STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

In the matter of PORTLAND BOARD OF EDUCATION -and- PORTLAND ASSOCIATION OF SCHOOL ADMINISTRATORS Case No. TDR-11,596.	Decision No. 2802 May 17, 1990

APPEARANCES:

William R. Connon, Esq.
for the Portland Board of Education

William Zeman, Esq.
for the Portland Association of School Administrators

DECISION AND DECLARATORY RULING

On September 16, 1988, the Portland Board of Education (the School Board) filed with the Connecticut State Board of Labor Relations (the Labor Board) a petition for a declaratory ruling seeking a determination as to whether a provision (Article 28A) of the collective bargaining agreement (the Contract) between the School Board and the Portland Association of School Administrators (the Administrators) was illegal as a parity clause.

After the requisite preliminary steps had been taken, the parties appeared before the Labor Board on May 16, 1989, for a hearing which was continued until September 13, 1989 and November 20, 1989. Full opportunity was given to adduce evidence, examine and cross-examine witnesses and make oral argument. Roth parties filed written briefs. On the basis of the record presented, we make the following decision and declaratory ruling.

FINDINGS OF FACT

1. The Portland Board of Education is a municipal employer within the meaning of the Act.

2. The Portland Association of School Administrators is an employee organization within the meaning of the Act and at all times relevant has been the exclusive bargaining representative for a unit of school administrators employed by the School Board,

3. The parties have had a series of collective bargaining agreements, the most recent being effective from July 1, 1989 to June 30, 1992.

4. The collective bargaining agreement covering the period July 1, 1986 to June 30, 1989 contained Article 28A which reads as follows:

> Administrators will not be paid less than the per diem rate for the 17th step 6th year of the teacher administrative work year of 227 days.

5. From at least the 1983-84 school year the administrators personnel policy contained a provision almost identical to that referenced in paragraph 4 supra.

6. In 1986, the state legislature passed the Education Enhancement Act (codified as Connecticut General Statute Section 10-257a et seq.) designed to attract and retain qualified employees and concomitantly to increase the standards for acquisition and retention of the teacher certificate. The Act provided municipalities with state funds designed to raise minimum salaries in three years to $20,000.00

7. Subsequently, Gertrude Scully, President of the Portland Education Association (P.E.A.), requested the School Board to re-open the contract between the Association and the School Board in order to receive the Enhancement Monies.[1] At that time, she became aware of Article 28A embodied in the contract between the School Board and the Portland Association of School Administrators.

8. Thereafter, the School Board and the P.E.A. reached an agreement to accept the enhancement funds which resulted in a revised salary structure. As a result, some teachers were receiving higher salaries than some of the administrators.

9. On June 25, 1987, Donald Gates, President of the Administrator's Association filed a grievance with the School Board claiming a violation of Article 28A.

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[1] Eligibility to participate in EEA monies requires the approval of the fiscal authority and mutual agreement of the local School Board and the representative of the teacher's bargaining unit.

10. This grievance was denied at all levels of the grievance procedure on the grounds that Article 28A was an illegal parity clause.

11. The grievance was processed through to arbitration and on September 13, 1988, arbitrator Peter Blum issued an award finding that the School Board violated Article 28A and ordered the School Board to pay any administrator affected retroactive pay in accordance with this provision.

12. The association then filed a motion to confirm the arbitration award.

13. Article 28A was removed from the collective bargaining agreement between the School Board and the Association effective July 1, 1989.

