

Matter of Kringdon v Kelly

2006 NY Slip Op 30706(U)

October 30, 2006

Supreme Court, New York County

Docket Number: 101941/06

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

In the Matter of the Application of
SANDRA KRINGDON,

Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules,

-against-

RAYMOND KELLY, as the Police
Commissioner of the City of New York, and
as Chairman of the BOARD OF TRUSTEES
of the Police Pension Fund, Article II, THE
BOARD OF TRUSTEES of the Police
Pension Fund, Article II, NEW YORK CITY
POLICE DEPARTMENT and THE CITY
OF NEW YORK,

Respondents.

Decision/Order

Index No.: 101941/06
Seq. No. : 001

Present:
Hon. Judith J. Gishbe
J.S.C.

FILED
NOV 02 2006
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Pet's petition [article 78] w/JLG verified petition, exhs	1
Resps' verified answer (AK) w/exhs	2
Resps' affirm (AK)	3
Resps' affirm in support (AK) w/exh	4
Pet's reply affirm in response (CPL) w/appendix	5
Resps' affirm in response (AK) w/exhs	6

Upon the foregoing papers, the decision and order of the court is as follows:

This is an Article 78 proceeding. Petitioner seeks a judgment reversing the
October 12, 2005 decision by the Board of Trustees that she does not have a service
related or line of duty disability. Petitioner contends that this decision was without a

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rationale basis, arbitrary and capricious. Petitioner contends that she did, in fact, suffer a line of duty injury ("LOD"), and therefore, she is eligible for "accidental disability retirement," ("ADR") which carries with it, and entitles her to, a higher rate of disability pay.

The respondents are the police commissioner, the police pension fund, the medical board, the police department, and the City of New York, collectively they are referred to as "NYPD." They have appeared in this action and answered the petition.

It is undisputed that petitioner joined the police force in 1995. In May 2000 she suffered a psychiatric episode and was diagnosed with a stress disorder that required her involuntary admission to a psychiatric unit for evaluation. She acknowledges that she was previously diagnosed as bi-polar. She contends, that when the NYPD Medical Board made its decision/recommendation to deny her LOD retirement, it focused solely on her pre-existing mental illness, failing to separately consider whether her exposure to the World Trade Center "9/11" tragedy exacerbated that condition, caused to her manifest previously undiagnosed disorders, or resulted in a renewed manifestation of a post traumatic stress disorder ("PTSD").

While the exact number of hours petitioner worked at Ground Zero is in dispute, and she was not a so-called "first responder," it is unrefuted in the record developed before the Medical Board (and therefore the Board of Trustees of NYPD) that petitioner was assigned on September 12, 2001 to a security detail at Washington and Vesey Streets, in the immediate area of the fallen towers and that her shift ended on September 14, 2001. It is also unrefuted that petitioner served an extended shift of no fewer than 24 hours, even by respondents' estimation. Petitioner contends she worked

many more hours, possibly as many as 40 hours, without being able to return home to her young children, including a 4 month old infant. It is also unrefuted in this record that before being assigned to this security detail, petitioner had only been assigned to administrative duties with the NYPD.

On September 14, 2001, following this extended tour of duty, petitioner had a psychiatric episode which so alarmed her fellow officers and her that she surrendered her shield and firearm. Petitioner was discovered wandering the street disoriented, and distraught. The officers first brought her to a precinct, and then called EMT's who delivered her to a local hospital where she was admitted for psychiatric observation.

At the hospital she was examined by Dr. Koppes, a psychiatrist, who diagnosed her with "acute stress disorder 308.3 . . ." He noted that she was "sobbing" had her "face buried" and kept asking "are the children safe?" and "is this real?" The hospital records show that petitioner told him about her previous hospitalization. Dr. Koppes also noted in her file that petitioner had been assigned to administrative duties and that the "disaster scene is completely new to her . . ." Dr. Koppes prescribed Ativan, and wrote the following letter on her behalf:

"Sandra Kringdon was seen in our emergency room today and was diagnosed with a severe acute stress reaction [DSM IV 308.3]. It is my opinion that she is unable to return to work at this time and will need psychiatric treatment, which is being arranged."

