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An Overview of Article 78  
Practice and Procedure

WITH

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2.0 Professional Practice

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40 N. Pearl Street

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## An Overview Of Article 78 Practice and Procedure

### Timed Agenda

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## AN OVERVIEW OF ARTICLE 78 PRACTICE AND PROCEDURE

Article 78 of the Civil Practice Law and Rules ("CPLR") is the main procedural vehicle to review administrative action in New York. To practice in this field, one must understand both the law and the day-to-day reality of Supreme Court procedures. Issues concerning commencement of the proceeding, statute of limitations, standing, service, transfer to the Appellate Division, and objections in point of law, to name a few, pose challenges for both the practitioner skilled in state practice and general practitioners. Additionally, precautions taken at the administrative hearing level, including make a proper record and determination, can go far in preventing significant problems upon judicial review.

To address these and other issues, this guide contains an annotated overview, in outline form, of the provisions of the law itself, with notes, cautions and comments throughout. Particularly important items are flagged. Traps for the unwary are highlighted. Where warranted, practical hints have been included. Salient issues at the forefront of the law, including issues concerning filing and personal service, have been updated.

Please remember that these are guidelines only, and are subject to updating and revision as the law and its interpretation by the courts change. Additionally, local practice may vary due to judges' and clerks' rules and practices. Keep in mind that some state agencies have unique statutes and regulations that vary from the norm, which can impact issues such as venue, subject matter jurisdiction, or the limitations period. Although a comprehensive understanding of article 78 is critical to negotiate judicial review of final agency determinations, there is no substitute for reading and understanding statutory provisions, regulations, case law and local rules.

### **Annotated Overview and Practical Guide - Judicial review of Administrative Determinations**

#### **I. NATURE OF THE PROCEEDING**

**A. Historical Background.** Article 78 is the modern codification of the old common law writs of certiorari, mandamus and prohibition. CPLR 7801. For reasons that remain obscure, even in medieval England these writs existed and were never considered to be in derogation of the sovereign's immunity from suit. An interesting discussion of this can be found in Jaffe, "Suits Against Governments and Officers: Sovereign Immunity," 77 Harv. L. Rev. 1 (1963).

**B. Comparison of Certiorari, Mandamus, and Prohibition.** The two most frequently used types of article 78 proceedings are those in the nature of certiorari (CPLR 7803(4)) and mandamus to review (CPLR 7803(3)), which differ in some important respects. See generally Mtr. of Poster v. Strough, 299 A.D.2d 127, 140-43 (2d Dep't 2002). The other types of proceedings are mandamus to compel and the writ of prohibition.

1. **The underlying administrative proceedings.** Review by certiorari follows a quasi-judicial determination made by an agency after a full evidentiary hearing mandated by law. Review by mandamus follows any other administrative determination, whether made after no hearing, something less than a full, formal hearing, or a discretionary hearing.

2. **The Record.** In certiorari proceedings, the evidence submitted to the court is generally limited to the record adduced before the agency. In mandamus proceedings, the court reviews any evidence the agency and the petitioner present. Mtr. of Poster v. Strough, 299 A.D.2d 127, 142-43 (2d Dep't 2002).

3. **Which court reviews.** Certiorari proceedings are generally transferred to the Appellate Division for initial disposition (see CPLR § 7804(g)) while mandamus proceedings are decided in Supreme Court. Id. The rationale for transferring certiorari proceedings is that the full hearing before the agency and the ensuing determination are functionally analogous to a hearing and decision by Supreme Court; review by the Appellate Division of this kind of agency determination is roughly analogous to appellate review of a Supreme Court decision. Mtr. of Poster v. Strough, 299 A.D.2d at 142.

4. **Standard of review.**

a) **Certiorari.** The standard of review in a certiorari proceeding (CPLR 7803(4)) is whether the determination is supported by substantial evidence.

b) **Mandamus to review.** The standard in mandamus to review proceedings (CPLR 7803(3)) is whether the determination has a rational basis. As explained below, the substantial evidence standard ultimately differs very little from the rational basis standard. In both cases, the question is whether the agency's determination is reasonable.

c) **Mandamus To Compel.** Mandamus to compel is available to compel a public official to perform a duty enjoined by law, where there is a "clear legal right" to the relief requested. Klostermann v. Cuomo, 61 N.Y.2d 525 (1984), Mtr. of DiBlasio v. Novello, 28 A.D.3d 339 (1st Dep't 2006) Mandamus may be used to compel a purely ministerial act which is required by law, but it cannot be used to direct the form of such action or how a public official should exercise discretion.

d) **Prohibition.** A writ of prohibition is available only where "there is a clear legal right and only where an officer acts without jurisdiction or in excess of powers, in a proceeding over which there is jurisdiction, in such a manner as to implicate the legality of the entire proceeding. ... Thus, as a general principle, absent extraordinary circumstances, courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency." Galin v. Chassin, 217 A.D.2d 446 (1st Dep't 1995). See also Mtr. of Doe v. Axelrod, 71 N.Y.2d 484 (1988).

**C. Special proceedings vs. actions.** Article 78 proceedings are “special proceedings” (CPLR 7804(a)), as opposed to “actions.” Accordingly, the procedure applicable to article 78 proceedings is governed first by article 78 itself, then by CPLR article 4 (“Special Proceedings”) and, then residually, by the CPLR provisions generally applicable to all actions. Mtr. of Long Island Citizens Campaign, Inc. v. County of Nassau, 165 A.D.2d 52, 54 (2d Dep’t 1991).

**D. Commencement.** Article 78 proceedings are commenced by first purchasing an index number (see Mtr. of Walker v. State of N.Y., Dep’t of Tax. & Fin., 300 A.D.2d 958 (3d Dep’t 2002); Mtr. of Buonocore v. Vill. of S. Yack, 238 A.D.2d 336 (2d Dep’t 1997), and then filing a petition (CPLR 304; 7804(c); as amended by Ch. 473 L. 2001) as opposed to the filing of a summons and complaint. The pleadings are the petition (not complaint) and answer (CPLR 7804(d)), and the parties are denominated as a petitioner and a respondent, not a plaintiff and a defendant.

An article 78 proceeding concludes in a judgment, not an order.

## II. SCOPE OF THE PROCEEDING

**A. The article 78 proceeding is a device for challenging and reviewing administrative action in court.** It supersedes the common law writs of certiorari to review, mandamus and prohibition (CPLR 7801). Although the writs have been technically abolished, the substantive aspects of the writ system have remained largely unchanged, and reference may continue to an article 78 proceeding “in the nature of certiorari” or “in the nature of mandamus” or “in the nature of prohibition.”

**B. Pursuant to CPLR 7803, the only questions that may be raised in an article 78 proceeding** (Mtr. of Featherstone v. Franco, 95 N.Y.2d 550 (2000)) are:

**1. Whether the body or office failed to perform a duty enjoined upon it by law (mandamus to compel).** In re Nat’l Equip. Corp. v. Ruiz, 19 A.D.3d 5, 10-12 (1<sup>st</sup> Dep’t 2005) (The clear legal right to the purely ministerial act of entering a jury verdict is subject to mandamus to compel); (Mtr. of Hassig v. N.Y. State Dep’t of Health, 5 A.D.3d 846 (3d Dep’t 2004) (No law compels Department of Health to implement any particular type of breast cancer prevention program); Mtr. of Lempesis v. Mills, 300 A.D.2d 733 (3d Dep’t 2002) (Hearing officer’s determination not to dismiss but to adjourn proceeding where respondent failed to comply with certain discovery requests under SAPA § 401(4) involves discretion and defeats extraordinary relief of mandamus); Mtr. of Jay Alexander Manor, Inc. v. Novello, 285 A.D.2d 951, 952 (3d Dep’t 2001), *lv. denied*, 97 N.Y.2d 610 (2002); Kupersmith v. Pub. Health Council of State, 101 A.D.2d 918, 919 (3d Dep’t 1984), *aff’d*, 63 N.Y.2d 904 (1984) (“Relief in the nature of mandamus is appropriate only where the

right to relief is ‘clear’ and the duty sought to be enjoined is performance of an act commanded to be performed by law and involving no exercise of discretion”).

**2. Whether the body or officer proceeded, is proceeding, or is about to proceed without or in excess of jurisdiction (prohibition).** In re Nat’l Equip. Corp. v. Ruiz, 9 A.D.3d 5, 10-12 (1<sup>st</sup> Dep’t 2005) (Prohibition is a discretionary); Mtr. of Figgins v. Henricus, 28 A.D.3d 1178 (4<sup>th</sup> Dep’t), lv. denied, 7 N.Y.3d 707 (2006); Mtr. of McLaughlin v. Eidens, 292 A.D.2d 712 (3d Dep’t 2002); Mtr. of Sims v. Sperrazza, 17 A.D.3d 1041 (4<sup>th</sup> Dep’t 2005) (extraordinary remedy, not to be used in derogation of the orderly administration of justice where ordinary channels of appeal or review are available); but see Mtr. of Briggs v. Halloran, 12 A.D.3d 1016 (3d Dep’t 2004) (authorizing prohibition where it would furnish “a more complete and efficacious remedy” than other procedures for redress); Mtr. of Mollen v. Matthews, 269 A.D.2d 42 (3d Dep’t 2000) (never used to correct or prevent trial errors of law or procedure); Mtr. of Haggerty v. Himelein & Nevis, 89 N.Y.2d 431 (1997) (but used to prevent actions either without or in excess of jurisdiction).

**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 an abuse of discretion as to the measure or mode of penalty or discipline imposed (mandamus to review).** Mtr. of Arrocha v. Bd. of Educ. of City of N.Y., 93 N.Y.2d 361 (1999) (The standard of review considers whether there’s a rational basis for the determination, whether the determination is arbitrary and capricious); Mtr. of Poster v. Strough, 299 A.D.2d 127, 140-43 (2d Dep’t 2002) (Mandamus to review questions the rationality of the administrative act where there is no record before the agency comparable to a trial record, and the parties are free to present any competent evidence in support of their position); or

**4. Whether a determination made as a result of a hearing at which evidence was required to be and was taken is, on the entire record, supported by substantial evidence (certiorari to review).** Mtr. of Kolt v. Zoning Bd. of Appeals, 159 A.D.2d 625 (2d Dep’t 1990) (Substantial evidence challenge to agency determination made after a hearing falls under certiorari to review); see generally Mtr. of Poster v. Strough, 299 A.D.2d 127, 140-43 (2d Dep’t 2002), for a comparison of certiorari and mandamus to review.

**C. An article 78 proceeding may *not* be used to challenge:**

**1. a determination which is not final (CPLR 7801(1));**

Mtr. of Essex County v. Zagata, as Comm'r of N.Y. State Dep't of Env'tl. Conservation, 91 N.Y.2d 447 (1998)

**2. a determination which can be adequately reviewed by an appeal to a court or to some other body or officer (CPLR 7801(1));**

Mtr. of Art-Tex Petroleum v. N.Y. State Dep't of Audit & Control, 93 N.Y.2d 830, 832 (1999)

Mtr. of Church of the Chosen v. City of Elmira, 18 A.D.3d 978 (3d Dep't 2005)

**3. a determination where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application, except when a rehearing has already been had, or a rehearing has been denied, or the time to apply therefor had expired (CPLR 7801(1));**

Mtr. of Branciforte v. Spanish Naturopath Soc'y, Inc., 217 A.D.2d 619, 620 (2d Dep't 1995)

**4. a determination which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court (CPLR 7801(2));**

Mtr. of Paciona v. Marshall, 35 N.Y.2d 289, 290 (1974)

Mtr. of Johnson v. Torres, 259 A.D.2d 370 (1<sup>st</sup> Dep't 1999)

**5. the constitutionality of legislative enactment *on its face*.**

American Indep. Paper Mills Supply Co., Inc., v. County of Westchester, 16 A.D.3d 443 (2d Dep't 2005);

Mtr. of Clear Channel Commc'n v. Rosen, 263 A.D.2d 663, 664 (3d Dep't 1999)

Bryant Ave. Tenants' Ass'n. v. Koch, 71 N.Y.2d 856, 858 (1988); Save the Pine Bush, Inc. v. City of Albany, 70 N.Y.2d 193, 202 (1987)

But see Mtr. of N.Y. City Health & Hosps. Corp. v. McBarnette, 84 N.Y.2d 194 (1994) allowing article 78 review of quasi-legislative rate making; and Mtr. of Llana v. Town of Pottstown 234 A.D.2d 881 (3d Dep't 1996).

**NOTE:**

*An article 78 proceeding is the proper method for determining whether a statute in a specific instance has been **applied** in an unconstitutional manner. Mtr. of Kovarsky v. Hous. & Dev. Admin of the City of N.Y., 31 N.Y.2d 184, 191-92 (1972)(Court should convert to a declaratory judgment if a facial challenge); Mtr. of Overhill Bldg. Co. v. Delany, 28 N.Y.2d 449, 458 (1971); Mtr. of Emminger v. Educ. Dep't of the State of N.Y., 215 A.D.2d 951 (3d Dep't 1995); Mtr. of Top Tile Bldg. Supply Corp. v. N.Y. State Tax Comm'n, 94 A.D.2d 885 (3d Dep't 1983), appeal dismissed, 60 N.Y.2d 653 (1983).*

**III. SCOPE OF REVIEW**

The scope of review in an article 78 proceeding depends on whether the challenged action is characterized as (a) judicial or quasi-judicial or (b) administrative.

**A. Judicial or Quasi-Judicial Action**

If an action is characterized as judicial or quasi-judicial, the agency must conduct an adversary-type hearing meeting due process standards before such action is taken.

Mtr. of Sowa v. Looney, 23 N.Y.2d 329, 333 (1968)

Mtr. of Atkins v. Goord, 16 A.D.3d 1011 (3d Dep't 2005)

Mtr. of Fuchino v. Herbert, 255 A.D.2d 914 (4<sup>th</sup> Dep't 1998)

Mtr. of Malloch v. Ballston Spa Cen. Sch. Dist., 249 A.D.2d 797 (3d Dep't), lv. denied, 92 N.Y.2d 810 (1998).

