New York City Tax Appeals Tribunal

In the Matter of	:	
	:	ORDER
SAMUEL D. FRIEDMAN	:	
	:	TAT (E) 03-21 (UB)
Petitioner.	:	TAT (E) 03-22 (UB)
	:	TAT (E) 03-23 (UB)

Upon the Memorandum of Law in Opposition to the Application of the Rule of Necessity ("Memorandum in Opposition") submitted on behalf of Samuel D. Friedman ("Petitioner") dated November 7, 2006; the Brief of the Commissioner of Finance of the City of New York ("Respondent") on the Rule of Necessity, dated November 8, 2006; the Reply Brief of Petitioner on the Rule of Necessity, dated November 20, 2006; and the Reply Brief of Respondent on the Rule of Necessity, dated November 21, 2006, the following order is issued.

The Determination of an Administrative Law Judge ("ALJ") dated June 8, 2006 (the "ALJ Determination") sustained notices of disallowance issued by the New York City Department of Finance (the "Department") denying refunds of New York City Unincorporated Business Tax ("UBT") for tax years 1992 and 1993 and notices of determination issued by the Department asserting UBT deficiencies for tax years 1994 through 2000. Petitioner filed an Exception to the ALJ Determination. Petitioner is represented by Joseph Lipari, Esq. and Ellen S. Brody, Esq. of Roberts and Holland, LLP and Respondent is represented by George P. Lynch, Esq. and Steven Laduzinski, Esq., Assistant Corporation Counsels, New York City Law Department.

While a partner at Roberts and Holland, LLP prior to his appointment to the New York City Tax Appeals Tribunal (the "Tribunal"), Commissioner Glenn Newman was involved in the representation of Petitioner in this matter. On the basis of that prior representation, Commissioner Newman has recused himself from participating in any review of the ALJ Determination.

Prior to his appointment to the Tribunal, Commissioner Robert Firestone was a Senior Counsel/supervisor at the New York City Law Department where he was involved in the representation of Respondent in this matter. On the basis of that prior representation, Commissioner Firestone also has recused himself from participating in any review of the ALJ Determination.[1]

Section 169.d of the New York City Charter (the "Charter") provides that upon the request of any party, the Tribunal is required to review en banc a determination of an administrative law judge.[2] That subsection further provides that to review a matter en banc, the Tribunal must have a majority present and "not less than two votes shall be necessary to take any action." The recusal of Commissioners Newman and Firestone would prevent the Tribunal from being able to fulfill its obligation to review the ALJ Determination in this matter. The Tribunal sent a letter dated October 11, 2006 to the Parties advising them that both Commissioner Newman and Commissioner Firestone would recuse themselves and inviting the Parties to submit briefs on the application of the doctrine known as the Rule of Necessity in these circumstances.

[1] On October 5, 2006, Petitioner moved to recuse Commissioner Firestone from participating in the review of Petitioner's Exception to the ALJ Determination. On November 8, 2006, Respondent moved to recuse Commissioner Newman from participating as well. The Rules of Practice and Procedure of the Tribunal provide at Title 20 Rules of the City of New York § 1-05(f)(2)(vi) that a recusal motion is to be decided without the participation of the Commissioner whose recusal is sought. It is not necessary to decide the motions as Commissioners Newman and Firestone have already recused themselves. Thus, the motions to recuse are moot.

[2] We note that the Parties have already had a full evidentiary hearing on the merits of this matter. Ours is an appellate review of the Record made at that hearing. The requirement that the Tribunal review an administrative law judge determination en banc appears to be mandatory and not subject to waiver by the parties. *See infra* pp. 11-12.

For the reasons set forth below, we conclude that the Tribunal cannot review the ALJ Determination in this matter and Petitioner's Exception is placed on hold sine die until such time as a court of competent jurisdiction issues an order compelling us to proceed or providing for an alternative solution, or until such time as circumstances otherwise permit the Tribunal to proceed.