DISCUSSION

The issue before us is whether Article 28A of the collective bargaining agreement between the School Board and the Association is an illegal parity clause. A parity clause in a contract binds an employer to give additional benefits to the contracting union in the event another union representing a different bargaining unit negotiates a benefit more favorable than that of the earlier contract. City of New London, Decision No. 1128 (1973); Borough of Naugatuck, Decision No. 1228 (1974), aff'd. in Local 1212 v. Conn. Labor Relations Board, 171 Conn. 342 (1976). In New London, we held that the "mere presence and necessary operation of such a clause inevitably interferes" with the latter union in future negotiations. There we stated:

> What we find to be forbidden is an agreement between one group (e.g. firemen) and the employer that will impose equality for the future upon another group (e.g. policemen) that has had no part in making the agreement. we find that the inevitable tendency of such an agreement is to interfere with, restrain and coerce the right of 'the later group to have untrammeled' bargaining. And this affects all the later negotiations (within the scope of the parity clause) even though it may be hard or impossible to trace by proof the effect of the parity clause upon any specific terms of the later contract (just as in the case before us) .

In the present case, Article 28A grants administrators a salary derived from the salary schedule of the teacher contract. In other words, an administrator cannot make less than a teacher who is on the 17th step, 6th year of the teacher salary schedule. We believe that this clause inevitably interferes with the teachers right to untrammeled bargaining and, as such, is an illegal parity clause in violation of the Act.

The Respondent Association does not argue that Article 28A is not a parity clause. Rather, it makes a series of procedural arguments objecting to the issuance of a declaratory ruling on grounds of mootness, estoppel and standing . We take up these and related arguments below.

I.

The first major procedural objection raised by the Respondent is mootness . In their view, since there is no longer an Article 28A in an existing contract between the parties, there is no substantial and immediate threat to the rights of the teacher unit. Thus, the issue raised by the petition is moot because no practical relief can be ordered citing Roy v. Mulcahy, 161 Conn. 324, 328; Gormley v. Panuzio, 166 Conn. 2,3. A case is moot when a determination is sought on a matter which when rendered, cannot have any practical effect on a legal controversy. Leo Hart v. McCormick, DC Pa. 395 F. Supp. 1073, 1076. At the time of the hearing, the parties were disputing the validity of an arbitrator's award interpreting Article 28A of the Contract in the Superior Court by way of a motion to confirm. Obviously, there is a continuing controversy that exists and a decision by the Board may have an effect upon that controversy.

As a corollary to its argument on mootness, the Respondent claims that by our agreeing to answer the petition we are in effect ruling upon the validity and legality of the arbitrator's award, an area which is the exclusive province of the Superior Court pursuant to the procedures outlined in Sections 52-418, 419 and 420 of the Conn. Gen. Stats.[2] This argument misses the mark. While the court has the power to determine whether an arbitrator has exceeded his powers or so imperfectly executed them,(Section 52-428(a) (4)), the arbitrator's power itself is limited by the provisions of

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2 Sec. 52-418. Vacating award. (a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or , in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. (b) If an award is vacated and the time within which the award is required to be rendered has not expired, the court or judge may direct a rehearing by the arbitrators. (c) Any party filing an application pursuant to subsection (a) of this section concerning an arbitration award issued by the state board of mediation and arbitration shall notify said board and the attorney general, in writing, of such filing within five days of the date of filing.

the collective bargaining agreements City of Hartford v. Local 308, International Brotherhood of Police Officers, N.A.G.E., 171 Conn. at 428. Put another way, an arbitrator is concerned solely with the interpretation of the contract not with the interpretation of statutes. Local 1219 v. Conn. Labor Relations Board, 171 Conn. 342 at 354. An arbitrator has no power to declare Article 28A illegal. And in the present case, the arbitrator did not rule on the legality of Article 28A; in fact, the illegality of the clause was not raised in the arbitration proceeding. The arbitrator properly limited his ruling to whether the School Board violated a contractual provision. On the other hand, we have the power and duty to determine whether the parties to the collective bargaining process are bargaining in good faith Section 10-153e(e)(f); 31-107 C.G.S. Essential to such a determination is a finding whether a particular subject is mandatory, permissive or illegal. Clearly then, a determination of whether a provision in a contract is an illegal one is not the exclusive province of the courts, rather it is peculiarly a matter for administrative competence and expertise. Therefore the issue is not whether the arbitrator exceeded his powers but whether the contractual clause in question is a legal one. In the present case, Statute 28A is an illegal parity clause and thus null and void.

