Matter of Pace v New York City Dept. of Educ.

2008 NY Slip Op 32086(U)

July 21, 2008

Supreme Court, New York County

Docket Number: 0117133/2007

Judge: Kibbie F. Payne

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SCANNED ON 7/24/2008

[* 1]

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

PRESENT: KIBBIE F. PAYNE PART 4
Justice

JANE PACE

INDEX NO. 117133/07

MOTION DATE 03-26-08

- v -

MOTION SEQ. NO. 001

THE NEW YORK CITY DEPARTMENT OF EDUCATION

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion for Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, the petition is decided in accordance with the annexed Judgement/Decision.

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: July 21, 2008

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

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In the Matter of the Application of:
JANE PACE,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

Index. No. 117133/07

-against-

Judgment/Decision

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

THE NEW YORK CITY DEPARTMENT OF EDUCATION

Respondent.

----------X

KIBBIE F. PAYNE, J.

This is a special proceeding pursuant to Articles 75 and 78. Petitioner Jane Pace ("Ms. Pace" or "petitioner"), an employee of respondent The New York City Department of Education (the "DOE" or respondent), now seeks to vacate the September 26, 2007 determination of the medical arbitrator (the "arbitration decision"), which found that her absence from September 1, 2004 through May 18, 2006 was not related to a Line of Duty Injury ("LODI"). In addition, Ms. Pace moves pursuant to vacate, as arbitrary, capricious and an abuse of discretion, the DOE's determination that she repay any disability compensation received during the September 1, 2004 through May 18, 2006 time period. Respondent has answered the petition, cross-moving for dismissal, claiming the petition is (1) time-barred; (2) barred by arbitration and award; and (3) fails to state a cause of action.

The petition sets forth the following: On January 6, 2004, Ms. Pace, a teacher at Middle School 172, tripped and fell in the classroom while preparing a teaching assignment, injuring her knees and right side. She remained at school for the rest of the day, but has not returned to classroom teaching since the accident. Ms. Pace saw her own chiropractor and several of her own doctors in January and February 2004 and, on March 5, 2004, Ms. Pace had a medical evaluation at the DOE's Medical Leave Bureau ("MLB"). At that time, she was found unfit to return to work as a result of the January 6, 2004 fall (the "Fall"). While Ms. Pace continued to see her own physicians, the petition provides that, on June 21, 2004 she returned to the MLB, was examined by Dr. Thompson, and again was found unfit to return to work. Dr. Thompson's report or determination was not included with the petition. At that appointment, Ms. Pace was instructed to return to the MLB for a follow-up appointment on July 2, 2004. The petition does not indicate that Ms. Pace attended such follow-up appointment-or any other appointment-with the MLB until May 6, 2006.

In April 2005, Ms. Pace filed for Social Security Disability benefits, which were granted in an unrelated decision dated June 8, 2006 (the "Social Security decision"). In that decision the Administrative Law Judge found that Ms. Pace had been disabled, "within the framework of the Medical-Vocational Guidelines . . .,

since January 6, 2004." However, the Social Security decision did not address or evaluate whether the June 6, 2004 fall was the cause of Ms. Pace's disability.

Although Ms. Pace continued to see her private doctors, she did not report for another MLB appointment until May 6, 2006 and in the interim she had fallen several more times-on April 21, 2005, August 11, 2005 and on another occasion, the date of which remains unspecified. Thereafter, on July 1, 2006, Ms. Pace received a letter that her claim for a LODI was denied for the period from September 1, 2004 to May 18, 2006. She received the LODI denial letter for a second time on July 5, 2006. The second letter informed her that her options were either to take a leave of absence without pay or to submit a letter of resignation or retirement.

On August 31, 2006, after being told that she would no longer be paid disability compensation, Ms. Pace reported for work at Middle School 172. At lunchtime, she was instructed to leave for the day but to report to the MLB on September 7, 2006; she then made an appointment with the MLB for September 15, 2006. On September 15, 2006 she reported to the MLB for a psychiatric examination and then returned to the Bureau on September 21, 2006 for a physical examination.