The Tribunal is well aware that the "participation of an independent, unbiased adjudicator in the resolution of disputes is an essential element of due process of law, guaranteed by the Federal and State Constitutions." General Motors Corp.-Delco Products Division v. Rosa, 82 N.Y.2d 183, 188 (1993). A Commissioner should disqualify himself or herself if the Commissioner has any questions about the propriety of participating in the review of a particular case. However, there exists a Rule of Necessity that provides "a narrow exception" to the disqualification requirements. The Rule of Necessity has been described as

> . . . an ancient edict which . . . operates on the principle that where disqualification would result in an absence of judicial machinery capable of dealing with a matter, and thereby negate the only tribunal with power to act in the premises, disqualification must yield to necessity. The Rule is a doctrine firmly rooted in the common law, and no express codification of the Rule of Necessity is required before the Rule can be lawfully invoked. [Citations omitted.][3]

Canon 9 of the Lawyer's Code of Professional Responsibility of the New York State Bar Association (the "CPR") states that "A lawyer should avoid even the appearance of professional impropriety." However, Disciplinary Rule 9-101(B)(3)(a) under that Canon further provides that:

[3] RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION, Recusal and Disqualification of Judges, 576-77, Banks and Jordan Law Publishing Company (2d ed. 2007).

> A lawyer serving as a public officer or employee shall not . . . [p]articipate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment, *unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter*. . . .[Emphasis added.]

This provision would appear to indicate that the Rule of Necessity constitutes an exception to the otherwise applicable disqualification rule.[4] In addition, Canon 4 of the CPR further provides that: "A lawyer should preserve the confidences and secrets of a client." Ethical Consideration 4-6 under that Canon provides that this obligation continues after the lawyer's employment.

Canon 3(E)(1)(b)(i) of the New York Code of Judicial Conduct (the "CJC") also contains language requiring a judge to recuse himself or herself if the judge knows that he or she served as a lawyer in the matter. A party cannot waive the disqualification of a judge under these circumstances. Canon 3(F). Section 3.23 of the Commentary to Canon 3(E)(1) explains that the Rule of Necessity may override the rule of disqualification where the case otherwise could not be heard:

> By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as possible.

[4] There does not appear to be any comparable express disqualification rule in the CPR applicable to former government lawyers such as Commissioner Firestone.

The CJC does not apply to administrative law judges unless the employing agency adopts it. CJC section 100.6(C). The Tribunal has not adopted the CJC. However, the City of New York (the "City") recently adopted Rules of Conduct for Administrative Law Judges and Hearing Officers of the City of New York (the "ALJ Rules"), which rules were adapted from the CJC. Title 48 of the Rules of the City of New York, Appendix A, effective February 13, 2007. Rule sections 103(D)(1)(b) and (c) correspond to Canon 3(E)(1)(b).[5]

The Court of Appeals stated in General Motors Corp., 82 N.Y.2d at 188, that:

> [W]here all members of the adjudicative body are disqualified and no other body exists to which the appeal might be referred for disposition, the Rule of Necessity ensures that neither the parties nor the Legislature will be left without the remedy provided by law. [Citations omitted.]

Thus, the Rule of Necessity requires "a biased adjudicator to decide a case if and only if the dispute cannot otherwise be heard." *Id.*

The United States Supreme Court has unequivocally endorsed the Rule of Necessity. U.S. v. Will, 449 U.S. 200 (1980). The Court noted the origin of the rule in 15th century England where "the Chancellor of Oxford could act as judge of a case in which he was a party when there was no provision for appointment of another judge. [Citations omitted.]" *Id.* at 213. The Court concluded that the Rule of Necessity required the Justices to decide a matter although all of them were parties in the case, as were all other federal judges. The Court reviewed its own history of invoking the Rule of Necessity and concluded that:

[5] Unlike the CJC, the ALJ Rules permit a party to waive the disqualification under these circumstances, but only for administrative law judges who are disqualified because of activities engaged in while in government service.

> The Rule of Necessity has been consistently applied in this country in both state and federal courts. . . . [Citations omitted.] The concept of the absolute duty of judges to hear and decide cases within their jurisdiction . . . is reflected in decisions of this Court. . . .[Citations omitted].

Id. at 214.