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2 (con't.)

sec. 52-419. Modification or correction of award. (a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated, or when the court is not in session, any judge thereof, shall make an order modifying or correcting the award if it finds any of the following defects: (1) If there has been an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award: (2) if the arbitrators have awarded upon a matter not submited to them unless it is a matter not affecting the merits of the decision-upon the matters submitted; or (3) if the award is imperfect in matter of form not affecting the merits of the controversy. (b) The order shall modify and correct the- award, so as to effect the intent thereof and promote justice between the parties. Sec. 52-420. Motion to confirm, vacate or modify award. (a) Any application under section 52-417, 52-418 or 52-419 shall be heard in the manner provided by law for hearing written motions at a short calendar session, or otherwise as the court or judge may direct, in order to dispose of the case with the least possible delay. (b) No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion. (c) For the purpose of a motion to vacate, modify or correct an award, such an order staying any proceedings of the adverse party to enforce the award shall be made as may be deemed necessary. Upon the granting of an order conf inning, modifying or correcting an award, a judgment or decree shall be entered in conformity therewith by the court or judge granting the order.

II.

The Respondent also argues that the School Board should be estopped from avoiding its contractual obligation because (1) Article 28A originated as a Board policy before it became part of any collective bargaining agreement and thus it embodies a statutory right by past practice. Hamden Board of Education, Decision No. 2087 (1981) and (2) parties cannot accept benefits under a contract fairly made and at the same time question its validity. Mozzochi v. Luchs, 35 Conn.Sup. 19,23; Schwarzschild v. Martin et al, 191 Conn. 316, 321. We do not find either of these arguments to be persuasive.

In Hamden, supra, the Teacher's Association filed a complaint with us alleging that a reduction in force provision in the collective bargaining agreement between the administrators and the school board was an illegal subject of bargaining because it invaded the exclusive bargaining territory of the Teacher's Association. There we held that the RIF provision was a mandatory subject of bargaining for the administrators unit and that there existed a longstanding practice by board policy which was protected by the Act.[3] Thus our decision was premised on the theory of unilateral change, which the collective bargaining statute protected. This would be an appropriate theory for the Association to pursue but for the fact that the subject here is illegal. Obviously, a practice concerning an illegal subject is not converted into a mandatory subject because of its longstanding acceptance by both parties. In other words, a party cannot make out a successful claim of unilateral change if the subject matter of that change is an illegal one.

In regard to the Respondent's argument on estoppel, we do not find the theory applicable here. The doctrine rests upon the misleading conduct of one party to the detriment of another. Linahan v. Linahan, 131 Conn. 307, 327. Its two essential elements are: one party must do or say something which is intended or calculated to induce another to believe in the existence of certain facts and to act on that belief; and the other party influenced thereby, must change his position to do some act or his injury which he would not otherwise have done" Dickeau v. Glastonbury, 156 Conn. 437, 441 (1968); Bozzi v. Bozzi, 177 Conn. 232, 241 (1979). "Estoppel rests upon the misleading conduct of one party to the prejudice of the other In the absence of prejudice, estoppel does not exist" Spear-Newman, Inc. v. Modern Floors Corporation, 149 Conn. 88,91. There is no evidence in the record to indicate that the Respondent, as a result of the words or conduct

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[3] Subsequently, in Connecticut State Council of AFSA Locals, Decision No. 2225 (1983), (aff'd.) Connecticut Education Association v. Connecticut State Board of Labor Relations, 5 Conn. App. 253 (1985), we held that the subject of displaced administrator unit members bumping members of the teacher unit is a mandatory subject of bargaining for the teacher unit and an illegal subject of bargaining for the administrator unit except that no criteria for determining layoff for administrators must discriminate against administrators solely because of their service as administrators.