**NOTE:**

*The hearing conducted by an administrative official acting in a judicial or quasi-judicial capacity may be more or less informal and technical rules of evidence and procedure may be disregarded. Mtr. of Brown v. Ristich, 36 N.Y.2d 183, 190 (1975).*

Judicial review of an adjudicatory agency determination is limited to the facts and record adduced before the agency.

Mtr. of Tamulinas v. Bd. of Educ., 279 A.D.2d 527 (2d Dep't 2001)

Mtr. of Fanelli v. N.Y. City Conciliation & Appeals Bd., 90 A.D.2d 756, 757 (1<sup>st</sup> Dep't 1982), aff'd, 58 N.Y.2d 952 (1983)

The agency's factual findings are conclusive if supported by "substantial evidence." "Substantial evidence" is defined as "**such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.**"

People ex rel. Vega v. Smith, 66 N.Y.2d 130, 139 (1985)

300 Gramatan Ave. Assocs. v. State Div. of Human Rights, 45 N.Y.2d 176, 180-81 (1978)

If a substantial evidence issue is raised, the proceeding is transferred for initial disposition to the Appellate Division (CPLR 7804(g)).

**B. Administrative Action**

No hearing need be held by an agency before administrative action is taken.

In reviewing administrative action, the court is not limited to the record before the agency. Mtr. of Poster v. Strough, 299 A.D.2d 127, 140-43 (2d Dep't 2002). The standard of review is

whether there is a rational basis for the action, or whether the action is arbitrary and capricious. *The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.*

Mtr. of Pell v. Bd. of Educ., 34 N.Y.2d 222, 231  
(1974)

A court may not substitute its judgment for that of the board or body whose determination is under review unless the determination is arbitrary and capricious and constitutes an abuse of discretion.

Mtr. of Diocese of Rochester v. Planning Bd. of Brighton, 1 N.Y.2d 508, 520 (1956)

The proceeding is heard in the first instance in Supreme Court (CPLR 7804(g))

**NOTE:**

*Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard. Mtr. of Jennings v. N.Y. State Office of Mental Health, 90 N.Y.2d 227 (1997); Mtr. of Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974). Note that the agency's determination need not be the only rational conclusion to be drawn from the record. The existence of other alternative rational conclusions, however, will not warrant annulment. Mtr. of Consol. Edison v. N.Y. State Div. of Human Rights, 77 N.Y.2d 411, 417 (1991).*

**CAUTION:**

*Do not confuse burden of proof with the standard of review. While the former refers to the level of proof necessary to prevail at the hearing, the latter governs the standard courts apply upon judicial review. See, e.g., Mtr. of King v. N.Y. State Dep't of Health, 295 A.D.2d 743 (3d Dep't 2002) limiting review "to whether the determination [based on] a preponderance of the evidence is fully supported by substantial evidence in the record" (multiple citations omitted); see also Mtr. of Fernald v. Johnson, 305 A.D.2d 503 (2d Dep't 2003) ("there is substantial evidence to support the determination of the respondent Commissioner ... that, at the hearing, it was proven by a preponderance of the evidence that the petitioner committed the acts [changed].") But see SAPA §306 setting forth the burden of proof at administrative adjudicatory hearings as substantial evidence.*

1. **Per Se Arbitrary and Capricious Agency Action**

a. **An agency may not reach a different conclusion in a determination based on similar facts and law without explaining the reason for the inconsistent decisions.** It is per se arbitrary and capricious for an agency to reach different results on substantially similar facts and law without explaining on the record the reason for same. In re Charles A. Field Delivery Serv., Inc., 66 N.Y.2d 516, 520 (1985). "[W]hen an agency determines to alter its prior stated course it must set forth its reasons for doing so.... Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary." See also Mtr. of Richardson v. Comm'r of N.Y. City Dep't of Soc. Servs., 88 N.Y.2d 35 (1996); In re 2084-2086 BPE Assocs., 15 A.D.3d 288 (1st Dep't 2005), lv. denied, 2005 N.Y. App. Div. LEXIS 5221 (1st Dep't May 10, 2005), lv. denied, 5 N.Y.3d 708 (2005); Mtr of Civic Ass'n. of the Setaukets v. Trotta, 8 A.D.3d 482 (2d Dep't 2004); Mtr. of Klein v. Levin, 305 A.D.2d 316, 317-20 (1st Dep't), lv. denied, 100 N.Y.2d 514 (2003). Providing reasons for the change in determination obviates the defect. Mtr. of Incorp. Vill. of Ocean Beach v. Dep't of Health, 277 A.D.2d 453 (2d Dep't 2000), lv. denied, 96 N.Y.2d 714 (2001); Mtr. of Lantry v. State, 12 A.D.3d 864 (3d Dep't 2004), aff'd, 6 N.Y.3d 49 (2005).

2. **Agency Determinations Must Reach the Right Result for the Right Reasons**

a. **Even if adequate grounds exist for the administrative determination, the determination will be annulled if the grounds upon which it rests are inadequate or improper, or were not the actual grounds relied upon.** Judicial review of administrative determinations is limited to the grounds invoked by the administrative body at the time of the decision. In re AVJ Realty Corp., 8 A.D.3d 14 (1st Dep't 2004); Mtr. of Stone Landing Corp. v. Bd. of Appeals, 5 A.D.3d 496 (2d Dep't 2004); Mtr of Cerame v. Town of Perinton Zoning Bd. of Appeals, 6 A.D.3d 1091 (4th Dep't 2004); Mtr. of Civil Serv. Employees Ass'n. Inc. v. N.Y. State Pub. Employment Relations Bd., 276 A.D.2d 967 (3d Dep't 2000), lv. denied, 96 N.Y.2d 704 (2001). Agency determinations must reach the right result for right reason. Where the wrong reason is stated, but the right result determined, the remedy is a remand for reconsideration. Mtr. of Scherbyn v. Wayne-Finger Lakes BOCES, 77 N.Y.2d 753 (1991); Mtr. of Montauk Improvement, Inc. v. Proccacino, 41 N.Y.2d 913, 913-14 (1977); Mtr. of Parkmed Assocs. v. N.Y. State Tax Comm., 60 N.Y.2d 935 (1983). In Montauk Improvement, *supra*, the Court of Appeals stated:

[A] reviewing court, in dealing with a determination ... which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis (citation omitted).

See Mtr. of Barry v. O'Connell, 303 N.Y. 46, 51-52 (1951); Fink v. Cole, 136 N.Y.S.2d 810, 812-13 (Sup. Ct. N.Y. County 1954), aff'd., 286 A.D.2d 73 (1st Dep't 1955), rev'd on other grounds, 1

N.Y.2d 48 (1956); Mtr. of Tamulinas v. Bd. of Educ., 279 A.D.2d 527 (2d Dep't 2001); Mtr. of Bruns v. Hanna, 101 A.D.2d 1015, 1016 (4th Dep't 1984); Mtr. of Baker v. Town of Mt. Pleasant, 92 A.D.2d 611 (2d Dep't 1983); Mtr. of Golisano v. Town Bd. of Macedon, 31 A.D.2d 85, 87-88 (4th Dep't 1968); Mtr. of Blum v. D'Angelo, 15 A.D.2d 909, 910 (1st Dep't 1962).

**NOTE:**

*In Fink v. Cole*, 1 N.Y.2d 48, 54 (1956), the Court of Appeals held that lack of findings did not prejudice petitioner where he was represented by counsel and the Commission decision showed a statutory violation.

**NOTE:**

*All of the above only applies in adjudicatory proceedings where the record is relevant. Where there is a pure question of law, or where the act challenged is discretionary, and a hearing is not mandated by law, the failure to make specific findings are less relevant and may not constitute a ground for annulling the determination. See Mtr. of Mid-Island Hosp. v. Wyman*, 25 A.D.2d 765, 766-67 (2d Dep't 1966) "It is only where an administrative body or officer is acting in a quasi-judicial capacity that specific findings are required of him [citations omitted]."

**3. Agency Determinations That Violate a Statutory Mandate**

A court will overturn an agency determination even where it is supported by substantial evidence if the board has violated a statutory mandate. Even if there is substantial evidence to support a determination, if there is procedural noncompliance by an administrative board that violates a mandatory statutory provision and rises to the level of an abuse of discretion or authority, "the noncompliance alone is sufficient to warrant granting a new hearing (multiple citations omitted)." See Mtr. of Syquia v. Bd. of Educ. of the Harpursville Cent. Sch. Dist., 80 N.Y.2d 531 (1992), where a board member adjudicating at the hearing was paid more by the agency than statutorily mandated. Held: invalid and prejudicial, remanded for new hearing despite substantial evidence to support the determination.

**4. Absent a Statutory or Regulatory Mandate, a Delay in Reaching a Determination Will Not Oust the Agency of Jurisdiction Unless the Delay Is Willful, Unreasonable as a Matter of Law or Prejudicial to Petitioner**

Mtr. of Mruczek v. McCall, 299 A.D.2d 638 (3d Dep't 2002)

Mtr. of Staley v. N.Y. State & Local Ret. Sys., 290 A.D.2d 721, 722 (3d Dep't 2002)

Mtr. of Graham v. Regan, 187 A.D.2d 866, 866-67 (3d Dep't 1992).

## C. Penalty

1. **The standard of review is “abuse of discretion.”** That standard is met if the nature or severity of the penalty imposed “shocks the judicial conscience.” CPLR 7803(3). Pell, 34 N.Y.2d 222; Mtr. of Kreisler v. N.Y. City Transit Auth., 2 N.Y.3d 775 (2004); Mtr. of Pearl v. Bd. of Prof'l Med. Conduct, 295 A.D.2d 764 (3d Dep't), lv. denied, 99 N.Y.2d 501 (2002).

Note that substantial evidence applies to determine if the evidence of guilt is sufficient to withstand judicial review, and then the abuse of discretion standard applies to determine if the penalty is excessive. Mtr. of Kelly v. Safir, 96 N.Y.2d 32 (2001). Note also that where a hearing officer only recommends a penalty, but does not have authority to impose a penalty, the penalty can be increased by the commissioner: “While the Hearing officer’s recommendation is entitled to deference . . . [the reviewing officer] remained “free to disregard the recommendation . . . , to make new findings and to impose different discipline’ (Mtr. of Spry v. Delaware County, 277 A.D.2d 779 [3d Dep't 2000]; see Mtr. of Benson v. Cuevas, 293 A.D.2d 927, 930 [3d Dep't], lv. denied, 98 N.Y.2d 611 [2002];” see also Mtr. of Tottey v. Varvayanis, 307 A.D.2d 652 (3d Dep't), lv. denied, 1 N.Y.3d 501 (2003).

While past derelictions may not be used to rule against a petitioner in an administrative hearing, they may be used in setting the penalty. Mtr. of Davis v. Smith, 32 A.D.3d 1096 (3d Dep't 2006). However, at least in employment disciplinary matters, the employee must be given notice and an opportunity to respond in writings to the undisclosed considerations used in setting penalty. Mtr. of Bigelow v. Bd. of Trustees of Gouverneur, 63 N.Y.2d 470 (1984).

## IV. PARTIES TO THE PROCEEDING (CPLR 7802)

### A. Petitioner

Petitioners challenging administrative action are proper parties to request review when they can show that the challenged administrative action will in fact have a harmful effect on them and that the interest asserted is arguably within the zone of interests to be protected by the statute in question.

Soc'y of Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761 (1991); Mtr. of N.Y. Propane Gas Ass'n v. N.Y. State Dep't of State, 17 A.D.3d 915 (3d Dep't 2005)

## 1. Standing

The courts have been increasingly strict in defining standing and have denied standing in a host of cases under various circumstances:

N.Y. State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207 (2004). [Declaratory judgment case, but relevant to article 78 practice] Plaintiff's showing of injury in fact in challenge to defendants' authority to issue guidelines too speculative - injury might not occur.

Mtr. of Colella v. Bd. of Assessors of the County of Nassau, 95 N.Y.2d 401 (2000). Property owners lacked standing to challenge exempt tax status of adjacent or nearby Temple. No injury in fact, not within zone of interests, no showing of injury different than public;

Mtr. of Transactive Corp. v. N.Y. State Dep't of Soc. Servs., 92 N.Y.2d 579 (1998). Subcontractor unable to challenge bid award because could not show injury distinct from that of general public;

Mtr. of Hassig v. N.Y. State Dep't of Health, 5 A.D.3d 846 (3d Dep't 2004). No standing to petitioner who sought to compel Department of Health to develop and implement a breast cancer prevention program. Petitioner cannot show harm different than general public; no particularized harm sufficient for standing.

Mtr. of Hunter's Crossing Neighborhood Ass'n v. Maul, 267 A.D.2d 1036 (4<sup>th</sup> Dep't 1999). Neighborhood association which failed to allege injury from establishment of group home lacks standing.

Mtr. of Parkland Ambulance Serv., Inc. v. N.Y. State Dep't of Health, 261 A.D.2d 770 (3d Dep't), lv. denied, 93 N.Y.2d 818 (1999). Conclusory allegations of "adverse impact" on expansion of service for competing ambulance service, insufficient to support standing.

### **CAUTION:**

*Do not confuse "standing" with "capacity" a different, although related, concept. See Mtr. of County of Oswego v. Travis, 16 A.D.3d 733 (3d Dep't 2005); Mtr. of Town of Riverhead v. N.Y. State Bd. of Real Prop. Servs., 7 A.D.3d 934 (3d Dep't 2004), aff'd, 5 N.Y.3d 36 (2005).*

**B. Respondent - “body or officer”**

1. CPLR 7802(a) defines “body or officer” to include “every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under [] article [78].”

2. The State is not a “body or officer” against whom a proceeding under article 78 may be brought.

Patchoque Scrap Iron & Metal Co v. Ingraham, 57 Misc. 2d 290, 291  
(Sup. Ct. Suffolk County 1968)

**V. VENUE**

**A. Generally.** CPLR 7804(b) provides that an article 78 proceeding is to be brought in the Supreme Court, in the county specified in CPLR 506(b), except as that section provides otherwise.

**B. CPLR 506(b).** Subject to specific statutory exceptions (outlined below), CPLR 506(b) provides that an article 78 proceeding is to be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located.