Pursuant to the contract between the United Federation of Teachers ("UFT") and the DOE, because the LODI determination

resulted in a denial of leave with pay for more than one month, Ms. Pace had the right to demand medical arbitration of her LODI claim. Ms. Pace claims that she submitted the paperwork for medical arbitration on September 11, 2006, but has not submitted copies of this paperwork. In addition, Article 23 of the UFT collective bargaining agreement provides a four-step grievance and arbitration process for resolving disputes concerning the interpretation and application of the contract. Petitioner states that she attended a Step Two grievance hearing, which was denied and after that hearing she received a bill from the DOE for $135,392.32, seeking to recoup the salary Ms. Pace received from September 1, 2004 through May 18, 2006.

On April 17, 2007, Ms. Pace attended her Step Three grievance hearing[1] where the parties stipulated that if Ms. Pace returned to work, her payroll and medical benefits would be restored. On April 23, 2007, Ms. Pace reported to work at the Regional Operations Center and two days later she reported to the MLB for a medical examination. At that time she was scheduled to return for a further examination the following month. On May 25, 2007, the DOE's orthopedic specialist examined Ms. Pace and found her unfit to return to work.

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[1] The court notes that although Ms. Pace states that she invoked steps two and three of the grievance process, the petition is silent as to the contents of the grievance and the papers filed in relation to that grievance are not attached as exhibits to the petition.

[* 6]

On September 5, 2007, Ms. Pace submitted her medical reports and findings to the medical arbitrator as the final appeal to the DOE's decision to deny her LODI pay benefits for September 1, 2004 through the present.

The impartial medical arbitrator, Dr. John R. Denton, issued an award, dated September 26, 2007 addressing the following issues:

> 1. Whether the Medical Bureau finding that [petitioner's] absence from 09/01/04 to the present was not the direct result of the injuries received by her on 01/06/04 was a medically reasonable one?
>
> 2. If this was not a medically reasonable finding, then for how long after 09/01/04 should her absence be considered a direct result of the 01/06/04 school incident?
>
> (Petition, Ex. A, p.1)

Dr. Denton reviewed the medical reports that Ms. Pace submitted, noting that an MRI performed six weeks after Ms. Pace's January 6, 2004 fall indicated a preexisting degenerative process in her lumbar spine. In addition, Dr. Denton performed a physical examination of Ms. Pace and spoke with two of her private physicians. Based on this data, Dr. Denton found that:

> It is medically reasonable to expect that [Ms. Pace] would have been adequately recovered from her lumbar spine sprain to have returned to school work by September 2004, which is a time period of eight months. She has no objective neurological findings at the present time. Some of the findings on my examination are subjective and not anatomic in nature, ... There is no evidence of atrophy of her right leg musculature.

(Pet., Ex. A, pp. 3-4)

And, based on the above, he opined that: "*[t]he Medical Bureau finding that Ms. Pace's absence from 09/01/04 to the present was not the direct result of the injuries received by her on 01/06/04 was a medically reasonable one.*" (Pet. Ex. A, p. 3) (emphasis in the original)

In support of that branch of the petition seeking to vacate the arbitration award, Ms. Pace argues that the medical arbitrator's findings are not based on any relevant facts or substantial evidence and are totally irrational. In support of the portion of the petition seeking to annul the DOE's LODI decision, Ms. Pace argues that the petition is not time-barred because she timely sought review of the DOE's decision after she exhausted all of her administrative remedies and that the DOE's decision, itself, is arbitrary and capricious and an abuse of discretion. In addition, Ms. Pace contends that the DOE should be equitably estopped from recouping more than $135,000 it paid to her between September 1, 2004 and May 18, 2006, while she was on LODI leave.