of the School Board, changed its position to its detriment. More to the point, however, is Borough of Naugatuck, Decision No. 1228 (1974). In that case, the Borough and the firefighters agreed to a parity clause indexed to the negotiations between the city and the police union. After settling with the police, the Borough refused to pay the firefighter's overtime provisions enjoyed by the police. The firefighters filed a-grievance which was processed to arbitration. Thereafter, the Board of Mediation and Arbitration issued an award finding the Borough in violation of the parity clause. Subsequently, this Board in City of New London, Decision No. 1128 (1973) held that a parity clause was an illegal subject of bargaining. Thereafter, the firefighters filed a canplaint with this Board alleging that the Borough failed to pay premium pay for overtime. The firefighters argued that notwithstanding the New London decision, the Board of Mediation and Arbitration decision was binding on the parties based on the principle of res judicata. In our decision, we acknowledged the principle, of res judicata, but stated that the res judicata effect did not survive our decision in New London. Thus after April 10, 1973, (the date of the New London decision), the parity clause was considered to be null and void. On appeal, the Supreme Court upheld the Labor Board's decision.': In regard to the Union's argument on res judicata, it stated:

> If the same cause of action is again sued on, the judgment is a bar with respect to any claims relating to the cause of action which were actually made or might have been made. Bridgeport Hydraulic Co. v. Pearson, 139 Conn. 186, 196, 91 A.2d 778; 46 Am. Jur. 2d, Judgments, Section 394. And with regard to an arbitration award, it is res judicata as to all matters in the submission. Corey v. Avco-Lycoming Div., Avco Corporation, supra, 319-20. The arbitrator was limited by the submission which did not include the issue of the validity of the parity clause. This being so, there is no identity of issues and the doctrine of res judicata did not bar the defendant from its determination of the unfair labor practice.

In the present case, the arbitrator never determined whether Article 28A was illegal; in fact, the issue was not raised before him. Thus, there was no identity of issues and the petitioner is not barred from raising the provision in this proceeding on res judicata or collateral estoppel grounds.

III.

The Respondent also makes the argument that the School Board lacks standing. They reason that since a parity clause interferes with the free exercise rights of the teacher's bargaining unit, only the teachers and not the School Board have the standing to file the petition here. Moreover, they make a related argument that the illegal clause must have an impact upon the teacher bargaining unit in order for a complaint to be filed. The failure of the teacher bargaining unit to file a complaint in a timely fashion after notice bars any disposition of the case on the grounds of laches. We disagree.

Our Connecticut Supreme Court has noted that "standing is not a technical rule intended to keep aggrieved parties out of court...rather it is a practical concept to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. Connecticut Association of Health Care Facilities, Inc. v. Worrell, 199 Conn. 609, 612 (1986). Standing concerns the question whether the interests sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Ducharme v. Putnam, 161 Conn. 135 (1971).

Moreover, we are mindful that standing is a judicial concept and are doubtful that it is applicable to administrative agencies since the collective bargaining statutes here define the proper parties. Under the Act concerning Teacher-School Board negotiations, a school board has the right to file prohibited practice complaints Section 10-153e(e) whenever it has reason to believe a prohibited practice has occurred. More specifically, the regulations promulgated pursuant to this statute allow an employer to file a scope of bargaining determination if "a party alleges that an illegal subject of bargaining is improperly submitted to a grievance arbitrator'Section 10-153e-28. This is exactly the claim before us. We think both these enactments are sufficient to permit the petitioner to present its claim before us.

Respondent's argument that there must be an impact upon the teacher bargaining unit in order for the parity clause to be challenged is incorrect and misconstrues our holding in City of New London, Decision No. 1128 (1973). In that case, we found no proof that the existence of the parity clauses in the firefighter's contract affected any specific item in the police contract. However, we concluded that the "mere presence and necessary operation of such a clause inevitably interferes with, restains, and coerces the Police Union in future negotiations with the City and the agreement upon such a clause constitutes a violation of [the Act] by the City [and] by the firefighter's Union". Our reasoning there applies to the present case. In addition, Respondent's laches argument is inapplicable here. Laches by estoppel is an unreasonable delay that was inexcusable and prejudicial to the defendant Sarner v. Fox Hill, Inc., 151 Conn. 437 (1964). Since we have found that.the School Board is a proper party to bring a petition for a declaratory ruling under the Act the teacher's unions' failure to raise the issue is irrelevant and as a result the doctrine of laches is inapplicable.