**NOTE:**

*While CPLR 506(b) permits venue to be placed in a number of different places, there is strong authority indicating that “where the material events took place” usually will and should govern where venue is to be placed. County of Nassau v. State of N.Y., 249 A.D.2d 353 (2d Dep’t 1998); Ronco Commc’ns & Elec., Inc. v. Valentine, 70 A.D.2d 773 (4<sup>th</sup> Dep’t 1979); Mtr. of Lacqua v. O’Connell, 280 A.D. 31 (1<sup>st</sup> Dep’t 1952); Burrell v. Countytowne Apt. P’ship, 247 A.D.2d 805 (3d Dep’t 1998); *but see* Mtr. of Intl. Summit Equities Corp. v. Van Schoor, 166 A.D.2d 531 (2d Dep’t 1990).*

**1. Exception - Justice of the Supreme Court or County Court.**

An article 78 proceeding against a Justice of the Supreme Court or a County Court Judge must be commenced in the Appellate Division of the Judicial Department where the proceeding, in the course of which the matter sought to be enforced or restrained, originated, is triable (CPLR 506(b)(1)).

In Mtr. of Nolan v. Lungen, 61 N.Y.2d 788, 790 (1984), the Court of Appeals held, in a prohibition against a District Attorney, that the proceeding instituted in the Appellate Division instead of the Supreme Court was properly dismissed:

Although as a venue provision, CPLR 506 (subdivision [b]) is waivable, to the extent that it also sets jurisdictional limitations, by virtue of the reference to it in CPLR 7804 (subd [b]), the provisions cannot be waived. The question whether a proceeding must be commenced in Supreme Court or the Appellate Division (as opposed to which county or department) clearly concerns subject matter jurisdiction. Thus, the present case, which named no Judge as respondent, was improperly commenced in the Appellate Division.

**2. Exception - CPLR 506(b)(2).**

CPLR 506(b)(2) requires that an article 78 proceeding against the following specified agencies be commenced in **Albany County Supreme Court**: (1) the Regents of the State of New York; (2) the Commissioner of Education; (3) Commissioner of Taxation and Finance or the Tax Appeals Tribunal; (4) the Public Service Commission; (5) the Commissioner of the Department of Transportation; (6) the Water Resources Board; (7) the Comptroller; and (8) the Department of Agriculture and Markets.

**3. Exception - Agency Statue or Regulation Designates Reviewing Court.**

On a related jurisdiction (not venue) issue, some statutes require that an article 78 proceeding against a specified agency be commenced in a specific court. For example, article 78 proceedings which seek to challenge disciplinary proceedings against doctors and physician assistants (Public Health Law § 230-c(5)) and against other professions (Education Law § 6510(5)) must be commenced in the Appellate Division, Third Department.

## VI. PLEADINGS

CPLR 7804(d) provides that there shall be a **verified petition**, a **verified answer** and a **reply** to a counterclaim or to new matter in the answer. CPLR 7804(d) also provides that the court may permit other pleadings upon such terms as it may specify. The respondent must serve a verified answer and supporting affidavits, if any, or make a motion to dismiss upon objections in point of law at least five days prior to the return date of the petition (CPLR 7804(c), (f)). Objections other than subject matter jurisdiction and failure to state a cause of action are waived unless raised by motion to dismiss or answer. Any motion to dismiss or answer must include lack of personal jurisdiction or that objection is waived (CPLR 3211(e)). See Mtr. of Mack v. Donovan, 36 A.D.3d 535, 536 (1<sup>st</sup> Dep't 2007); Mtr. of Butler v. Goord, 262 A.D.2d 694 (3d Dep't 1999).

### A. Petition

1. **Order to Show Cause or Notice of Petition.** Pursuant to CPLR 403(a) and 7804(c), a petition can be brought by either an order to show cause or a notice of petition. CPLR 304, 306-a and 306-b were amended in late 2001 (Ch. 473 L. 2001) to eliminate the requirement that petitioners file an order to show cause or a notice of petition with their petition to toll the statute of limitations - now, filing of the petition alone commences the proceeding. The amendment does not change or eliminate the need to *serve* a notice of petition or an order to show cause with the petition on petitioner's opponent to acquire personal jurisdiction.

#### **CAUTION:**

*Service of a petition without an Order to Show Cause or a Notice of Petition is a jurisdictional defect requiring dismissal of the proceeding. Spodek v. N.Y. State Comm'r of Tax. & Fin., 85 N.Y.2d 760 (1995). Note also that service of a Notice of Petition or Order to Show Cause without a return date requires dismissal of an article 78 proceeding. Mtr. of Krenzer v. Town of Caledonia Zoning Bd., 233 A.D.2d 882 (4<sup>th</sup> Dep't 1996); Mtr. of Metzger v. N.Y. State Tax Appeals Tribunal, 205 A.D.2d 851 (3d Dep't), *lv. denied*, 84 N.Y.2d 811 (1994). *But see* Mtr. of Rivera v. Glen Oaks Vill. Owners, Inc., 29 A.D.3d 560 (2d Dep't 2006), and Mtr. of Ballard v. HSBC Bank USA, 6 N.Y.3d 658 (2006) (holding that the defect is waivable and does not implicate subject matter jurisdiction). In addition, court clerks can change an erroneous date. Mtr. of Nat'l Gypsum v. Assessor of Tonawanda, 4 N.Y.3d 680 (2005).*

2. **The petition may be accompanied by affidavits or other written proof (CPLR 7804(d)).**

Any affidavits attached to the petition should be considered part of the application for relief.

Mtr. of McEachin v. McGinnis, 305 A.D.2d 816 (3d Dep't 2003)

Mtr. of Honolulu Ltd. v. Fifth Ave. Coach Lines, Inc.,  
32 Misc. 2d 889, 891 (Sup. Ct. N.Y. County 1962)

**NOTE:**

*A court may deem an affidavit, or even the notice of petition, a petition if it contains the attributes of a petition. Mtr. of Shumsky v. N.Y. City Loft Bd., 192 A.D.2d 350 (1<sup>st</sup> Dep't 1993); Mtr. of Gryska v. Cheung County Elmira Sewer Dist., 149 A.D.2d 849 (3d Dep't 1989); but see Mtr. of Long Island Citizens Campaign, Inc. v. County of Nassau, 165 A.D.2d 52 (2d Dep't 1991).*

Use of an affidavit which contains a prayer for relief in place of a petition has been held to constitute a mere technical irregularity and not a jurisdictional defect.

Mtr. of Kohnberg v. Murdock, 4 A.D.2d 750, 751 (2d Dep't 1957)

Mtr. of Ritter v. City of Binghamton, 105 Misc. 2d 1061 (Sup. Ct. Broome County 1980), rev'd on other grounds, 80 A.D.2d 710 (3d Dep't 1981), aff'd, 54 N.Y.2d 629 (1981).

**3. The liberal rule with respect to a pleading in an action will be applied to a petition in an article 78 proceeding.**

People ex rel Brooklyn Union Gas Co. v. Miller, 253 A.D. 162, 165 (2d Dep't 1938)

**CAUTION:**

*A pleading in a special proceeding must comply with pleading requirements applicable to a complaint in a civil action. See CPLR 402. Thus, a pleading must be "sufficiently particular to give the court and the parties notice of the transactions [or] occurrences . . . intended to be proved and the material elements of each cause of action or defense" (CPLR 3013)." Conclusory and generalized statements contained in a petition, which are unsupported by specific allegations, fall short of meeting the specificity requirements and may result in dismissal of the petition. Mtr. of Johnson v. Goord, 290 A.D.2d 844 (3d Dep't 2002).*

A petition based on information and belief, rather than on outright allegations of wrongdoing, cannot be sustained.

Mtr. of Pachuki v. Walters, 56 A.D.2d 677 (3d Dep't), lv. denied, 42 N.Y.2d 808 (1977)

Kaplan v. Lipkins, 36 Misc. 2d 868, 869 (Sup. Ct. Queens County 1962), aff'd, 19 A.D.2d 723 (2d Dep't 1963)

**4. Timing of Service.** Unless petitioner uses an order to show cause to alter time periods, the notice of petition and petition must be served at least twenty days before the return date (CPLR 7804(c)).

**NOTE:**

*A return date which does not meet the 20 day requirement will be treated as a defect or irregularity which, pursuant to CPLR 2001, shall be disregarded in the absence of substantial prejudice to a party. Mtr. of Griswald v. Vill. of Penn Yan, 244 A.D.2d 950 (4<sup>th</sup> Dep't 1997); Mtr. of Marmo v. Dep't of Env'tl. Conservation, 134 A.D.2d 260 (2d Dep't 1987); Mtr. of Brown v. Casier, 95 A.D.2d 574, 577 (3d Dep't 1983).*

**5. Verification.** The petition must be verified, or it is a nullity (see CPLR 3022).

However, the failure by petitioner to verify the petition is waived if respondent does not give notice to petitioner with "due diligence" that respondent has elected to treat the petition as a nullity. Due diligence has been interpreted to require that the defective pleading be rejected within 24 hours of receipt.

Mtr. of Miller v. Bd. of Assessors, 91 N.Y.2d 82 (1997)

Peterson v. N.Y. City Police Dep't., 270 A.D.2d 184 (1<sup>st</sup> Dep't 2000)

Colon v. Vacco, 242 A.D.2d 973 (4<sup>th</sup> Dep't), lv. denied, 91 N.Y.2d 804 (1997).

**NOTE:**

***Failure of petitioner to serve any affidavits or memorandum of law in support of their Verified Petition.*** Any attempt by a petitioner to serve such papers as part of their reply violates section 202.8(c) of the Uniform Rules for the New York State Trial Courts governing motion procedure in article 78 proceedings. See 22

*N.Y.C.R.R. §§ 202.8(b), 202.9. Under 22 N.Y.C.R.R. §§ 202.8(b), petitioner, as the moving party in an article 78 proceeding, is obligated to “serve copies of all affidavits and briefs upon all other parties at the time of service of the notice of motion.” (Emphasis added). Section 202.9 makes the up-front service of papers requirement applicable to special proceedings. This filing requirement has been enforced by the courts. See Rosenman Colin Freund Lewis & Cohen v. Edelman, 165 A.D.2d 533, 536 (1st Dep’t), lv. denied, 77 N.Y.2d 802 (1991) (movant not permitted to flout “well-understood norms of motion practice requiring the moving party to set forth whatever it is he has to say in papers accompanying the notice of motion (22 N.Y.C.R.R. 202.8[c]).”); see also Sutherland v. Glennon, 157 Misc. 2d 547, 549 (Sup. Ct. Monroe County 1993), appeal dismissed, 209 A.D.2d 898 (3d Dep’t 1994) (although an article 78 movant is not required by § 202.8 to prepare a brief, if a brief is prepared it must be served with the notice of petition).*

**B. Answer**

**1. The answer, together with supporting affidavits, must be served at least five days before the return date (CPLR 7804(c)).**

**NOTE:**

*If the fifth day before the return date is a Sunday or holiday, service of the answer on the following day is timely. Mtr. of Jones v. Coughlin, 125 A.D.2d 883 (3d Dep’t 1986); Mtr. of Rome-Floyd Residents Ass’n v. Flacke, 113 Misc. 2d 990, 993 (Sup. Ct. Oneida County 1982), aff’d, 93 A.D.2d 981 (4<sup>th</sup> Dep’t 1983).*

If a petition is served pursuant to an order to show cause, rather than by notice of petition, and the order to show cause does not provide a date for service of the answer, the answer should be served on or before the return date.

Mtr. of Stortecky v. Mazzone, 156 Misc. 2d 16 (Sup. Ct. Fulton County 1992)

N.Y. State Builders Ass’n, Inc. v. State, 98 Misc. 2d 1045, 1048 (Sup. Ct. Albany County 1979)

**2. Contents of answer.** The answer should contain: (1) responses to the petition’s allegations; (2) objections in point of law that could terminate the proceeding; (3) a statement of pertinent and material facts showing the grounds of the respondent’s actions complained of (CPLR 7804(d)); and (4) verification by someone at the agency with personal knowledge of the facts, whenever possible.

Mtr. of Battaglia v. Schuler, 60 A.D.2d 759 (4<sup>th</sup> Dep’t 1977)

**NOTE:**

*Given the nature of the lower courts in New York City, the answer or memorandum of law in support of the answer may need to contain an explanation of why the administrative determination is not arbitrary and capricious, etc., and/or is supported by substantial evidence. See CPLR 7804(d) ("answer . . . must state pertinent and material facts showing the grounds of the respondent's action complained of"). The length of the explanation will depend on the length of the administrative determination or the testimony or evidence presented at the hearing.*

**C. Record of Proceedings Below (The Return or Administrative Record)**

**1. Respondent must file with the answer a certified transcript of the record (CPLR 7804 (e)).**

**NOTE:**

*In preparing answers, affidavits and briefs, it is essential to determine the exact nature of the proceeding and the appropriate scope of judicial review. Once this is determined, tailor affidavits and briefs to properly address the appropriate test of a determination's validity. Do not fight on the wrong battlefield.*

When the determination was made after an adjudicatory hearing, the hearing transcript and exhibits submitted at the hearing constitute the return or administrative record. In adjudicatory proceedings, respondent cannot support the determination with material outside the hearing record, since the determination must be based solely on the record.

Mtr. of Simpson v. Wolansky, 38 N.Y.2d 391 (1975)

49<sup>th</sup> St. Mgmt. Co. v. N.Y. City Taxi & Limousine Comm'n, 277 A.D.2d 103 (1<sup>st</sup> Dep't 2000) (using a determination from another hearing to support your decision is prohibited).

Mtr. of Smith v. Bd. of Educ., Oteora Cent. Sch. Dist., 221 A.D.2d 755 (3d Dep't 1995), lv. denied, 87 N.Y.2d 810 (1996)

When the determination was made without a hearing, or after a hearing that was not mandated by law, all of the documents and data upon which the determination was based constitute the return.

a. It is absolutely essential in a “non-hearing” case that the determination be supported by detailed affidavits authored by decision-makers, carefully explaining the grounds for the determination. Mtr. of Kirmayer v. N.Y. State Dep’t of Civil Serv., 24 A.D.3d 850 (3d Dep’t 2005). These affidavits are the respondent’s sole opportunity to set forth the “rational basis” for the determination at issue.

b. Affidavits must be by someone with personal knowledge of the facts. An affidavit by an attorney who has no personal knowledge of the pertinent facts lacks probative value.