Petitioner's May 2000 hospitalization with a stress disorder coincided with her claims of sexual harassment by a coworker on the force and with finally revealing to her husband that she had been sexually abused by her grandfather from age 3 to 13. After that episode in May 2000, she was involuntarily committed to a psychiatric ward where

she diagnosed by Dr. Maximo Perez, M.D. as having a psychotic disorder, not otherwise specified (DSM 298.9). The examination revealed no hallucinations (auditory or visual), but confirmed psychosocial and environmental factors stressor were affecting petitioner, and that they were "moderate to severe."

Petitioner admits that following her release from the psychiatric hospital in 2000 she continued in an outpatient therapy program with Dr. Thompson at St. Vincent's hospital. Petitioner was in therapy from May 23, 2000 until February 2, 2001, when Dr. Thompson discharged her. In her discharge summary, Dr. Thompson diagnosed petitioner with "adjustment disorder with anxiety," DSM 309.24. Dr. Thompson also reported that petitioner had psychosocial and environmental factors affecting her, noting that "[patient] was being sexually harassed at work and this was stressful . . ." and that petitioner had revealed a "history of sexual abuse during childhood . . ." Petitioner was not prescribed any medication at that time, and she was pregnant with her second child, born shortly before 9/11.

Following the episode on September 14, 2001, petitioner resumed outpatient therapy with Dr. Thompson and she was reassessed. In her September 21, 2001 assessment, Dr. Thompson wrote that petitioner had just returned from maternity leave and was still acclimating herself to juggling her work schedule, and the added burden of a new child. She noted that petitioner's husband, a sergeant with the police force, had also been pressed into service on "9/11" at Ground Zero, adding to petitioner's anxiety about his safety. Dr. Thompson wrote that petitioner had always had administrative duties with the NYPD, and therefore had "never been involved a critical incident at work," referring to petitioner's assignment to Ground Zero. Dr. Thompson also noted

that petitioner had completed her shifts without incident, and it was not until she had completed her tour of duty that petitioner had the episode that culminated in her being brought to the hospital.

Petitioner was again admitted to the hospital for psychiatric evaluation on October 19, 2001, following another psychiatric episode. She remained there until she was discharged on November 1, 2001. The discharge summary describes petitioner's "disorganized thinking," "bizarre behavior," having "ruminative thoughts," looking "disheveled," and "sitting on the floor" when she was admitted. The doctor noted that these symptoms manifested after petitioner had reportedly been at "Ground Zero" for 36 straight hours, and she had learned of a friend's death at the World Trade Center. The doctor prescribed Zoloft, Risperidal, and Haldol.

Petitioner went back into therapy with Dr. Thompson who reassessed her, again, on November 5, 2001. Her assessment was that petitioner's "diagnostic picture remained somewhat unclear with postpartum psychosis, PTSD, depression the most probable . . ." Dr. Thompson noted that petitioner looked "fragile, anxious, shaky . . ." and that she was fearful "about being forced to return to work at the police department . . ." Other notations in her file are that petitioner became very anxious whenever she has contact with NYPD (e.g. when waiting to see the NYPD psychologist) and when exposed to news reports about Ground Zero. Dr. Thompson also noted that petitioner was having nightmares about her experiences as a sexually abused child, and also about the World Trade Center attacks.

Petitioner applied for line of duty disability retirement with the Medical Board on June 12, 2003. The police commissioner filed an application for ordinary disability

retirement ("ODR") on her behalf. Dr. Charles Martinez, M.D. NYPD's deputy chief surgeon endorsed the ODR application, but not the ADR application, based upon his conclusion that:

"Detective Kringdon has a serious, disabling, psychiatric condition (a psychosis). She need four different psychotropic medications . . . She has not been able to do even restricted duty for approximately twenty [20] months, and it is reported that she is not able to tolerate anything outside of her normal daily routine. She is apparently unable to leave her house to go anywhere except to doctor's appointment, and changes in her routine trigger anxiety along with the potential for serious decompensation . . ."