DECLARATORY RULING

By virtue of and pursuant to the powers vested in the Connecticut State Board of Labor Relations by the Act Concerning Collective Bargaining for State Employees, it is hereby

DECLARED, that to the extent discussed in the attached decision, the provision (Article 28A)of the collective bargaining agreement between the Portland School Board and the Portland Association of School Administrators is an illegal parity clause.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

By s/Patricia V. Low
Patricia V. Low, Chairman

s/Craig Shea
Craig Shea

s/Susan Meredith
Susan Meredith

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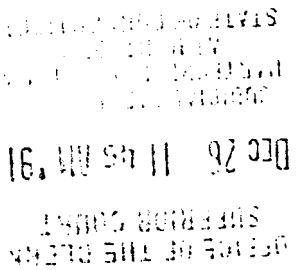
NO. 379648	:	SUPERIOR COURT
PORTLAND ASSOCIATION OF	:	
SCHOOL ADMINISTRATORS	:	JUDICIAL DISTRICT OF
VS.	:	HARTFORD/NEW BRITAIN
CONNECTICUT STATE BOARD OF	:	AT HARTFORD
LABOR RELATIONS AND	:	
PORTLAND BOARD OF	:	
EDUCATION	:	DECEMBER 16, 1991

MEMORANDUM OF DECISION

The Appellant, Portland Association of School Administrators (hereinafter "Association) appeals from the decision of the Connecticut State Board of Labor Relations (hereinafter "Labor Board"); on a petition by the Portland Board of Education (hereinafter. "Portland") declaring a provision of a collective bargaining agreement between Portland and the Association, an illegal parity clause.

The thrust of the appeal is aimed not at the substantive issue of the legality of a parity clause; but rather the procedure by which the issue was raised and decided.



FACTS

Prior to a July 1, 1989 successor agreement, the contract between the Association and Portland contained the following provision as Article 28A:

> "Administrators will not be paid less than the per diem rate for the 17th step, 6th year of the teacher salary schedule multiplied by the administrative work year of 227 days."

The Association filed a grievance seeking the enforcement of Article 28A. The Education Enhancement Act resulted in sustantial salary increases for Portland teachers with the 17th step', 6th year of their salary schedule exceeding the rate of pay of certain Association members. This grievance resulted in an arbitration award in American Arbitration Association Case No. 1239.0427.87. The award directed Portland to pay salary increases to Association members. The salary increases were required because of the parity clause provision of Article 28A.

Portland did not dispute the legality of Article 28A in the arbitration hearing; and did not seek to vacate the arbitration award pursuant to Conn. Gen. Stat. Sec. 52-418.

Portland responded to the September 13, 1988 arbitration

award, by filing its petition for declaratory ruling with the Labor Board on September 16, 1988. That petition resulted in the decision which is challenged by this appeal.

In a parallel proceeding the Association sought to confirm the arbitration award, Docket No. CV-88-0053221-S, Association v. Portland, Middlesex Judicial District. In that action the Court (Higgins, J.) abstained from further action until a final decision is rendered in this appeal.

In negotiations for a successor collective bargaining agreement between the Association and Portland, Article 28A was deleted effective July 1, 1989.

The Labor Board held hearings on Portland's declaratory ruling petition on May 16, 1989, September 13, 1989 and November 20, 1989. At the outset of the hearing it was known to all the parties that the agreement which would take place on July 1, 1989 deleted Article 28A, the parity clause.

The Appellant Contends that under the facts of this case the issue of the parity clause was moot when presented and/or decided by the Labor Board. The appellant relies on Labor Board decisions which indicate that the relief available in a parity case is the deletion of the offending clause from the collective bargaining agreement, see Labor Board decisions, City of New Londod, (1973) Decision No. 1128, City of Middletown, Decision No. 1669, Borough of Naugatuck, Decision

No. 1228 (1979).