In opposition to the petition and in support of its cross-motion, the DOE argues that Article 78 relief is time-barred because the petition was not brought within four months of the July 1, 2006 decision determining that Ms. Pace was not eligible

for LODI benefits after September 1, 2004. The DOE also argues that the medical arbitrator's determination that Ms. Pace's inability to return to work was not directly attributable to her the Fall, was final and binding on the issue of LODI benefits and, the doctrine of *res judicata* bars the subsequent determination of that issue in this proceeding. Alternatively, the DOE contends that its LODI decision was neither arbitrary nor capricious and that Ms. Pace has failed to identify any of the grounds enumerated in CPLR 7511(b) as a basis for vacating the arbitration award.

It is well settled that the statute of limitations in an Article 78 proceeding is four months from when the agency's determination becomes final and binding (CPLR 217; *Best Payphones, Inc. v. Dep't of Info. Tech. & Telecomms.*, 5 N.Y.3d 30, 34 [2005]; *Solnick v. Whalen*, 49 N.Y.2d 224, 230-233 [1980]; *Jackson v. Triborough Bridge & Tunnel Auth.*, 155 Misc.2d 715, 719 [Sup. Ct. N.Y. County 1992]). In this case, the DOE's determination became final and binding when the medical arbitrator communicated his decision to Ms. Pace.

Article 21 of the Collective Bargaining Agreement, Section J, details the procedure for expeditious handling of "injury in the line of duty" claims. Section J(4)(c) states that in situations where the findings of the MLB result in, *inter alia*, a denial of leave with or without pay for more than one month, the

teacher may request an independent evaluation of the finding of the MLB by submitting the request in writing to the Division of Human Resources within ten school days of receipt of notice. That section goes on to state:

> The medical arbitrator shall examine the teacher and consult with the teacher's physician and the Board's physician. The arbitrator's authority shall be limited to determining the medical aspects of the teacher's claim. The arbitrator's decision shall be rendered within 10 days after he/she has completed the evaluation of the teacher, **and if made within his/her authority under this agreement shall be accepted as final and binding by the Board and the teacher.** (Emphasis supplied) (Cross Motion, Ex. B).

In *Grant v. Community School District 29,* 109 A.D.2d 797 (2d Dept 1985), petitioner challenged the DOE's denial of LODI disability payments. In that case, the Appellate Division, Second Department determined that the four-month statute of limitations began to run on the date that the medical arbitrator's decision was communicated to the petitioner, not on the date that the community school district's medical director issued his decision.

In this case, as in *Grant,* the collective bargaining agreement gave petitioner the right to appeal the DOE's LODI determination to a medical arbitrator and that agreement also states that the arbitrator's decision shall be "final and binding". Accordingly, the decision regarding Ms. Pace's LODI status became final and binding when the medical arbitrator's

decision was communicated to Ms. Pace on or about September 26, 2007, less than four months before this action was commenced on December 27, 2007. Thus, the portion of the petition seeking Article 78 relief is timely.

The DOE's argument that the request for relief under Article 75 of the CPLR is barred by the doctrine of *res judicata* is without merit. It is well settled that "the doctrine of res judicata is applicable to arbitration awards and may serve to bar the subsequent litigation" of the same issue or claim (*Ranni v. Ross*, 58 N.Y.2d 715, 717 [1982]; *American Ins. Co. v. Messenger*, 43 N.Y.2d 184, 189 [1977]). The issue that the medical arbitrator addressed in his award was whether the Medical Board's finding regarding Ms. Pace was medically reasonable.

In this petition, Ms. Pace is not seeking to relitigate the issue of whether the Medical Board's finding was medically reasonable. Rather, Ms. Pace is attempting to vacate the arbitrator's decision under CPLR Article 7511(b)(1), which provides that, where a party participated in an arbitration, it may apply to have the award vacated where its rights were prejudiced by: "(i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) [the fact that] an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and

definite award upon the subject matter submitted was not made[.]" These are the exclusive grounds for vacating an arbitration award (*Blamowski v. Munson Trans.*, 91 N.Y.2d 190, 194 [1997]; *Austin v. Board of Education of the City School Dist. Of the City of N.Y.*, 280 A.D.2d 365 [1st Dept. 2001]).