After making a number of other observations about petitioner's "severely compromised" ability to function, Dr. Martinez went on to state and recommend that:

"Det. Kringdon is not fighting the survey but she claims that her problems are service related and are related to the World Trade Center; however, she was depressed for two months prior to the WTC and had a psychiatric hospitalization for psychosis two years prior to the WTC which was unknown to the Department, apparently has a prior history of hallucinations and was not an early responder to the WTC. Further, there is a family history of psychosis, and the officer was a victim of abuse from three [3] to thirteen [13] years of age."

Although it appears Dr. Martinez did not personally examine petitioner, Dr. Lamstein, director of NYPD's psychological evaluation unit ("PEU"), did evaluate her on June 24, 2003, and reviewed petitioner's hospital records. In her evaluation, Dr. Lamstein noted that petitioner had for the first time come to the PEU's attention on September 14, 2001, following her tour of duty at Ground Zero. In her June 24, 2005 report to the PEU, Dr. Lamstein recounts her review of hospital records, and conversations with various of petitioner's doctors. She writes in paragraph 16 that:

[Petitioner's] psychiatrist stated on June 13, 2003 that he believes the detective has bipolar disorder and PTSD with the trauma being the September 11, 2001 attack on the World Trade Center rather than her history of ten [10] years of childhood sexual abuse. He also noted post-partum factors in her illness. **However, it must be noted that Det. Kringdon was not working near the World Trade Center on September 11, 2001, she was not a first responder, and she was not involved in the recovery work site.** Although seeing something as horrific as the World Trade Center site would be distressing to most everyone, Det. Kringdon's involvement as a police officer with the events of September 11th were minimal. Furthermore, Det. Kringdon said she had been depressed for two [2] months prior to the World Trade Center attack, had suffered a severe psychotic episode a year earlier and also reported a long history of auditory hallucinations. There is no question in this writer's mind that Det. Kringdon is suffering from a psychiatric disorder and is unable to return to Full Duty police work in the foreseeable future. She is very fragile, and there is too big of a risk of decompensation if she is returned to work, even on a Restricted Duty basis. She is psychological unsuitable for Full Duty police work."

Emphasis added

The Medical Board met and examined petitioner on September 23, 2006, rendering its report to the Board of Trustees, that petitioner did not qualify for LOD or ADR but only for ODR. This report relies upon Dr. Lamstein's examination, various hospital records, including those of Dr. Thompson¹ and petitioner's own written narrative in support of her LOD application about what happened to her on September 14, 2001.

In relevant part, the board wrote that petitioner had a history of hospitalization and of "auditory hallucinations, catatonic states, unresponsiveness, lack of orientation,

¹It bears note that Dr. Thompson is referred to as being a "a social worker," although she is a licensed psychologist.

and disorganized thinking . . ." This is not supported by the administrative record. It also noted that her behavior while being examined ("illogical," "paranoid thinking," "inappropriate" affect etc.). Concluding that petitioner is "very easily stressed," and "sinks very easily into depressed states," the board recommended that her application for ADR should be disapproved because "she has Bipolar Disorder." The recommendation is endorsed by the director of PEU who reviewed the file developed before the medical board. In his endorsement, he wrote the following:

"As Dr. Lamstein reports, Det. Kringdon presents her psychiatric condition as if traumatic experiences as a police officer produced her disability, but the case facts do not coincide with such a conclusion. Det. Kringdon has a psychotic disorder, not only an anxiety disorder. Given her mother's history of psychosis, there is reason to believe that biological factors played a primary role in the genesis of her condition. Certain kinds of stressors may have played a role in the timing or emergence of her symptoms; it is possible that if kept in a very stress-free environment, Det. Kringdon would not have become psychotic. This is true with all psychiatric disorders, but does not necessarily mean that the stressors of life 'caused' the disorders themselves. Further, as Dr. Lamstein pointed out, Det. Kringdon has said that she had hallucinations throughout her life; her direct exposure to the events of 9/11 were minimal; and she said in September 2001 that she felt depressed for two months. Det. Kringdon has a psychotic disorder, and while active symptoms are in remission, she continues to experience residual ones such as extreme vulnerability to anxiety."

After receiving this recommendation, the Board of Trustees remanded the matter to the Medical Board for consideration of new evidence. On May 28, 2004 the Medical Board reaffirmed its previous decision to not approve of ADR, but only of ODR.