The Labor Board decisions and the mootness cases cited by Appellant in its brief are distinguishable from the instant case. In none of the cited cases is there a simultaneous effort by the party claiming the issue of mootness; to enforce the parity clause to the economic disadvantage of the other party to the contract.

If there were not 'this effort to enforce the parity clause award the issue of the validity of Article 28A would indeed be moot. It is the enforcement of the parity clause which impacts the rights of Portland, even though Portland is not entitled as a matter of law to enter into a contract illegal under public policy, Lieberman v. Board Of Labor Relations, 216 Conn. 253 (1990).

A finding of mootness is dependent on the absence of an actual controversy for which relief can be granted. Waterbury Hospital v. Connecticut Health Care Association, 186 Conn. 247, 251 (1982). Hartford Principals & Supervisor Assn v. Shedd, 202 Conn 492, 497 (1987). The controversy exists over the enforcement of Article 28A now as it did when the matter was before the Labor Board. Thus, the labor board's decision on validity may impact the enforcement action in CV-88-0053221.

The Court determines that the issue of the parity clause

was not moot when decided by the Labor Board.

Appellant also argues that the decision of the Labor Board in determining the parity clause illegal is an improper effort to upset the arbitration award enforcing the clause. Citing the authority of the Superior Court to vacate, confirm or modify arbitration awards pursuant to Conn. Gen. Stat. Sec. 52-418 et. seq.

The answer to this claim is simply that the Labor Board decision does not purport to directly address the arbitration award.

The Labor Board holding is:

> "Declared, that to the extent discussed in the attached decision, the provision (Article 28A) of the collective bargaining agreement between the Portland Association of School Administrators is an illegal parity clause."

An issue which was not moot since the Association had an action pending seeking the enforcement of the offensive provision.

The Labor Board decision does not directly effect the arbitration award.

The final claim of the Association is that Portland is estopped from asserting the illegal nature of the parity clause because of its conduct on prior negotiations and in confirming parity as a policy.

A parity clause is clearly an illegal subject of collective bargaining, Local 1219 v. Conn. Labor Relations Board, 171 Conn. 342 (1976). In the collective bargaining context parties are prohibited from bargaining and agreeing on illegal subjects of collective bargaining, N.L.R.B. v. Master-Division, Borg. Warner Corp., 356 U.S. 342, 349-50 (1958); West Hartford Education Assn. Inc. v. DeCaurcy, 162 Conn. 566, 576-77 (1972). The ultra vires nature of Portland's actions in agreeing to or advocating a parity clause is expressly recognized in Lierberman v. Board of Labor Relations, 216 Conn. 253 (1990).

Estoppel or res judicata would normally preclude the action of Portland in foregoing its claim of illegality in the arbitration proceedings to save it for another forum. The special nature of the arbitration process, however; saves the claim in this instance. This has been recognized in a long line of cases. New Britain Machine v. Lodge, 1021, 143 Conn. 399, 404; American Brass Co. v. Torrington Brass Workers Union, 141 Conn. 514, 521; L. Luzio Construction Co. v. Connecticut State Board of Labor Relations, 148 Conn. 135 and Local 1291 v. Connecticut State Board of Labor Relations, 171 Conn. 342, 354 (1976).

The continuing contraversy over the application and financial consequences of the illegal parity clause, also

serves to answer appellant's challenge to Portland's standing to raise the issue of the parity clause.

It is true that the detriment of Article 28A fell on the teachers who had not brought or participated in the challenge to the parity clause. The interest of Portland in avoiding illegal contract provisions certainly suffices to give them standing to challenge the legality of the parity clause. See Conn. Assoc. of Health Care Facilities Inc. v. Warrell, 199 Conn. 609, 612 (1986).

For the foregoing reasons the appeal is dismissed.

Appeal Dismissed.

J.

Hon. Robert McWeeny

Superior Court Judge