PPG Indus. v. A.G.P. Sys., 235  
A.D.2d 979 (3d Dep’t 1997)

The mere filing and serving of an answer, without filing a certified transcript and/or affidavits or other written proof demonstrating the basis for respondent’s determination, is not sufficient to satisfy the requirements of CPLR 7804(e) and may result in entry of a default judgment.

Mtr. of Gilbert v. Endres, 13 A.D.3d 1104 (4<sup>th</sup> Dep’t  
2004)

Mtr. of Captain Kidd’s, Inc. v. N.Y. State Liquor  
Auth., 248 A.D.791, opinion on remand, 249 A.D.2d  
739 (3d Dep’t 1998)

## **2. Composition of the record in adjudicatory (judicial/quasi-judicial) proceedings**

a. **The standard of review in adjudicatory proceedings.** Judicial review of adjudicatory agency determinations is limited to the facts and record adduced before the agency. Mtr. of Tamulinas v. Bd. of Educ., 279 A.D.2d 527 (2d Dep’t 2001); Mtr. of Fanelli v. N.Y. City Conciliation & Appeals Bd., 90 A.D.2d 756, 757 (1st Dep’t 1982), aff’d, 58 N.Y.2d 952 (1983). Consideration of material outside the record used by the administrative law judge to discredit petitioner’s witness deprives the petitioner of a fair hearing. Mtr. of Korth v. McCall, 275 A.D.2d 511 (3d Dep’t 2000). The agency’s factual findings are conclusive if supported by “substantial evidence.” “Substantial evidence” is defined as “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.” People ex rel. Vega v. Smith, 66 N.Y.2d 130, 139 (1985); 300 Gramatan Ave Assocs. v. State Div. of Human Rights, 45 N.Y.2d 176, 180-81 (1978).

**b. State Administrative Procedure Act (“SAPA”) record requirements.**

**i. Article 3 of SAPA applies only to adjudicatory proceedings required by law to be made on the record.** Mtr. of Metro. Taxicab Bd. of Trade, Inc. v. Boardman, 270 A.D.2d 633 (3d Dep’t 2000).

**ii. SAPA § 302 “Record.”**

**a. Section 302(1)** specifies that in any agency adjudicatory proceeding the record includes:

(a) all notices, pleadings, motions, intermediate rulings; (b) evidence presented; (c) a statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose; (d) questions and offers of proof, objections thereto, and rulings thereon; (e) proposed findings and exceptions, if any; (f) any findings of fact, conclusions of law or other recommendations made by a presiding officer; and (g) any decision, determination, opinion, order or report rendered.

**b. Section 302(2)** requires the agency to make a "complete record" of all adjudicatory proceedings, and furnish a copy of the record and transcript to any party.

**c. Section 302(3)** cautions that findings of fact be based exclusively on the evidence and matters officially noticed.

**NOTE:**

*In addition to SAPA's definition of the what constitutes an administrative record, the composition of the administrative record may be effected by an administrative agency's controlling statute or regulation. See, e.g., 18 N.Y.C.R.R. § 358-5.11(a) (setting forth the elements of an administrative hearing record before the New York State Office of Temporary and Disability Assistance).*

**d. Marked, but not introduced documents.** Documents marked for identification but never introduced into evidence and hearsay information not admitted as evidence, stipulated to or judicially noticed, are not properly part of the record. Mtr. of Korth v. McCall, 275 A.D.2d 511 (3d Dep’t 2000); Mtr. of Yanoff v. Comm'r of Educ., 64 A.D.2d 763 (3d Dep’t 1978).

**c. The record must accompany the filing of the answer.** CPLR 7804(e) provides that respondent must file (in the County Clerk's Office) with the verified answer

a certified transcript of the record of the proceedings under consideration (commonly called "the Return"), unless already filed. Supreme Court may order a defect or omission cured.

**i. The documents listed under SAPA 302(1) constitute the return.** In adjudicatory proceedings, respondent cannot support the determination with material outside the hearing record, since the determination must be based solely on the record. Mtr. of Simpson v. Wolansky, 38 N.Y.2d 391 (1975); Mtr. of Smith v. Bd. of Ed., Onteora Sch. Dist., 221 A.D.2d 755 (3d Dep't 1995), *lv. denied*, 87 N.Y.2d 810 (1996); but see 49th St. Mgmt. Co. v. N.Y. City Taxi & Limousine Comm'n, 277 A.D.2d 103 (1<sup>st</sup> Dep't 2000) (finding that despite reliance upon another administrative hearing, the determination would stand because of the existence of "substantial other evidence" to support the determination).

**ii. Failure to serve transcript or affidavits.** The mere filing and serving of an answer, without filing a certified transcript (in adjudicatory determinations) and/or affidavits or other written proof demonstrating the basis for respondent's determination (in non-adjudicatory situations), is not sufficient to satisfy the requirements of CPLR 7804(e) and may result in entry of a default judgment. Mtr. of Captain Kidd's Inc. v. N.Y. State Liquor Auth., 248 A.D.2d 791, opinion on remand, 249 A.D.2d 739 (3d Dep't 1998); Mtr. of Polite v. Goord, 245 A.D.2d 1109 (4th Dep't 1997).

**a. Failure to file the requisite documents can result in reversal and remand where lower court ruled on an incomplete record.** See Mtr. of Captain Kidd's, Inc. v. N.Y. State Liquor Auth., 248 A.D.2d 791 (3d Dep't 1998); Mtr. of Polite v. Goord, 245 A. D.2d 1109 (4th Dep't 1997); Mtr. of Petty v. Sullivan, 131 A.D.2d 762 (2d Dep't 1987).

**b. Failure to file the record also prevents petitioner from perfecting his appeal or review proceeding by certification.** See, e.g., Appellate Division, Third Department rule 800.7(a)(1).

**d. The return should be assembled in chronological order with individual documents designated by separate exhibit numbers.** The administrative documents should not be assembled under one exhibit. Nor should they be placed out of chronological order. The transcript must be read to determine what documents are referenced in the hearing and what, therefore, needs to be included in the record.

**e. Limitations on the use of affidavits and evidence that were not before the agency in adjudicatory proceedings.**

**i. Limits on the use of affidavits.** Although CPLR 7804(d) provides that "a verified petition ... may be accompanied by affidavits or other written proof," in adjudicatory proceedings factual averments not made before the agency will not be considered on review. Mtr. of Basile v. Albany Coll. of Pharmacy, 279 A.D.2d 770 (3d Dep't), *lv. denied*, 96 N.Y.2d 708 (2001) (affidavits will be disregarded); Mtr. of Hakeem v. Coombe, 233 A.D.2d 805 (3d

Dep't 1996); Mtr. of Celestial Food Corp. v. N.Y. State Liquor Auth., 99 A.D.2d 25, 26-27 (2d Dep't 1984); cf. Mtr. of Fanelli v. N.Y. City Conciliation & Appeals Bd., 58 N.Y.2d 952 (1983), aff'g, 90 A.D.2d 756, 757 (1st Dep't 1982).

**a. Exception - Allegations outside of record.**

Where petitioner makes allegations that are outside the hearing, but necessarily affect the determination's validity (e.g., off-the-record conversations, issues involving the hearing officer's previous involvement in matter [i.e., investigation]; predetermination of guilt; destruction of evidence) affidavits should be obtained to refute the allegations. See Mtr. of O'Neal v. Coughlin, 162 A.D.2d 826 (3d Dep't 1990) (Allegations of hearing officer's prior involvement in the administrative proceeding refuted by affidavit submitted in Supreme Court).

**ii. Limits on the use of evidentiary submissions.** Because in adjudicatory proceedings, courts will only review the record that was before the agency, attempts to supplement the evidentiary basis of the determination by use of documentary evidence is generally prohibited. See Mtr. of Sterling 350 Enters. v. N.Y. State Div. of Hous. & Comm. Renewal, 259 A.D.2d 621 (2d Dep't 1999); Mtr. of Duamutef v. Johnson, 266 A.D.2d 823 (4th Dep't 1999), lv. denied, 94 N.Y.2d 759 (2000) (Court highly critical of answer which contained exhibits that were not made available to petitioner at hearing); see also Mtr. of Acme Bus Corp. v. Bd. of Ed., 91 N.Y.2d 51 (1997); Mtr. of Yonkers Gardens Co. v. N.Y. State Div. of Hous. & Cmty. Renewal, 51 N.Y.2d 966 (1980); Levine v. N.Y. State Liquor Auth., 23 N.Y.2d 863, 864 (1969) (rejecting new matter appended to plaintiffs brief). Mtr. of City of Saratoga Springs v. Zoning Bd. of Appeals of Wilton, 279 A.D.2d 756 (3d Dep't 2001).

**a. Exception - Public records, non-evidentiary material and incontrovertible documentary evidence.**

Public records, non-evidentiary material and incontrovertible documentary evidence. See Mtr. of Flah's of Syracuse, Inc. v. Tully, 89 A.D.2d 729 (3d Dep't 1982) (State Tax Commission moved to dismiss amicus curiae brief which contained three documents not part of record on appeal). HELD: Internal Tax Department memorandum to auditors regarding this case and a store and office lease form are "evidentiary in nature, and therefore, since they are not part of the record on appeal, they will not be considered by this Court in this proceeding" (emphasis added). Id. at 729.

However, the Court let in a New York State Bar Association report on the subject matter in issue because it was "not evidentiary and could have been researched by the court on its own." Id. at 730. See also Mtr. of Persing v. Coughlin, 214 A.D.2d 145 (4th Dep't 1995) (Court will take judicial notice of a date and a fact that was not brought to trial court's attention, even for purpose of reversing a judgment); State v. Peerless Ins. Co., 117 A.D.2d 370, 374 (3d Dep't 1986). On appeal, State needed to place before court a tax assessment form (notice of

determination and demand) to prove when the statute of limitations commenced. We attached the document to the brief. The Court let the document in: "For the purpose of sustaining a judgment, incontrovertible, documentary evidence dehors the appeal record may be received by an appellate court [multiple citations omitted]."

Neither the authenticity nor accuracy of the document was disputed; if disputed, the court may reject or remand for admission or trial. Mtr. of Raqiyb v. Coughlin, 214 A.D.2d 788 (3d Dep't), lv. denied, 86 N.Y.2d 702 (1995).

**NOTE:**

*Object if the petitioner attaches documents to the petition which were not part of the administrative record. In an article 78 proceeding, a court is limited to reviewing the administrative record; it may not consider evidence de hors the record. Lusker v. City of N.Y., 194 A.D.2d 487 (1st Dep't), lv. denied, 82 N.Y.2d 660 (1993); Brusco v. N.Y. State Div. of Hous. & Comty. Renewal, 170 A.D.2d 184, 185 (1st Dep't 1991), appeal dismissed, 77 N.Y.2d 939 (1991), cert. denied, 502 U.S. 857 (1991) ("In the course of judicial review, the court may not consider arguments or evidence not contained in the administrative record.").*

**3. Composition of the record in non-adjudicatory proceedings**

**a. Judicial review of non-adjudicatory agency action is not limited to the "record" before the agency, because there is no record per se.** Mtr. of Poster v. Strough, 299 A.D.2d 127, 140-43 (2d Dep't 2002).

**b. The agency's determination is reviewed to see if there is a rational basis for the action, or whether the action is arbitrary and capricious.** The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. Mtr. of Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974).

**c. No substitution of judgment.** A court may not substitute its judgment for that of the board or body whose determination is under review unless the determination is arbitrary and capricious and constitutes an abuse of discretion. Mtr. of Diocese of Rochester v. Planning Bd. of Brighton, 1 N.Y.2d 508, 520 (1956).

**d. When the determination was made without a hearing, or after a hearing that was not mandated by law, all of the documents and data upon which the determination was based constitute the return.**

i. **Need for affidavits.** It is absolutely essential in a "non-hearing" case to prepare detailed affidavits by decision-makers, completely explaining the grounds for the determination. This is the respondent's sole opportunity to set forth the "rational basis" for the determination at issue.

ii. **Affidavits must be by someone with personal knowledge of the facts.** An affidavit by an attorney who has no personal knowledge of the pertinent facts lacks probative value. PPG Industries v. A.G.P. Sys., 235 A.D.2d 979 (3d Dep't 1997).

#### D. Motion to Dismiss

1. **Respondent may raise an objection in point of law by setting it forth in a motion to dismiss the petition (or, of course, in the answer) (CPLR 7804(f)).**

2. **Timing of motion.** The motion to dismiss, like the answer, must be served five days before the return date of the petition (CPLR 7804(f)). CPLR 2103 does not apply to add days for mailing since the motion does not set a return date.

Mtr. of Ayres v. Comm'r of Tax & Fin., 252 A.D.2d 808 (3d Dep't 1998)

Mtr. of Harvey v. N.Y. State Dep't of Env'tl. Conservation, 235 A.D.2d 625 (3d Dep't 1997)

3. **File answer if motion denied.** If the motion to dismiss is denied, the Court *shall* permit the respondent to answer (CPLR 7804(f)). Compare CPLR 404(a) "may permit the respondent to answer" (emphasis added).

#### **CAUTION:**

*It is error for lower court to award petitioner affirmative relief without allowing respondent to interpose an answer. Mtr. Nassau BOCES Cent. Council of Teachers v. Bd. of Cooperative Educ. Servs. of Nassau County, 63 N.Y.2d 100 (1984); Mtr. of Short v. Safir, 267 A.D.2d 114 (1<sup>st</sup> Dep't 1999); Mtr. of Jones v. Kennedy, 112 A.D.2d 627 (3d Dep't 1985), rev'd on other grounds, 66 N.Y.2d 904 (1985); Mtr. of LaRocque v. Farnan, 51 A.D.2d 1057 (2d Dep't 1976).*

4. **Exception - no issue of fact.**

If all the papers before the court on respondent's motion to dismiss the petition make clear that no issue of fact exists and that an answer could add nothing, an answer pursuant to CPLR 7804(f) is not required.

Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409 (2001)

Campaign for Fiscal Equity v. N.Y., 86 N.Y.2d 307, 318 (1995)

Jiggetts v. Grinker, 75 N.Y.2d 411, 414 (1990)

Mtr. of Giorgio v. Bucci, 246 A.D.2d 711 (3d Dep't), lv. denied, 91 N.Y.2d 814 (1998)

Marlow v. Kobliner, 78 A.D.2d 874 (2d Dep't 1980), lv. denied, 53 N.Y.2d 603 (1981)

This motion should therefore be used sparingly to make threshold objections that could terminate the proceeding.