On November 10, 2004, the Board of Trustees remanded the matter once again

to the Medical Board, this time for it to specifically consider the effect of "9/11" on the petitioner. The Medical Board, indicating it had considered the "possibility that 9/11 had impacted on her . . ." nonetheless reaffirmed its decision. It noted, once again, that petitioner is bi-polar and extensively medicated. It also wrote that:

"[the condition] did not occur due to trauma, but is a condition which is medically dispositioned and is a cyclical severe illness which usually begins in ones teenage years. A person can work with the illness between cycles. Usually the illness becomes prominent due to the individual having to face the daily stresses of adult living."

Among the new evidence before the Medical Board was the report of Dr. Thompson, dated April 13, 2005 which states the follows:

"[Petitioner's] current diagnoses include Bipolar disorder and Post-Traumatic Stress Disorder. She is expected to require long term treatment for her conditions. Prior to 9/11 Ms. Kringdon was able to work without limitations. Since that time she has been unable to work due to her psychiatric condition."

The Board of Trustees unanimously denied petitioner's ADR application, but approved the commissioner's ODR application on her behalf on October 12, 2005.

Petitioner contends that notwithstanding the two remands, and endorsements of the ODR application, the Board of Trustee's decision, to deny petitioner line of duty disability was arbitrary and capricious and without rational basis. Petitioner claims that the Medical Board's recommendation and decision, that the events of 9/11, and her assignment to Ground Zero had absolutely no effect or bearing on her mental health, were also without any rational basis.

Discussion

An application for line of duty or ADR benefits is governed by Administrative Code § 13-252 (Retirement for Accidental Disability). The legislature recently enacted a new statute pertaining to members in public service who worked at the World Trade Center. This so-called "9/11 bill" entitles a member to a certain presumption when the member files an ADR application. Administrative Code § 13-252.1.

In relevant part, Administrative Code § 13-252 (Retirement for Accidental Disability) provides, that if, following a medical examination and investigation, a member is "physically or mentally incapacitated for the performance of city-service, as a natural and proximate cause of such city-service . . ." such member should be retired. It provides further that:

"if such member is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in any such service while a member, and such disability was not the result of willful negligence on the part of such member, and that such member should be retired, the medical board shall so certify to the [Board of Trustees] . . . and such [Board of Trustees] shall retire such member for accident disability forthwith."

Administrative Code § 13-252.1, which governs retirement for accident disability for any member who worked at the World Trade Center site rescue, recovery, or clean up operations provides as follows:

§ 13-252.1. Accidental disability retirement; World Trade Center presumption.

1. (a) Notwithstanding any provisions of this code or of any general, special or local law, charter or rule or regulation to the contrary, any condition or impairment of health caused by a qualifying condition or impairment of

health resulting in disability to a member who participated in World Trade Center rescue, recovery or cleanup operations for a minimum of forty [40] hours shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's own willful negligence, unless the contrary be proved by competent evidence. A member shall be eligible for the presumption provided for under this paragraph notwithstanding the fact that the member did not participate in World Trade Center recovery and cleanup operations for a minimum of forty [40] hours, provided that: (i) the member participated in the rescue, recovery, or cleanup operations at the World Trade Center site between September eleventh, two thousand one [9/11/01] and September twelfth, two thousand one [9/12/01]; (ii) the member sustained a documented physical injury at the World Trade Center site between September eleventh, two thousand one [9/11/01] and September twelfth, two thousand one [9/12/01] that is a qualifying condition or impairment of health resulting in disability to the member that prevented the member from continuing to participate in World Trade Center rescue, recovery or cleanup operations for a minimum of forty [40] hours; and (iii) the documented physical injury that resulted in a disability to the member that prevented the member from continuing to participate in World Trade Center rescue, recovery or cleanup operations for a minimum of forty [40] hours is the qualifying condition or impairment of health which the member seeks to be eligible for the presumption provided for under this paragraph.

(b) In order to be eligible for the presumption provided for under paragraph (a) of this subdivision, a member must have successfully passed a physical examination for entry into public service which failed to disclose evidence of the qualifying condition or impairment of health that formed the basis for the disability.