In the Article 75 challenge, this court is not reviewing the arbitrator's substantive findings regarding Ms. Pace's medical condition. Rather, it is determining whether the award must be vacated because Ms. Pace's rights were prejudiced because the arbitrator's decision was tainted by a ground articulated in CPLR 7511(b). As the court of Appeals stated in *Silverman v. Benmor Coats*, 61 N.Y.2d 299, 307 (1984):

> CPLR article 75 evidences in numerous ways the intent of the Legislature that . . . the authority of the arbitrator is plenary. Thus CPLR 7501 mandates that the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

Accordingly, *res judicata* is not a bar to Article 75 review of the medical arbitrator's decision.

However, the DOE correctly argues that Ms. Pace has failed to demonstrate that the arbitration award violates a ground enumerated in CPLR 7511(b). Here, Ms. Pace argues that the arbitrator's decision was not based on the credible evidence and was totally irrational. However, an arbitration award will not be vacated based on the arbitrator's factual or legal

determination (*See Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146, 155 [1995]). Further, the Court of Appeals has held that:

> [T]he courts will not assume the role of overseers to mold the [arbitration] award to conform to their sense of justice, Thus, an arbitrator's award will not be vacated for errors of law and fact committed by the arbitrator, and even where the arbitrator states an intention to apply the law, and then misapplies it, the award will not be set aside.
>
> (*Sprinzen v. Nomberg*, 46 N.Y.2d 623, 629 [1979]) (internal quotations and citations omitted).

Moreover, to vacate an award on the ground that it is totally irrational requires a showing that there was no proof whatsoever to justify the award (*Peckerman v. D & D Assoc.*, 165 A.D.2d 289, 296 [1st Dept 1991]). Manifest disregard of the facts is not a legally permissible ground for vacatur of an arbitration award (*see, e.g., Wein & Malkin, LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479 [2006]). An arbitration award may not be vacated if there is any plausible basis for it (*Azrielant v. Azrielant*, 301 A.D.2d 269, 275 [1st Dept 2002]). Thus, the party seeking to vacate the award must shoulder a very heavy burden (*see Lehman Bros., Inc. v. Cox*, 10 N.Y.3d 743 [2008]).

Clearly, Ms. Pace's argument that the medical arbitrator ignored the facts and the opinions of her personal physicians is unsupported by the record. The arbitration award states, and Ms. Pace admits, that the medical arbitrator interviewed and

physically examined her and reviewed her medical records. Indeed, the medical arbitrator detailed the reports he reviewed and the physicians he spoke with before he made his decision regarding Ms. Pace's LODI claim. In addition, he fully reported the results of his physical exam of Ms. Pace. Moreover, the medical arbitrator noted that Ms. Pace had preexisting degenerative disc disease and that Ms. Pace had sustained two non-line of duty falls in Florida in 2005, both of which exacerbated her symptoms. He opined that it was medically reasonable to expect that Ms. Pace would have recovered from a lumbar sprain in eight months and would have been able to return to work by September 2004.

Thus, the medical arbitrator's decision was supported by evidence in the record and Ms. Pace has failed to demonstrate that the award was completely irrational or that it was the product of partiality, misconduct or abuse of power.