**E. Reply**

There shall be a reply to a counterclaim denominated as such and to new matter in the answer or where the accuracy of proceedings annexed to the answer is disputed (CPLR 7804(d)).

**F. Other Pleadings**

The court may permit such other pleadings as are authorized in an action upon such terms as it may specify (CPLR 7804(d)).

**CAUTION:**

*A pleading in an article 78 proceeding may not be amended as of right. The party seeking to amend a pleading must obtain court authorization to do so. Mtr. of Purtell v. Kuczek, 112 A.D.2d 1092, 1094 (3d Dep't 1985).*

**VII. OBJECTIONS IN POINT OF LAW - GENERALLY**

**A. Respondent may raise an “objection in point of law” by setting it forth in his answer or by a motion to dismiss the petition (CPLR 7804(f)).**

**B. Akin to affirmative defenses.** Although there are no “affirmative defenses” in article 78 proceedings (Mtr. of Hop-Wah v. Coughlin, 118 A.D.2d 275 (3d Dep't 1986), rev'd on other grounds, 69 N.Y.2d 791 (1987)), an objection in point of law is “akin to an affirmative defense (see

CPLR 3018(b)), which may be raised by a motion to dismiss (see CPLR 3211(a)).” By this the court means “threshold objections of the kind listed in CPLR 3211(a), which are capable of disposing of the case without reaching the merits.” See Hop-Wah, *supra*.

**C. Threshold objections.** These are objections *to the petition*, raised by *respondent* pursuant to CPLR 7804(f). They are *threshold* “objections” that dispose of the case without reaching the merits. They do not include petitioner’s legal (including constitutional claims such as due process) or procedural challenges to the administrative determination. CPLR 7804(g). Stated simply, petitioner cannot raise an objection in point of law to his own proceeding.

Mtr. of Sureway Towing, Inc. v. Martinez, 8 A.D.3d 490 (2d Dep’t 2004) (Petitioner’s violation of law argument not an objection that could terminate proceeding);

Mtr. of Hoch v. N.Y. State Dep’t of Health, 1 A.D.3d 994 (4<sup>th</sup> Dep’t 2003) (“[A]n ‘objection in point of law’ is one raised ... by respondent in the answer”);

Mtr. of Zito v. N.Y. State Racing & Wagering Bd., 300 A.D.2d 805 (3d Dep’t 2002), *lv. denied*, 100 N.Y.2d 502 (2003) (Substantial evidence case transferred despite due process claim);

Mtr. of Palace Camera & Elec., Inc. v. City of N.Y., 280 A.D.2d 605 (2d Dep’t 2001) (Petitioner’s argument that penalty is excessive not an objection that could terminate proceeding);

Mtr. of Pieczonka v. Jewett, 273 A.D.2d 842 (4<sup>th</sup> Dep’t 2000) (Claim that the agency lacked jurisdiction in the underlying administrative proceeding should have been transferred);

Mtr. of Stein v. County of Rockland, 259 A.D.2d 552 (2d Dep’t 1999) (Same, regarding claim that the hearing officer lacked jurisdiction);

Mtr. of Martin v. Platt, 191 A.D.2d 758 (3d Dep’t), *lv. denied*, 82 N.Y.2d 652 (1993) (“[Petitioner’s due process claim does not qualify as an ‘objection’ as that term is used in C.P.L.R. 7804 [f] and [g]”);

Mtr. of G & G Shops, Inc. v. N.Y. City Loft Bd., 193 A.D.2d 405 (1<sup>st</sup> Dep’t 1993) (Petitioners’ “constitutional and procedural” argument for overturning the determination should have been transferred);

Mtr. of Wayering v. City of St. Lawrence, 140 A.D.2d 838, 839 (3d Dep't 1988) (Claims against hearing raised in petition are not objections in point of law);

Mtr. of Hop-Wah v. Coughlin, 118 A.D.2d 275 (3d Dep't 1986), rev'd on other grounds, 69 N.Y.2d 791 (1987);

Mtr. of O'Donnell v. Rozzi, 99 A.D.2d 494 (2d Dep't 1984) (Legal issues which "deal [] with the merits of petitioner's claim" like petitioner's claim that the rules which he was found guilty of violating were unconstitutional -- should not be resolved by Supreme Court, but instead should be transferred to the Appellate Division).

But see

Mtr. of Sachs v. N.Y. State Racing & Wagering Bd., 1 A.D.3d 768 (3d Dep't 2003), lv. denied, 2 N.Y.3d 706 (2004) "[Special Term] properly reviewed petitioner's potentially dispositive claims related to lack of jurisdiction, bias and the amendment of the charges and, after rejecting them, transferred the proceeding to this Court to address the substantial evidence issue (see CPLR 7804[g])." See also Mtr. of Earl v. Turner, 303 A.D.2d 282 (1st Dep't), lv. denied, 100 N.Y.2d 506 (2003). (Sachs is contrary to most precedent. There are no objections in point of law that petitioner can raise (unless it is the rare situation where they are raised in a reply) and, as shown above, objections are to the judicial proceeding, not to the underlying hearing).

As the above shows, there is some confusion over what constitutes an objection in point of law. However, the 1990 amendment to CPLR 7804(g) provides a clear explanation of what kind of objection "could terminate the proceeding" by providing an illustrative list -- "lack of jurisdiction, statute of limitations and res judicata." Employing the principle of statutory construction known as "ejusdem generis," "by which a series of specific words describing things or concepts of a particular sort are used to explain the meaning of a general one in the same series," Mtr. of the Estate of Riefberg, 58 N.Y.2d 134, 141 (1983), the general phrase "objections as may terminate the proceeding" is clearly limited to the kinds of threshold objections raised by a respondent that could terminate the judicial proceeding without reaching the merits. See also Alexander, Practice Commentaries, McKinney's, Book 7B, CPLR 7804:8, 660-61. Thus, the provision, for example, has no application to petitioner's due process or other objections to the administrative proceeding.

## VIII. OBJECTIONS IN POINT OF LAW - SPECIFICALLY

### A. Failure to Comply with an Applicable Statute of Limitations

Article 78 proceedings are commenced by purchasing an index number and filing a petition with the Clerk of the Court in the county in which the proceeding is brought (CPLR 304, as amended by Ch. 473 L. 2001). Mtr. of Loper v. Selsky, 29 A.D.3d 1183 (3d Dep't 2006). The Clerk of the Court is the County Clerk.

#### **CAUTION:**

*Filing the petition with the Supreme Court Clerk will neither commence proceeding nor toll the statute of limitations. **The petition must be filed in the County Clerk's Office.** Mtr. of Mendon Ponds Neighborhood Ass'n v. Dehm, 98 N.Y.2d 745 (2002); Montague v. N.Y. State Dep't of Envtl. Conservation, 25 A.D.3d 904 (3d Dep't), *lv. denied*, 6 N.Y.2d 712 (2006). However, some county clerks have reacted to Mendon Ponds by designating the Supreme court clerks as their agents for filing. This is perfectly acceptable because the statute, CPLR 304, states that filing must be by "delivery of the ... petition to the clerk of the court ... or any other person designated by the clerk of the court for that purpose" (emphasis added). However, some locally imposed clerk rules do not pass muster. See Sharratt v. Hickey, 298 A.D.2d 956 (4<sup>th</sup> Dep't 2002) (voiding a local county clerk's rule that petitioner had to supply an original and three copies for filing).*

Commencement by filing provisions apply to proceedings originated in the Appellate Division. Mtr. of Spodek v. N.Y. State Comm'r of Tax. & Fin., 85 N.Y.2d 760 (1995). Service is a follow-up procedure.

**1. CPLR 217 - Four months.** The article 78 proceeding must be commenced within four months after the determination becomes "final and binding." *Four months is not 120 days.* General Construction Law § 30 provides that a "month" "shall be computed by counting such number of calendar months from such day." The provision does not state that you count days. General Construction Law § 31 defines the term "month" as a "calendar month and not a lunar month." The annotations thereunder construe, for example, the six month period in CPL § 30.30 as "6 months, not 180 days." See People v. Cortes, 80 N.Y.2d 201 (1992) (same). In N.Y. State Ass'n of Counties v. Axelrod, 78 N.Y.2d 158 (1991), the Court of Appeals held that an article 78 proceeding that accrued on June 2, 1987, and was commenced exactly four months later on October 2, 1987, was timely. The matter would have been untimely if it had to be commenced within 120 days of accrual, because it was commenced 122 days after the period of limitations accrued.

Under CPLR 203(c)(1), a claim is interposed for statute of limitations purposes upon filing.

**CAUTION:**

*Some statutes have shorter periods of limitation that supersede CPLR 217. Therefore, it is important to examine carefully the statute providing for judicial review of the determination at issue. E.g., Environmental Conservation Law § 17-0909(2) - 60 days after service of water quality determination. Environmental Conservation law § 24-0705(6) - 30 days after filing of freshwater wetlands permit decision.*

**CAUTION:**

*The sequence of filing and service matters – to toll the statute of limitations the petition must be filed before service. Harris v. Niagara Falls Bd. of Educ., 6 N.Y.3d 155 (2006); Hertz v. Schiller, 239 A.D.2d 240 (1<sup>st</sup> Dep't 1997); see also Mtr. of Gershel v. Porr, 89 N.Y.2d 327 (1996); Mtr. of Fry v. Vill. of Tarrytown, 89 N.Y.2d 714, 719-20 (1997); Mtr. of Parkinson v. Leahy, 277 A.D.2d 810, 811 (3d Dep't 2000); Mtr. of American Home Assur. Co. v. Dubuissou, 291 A.D.2d 402 (2d Dep't 2002); Mtr. of Washington v. N.Y. City Transit Police, 247 A.D.2d 285 (1<sup>st</sup> Dep't 1998).*

**a. Commencement of time.** When the four-month limitation period begins to run depends upon the nature of the relief sought by petitioner. Mtr. of Yarbough v. Franco, 95 N.Y.2d 342 (2000).

**b. Hearings held - when received.** Where the aggrieved party is entitled to receive a hearing, and does receive that hearing, the period commences on the date the hearing determination becomes binding (usually when received by petitioner, not when mailed). See Mtr. of Carter v. State of N.Y., 95 N.Y.2d 267 (2000); N.Y. State Ass'n of Counties v. Axelrod, 78 N.Y.2d 158, 165 (1991); Mtr. of Johns v. Rampe, 25 A.D.3d 283 (1st Dep't 2005); Mtr. of Warburton v. N.Y. State Dep't of Corrections, 251 A.D.2d 831 (3d Dep't 1998). But see Mtr. of Dudish v. N.Y. State Div. of Human Rights, 15 A.D.3d 823 (3d Dep't), lv. denied, 5 N.Y.3d 701 (2005) (Pursuant to statute, statute of limitations accrues when determination served (mailed) not received).

**c. Hearing deprived - date refused.** Where petitioner is entitled to a hearing, but is deprived of that hearing, the period of limitation begins to run on the date the demand for the hearing is refused.

**d. No hearing right - when received.** Where there is no right to a hearing, the limitation period runs from the date the determination sought to be reviewed becomes final and binding, usually when received.

Mtr. of De Milio v. Borghard, 55 N.Y.2d 216, 220 (1982)

Mtr. of Rakiecki v. State Univ. of N.Y., 31 A.D.3d 1015 (3d Dep't 2006)

e. **Statute silent on statute of limitations.** Under a statute silent on statute of limitations, the limitations period commences running on the party's *receipt* of the administrative determination, that is, when the petitioner is aggrieved by the determination.

Mtr. of Edmead v. McGuire, 67 N.Y.2d 714 (1986)

Mtr. of Biondo v. N.Y. State Bd. of Parole, 60 N.Y.2d 832, 834 (1983)

2. **Meaning of Final and Binding.** In order to ascertain whether the determination is "final and binding," and thus whether the statute of limitations has accrued, the agency must have reached a definitive position on the issue that "inflicts actual concrete injury," that may not be prevented or "significantly ameliorated by further administrative action or by steps available to the complaining party." See Mtr. of the City of N.Y. v. Grand Lafayette Props., 6 N.Y.3d 540 (2006) (holding that a determination was not final and binding until the expiration of a twenty day call-up period); Mtr. of Best Payphones, Inc. v. Dep't of Info. Tech. & Telecom. of the City of N.Y., 5 N.Y.3d 30, 34 (2005) (holding that the statute of limitations accrued on the date of a letter informing petitioner that it had 60 days to take action and not when the 60-day period ran).

a. **Respondent must establish when receipt occurred.** In many administrative proceedings, respondent has the hard job of establishing when the petitioner received the determination. See Mtr. of Edwards v. Coughlin, 191 A.D.2d 1044 (4<sup>th</sup> Dep't 1993). Absent the rare situation where the petitioner makes a fatal admission in the petition, how does respondent prove receipt?

b. **If no actual proof, must establish presumption.** Where actual proof of receipt is not available, respondent must establish a presumption that there was receipt. The presumption becomes relevant in those cases where there is a significant delay between the issuance of the determination and the commencement of the proceeding. Although proof of the date that the determination was *issued*, without more, is insufficient to establish receipt (Warburton, *supra*), respondent need only prove enough to "shift the burden of persuasion to petitioner to establish was timely." Warburton.

c. **Use affidavits showing office procedures to shift burden to petitioner.** Affidavits showing that normal office procedures exist and were followed to assure that the determination was communicated and received by the petitioner within a certain time-frame are sufficient to shift the burden of persuasion to the petitioner. Mtr. of Fortunato v. Workers' Comp. Bd. of N.Y., 270 A.D.2d 641 (3d Dep't), lv. denied, 95 N.Y.2d 761 (2000).

Mere denial of receipt does not suffice to overcome the presumption. Mtr. of Fortunato, *supra*.

**NOTE:** The CPLR does not apply to agency proceedings, only to court proceedings. CPLR 2103(b)(2) does not apply to add five days for mailing to papers served within administrative proceedings. The CPLR only applies to litigation; it has no applicability to administrative time frames. Mtr. of De Milt v. Tax Appeals Tribunal, 232 A.D.2d 824 (3d Dep't 1996), lv. denied, 89 N.Y.2d 816 (1997).