(c) For purposes of this subdivision, "qualifying condition or impairment of health" shall include:

* * *

(iv) Diseases of the psychological axis, including

post-traumatic stress disorder, anxiety, depression, or any combination of such conditions;

* * *

(vi) New onset diseases resulting from exposure as such diseases occur in the future including cancer, chronic obstructive pulmonary disease, asbestos-related disease, heavy metal poisoning, musculoskeletal disease and chronic psychological disease;

(d) For purposes of this subdivision "participated in World Trade Center rescue, recovery or cleanup operations" shall mean any member who:

(i) participated in the rescue, recovery, or clean up operations at the World Trade Center site between September eleventh, two thousand one [9/11/01] and September twelfth, two thousand two [9/12/02] . . ."

It is petitioner's argument, that she proved she was rendered incapacitated as a result of post traumatic stress disorder ("PTSD"), stemming from her tour of duty at Ground Zero, with or without the presumption inherent in Administrative Code § 13-252.1. She argues further that the "9/11" presumption entitled her to ADR, as a matter of law, because the respondents have failed to prove the contrary by competent evidence.

Petitioner maintains that even after her earlier episode in May 2000, she continued to work as and remained a full time police officer, until the 9/11 attacks. She contends that the Medical Board's assumption, that her decompensation after 9/11 was solely due to her pre-existing mental illness, fails to tease apart the issue of whether her inability to return to work is attributable and causally related to her assignment to Ground Zero. Petrella v. Board of Trustees of the Police Pension Fund, 141 AD2d 361 (1st dept. 1988).

Alternatively, petitioner contends that the Medical Board's recommendation is legally insufficient because it decided *ipse dixit* that she qualified for ODR, but not ADR, without any kind of a thorough evaluation. Mulheren v. Board of Trustees, 307 AD2d 129 (1st dept. 2003). Thus, she contends the decision is inconsistent with the substantial evidence that the Board of Trustees had before it.

An applicant for ADR benefits must prove the existence of a disability and that the disability is causally related to an injury sustained in the line of duty. Matter of Drayson v. Board of Trustees of the Police Pension Fund of the City of New York, Art. 2, 37 AD2d 378 (1st dept. 1971). Although the Board of Trustees ultimately decides whether to grant or deny the application for ADR (and for ODR), the trustees rely on the Medical Board to review the medical evidence and decide the medical issues involved.

"In an article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks rational basis, or is arbitrary or capricious . . ." Borenstein v. New York City Employees' Retirement System, 88 NY2d 756 (1996). Thus, the court's review of the decision to deny ADR is limited to whether the Board of Trustee's decision was supported by "some credible evidence" and was not arbitrary and capricious. Drayson v. Board of Trustees of the Police Pension Fund, *supra* at 380. This standard is set because the court lacks the expertise to "weigh the medical evidence or substitute [its] own judgment for that of the Medical Board." Borenstein v. New York City Employees' Retirement System, *supra* at 761.

Respondents contend that petitioner is not entitled to the presumption afforded by Administrative Code § 13-252.1 because she only recently filed the appropriate form necessary for consideration under this special legislation and, in any event, petitioner

was not on duty for 40 hours prior to the ^{fr} conclusion of her tour of duty on September 14, 2001. Petitioner has indicated she was on duty from September 12, 2001 at 0600 hours until September 13, 2001 at 0400 hours. There is, however, no documentary proof of the exact number of hours she worked. Petitioner admits she only filed the appropriate form in July 2006, but claims that not only was the legislation new, the form she needed to file did not become available well after she filed her ADR application.

Whether petitioner was entitled to this legal presumption was not fully considered by the Board of Trustees, nor can they now, in hindsight, aver that this is what they would have decided, had the issue of the presumption been squarely before the Board. Although fulfillment of a 40 hour tour of duty is "presumptive evidence" of eligibility, the code has certain nuances, listing a number of other considerations regarding its application. There are disputed facts about how many hours petitioner worked, which was not fully developed or decided in the administrative record. There is no indication that the Board adequately considered the impact of the recently enacted 9/11 bill upon petitioner's application, despite their present contention that they did. This alone is basis to remand this matter to the respondents.