Courts throughout the country have repeatedly recognized the principle that the Rule of Necessity requires an otherwise disqualified adjudicator to hear a case where there is no other alternative. *See e.g.* General Motors Corp., 82 N.Y.2d 183; P.L. 2001 v. State, 895 A.2d 1128 (N.J. 2006); Stilp v. Commonwealth, 905 A.2d 918 (Pa. 2006); Scheehle v. Justices of the Supreme Court, 120 P.3d 1092 (Ariz. 2005); Jorgensen v. Blagojevich, 811 N.E.2d 652 (Ill. 2004); Commonwealth v. Loretta, 438 N.E.2d 56 (Mass. 1982); Dacey v. Connecticut Bar Ass'n., 368 A.2d 125 (Conn. 1976); Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Ctr., 73 Cal. Rptr.2d 695 (Cal. App., 2d Dist. 1998); and Barker v. Sec'y of State's Office, 752 S.W.2d 437 (Mo. Ct. App., W. Dist. 1988).

In Barker, 752 S.W.2d 437, which involved a worker's compensation claim, the Missouri Court of Appeals addressed a situation closely paralleling the one confronting the Tribunal. The employee in question applied to the Missouri State Labor and Industrial Relations Commission (the "Commission") for a review of an adverse decision of an administrative law judge. Like the Tribunal, that Commission was a three-member body two members of which constituted a quorum and a decision of the Commission required the votes of a majority of the members. During the interval between the initial hearing and the request for review, the assistant attorney general who had represented the employer and the insurance company before the administrative law judge was appointed to the Commission. While no motion to disqualify her was made, she voluntarily refrained from participating in the matter. However, a deadlock arose between the two remaining members of the Commission and the

third member then intervened to break the tie. The court concluded that:

> There is no other mechanism for review available, thus when a deadlock occurs between two members of the Commission, the rule of necessity applies to allow the third member to participate and break the tie even in face of this member's bias.

752 S.W.2d at 441.

While there has been no assertion by either Party that there is evidence of actual bias on the part of either Commissioner Newman or Firestone, we note that where the Rule of Necessity is found to apply, *i.e.*, where there is no other forum available to decide the matter and no provision for delegating the authority to hear the matter to another adjudicator, the rule has been applied even where there was evidence of actual bias. In Sharkey v. Thurston, 268 N.Y. 123 (1935), the Court of Appeals concluded that the Rule of Necessity required the Mayor of Lockport, New York, to conduct a hearing on the removal of members of the Board of Police Commissioners despite the Mayor's previous statements indicating that he had prejudged the matter.[6] In Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52 (Mo. Ct. App. E.Dist. 1990), the court applied the rule in a case where three councilmen on a Board of Impeachment had voted to impeach the mayor, who had publicly and specifically criticized each of them. While the court concluded that the three councilmen most likely were biased, the court stated that:

[6] *But see* Clisham v. Bd. of Police Commissioners, 613 A.2d 254 (Conn. 1992) (action by board in removing police commissioner reversed where strong evidence of prejudgment existed notwithstanding the absence of a quorum of non disqualified members and of another forum). The court cited no authority for its decision not to apply the rule under these circumstances but noted that it did not have to "determine what alternatives the board might have pursued." *Id.* at 265. The court was able to avoid the question because the membership of the board in question had changed by the time of the court's decision remanding the matter to the same board for a rehearing. The court presumed "that on remand the board will be so constituted as to conduct an impartial hearing." *Id*. We note that this decision does not apply in New York.

> Due process considerations do not require a biased administrative agency to forego making a decision which no other entity is authorized to make. Under such circumstances, the so-called Rule of Necessity permits an adjudicative body to proceed in spite of its possible bias or self-interest. [Citation omitted.]

796 S.W. 2d at 60.

The Missouri courts in the Barker and Fitzgerald cases concluded that an appropriate remedy where the Rule of Necessity required a possibly biased adjudicator to hear a case was to modify its standard of review of the determination of the administrative body:

> We do not substitute our judgment for that of the administrative agency, which, though biased, retains expertise for which we should show some respect. Our standard of review should therefore be deferential, but it should also compensate for the possibility that bias may have tainted the agency's exercise of its expertise. Accordingly, the decision of a biased administrative agency acting under the Rule of Necessity should be upheld if the evidence presented at the administrative hearing would have entitled an objective decisionmaker to reach the same conclusion.