**3. The statute of limitations for pro se inmates who proceed by order to show cause.** The Court of Appeals in Grant v. Senkowski, 95 N.Y.2d 605 (2001), while rejecting the federal "mail box rule" (holding that service was made when prisoners place their mail in the prison outbox), determined that the statute of limitations for pro se inmates who proceed by order to show cause was not dependent upon the justice's alacrity in signing the order to show cause. Accordingly, the Court of Appeals held that the statute is tolled when the unexecuted, proposed order to show cause reaches the courthouse. See Mtr. of Blanche v. Selsky, 13 A.D.3d 681 (3d Dep't 2004), appeal dismissed, lv. denied, 4 N.Y.3d 844 (2005).

**NOTE:**

*CPLR 201 provides that "No court shall extend the time limited by law for the commencement of an action." A court "lacks] authority to 'extend the time limited by law for the commencement of [the proceeding]" (multiple citations omitted)"* Mtr. of Samuels v. Selsky, 289 A.D.2d 959 (4<sup>th</sup> Dep't 2001).

**4. Effect of agency reconsideration.** Unless an agency formally reconsiders its determination, the statute of limitations will not be extended.

Cmty. Counseling & Mediation Servs. v. N.Y. City Dep't of Health & Mental Hygiene, 45 A.D.3d 315 (1st Dep't 2007)

Mtr. of Boston Culinary Group, Inc. v. N.Y. State Olympic Reg'l Dev. Auth., 18 A.D.3d 1103 (3d Dep't), lv. denied, 5 N.Y.3d 712 (2005)

Mtr. of Paterson v. N.Y. State Teacher's Ret. Sys., 25 A.D.3d 899 (3d Dep't 2006) (statute of limitations not tolled even where agency responded to petitioner's request for a recalculation of benefits); Mtr. of Adler v. N.Y. State Teacher's Ret. Sys., 188 A.D.2d 732 (3d Dep't 1992) (same).

**5. The statute of limitations is not extended by an application to an agency that it reconsider its determination as a matter of discretion.**

Mtr. of Lubin v. Bd. of Educ., 60 N.Y.2d 974 (1983)

Mtr. of Mule v. Hawthorne Cedar Knolls Union Free Sch. Dist., 290 A.D.2d 698 (3d Dep't 2002)

Mtr. of Quantum Health Res. v. DeBuono, 273 A.D.2d 730 (3d Dep't 2000), appeal dismissed, 95 N.Y.2d 927 (2000).

Mtr. of Lynn v. Town of Clarkstown, 296 A.D.2d 411 (2d Dep't 2002)

Mtr. of Heysler v. Park, 167 A.D.2d 837 (4<sup>th</sup> Dep't 1990)

Raykowski v. N.Y. City Dep't of Transp., 259 A.D.2d 367 (1<sup>st</sup> Dep't 1999)

Compare Mtr. of Yarbough v. Franco, 95 N.Y.2d 342 (2000) (limitations period runs from receipt of denial of motion to vacate a default; a motion to vacate a default is not merely a motion to reconsider, because it presents issues not ruled on by the agency and affords the agency an opportunity to make a record for judicial review)

**6. Effect of negotiations and settlement.** Negotiations and settlement conferences after the administrative determination becomes final and binding will not extend the statute of limitations.

Mtr. Of Pronti v. Albany Law Sch. Of Union Univ., 301 A.D.2d 841 (3d Dep't), lv. denied, 100 N.Y.2d 509 (2003)

In re 252 W. 30<sup>th</sup> St. Realty Corp., 165 A.D.2d 759 (1<sup>st</sup> Dep't 1990)

Mtr. of Cabrini Med. Ctr. v. Axelrod, 107 A.D.2d 965 (3d Dep't 1985)

**7. Declaratory judgment or continuing wrong.** The application of the statute of limitations cannot be evaded by framing a suit which should properly be an article 78 proceeding as one seeking a declaratory judgment or casting the grievance as a continuing wrong.

N.Y. City Health & Hosp. Corp. v. McBarnette, 84 N.Y.2d 194 (1994)

Koerner v. State of N.Y., 62 N.Y.2d 442, 446-47 (1984)

Press v. County of Monroe, 50 N.Y.2d 695 (1980)

Solnick v. Whalen, 49 N.Y.2d 224 (1980)

**8. Waiver.** The statute of limitations defense is waived if not raised by motion to dismiss or answer.

Mtr. of Fry v. Vill. of Tarrytown, 89 N.Y.2d 714 (1997)

**CAUTION:**

*Respondent must object to the timeliness of the proceeding. See Mtr. of Fry v. Vill. of Tarrytown, 89 N.Y.2d 714, 715 (1997) (“Petitioner failed to comply with the CPLR commencement-by-filing system when, after paying the filing fee, he filed only an unexecuted order to show cause [no longer necessary under Ch. 473 L. 2001 amendments] and petition with the clerk of the court but did not file a signed copy of the order. However, we conclude that this threshold filing defect does not authorize a sua sponte dismissal of the special proceeding because respondents appeared in the proceeding and litigated its merits without raising this objection” (emphasis added)).*

Fiedelman v. N.Y. State Dep’t of Health, 58 N.Y.2d 80, 83 (1983)

Becker v. City of N.Y., 249 A.D.2d 96 (1<sup>st</sup> Dep’t 1998)

Mtr. of Hans v. Burns, 48 A.D.2d 947 (3d Dep’t 1975)

**9. Estoppel.** Respondent may be estopped from raising the statute of limitations defense if petitioner can demonstrate that respondent either made false representations to petitioner or concealed facts from petitioner.

Mtr. of Davis v. Peterson, 254 A.D.2d 287 (2d Dep’t 1998)

Mtr. of Upstate Milk Coops. v. N.Y. State Dep’t of Agric. & Mkts., 101 A.D.2d 940 (3d Dep’t), lv. denied, 63 N.Y.2d 604 (1984)

**10. Ambiguity or uncertainty.** Any ambiguity or uncertainty created by a public body respecting when its determination becomes final and binding is resolved against it.

Mtr. of Carter v. State of N.Y., 95 N.Y.2d 267 (2000)

But see

Mtr. of Greenland v. Hannigan, 278 A.D.2d 923 (4<sup>th</sup> Dep't 2000)

Mtr. of Musilli v. N.Y. State & Local Police Dep't Sys., 249 A.D.2d 826 (3d Dep't 1998)

**11. Effect of recommencement of article 78 proceeding after termination.** If an article 78 is timely commenced and terminated for a reason *other than* voluntary discontinuance, lack of personal jurisdiction, or final judgment on the merits, CPLR 205(a) allows the petitioner to commence a *new* proceeding within six months following the termination. Note that filing and service must be accomplished within the 6 month period. See Pyne v. 20 E. 35 Owners Corp., 267 A.D.2d 168 (1<sup>st</sup> Dep't 1999).

Mtr. of Morris Investors, Inc. v. Comm'r of Fin. of the City of N.Y., 69 N.Y.2d 933 (1987)

Mtr. of Hicks v. City of N.Y., 247 A.D.2d 342 (1<sup>st</sup> Dep't 1998)

Mtr. of Winston v. Freshwater Wetlands Appeals Bd., 224 A.D.2d 160 (2d Dep't 1996)

**NOTE:**

*CPLR 205(a) extension applies after dismissal of article 78 proceeding for failure to serve the Attorney General (Mtr. of Schanbarger v. Comm'r of Soc. Servs., 99 A.D.2d 621 (3d Dep't 1984), appeal dismissed, 62 N.Y.2d 604 (1984), lv. denied, 65 N.Y.2d 604 (1985)), but not after dismissal for lack of personal jurisdiction (Markoff v. S. Nassau Cmty. Hosp., 61 N.Y.2d 283 (1984)).*

**B. Lack of Personal Jurisdiction over Respondent**

**1. In General.**

**a. Commencement and service are totally distinct.** Petitioner can commence properly, toll the statute of limitations, and still have the proceeding dismissed for failure to achieve personal jurisdiction over the respondent if service is not effectuated. Although there is no longer a need to file a notice of petition or an executed order to show cause with the petition to commence a proceeding (see L. 2001 ch. 473 [*supra*], you must still *serve a notice of petition or an order to show cause along with your petition to acquire personal jurisdiction*. Service of a petition without an order to show cause or a notice of petition is a jurisdictional defect requiring dismissal of the proceeding. Mtr. of Spodek v. N.Y. State Comm'r of Taxation & Fin., 85 N.Y.2d 760 (1995). Indeed, failure to serve a notice of petition precludes jurisdiction over respondent. Mtr. of Campisi

v. Scelba, 166 A.D.2d 442 (2d Dep't 1990); Mtr. of Common Council of the City of Gloversville v. Town Bd. Of Johnstown, 144 A.D.2d 90 (3d Dep't 1989). Failure to serve the petition on respondent and the Attorney General is also fatal. Mtr. of Rosenberg v. N.Y. State Bd. of Regents, 2 A.D.3d 1003 (3d Dep't 2003).

**b. The terms and conditions of an order to show cause must be strictly followed or the proceeding will be dismissed for lack of personal jurisdiction.** Mtr. of Robinson v. Goord, 21 A.D.3d 1150 (3d Dep't 2005) (“orders to show cause require strict compliance with their terms”); Mtr. of Frederick v. Goord, 20 A.D.3d 652 (3d Dep't), lv. denied, 5 N.Y.3d 712 (2005); Mtr. of Boustani v. Goord, 298 A.D.2d 732 (3d Dep't 2002) (“[n]o jurisdiction is acquired if the service requirement capable of being satisfied have not been met”); Mtr. of Joshua v. Comm'r of the Dep't of Correctional Servs., 240 A.D.2d 797 (3d Dep't 1997). “[Failure to comply with the service directives set forth in the order to show cause requires dismissal of the petitioner for lack of personal jurisdiction.” Mtr. of Davis v. Goord, 20 A.D.3d 785 (3d Dep't), appeal dismissed, 5 N.Y.3d 861 (2005); Mtr. of Arosena v. Carpenter, 19 A.D.3d 838 (3d Dep't 2005).

**c. If you proceed by order to show cause and violate its terms and conditions, you cannot fall back on the statutory largess of the “due diligence” or “good cause” provisions in CPLR 306-b providing for a discretionary extension of service.** Mtr. of Frederick v. Goord, 20 A.D.3d 652 (3d Dep't), lv. denied, 5 N.Y.3d 712 (2005) (“CPLR 306-b . . . is inapplicable where . . . an order to show cause is used to bring on a CPLR article 78 proceeding and petitioner fails to make service as required by the order to show cause”). Note that all is not lost - the court did endorse applying for a new order to show cause.

## 2. Time for Service

**a. Pleadings must be served on the respondent and the Attorney General's office no later than 15 days after the date in which the statute of limitations expires.** CPLR 306-b. Contrast this with the time for serving a summons and complaint which, unlike a special proceeding, is dependent upon filing.

**b. Respondent must move to dismiss any proceeding where there is a failure to serve properly or timely, but note that the Supreme Court has the discretion to dismiss or extend the time to effectuate proper service.** (CPLR 306-b). If petitioner does not properly serve respondent, but still has time to effect service within the CPLR 306-b time period, the court should not dismiss. Rink v. Fulgenzi, 231 A.D.2d 562 (2d Dep't 1996). If the court decides to extend the time to answer, the extension can be based upon “good cause” and/or “in the interest of justice,” *two separate standards*. If petitioner established “good cause” the extension will be granted. If there is no good cause, an extension still may be granted, upon the court's discretion, in the “interest of justice.” The “interest of justice” exception may consider such elements as the expiration of the statute of limitations, whether the claim has merit, the length of delay (diligence) in service, the promptness of petitioner's request for an extension, and the prejudice to the defendant.

In any event, it is a wholly discretionary act, reviewed under the very rigorous “abuse of discretion” standard. See Leader v. Maroney, 97 N.Y.2d 95 (2001); see also Slate v. Schiavone Constr. Co., 4 N.Y.3d 816 (2005). There, the Court of Appeals reversed the Appellate Division, finding it abused its discretion in applying an interest of justice exception despite the long delay on plaintiff’s part.

### 3. Manner of Service

**The notice of petition and petition must be served “in the same manner as summons” (CPLR 403(c); 7804(c)).** In general, service is by delivery (i.e., personal service, see CPLR 308) to the agency respondent and the Attorney General (CPLR 307(2); 7804(c)). Mtr. of Rosenberg v. N.Y. State Bd. of Regents, 2 A.D.3d 1003 (3d Dep’t 2003). Thus, absent an order to show cause authorizing alternative means of service, or strict compliance with the provisions of CPLR 312-a (authorizing service by mail under tightly prescribed circumstances) or CPLR 307(2) (authorizing service by certified mail upon the agency along with personal service on the Attorney General), service of process by ordinary mail is insufficient to confer jurisdiction in an article 78 proceeding. Mtr. of Rosenberg v. N.Y. State Bd. of Regents, 2 A.D.3d 1003 (3d Dep’t 2003); Yoon Kim v. N.Y. State Dep’t of Health, 262 A.D.2d 156 (1<sup>st</sup> Dep’t 1999); Mtr. of Spodek v. N.Y. State Comm’r of Taxation & Fin., 85 N.Y.2d 760 (1995); Mtr. of Harlem River Consumer’s Coop., Inc. v. State Tax Comm’n, 44 A.D.2d 738 (3d Dep’t 1974), aff’d, 37 N.Y.2d 877 (1975). Note that CPLR 307(1) applies to service upon the state, not service upon state agencies.

### 4. Service upon the Attorney General

**Where a State agency is a respondent, service on the Attorney General is also a jurisdictional requirement (CPLR 7804(c)).** However, if the petition is timely filed, the statute of limitations is tolled and failure to serve the Attorney General, whose capacity is that of counsel to the agency, will not result in a violation of the statute of limitations. Mtr. of Troy v. Sobol, 216 A.D.2d 661 (3d Dep’t 1995); Mtr. of Chem-Trol Poll. Servs., Inc. v. Ingraham, 42 A.D.2d 192 (4<sup>th</sup> Dep’t), lv. denied, 33 N.Y.2d 516 (1973); but see Mtr. of Beaver Bldg. Corp. v. Roberts, 129 A.D.2d 852 (3d Dep’t 1987). *Note also* that because the court may extend the time for petitioner to serve respondent under CPLR 306-b, clearly the court has the authority to extend the time for service on the Attorney General.