In reviewing agency decision-making, it is well settled that "a court may not substitute its judgment for that of the board or body" responsible for making the determination (*Arrocha v. Board of Ed.*, 93 N.Y.2d 361, 363 [1999]). Section 7803 of the CPLR provides in pertinent part:

> The only questions that may be raised in a proceeding under this article are:
>
> * * *
>
> 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and

> capricious or an abuse of discretion, including abuse of discretion as to the method or mode of penalty or discipline imposed;

Judicial review of an agency's action is limited to whether a determination violated lawful procedure, was affected by an error of law or was arbitrary and capricious *(e.g., Reynolds v. City of N.Y.*, 294 A.D.2d 162, 163 [1st Dept. 2002]). Simply put, the function of the court is to find whether the determination has a rational basis or is taken without regard to the facts (*see Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

Under the arbitrary and capricious test a court will review the rationality or reasonableness of the agency's determination. The reviewing court does not examine the facts de novo and will overturn the administrative action only when there is no rational or reasonable basis for that action *(Velasquez v. Perales*, 151 A.D.2d 766, 767 [2d Dep't 1989]). A rational or reasonable basis for an agency determination exists if there is evidence in the record to support its conclusion (*Sewell v. City of New York*, 182 A.D. 2d 469, 473 [1st Dept 1991], *app. denied*, 80 N.Y.2d 756 [1992]).

Under these standards, it cannot be said that the DOE's actions were arbitrary or capricious as there is sufficient evidence in the record to support the DOE's conclusion that Ms. Pace's absence after September 1, 2004 was not the result of her January 6, 2004 LODI. The medical arbitrator determined that,

"[t]he Medical Bureau finding that Ms. Pace's absence from 09/01/04 to the present was not the direct result of the injuries received by her on 01/06/04 was a medically reasonable one." Once the medical arbitrator makes his decision, the collective bargaining agreement requires that the arbitrators decision, "shall be accepted as final and binding by the Board and the teacher" (UFT Contract, Article 21[J][3]).

Ms. Pace's reliance on the Social Security Administration's finding of disability is misplaced. The Social Security Administration found that Ms. Pace was unable to engage in any substantial gainful activity because of back pain, exacerbated by physical exertion and because of severe emotional problems. Although the Social Security decision found that Ms. Pace had been disabled since January 6, 2004, no determination was made as to the narrowly defined issue of whether Ms. Pace's absence from work after September 1, 2004 was the result of the LODI. Thus, the Social Security decision does not contradict the DOE's denial of LODI benefits after September 1, 2004.

Finally, petitioner challenges the DOE's attempt to recoup more than $135,000, arguing that it is "an abuse of discretion as to the measure or mode of penalty of discipline imposed." While labeled an "abuse of discretion" claim, petitioner also seems to be arguing that equitable estoppel should serve as a bar to the DOE's recovery of these monies. However, the case to which

petitioner cite in support of her estoppel argument are inapposite on the facts.[2]

In determining whether an agency has committed an abuse of discretion, the court's role in reviewing the penalty imposed by an administrative agency is extremely limited (*17 Cameron St. Restaurant Corp. v. New York State Liquor Authority*, 48 N.Y.2d 509, 512 [1979]). The well-settled rule is that "the [agency's] award may be set aside if the excessiveness is so great as to shock the sense of justice of the court" (*Stolz v. Board of Regents*, 4 A.D.2d 361, 364 [3d Dep't 1957]).

Here, petitioner has not introduced evidence sufficient to convince the court that the DOE's award recouping all the money paid to Ms. Pace while she was neither working nor out-of-work under any LODI was excessive enough to shock the court's sense of justice. Initially, petitioner claims that Dr. Thompson, of the MLB, determined that she was unfit to return to work due to a

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[2] See *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 309 (1917) (denying petition for a writ of mandamus compelling Secretary of Interior to restore name of deceased to rolls under Choctaw-Chickasaw Agreement); *Triple Cities Constr. Co. v. Maryland Casualty Co.*, 4 N.Y.2d 443 (1958) (in action to recover under a construction lien, defendant lulled and misled plaintiff into sense of complacency by conducting settlement negotiations to "induce [plaintiff] to continue negotiations until after the expiration of the time within which an action could be maintained); *Romano v. Metropolitan Life Ins. Co.*, 271 N.Y. 288 (1936) (insurance policy contained two-year limitation on defendant-insurance company's ability to contest policy's validity and defendant was induced plaintiff's request for extension of time to refrain from beginning its contest of policy's validity within time limited by the policy).