Fitzgerald, 796 S.W.2d at 61; *see also* Barker, 752 S.W.2d at 441.

The New York State Tax Appeals Tribunal (the "State Tribunal") has concluded that the Rule of Necessity would apply to permit its commissioners to hear a matter where they would otherwise have been disqualified. In Matter of Manhattan & Queens Fuel Corp., New York State Tax Appeals Tribunal (May 22, 1997), one commissioner had recused himself because he represented the New York State Department of Taxation and Finance ("DTF") in the same matter prior to his appointment to the State Tribunal. His recusal was not at issue. The taxpayer moved to recuse one of the two remaining commissioners on the grounds that he had represented DTF in another matter involving the same taxpayer. The State

Tribunal concluded that recusal was not required but, in any event, the Rule of Necessity would have permitted that commissioner to participate because, otherwise, the State Tribunal would be unable to act leaving the parties without the remedy provided by law.[7] *See also* Matter of Janus Petroleum, Inc., New York State Tax Appeals Tribunal (October 2, 1997). The Tribunal has previously invoked the Rule of Necessity to permit a Commissioner to participate in a matter where the Commissioner's participation was required to constitute a quorum. Matter of Gruber, TAT(E) 03-07 (RP) *et al.* (September 12, 2006); Matter of Rosenblum, TAT(E) 01-31 (RP) (September 12, 2006). However, those cases did not involve a Commissioner who was involved in the representation of one of the parties in the same matter prior to the Commissioner's appointment to the Tribunal.

The Rule of Necessity is strictly construed and thus is inapplicable where the authority to review a case can be delegated to another person or another body, or a quorum of non disqualified members is available to conduct the review. With exceptions not relevant here, the Tribunal is the exclusive forum for the resolution of disputes between taxpayers and the Department involving non-property taxes administered by the City. With respect to the UBT, the Administrative Code of the City of New York (the "Code") provides at section 11-521(c) that:

> No assessment of a deficiency in tax . . . shall be made, begun or prosecuted . . . until a notice of deficiency has been mailed to the taxpayer, nor until the expiration of the time for filing a petition with the tax appeals tribunal contesting such notice, nor, if a petition with respect to the taxable year has been both served

[7] It is not clear whether the Rule of Necessity would require the participation of only the minimum number of disqualified Commissioners necessary to constitute a quorum, *i.e.,* one of the two disqualified Commissioners. *See* Fitzgerald, 796 S.W.2d 52. We note that as Commissioners Newman and Firestone are disqualified based on their prior involvement in the representation of one of the Parties, choosing just one of them to participate would create an appearance of bias as each was involved in the representation of a different Party. Moreover, even if the Rule of Necessity would permit only one of the disqualified Commissioners to participate initially, in the event of a deadlock, the Rule of Necessity might have to be invoked again to permit the other disqualified Commissioner to break the tie. *See* Barker,752 S.W.2d 437.

> upon the commissioner of finance and filed with the tax appeals tribunal, until the decision of the tax appeals tribunal has become final.[8]

Furthermore, Code section 11-530(b) provides, with an exception not relevant here, that: "The review of a decision of the tax appeals tribunal . . . shall be the exclusive remedy available to any taxpayer for the judicial determination of the liability of the taxpayer for the taxes imposed by this chapter." *See also* Bankers Trust Corp. v. N.Y.C. Dept. of Finance, 1 N.Y.3d 315 (2003).

Petitioner has suggested that the State Tribunal be asked to "designate" one or more of its commissioners to serve as Commissioners of the Tribunal to hear this matter.[9] It is not entirely clear whether Petitioner is suggesting that the Tribunal or the Mayor make this request. In either case, we find no legal basis for such a solution. Charter section 168.b provides that the Commissioners of the Tribunal are to be appointed by the Mayor. The Charter makes no provision for the Commissioners to delegate their authority to hear a particular matter. Any unauthorized attempt by a Commissioner to delegate his or her function would appear to infringe on the Mayor's appointment power, which can only be limited by New York State law or by referendum.[10] Moreover, we find no authority in the Charter permitting the Mayor to delegate the authority of the Commissioners to any other person once the Mayor has appointed the Commissioners.