#### But note

In prisoner cases where the order to show cause mandates service on the Attorney General, the Third Department has dismissed cases for lack of personal jurisdiction where, despite good and proper service on the state agency, the Attorney General was not served:

See Mtr. of McCorkle v. Beaver, 16 A.D.3d 715 (3d Dep’t 2005); Mtr. of Vera v. Goord, 13 A.D.3d 994 (3d Dep’t 2004).

Service on the Attorney General alone does not confer jurisdiction over respondent. Mtr. of Taylor v. Poole, 285 A.D.2d 769 (3d Dep't 2001); Mtr. of Grassia v. Tracy, 232 A.D.2d 930 (3d Dep't 1996); Mtr. of Cohen v. State Tax Comm'n, 51 A.D.2d 79 (3d Dep't 1976); Mtr. of Russo v. Dep't of Motor Vehicles, 181 A.D.2d 774 (2d Dep't 1992).

## 5. Orders to Show Cause

**In lieu of a notice of petition, an executed order to show cause can be used, along with a petition, to acquire personal jurisdiction over the respondent.** CPLR 7804(c). Note that an unexecuted order to show cause is a nullity (see Mtr. of Fry v. Vill. of Tarrytown, 89 N.Y.2d 714 (1997)), and cannot be used to acquire personal jurisdiction. Orders to show cause are traditionally used to truncate the time for service, to acquire preliminary relief, or to alter the manner of service. Nor may an order to show cause do away with service altogether on any named respondent. For example, the order to show cause *may not* authorize service on the Attorney General's Office for the named respondents. See Mtr. of Standifer v. Goord, 285 A.D.2d 912 (3d Dep't 2001); Mtr. of Taylor v. Poole, 285 A.D.2d 769 (3d Dep't 2001).

### C. Absent a Showing of Obstacles Beyond Petitioner's Control, Failure to Comply with the Terms and/or Conditions of Service in an Order to Show Cause Results in Dismissal of the Proceeding

As a *quid pro quo* for the right to alter the method of service, the petitioner must adhere strictly to the terms and conditions in the order to show cause.

Mtr. of Zambelli v. Dillon, 242 A.D.2d 353 (2d Dep't 1997) ("the Method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with [citations omitted]"); see also Mtr. of Alevras v. Chairman of N.Y. State Bd. of Parole, 118 A.D.2d 1020 (3d Dep't), appeal dismissed, 68 N.Y.2d 753 (1986) ("[W]hen these rules have been erased, jurisdiction is not acquired unless those service requirements capable of being met have been satisfied"); Mtr. of Hoyer v. Coughlin, 179 A.D.2d 921 (3d Dep't 1992); Mtr. of McGreevey v. Simon, 220 A.D.2d 713 (2d Dep't 1995) ("Failure of . . . [a petitioner] to satisfy the service requirements set forth in the order to show cause requires dismissal for lack of jurisdiction...." (Emphasis added)). Mtr. of Hickey v. Goord, 3 A.D.3d 802 (3d Dep't 2004) (citing Mtr. of Gittens v. Selsky, 193 A.D.2d 986, 987 (3d Dep't 1993)).

### D. Petitioner has Failed to Exhaust Administrative Remedies

1. **Petitioner must exhaust all available administrative remedies before seeking judicial review of administrative determinations.**

Watergate II Apartments v. Buffalo Sewer Auth., 46 N.Y.2d 52, 57 (1978)

YMCA v. Rochester Pure Waters Dist., 37 N.Y.2d 371, 375 (1975)

DiBlasio v. Novello, 28 A.D.3d 339 (1<sup>st</sup> Dep't 2006); Capers v. Giuliani, 253 A.D.2d 630 (1<sup>st</sup> Dep't 1998), motion dismissed, lv. denied, 93 N.Y.2d 868 (1999); Frumoff v. Wing, 239 A.D.2d 216 (1<sup>st</sup> Dep't 1997)

Mtr. of Grande v. Nassau County, 275 A.D.2d 457 (2d Dep't 2000), lv. denied., 96 N.Y.2d 720 (2001)

Mtr. of N.Y. State Correction Officers & Police Benevolent Ass'n v. State, 301 A.D.2d 845 (3d Dep't 2003)

Mtr. of Muhammad v. Coombe, 237 A.D.2d 993 (4<sup>th</sup> Dep't 1997)

“As applied” constitutional issues must be raised at administrative level.

Mtr. of Schulz v. State, 86 N.Y.2d 225, cert. denied, 516 U.S. 944 (1995)

## **2. Purpose of exhaustion requirement.**

The exhaustion “doctrine furthers the salutary goals of relieving the courts of the burden of deciding questions entrusted to an agency, preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its ‘expertise and judgment’” Watergate II Apartments v. Buffalo Sewer Auth., 46 N.Y.2d 52, 57 (1978) (citations omitted); see also Grieco v. Turner, 289 A.D.2d 88, 89 (1<sup>st</sup> Dep't 2001), lv. denied, 98 N.Y.2d 610 (2002).

**3. Exceptions to the exhaustion rule.** Petitioner need not exhaust when: (a) an agency's action is challenged as either unconstitutional on its face or wholly beyond its grant of power; or (b) when resort to an administrative remedy would be futile; or (c) when resort to an administrative remedy would cause irreparable injury. Watergate II Apartments v. Buffalo Sewer Auth., 46 N.Y.2d 52, 57 (1978). But see Bankers Trust Corp. v. N.Y. City Dep't of Fin., 1 N.Y.3d 315 (2003), requiring exhaustion under the “exclusive remedy” provision of the tax law, unless argument was that the statute was unconstitutional or wholly inapplicable.

4. **The defense of failure to exhaust administrative remedies is waived if not raised.**

Custom Topsoil, Inc. v. City of Buffalo, 12 A.D.3d 1162 (4th Dep't 2004)

Mtr. of Hall v. Johnstone, 209 A.D.2d 982 (4th Dep't 1994)

Mtr. of Greco v. Trincellito, 206 A.D.2d 779 (3d Dep't 1994)

Mtr. of SCS Bus. & Tech. Inst. v. Barrios-Paoli, 156 A.D.2d 288 (1st Dep't 1989)

Punis v. Perales, 112 A.D.2d 236, 238 (2d Dep't 1985)

But see

Sheils v. County of Fulton, 14 A.D.3d 919 (3d Dep't) ("Unless petitioner's case falls within one of the exceptions to exhaustion doctrine, a declaratory judgment action is not available to challenge an administrative determination before exhausting administrative remedies"), lv. denied, 4 N.Y.3d 711 (2005).

Xerox Corp. v. Dep't of Taxation & Fin., 140 A.D.2d 945 (4th Dep't), lv. denied, 72 N.Y.2d 809 (1988)

#### **E. Laches**

Where the aggrievement arises from refusal of the respondent to act or perform a duty mandated by law, *unreasonable delay in demanding performance may bar the award of the relief requested in the petition.*

Mtr. of McKenzie v. Comptroller of State, 268 A.D.2d 828 (3d Dep't), lv. denied, 95 N.Y.2d 760 (2000)

Mtr. of Densmore v. Altmar-Parish-Williamstown Cent. Sch. Dist., 265 A.D.2d 838 (4th Dep't 1999), lv. denied, 94 N.Y.2d 758 (2000)

Mtr. of Civ. Serv. Employees Ass'n v. Bd. of Educ.,  
239 A.D.2d 415 (2d Dep't 1997)

Austin v. Bd. of Higher Educ., 5 N.Y.2d 430 (1959)

**F. The Petition Fails to State a Cause of Action on its Face**

1. **The petition must allege a “legal wrong.”** Facts must allege a “cognizable legal theory.” On the motion, the allegations in the petition will be accepted as true and given the benefit of “every possible favorable inference.”

Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d  
409 (2001)

Sevenson Hotel Assocs. v. Stranges, 262 A.D.2d 957  
(4th Dep't 1999)

Mtr. of Sage v. CUNY Law Sch., 208 A.D.2d 751 (2d  
Dep't 1994)

2. **The petition must contain factual allegations indicating the existence of a cause of action; conclusory and/or speculative allegations alone are insufficient.**

Mtr. of Kirk v. Bahou, 73 A.D.2d 770, 771 (3d Dep't  
1979), aff'd, 51 N.Y.2d 867 (1980)

Nassau County Correction Officers Benevolent Ass'n  
v. Nassau County Pub. Employment Relations Bd., 63  
A.D.2d 670, 671 (2d Dep't 1978)

Mtr. of Park v. Lewis, 139 A.D.2d 961 (4th Dep't  
1988)

But note

Facts underlying conclusory allegations in petition may be developed by supporting affidavits.

In re Waxman, 96 A.D.2d 906 (2d Dep't 1983)

People ex rel. Dew v. Reid, 82 Misc. 2d 583, 585  
(Sup. Ct. Oneida County 1975)

Motions to dismiss based on failure to state a cause of action are most useful in peremptory and prohibition proceedings, where the legal insufficiency of the petition is apparent without a review of the record.

Mtr. of State of N.Y. v. King, 36 N.Y.2d 59 (1975)

Mtr. of Stannard v. Axelrod, 100 Misc. 2d 702 (Sup. Ct. Broome County 1979)

The proceeding is fatally defective where the petition is made by an attorney rather than the client, unless the attorney demonstrates personal knowledge of the facts.

Mtr. of Klein v. Haft, 68 A.D.2d 872 (1st Dep't 1979)

#### **G. Legislative-type Action is Not Reviewable in an Article 78 Proceeding**

It is settled that an article 78 proceeding may not be utilized to review legislative action. However, under CPLR 103c, the proceeding need not be dismissed since the court can convert the proceeding to a declaratory judgment action.

Mtr. of Capital Fin. Corp. v. Comm'r of Taxation & Fin., 218 A.D.2d 230 (3d Dep't), appeal dismissed, 88 N.Y.2d 874, appeal denied, 88 N.Y.2d 811 (1996)

Mtr. of Lakeland Water Dist. v. Onondaga County Water Auth., 24 N.Y.2d 400 (1969)

#### **NOTE:**

*Lakeland (supra) criticized in N.Y. City Health & Hosps. Corp. v. McBarnette, 84 N.Y.2d 194, 201-02 (1994), explaining that for limitations purposes, you must examine whether the underlying proceeding is cognizable as an article 78 proceeding.*

But see

Mtr. of Rodriguez v. N.Y. City Transit Auth., 269 A.D.2d 600 (2d Dep't 2000), lv. denied, 96 N.Y.2d 704 (2001) (Conversion under CPLR103(c) will not extend statute of limitations or apply wrong proceeding's time limitation to right one).

## H. The Issue is Not Justiciable

Courts will not interpose themselves into the management and operation of public enterprises.

Klostermann v. Cuomo, 61 N.Y.2d 525, 535-37 (1984)

But see

Mtr. of Natural Res. Def. Council v. N.Y. City Dep't of Sanitation, 83 N.Y.2d 215, 220-22 (1994)

Jones v. Beame, 45 N.Y.2d 402, 407 (1978)

Mtr. of Abrams v. N.Y. City Transit Auth., 39 N.Y.2d 990 (1976)

## I. Res Judicata and Collateral Estoppel

### 1. Res Judicata (Claim Preclusion)

A valid final judgment bars future actions between the same parties or their privies based on the same or similar facts. Bringing the second action on a different legal theory or raising issues which could have been (but were not) litigated in the first action, is of no avail.

Mazza v. N.Y. City Police Dep't, 6 A.D.3d 186 (1st Dep't 2004) (res judicata bars suit where previous similar proceeding withdrawn on merits)

O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 (1981)

Dobkin v. N.Y. Univ., 278 A.D.2d 24 (1st Dep't 2000)

Mtr. of Schulz v. N.Y. State Legislature, 278 A.D.2d 710 (3d Dep't 2000)

Res Judicata applies to adjudicatory administrative determinations decided on the merits.

Mtr. of Timm v. Van Buskirk, 17 A.D.3d 686 (2d Dep't 2005)

## 2. Collateral Estoppel (Issue Preclusion)

Bars re-litigation of discrete issues of fact adjudicated in prior litigation, including adjudicatory administrative determinations. Note that collateral estoppel is a flexible rule that the court may not apply in every situation. You need in both proceedings: (1) same issue; (2) same party against whom collateral estoppel is being asserted; and (3) a full and fair opportunity of that party to litigate the issue in the first proceeding.

Jeffreys v. Griffin, 1 N.Y.3d 34 (2003)

American Ins. Co. v. Messinger, 43 N.Y.2d 184, 187 (1977)

Mtr. of Hassig v. N.Y. State Dep't of Env'tl. Conservation, 6 A.D.3d 1007 (3d Dep't), appeal dismissed, appeal denied, 3 N.Y.3d 736 (2004)

Mtr. of Owen v. Town Bd. of Wallkill, 94 A.D.2d 768 (2d Dep't), lv. denied, 60 N.Y.2d 560 (1983)

### J. Failure to Raise the Issue in the Administrative Proceeding

1. A petitioner may not raise new issues in an article 78 proceeding that were not raised before the administrative body whose determination is under review.

Mtr. of Yarbough v. Franco, 95 N.Y.2d 342, 347 (2000)

Mtr. of Henry v. Wezler, 82 N.Y.2d 859, 862 (1993)

Mtr. of Roggemann v. Bane, 223 A.D.2d 854, 856-57 (3d Dep't 1996)

### 2. Including constitutional issues.

Cibro Petroleum Prods.v. Chu, 67 N.Y.2d 806 (1986)

Melahn v. Hearn, 60 N.Y.2d 944, 945 (1983)

In re Baby Girl U., 224 A.D.2d 869, 870 (3d Dep't), lv. denied, 88 N.Y.2d 810 (1996)

Mtr. of Burkins v. Scully, 108 A.D.2d 743, 744 (2d Dep't 1985)

Matherson v. Marchello, 100 A.D.2d 233, 241, n.4 (2d Dep't 1984).

