed to the certificate of amendment." The amended Certificate of Incorporation filed herein did not contain the consent or endorsement of the Industrial Board of Appeals and, therefore, is without authorization (see generally 7-8 White on New York Corporations § N804.02).

The court finds that although the Executive Assembly may vote to amend the Certificate of Incorporation in order to change the powers and duties allotted to the Executive Board and to the Executive Assembly, they must do so in a manner consistent with all of the provisions of the Not-For-Profit Corporation Law. This was not done here.

In view of the foregoing, the within petition is granted and the first branch of the respondents' counterclaims is denied and it is the declaration of the court that the June 16, 2004 amendment to the Certificate of Incorporation is null and void, any actions taken by respondents in reliance on the amended Certificate of Incorporation is null and void, and respondents may not take any further actions based upon this amended Certificate of Incorporation.

As regards the remainder of respondents' counterclaims,

it is the declaration of the court that as quorum of seven members of the Executive Board was not present at the Board meeting of May 19, 2004, the vote by five members of the Executive Board to terminate the legal services of Hinman Straub was not a valid exercise of power and, therefore, is void.

It is the further declaration of the court that the actions taken by Richard Harcow, Carl Canterbury, Daniel Stuart, Grant Marin, Anthony Farda and Mitzie Vilsaint at a meeting of the Executive Board on July 7, 2004, including the termination of Hinman Straub as counsel for the Association and the retention of Cronin & Byczek as counsel for the Association, is without force and effect, as a vote by the majority of the members at a meeting, in the absence of a quorum of seven members of the Executive Board, and is invalid.

It is the further declaration of the court that in light of the foregoing Hinman Straub remains the General Counsel to the Association. The court further declares that any other actions taken by members of the Executive Board in the absence of a quorum, and after the original temporary restraining order was in force are without force and effect.

Respondents counterclaims for a declaration that this action was wrongfully commenced using union funds, and for a declaration that the petitioners violated the Association's Constitution and Bylaws by commencing this action are denied, as a justiciable controversy existed between members of the Association.

It is, therefore, the declaration of the court that petitioners were entitled to commence this action on behalf of the Association, using union funds.

A copy of this memorandum decision with short form order has been e-mailed to respective counsel this day.

The court directs that on or before October 20, 2004 Petitioner, New York State Correctional Officers and Police Benevolent Association, shall post a copy of this memorandum decision on its website and the same shall remain posted for the information of the membership for a period of twenty-one (21) consecutive days.

This constitutes the decision and judgment of the court. Short form order signed herewith.

/s/

J.S.C.