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[8] *See also* Code §§11-672.2, 11-708.

[9] Petitioner's Memorandum in Opposition, 7. While both Parties suggested alternatives for resolving the issue, there was no alternative on which the Parties could agree. Petitioner also has suggested that the Charter be amended to increase the number of Commissioners as is authorized by Charter section 168.b. Petitioner's Memorandum in Opposition, 6-7. Clearly, amending the Charter is outside the authority of the Tribunal. However, we note that increasing the number of Commissioners raises more questions than it might answer, *e.g.*, if the number of Commissioners is increased to four, what is the requisite number of Commissioners for a review en banc? If all four Commissioners would be required for a review en banc, would a quorum of Commissioners necessary to hear a matter remain at two although that would be less than a majority? Finally, if more than two Commissioners would be required for a quorum, then adding only one Commissioner would not provide a sufficient number of non disqualified Commissioners to hear this case.

[10] New York Municipal Home Rule Law §23(2)(f).

The courts of New York have not broadly interpreted applicable law to find an implied delegation of adjudicative authority even where the alternative was to allow a possibly biased adjudicator to hear a matter. In Sharkey v. Thurston, 268 N.Y. at 129, the Court of Appeals held that a general statutory provision authorizing another official to act where the mayor was "unable" did not permit that officer to act if the mayor were merely disqualified, although the court found that the mayor was not disqualified in the case before it. The court in Reed v. Richardson, 26 Misc.2d 89, 94 (N.Y. Sup. Ct. 1960), concluded that "it is doubtful if this court can, under any of its equity powers, exercise any discretion to vary, modify or extend the provisions of . . . the City Charter of the City of Oswego. Such statute can best be modified or changed by action of the legislative body of such city." *See also* McComb v. Reasoner, 29 A.D.3d 795 (2d Dept. 2006), where the court ruled that any delegation of power must be to one with the authority to act. No authority to delegate the responsibilities of the Tribunal can, therefore, be read into the Charter where no explicit authority exists and no other body is authorized to hear and decide City administered non-property tax cases.

The Rule of Necessity would not apply in this matter except for the requirement that any review of an administrative law judge determination by the Tribunal must be en banc. Charter §169.d. We find no authority to conclude that this requirement is directory only and, thus, can be waived or ignored. Section 171 of McKinney's Statutes states:

> In the construction of statutes, mandatory provisions, generally speaking, are those which are essential. They go to the jurisdiction or authority of the person acting, and a compliance with them is a condition precedent to the validity of the action or determination under it. Where they prescribe a certain mode of procedure it must be strictly pursued, otherwise the whole proceeding is thereby rendered void.

The Court of Appeals in Huff v. Graves, 277 N.Y. 115, 121 (1938), quoting Wuesthoff v. Germania Life Ins. Co, 107 N.Y. 580, 589 (1888), describes the standard for distinguishing mandatory from directory provisions as follows:

> "The exercise by courts of a power to disregard a particular provision of a statute on the ground that it is directory merely, is a delicate one and should be applied with great caution. The intention of the Legislature is the cardinal consideration. . . ."

When the Tribunal was originally established, evidentiary hearings were conducted by the Bureau of Hearings within the Department. An appeal of a Bureau of Hearings determination was heard by a single Commissioner. The President of the Tribunal could order an appeal of a Bureau of Hearings determination to be heard or reheard by the Commissioners sitting en banc "when consideration by the full tribunal is necessary to secure or maintain uniformity of its decisions." Former Charter § 169.e as enacted by General Election, November 8, 1988. The Tribunal was later restructured to replace the Bureau of Hearings with the administrative law judge division within the Tribunal. L 1992, ch 808, § 134. That amendment eliminated the provision making en banc review of a determination discretionary with the President of the Tribunal. Charter § 169.d. The Governor's Memorandum approving the 1992 amendments describes the changes to the Tribunal as conforming the adjudication of City tax cases generally to the State's procedures including, among other things, authorizing "appeals from the determinations . . . to the commissioners of the Tribunal sitting en banc." 1992 N.Y. Sess. Laws, 2927 (McKinney). The above legislative history strongly suggests that in amending the Charter in 1992, the legislature viewed the en banc nature of the Commissioners' review of determinations as a necessary

element of that review. Thus, we conclude that it is a mandatory, rather than directory, provision of the Charter.[11]