LODI. Ms. Pace neither alleges, nor does the submitted evidence demonstrate, that Dr. Thompson found Ms. Pace unfit to return to work on a permanent basis. Even when taking Ms. Pace's statements as true, Dr. Thompson merely found her unfit to return to work at that point in time-June 21, 2004-and does not speak to Ms. Pace's continued absence from work for the time period during which the DOE has found her absence was not due to a LODI, *viz.*, September 1, 2004 through May 18, 2006.

The crux of Ms. Pace's argument is that in continuing to collect her salary while she was not working, she relied on the MLB's determination that she was unfit to return to work due to a LODI. However, such reliance is unreasonable in light of the fact that Ms. Pace admits that after her June 21 appointment, the MLB instructed her to return for another appointment on July 2, 2004. Since her own evidence suggests that the next time she actually did appear for a MLB appointment was in May of 2006-nearly two years after the appointment at which she was originally instructed to appear-it cannot be said that the DOE somehow lulled Ms. Pace into a sense of complacency about whether she was entitled to remain on paid leave. Ms. Pace's own actions, in failing to go to the MLB for follow-up appointments, resulted in length of time during which she continued to collect a salary despite being absent due to a non-LODI (as was determined by the DOE and affirmed in the medical arbitration). Indeed, while the petition alleges that Ms. Pace was scheduled to

return to the MLB for a follow-up visit on July 2, 2004 - a visit subsequently rescheduled to September 24-she neither claims to have appeared at the September 24, 2004 exam nor does she offer any information as to *any* visit to the MLB between her June 24, 2004 visit and her May 6, 2006 appointment with the MLB.

When money is paid under mistake of material fact, it may generally be recovered, "unless the party resisting repayment can demonstrate that its position has so changed by reason of the payment as to make repayment inequitable" (*Kirby McInerney & Squire, LLP v. Hall Charne Burce & Olson, S.C.*, 15 A.D.3d 233 [1st Dep't 2005] *citing Mayer v. New York*, 63 N.Y. 455 [1875]). Further, the burden of proving that circumstances would except her from the general rule allowing recovery lie with the party resisting the repayment (*Mayer* at 457).

Ms. Pace has failed to produce any of the documents she filed in support of her Step 2 and Step 3 grievance hearings or explain the issues that were determined at those hearings. Nor did she produce the stipulation that apparently resolved the Step 3 hearing. The documents concerning the Step 2 and Step 3 grievances seem particularly important as they appear to relate to the issues regarding Ms. Pace's pay. Thus, the DOE's determination regarding Ms. Pace's repayment of monies received from September 1, 2004 through May 18, 2006 will not be disturbed.

Accordingly, it is

ORDERED that the branch of the petition that seeks Article 75 relief vacating the decision of the medical arbitrator is denied; and it is further

ORDERED that the branch of the petition that seeks Article 78 relief annulling the DOE's decision to deny Ms. Pace LODI benefits after September 1, 2004 is denied; and it is further

ORDERED that the branch of the petition that seeks to estop the DOE from recouping in excess of $135,000 in disability compensation is denied; and it is further

ORDERED that the cross motion is granted to the extent that the branch of the cross motion seeking to dismiss Ms. Pace's request for Article 75 relief annulling the medical arbitrator's decision is granted; and it is further

ORDERED that the portion of the cross motion that seeks to dismiss the request for Article 78 relief is granted to the extent of dismissing that portion of the claim that seeks to set aside the LODI decision as arbitrary and capricious.

The foregoing constitutes the decision and judgment of the court and the Clerk is directed to enter judgment accordingly.

Dated: July 21, 2008

ENTER:

KIBBIE F. PAYNE
J.S.C.