Even if petitioner is not entitled to the presumption afforded by Administrative Code § 13-252.1, the Medical Board (and therefore the Trustees) concluded that petitioner's inability to return to work was due to pre-existing mental conditions that worsened on their own, having nothing to do with petitioner's added stress of being assigned to a security detail at the epicenter of such a horrifying scene. Not only was petitioner accustomed to a desk job, she had already been diagnosed with a psychosis.

The Medical Board relied heavily upon Dr. Lamstein's evaluation. She, however,

doubted or at least trivialized petitioner's claims of PTSD because petitioner was not at Ground Zero on September 11th, and her exposure was "minimal."

The director of PEU's observation that neither biology, nor environment "played a primary role in the genesis of [petitioner's] condition" is, again, a conclusion that does not address the unanswered question of whether her assignment played *any* role in her decompensation. It completely ignored that petitioner's PTSD symptoms manifested within several weeks of her being hospitalized on September 14, 2001, and that before that time she was not on prescribed medication.

The record before the Medical Board (and therefore the Board of Trustees) is replete with opinions by the doctors who treated petitioner over a lengthy period of time, each of whom established a direct linking between petitioner's new or exacerbated psychological ailments to her assignment at the World Trade Center. *Compare: Matter of Petrella v. Board of Trustees of the Police Pension Fund, supra; Jefferson v. Kelly, 2006 WL 2971535 (N.Y. Sup.), 2006 N.Y. Slip Op. 26417.*

The reports by Dr. Thompson, and her notations about petitioner's therapy sessions with her, present a striking "before" and "after" picture of her patient. Yet, her observations, diagnoses and evaluations appear to have been marginalized in the applications, if not ignored. PEU's evaluation of existing medical records also concludes the pre-existence of some symptoms which are not supported by the medical records.

An accident that precipitates the development of a latent condition or aggravates a pre-existing condition is a "cause" of disability within the meaning of the administrative code. Matter of Petrella v. Board of Trustees of the Police Pension Fund, supra

(*internal citations omitted*). Petitioner relies upon a number of decisions by judges of coordinate jurisdiction who have remanded applications to the Board of Trustees for its review because the board failed to address the "causation" issues framed by Petrella, Matter of Joseph v. Safir, Index No. 109549/99, Sup. Ct., N.Y. Co., Cahn, J., 10/3/02; Matter of Vargas v. Board of Trustees of the New York City Police Department, Index No. 122425/99, Sup. Ct., N.Y. Co., Friedman, J., 3/18/00; Matter of Kohut v. Kelly et al., Index No. 104800/05, Sup. Ct., N.Y. Co., Feinman, J., 12/19/05. These cases typify the balance this court must strike between being careful to not substitute its own judgment for the Trustees' on the one hand, but being vigilant, on the other hand, that the board has properly considered the issue of "causation."

By assuming that petitioner's disability was due primarily, if not solely, to a pre-existing condition, and failing to consider whether her assignment after 9/11 precipitated the development of a latent condition, or aggravated an existing condition, the Medical Board (and therefore the Board of Trustees) failed to engage in the kind of "causal" analysis required by the administrative code, and relevant legal authority. Moreover, the medical analysis and the Board of Trustees decision appears also to have been based, in part, upon inaccurate information. Thus, the denial of petitioner's application for ADR appears to be arbitrary and capricious.

For all of the problems evident in the administrative record, the court is remanding this matter to the Medical Board for it to consider whether petitioner has a post traumatic stress disorder, and if so, whether this condition was due to, or caused in part by her being assigned to Ground Zero. The Medical Board shall further consider whether an existing, or latent condition petitioner may have had, or later manifested,

was aggravated or precipitated by her assignment. Finally, respondents are to fully address whether petitioner is entitled to the presumption in the recently enacted legislation known as the "9/11 bill" and if not, articulate why.

Conclusion

The petition for an order remanding this matter to the respondents is hereby granted for petitioner's application to be reconsidered in the manner specified herein. The Clerk shall enter judgment in favor of petitioner against the respondents.

Any requested relief not addressed expressly by the court has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
October 30, 2006

SO ORDERED:



HON. JUDITH J. GISCHE, J.S.C.

FILED
NOV 02 2006
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