We further believe that the requirement of a quorum of two Commissioners to issue a decision also is mandatory and not directory. Section 41 of the New York General Construction Law ("GCL") provides that where a body of three or more public officers is required to act jointly or as a board, a majority of the whole number of members, determined without regard to vacancies or disqualification, constitutes a quorum for action and not less than such a majority is required to exercise any power or authority given to such a body. *See* Matter of CS Integrated, LLC, 19 A.D.3d 886 (3d Dept. 2005) (applying GCL section 41 to the State Tribunal).

Based on the foregoing, we conclude that there is no other forum available to hear the appeal from the ALJ Determination in this case or to which this case may be referred and we find no authority for waiving the requirement that at least two Commissioners hear this case. Thus, this is the type of situation for which the Rule of Necessity was devised. We agree with the court in Barker, 752 S.W.2d at 441, which concluded that "[e]xhaustive research has failed to yield any other possible solution to this unusual and vexatious problem."

However, notwithstanding our conclusion that, as a matter of law, the Tribunal is authorized to proceed under the Rule of Necessity, in an abundance of caution and out of concern that doing so may expose one or both of them to allegations that they may have violated applicable ethics rules, Commissioners Newman and Firestone each requested an opinion from the New York State Bar Association Committee on Professional Ethics as to whether:

[11] *Compare* Matter of Bray Terminals, Inc., 248 A.D.2d 832 (3d Dept. 1998),where the court held that the failure of the State Tribunal to issue a decision within six months due to the presence of two vacancies did not render the decision a nullity as the time limit was directory and not mandatory.

> If the Tribunal, including [Commissioners Newman and Firestone] concludes, in good faith, that the legal doctrine called the "rule of necessity" applies so as to require . . . Commissioners [Newman and Firestone] to hear [the matter at bar] will [Commissioners Newman and Firestone] have violated the applicable ethics rules if either: (a) an appellate court later reverses that decision in whole or in part, or (b) that decision is affirmed by an appellate court?

In a letter dated March 23, 2007, the Committee on Professional Ethics declined to answer the question, stating:

> [W]e are unable to provide you such an opinion. This Committee opines on the standards of conduct required by the ethical codes, but does not address the disciplinary consequences of any violation of those standards. (In saying this, [the signor of the letter is] not suggesting by any means that there would be any disciplinary consequences arising out of the situation you posit.) In addition, we decline to opine on the hypothetical you suggest because any response would depend on what the appellate court might say in ruling on the question.

We can find no procedural mechanism whereby the Tribunal can present the question of the application of the Rule of Necessity in this case to an appellate court prior to undertaking the very action on which the Committee on Professional Ethics declined to provide guidance.[12] Moreover, in the absence of any assurance from the Committee on Professional Ethics that proceeding in good faith under the Rule of Necessity would not constitute a violation of any applicable ethics rules, Commissioners Newman and Firestone also could be exposed to possible disciplinary action as City administrative law judges under the newly promulgated ALJ Rules.

[12] We note, however, that either of the Parties has the right to bring this question before a court in an Article 78 proceeding in the nature of mandamus or prohibition. NY Civil Practice Laws and Rules § 7803(1), (2).

Therefore, based on the foregoing, we conclude that, notwithstanding our opinion that as a matter of law, the Tribunal could and should proceed to exercise its statutory obligation to review the ALJ Determination under the Rule of Necessity, we are prevented from doing so under our equal but conflicting responsibilities under the CPR and ALJ Rules. As a consequence, out of an excess of caution and concern for the integrity of the Tribunal, we place this matter on hold sine die until such time as a court of competent jurisdiction issues an order compelling us to proceed or providing for an alternative solution, or until such time as circumstances otherwise permit the Tribunal to proceed.

IT IS SO ORDERED.

Dated: April 30, 2007
New York, New York

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GLENN NEWMAN
President and Commissioner

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ELLEN E. HOFFMAN
Commissioner

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ROBERT J. FIRESTONE
Commissioner