## K. The Court Lacks Subject Matter Jurisdiction

1. **Supreme Court lacks jurisdiction to entertain actions against the State for money damages. Such claims can only be brought in the New York Court of Claims.**

Olsen v. N.Y. State Dep't of Envtl. Cons., 307 A.D.2d 595, 596 (3d Dep't), appeal denied, 1 N.Y.3d 502 (2003)

Psaty v. Durvea, 306 N.Y. 413 (1954)

Glendora v. Cohen, 215 A.D.2d 529 (2d Dep't), lv. denied, 86 N.Y.2d 706 (1995)

State of N.Y. v. Jacobs, 167 A.D.2d 876 (4th Dep't 1990)

### **CAUTION:**

*Where petitioner is not seeking compensation for some wrongdoing by the State, but merely is seeking to have respondent comply with a law that provides for payment to petitioner, Supreme Court has subject matter jurisdiction over the proceeding. Mtr. of Gross v. Perales, 72 N.Y.2d 231, 235-36 (1988); Morell v. Balasubramanian, 70 N.Y.2d 297 (1987); Mtr. of Economics Opportunity Comm'n, Inc. v. Shaffer, 114 A.D.2d 628, 630 (3d Dep't 1985). Conversely, the Court of Claims doesn't have jurisdiction where money damages are incidental to the relief. Guy v. State, 18 A.D.3d 936 (3d Dep't 2005).*

2. **Subject matter jurisdiction is not waivable.**

Mtr. of Fry v. Vill. of Tarrytown, 89 N.Y.2d 714, 718 (1997)

In re Jarrett, 230 A.D.2d 513 (4th Dep't 1997)

## L. Mootness

1. **Timing of defense.** Mootness is a component of subject matter jurisdiction that can be raised at any time. In fact, counsel has an obligation to bring new facts that moot the proceeding to the court's attention.

Mtr. of Spano v. Wing, 285 A.D.2d 809, 811 (3d Dep't 2001)

Mtr. of Cerniglia v. Ambach, 145 A.D.2d 893 (3d Dep't 1988), lv. denied, 74 N.Y.2d 603 (1989)

2. **Where the conduct or a determination of an administrative body is challenged and the conduct ceases to affect the petitioner before his claim has been determined, the petition will be dismissed as moot.**

Mtr. of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 713-14 (1980)

Mtr. of NRG Energy v. Crotty, 18 A.D.3d 916, 918-19 (3d Dep't 2005)

Mtr. of Orsi v. Bd. of Appeals of the Town of Bethlehem, 3 A.D. 3d 698, 700-01 (3d Dep't 2004)

Save the Pine Bush v. Cuomo, 200 A.D.2d 859 (3d Dep't 1994), appeal dismissed, 83 N.Y.2d 884 (1994)

### 3. Exceptions to Mootness

See Mtr. of Hearst Corp. v. Clyne, 50 N.Y.2d 707 (1980).

Three issues must be present:

- a. **Likelihood of repetition.** Mtr. of Laborers' Int'l Union of N. America v. N.Y. State Dep't of Transp., 280 A.D.2d 66, n.2 (3d Dep't 2001).
- b. **Recurring issues that typically evade review.** Mtr. of Beattie v. N.Y. State Bd. of Parole, 39 N.Y.2d 445 (1976); Mtr. of Amato v. Ward, 41 N.Y.2d 469 (1977)
- c. **Significant and important issues not previously adjudicated.**

**4. Cases where exceptions were met:**

Mtr. of Williamsville Clare Bridge Operator, Inc. v. Novello, 6 A.D.3d 861 (3d Dep't 2004)

Mtr. of Laborers' Int'l Union v. N.Y. State Dep't of Transp., 280 A.D.2d 66 (3d Dep't 2001)

**5. Cases where exceptions were not met:**

Mtr. of Karlin v. Goord, 18 A.D.3d 906 (3d Dep't), lv. denied, motion denied, 5 N.Y.3d 703, 5 N.Y.3d 717 (2005)

Mtr. of NRG Energy, Inc. v. Crotty, 18 A.D.3d 916 (3d Dep't 2005)

Mtr. of Kasin v. Novello, 303 A.D.2d 910 (3d Dep't 2003)

**M. Failure to Comply with a Statutory Condition Precedent**

Some statutes contain conditions precedent to an article 78 proceeding (see, e.g., Tax Law § 1138(a)(4)). Failure to comply deprives the court of jurisdiction.

Mtr. of O'Connor v. Bd of Ed. of Greenburgh-Graham Union Free Sch. Dist., 11 A.D.3d 616 (2d Dep't 2004)

Mtr. of Vinter v. Comm'r of Taxation & Fin., 305 A.D. 2d 738 (3d Dep't 2003)

Mtr. of Taylor v. Hammondsport Cent. Sch. Dist., 267 A.D.2d 987 (4th Dep't 1999)

**N. Failure to Join a Necessary Party**

**1. Joinder under CPLR 1001(a).** A person who might be inequitably affected by a judgment in a proceeding must be joined as a necessary party. CPLR 1001(a). However, the statute allows the proceeding to continue under five circumstances set forth under CPLR 1001(b). But where the statute of limitations has run, and the party ought to have been joined, the courts have often, but not always (*see below*) dismissed the proceeding.

Mtr. of Boston Culinary Group, Inc. v. N.Y. State Olympic Reg'l Dev. Auth., 18 A.D.3d 1103 (3d Dep't), lv. denied, 5 N.Y.3d 712 (2005)

Mtr. of Green v. Bellini, 12 A.D.3d 1148 (4th Dep't 2004)

Mtr. of Brancato v. N.Y. State Bd. of Real Prop. Serv., 7 A.D.3d 865 (3d Dep't 2004)

Mtr. of Haddad v. City of Hudson, 6 A.D.3d 1018 (3d Dep't 2004)

**2. Exceptions under CPLR 1001(b).** However, courts will apply the exceptions under CPLR 1001(b) where jurisdiction may not be obtained without the consent of the party.

Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 819-21 (2003)

And can allow the proceeding to continue without the necessary party, even where the statute of limitations has run.

Mtr. of Red Hook v. N.Y. City Bd. of Standards & Appeals, 5 N.Y.3d 452 (2005)

Mtr. of Long Island Contractors' Ass'n v. Town of Riverhead, 17 A.D.3d 590, 594 (2d Dep't 2005)

Mtr. of 27<sup>th</sup> St. Block Assoc. v. Dormitory Auth. of the State of N.Y., 302 A.D.2d 155 (1st Dep't 2002)

This is especially true where the interests of the named party and the nonjoined party are so intertwined that there is virtually no prejudice to the nonjoined party.

Sawicki v. County of Suffolk, 4 A.D.3d 465 (2d Dep't 2004)

**3. Court will dismiss where the governmental agency that performed the act under review is not named.**

Mtr. of Wittenberg Sportsmen's Club, Inc. v. Town of Woodstock Planning Bd., 16 A.D.3d 991 (3d Dep't 2005)

Mtr. of Emmett v. Town of Edmeston, 3 A.D.3d 816 (3d Dep't), aff'd,  
2 N.Y.3d 817 (2004)

## **IX. REVIEW OF QUASI-JUDICIAL DETERMINATIONS; TRANSFER TO THE APPELLATE DIVISION**

### **A. Meaning of "Substantial Evidence"**

#### **1. It is a legal standard for courts to apply.**

"Substantial evidence" is not an evidentiary standard to be met by a litigant, although some cases, and even the State Administrative Procedure Act (see SAPA § 306(1)), suggest otherwise.

#### **2. Understanding how it operates (or should operate).**

The substantial evidence test examines whether a rational decisionmaker could make the determination at issue based on the record before the agency. See Mtr. of Buric v. Safir, 285 A.D.2d 255, 263 (1<sup>st</sup> Dep't 2002) ("An administrative agency's determination will be found to have been supported by substantial evidence where there is a rational basis for such finding in the record as a whole [citations omitted].")

Viewed this way, the test necessarily incorporates whatever the applicable evidentiary standard was at the hearing -- whether that standard was preponderance of the evidence or clear and convincing evidence — and which party had the burden of proof. Looking at substantial evidence in this way avoids the seeming illogic of speaking of substantial evidence to support a determination where the burden of proof at the hearing was on the petitioner.

Courts sometimes articulate how the test operates in ways that seem internally inconsistent, but that make sense if considered in light of the foregoing. See, e.g., Mtr. of Fernald v. Johnson, 305 A.D.2d 503, 503-04 (2d Dep't 2003), where the court describes substantial evidence as "more than mere surmise, conjecture, or speculation, but less than a preponderance of the evidence," but then goes on to find that there is substantial evidence to support the determination "that, at the hearing, it was proven by a preponderance of the evidence" that the petitioner committed the alleged misconduct.

Similarly, in Mtr. of King v. N.Y. State Dep't of Health, 295 A.D.2d 743 (3d Dep't 2002), the court stated that, "our review is limited to whether the determination [based on] a preponderance of the evidence is fully supported by substantial evidence in the record." (Internal quotation marks and citations omitted.)

**B. Requirement of transfer to Appellate Division**

1. CPLR 7804(g) provides that when an issue specified in question four of CPLR 7803 (i.e., whether a determination made as a result of a hearing required by law is supported by substantial evidence) is raised, the Supreme Court shall make an order directing that the proceeding be transferred to the Appellate Division. See Mtr. of Rizzuto v. Murphy, 3 A.D.3d 801 (3d Dep't 2004); Mtr. of Martin v. Platt, 191 A.D.2d 758 (3d Dep't), lv. denied, 82 N.Y.2d 652 (1993).

2. Only where the challenged administrative hearing was held *pursuant to direction of law* is a proceeding raising a substantial evidence question to be transferred.

Mtr. of Metropolitan Taxicab Bd. of Trade Inc. v. Boardman, 270 A.D.2d 633 (3d Dep't 2000).

Mtr. of Colton v. Bermar, 21 N.Y.2d 322, 329 (1967)

Mehdi v. Bd. of Managers of Jones Mem'l Hosp., 116 A.D.2d 1024, 1025 (4th Dep't 1986)

Mtr. of City of Rome v. N.Y. State Health Dep't, 65 A.D.2d 220, 224 (4th Dep't 1978), lv. denied, 46 N.Y.2d 713 (1979)

3. Where an adjudicatory hearing is mandated by law, but the challenge is limited to procedural or statutory questions and no evidentiary challenge to the hearing is made, the matter must be decided by Supreme Court under the arbitrary and capricious test.

Mtr. of Cons. Edison Co. v. N.Y. State Div. of Human Rights, 77 N.Y.2d 411, 417 (1991)

4. Whether a substantial evidence question is raised in an article 78 proceeding is determined by the substance of the petition and not by petitioner's characterization of his claims.

Mtr. of Save the Pine Bush, Inc. v. Planning Bd. of the City of Albany, 83 A.D.2d 741 (3d Dep't 1981), appeal dismissed, 61 N.Y.2d 668, lv. denied, 61 N.Y.2d 602 (1983)

Mtr. of Daigle v. State Liquor Auth., 35 A.D.2d 901 (3d Dep't 1970)

**5. A petitioner's conclusory claim of a lack of substantial evidence is fine and states a cause of action.**

Mtr. of Rodriguez v. Goord, 260 A.D.2d 736 (3d Dep't), lv. denied, 93 N.Y.2d 818 (1999)

**6. Transfer of such cases is mandated, despite the existence of other legal issues raised by the petitioner that may be dispositive.** (Note that "objections" raised by respondent that would terminate the proceeding must be ruled on by Special Term (see above).)

Mtr. of Town of Cortlandt v. N.Y. State Bd. of Real Prop. Servs., 288 A.D.2d 388 (2d Dep't 2001)

Mtr. of Magwood v. Glass, 240 A.D.2d 409 (2d Dep't 1997)

Mtr. of Schultz v. Tonawanda Hous. Auth., 79 A.D.2d 843 (4th Dep't 1980)

Even if there are other points involved, once a substantial evidence question is raised, *the entire proceeding* must be transferred to the Appellate Division.

Mtr. of Carroll v. County of Putnam, 271 A.D.2d 443 (2d Dep't 2000), lv. denied, 97 N.Y.2d 605 (2001)

Mtr. of Rodriguez v. Goord, 260 A.D.2d 736 (3d Dep't), lv. denied, 93 N.Y.2d 818 (1999)

Mtr. of Dan's Living Room, Ltd. v. State of N.Y. Liquor Auth., 31 A.D.2d 799 (1st Dep't), aff'd, 25 N.Y.2d 759 (1969)

**NOTE:**

*Before transfer to the Appellate Division, the Supreme Court **must pass on objections raised by respondent.** CPLR 7804(g). See Mtr. of Bottom v. Murray, 278 A.D.2d 817 (4th Dep't 2000).*

**7. If a matter is erroneously transferred, the Appellate Division will usually retain jurisdiction over the case and determine all issues.**

Mtr. of Young v. Selsky, 279 A.D.2d 672 (3d Dep't), lv. denied, 96 N.Y.2d 712 (2001)

Mtr. of Riklis v. Bd. of Zoning Appeals of Town of Hempstead, 243 A.D.2d 482 (2d Dep't 1997), lv. denied, 91 N.Y.2d 809 (1998)

Agusta v. Silva, 201 A.D.2d 405 (1st Dep't 1994)

But see Mtr. of Burgess v. Selsky, 270 A.D.2d 736 (3d Dep't 2000) (remitting the matter to Supreme Court where improperly transferred); see also Mtr. of Save Easton Env't. v. Marsh, 213 A.D.2d 961 (3d Dep't 1995), lv. denied, 90 N.Y.2d 802 (1997).

**8. Once transferred, the Appellate Division will determine all issues before it, including the validity of any prior non-final orders ruled on by the Supreme Court** (Mtr. of Bd. of Educ. Union-Endicott v. N.Y. State Pub. Employees Relations Bd., 250 A.D.2d 996 (3d Dep't 1998), lv. denied, 93 N.Y.2d 805 (1999); Mtr. of Schultz v. Roberts, 138 A.D.2d 980 (4th Dep't 1988); Mtr. of Desmone v. Blum, 99 A.D.2d 170 (2d Dep't 1984)), and Supreme Court loses all jurisdiction over the proceeding. City of Syracuse v. Surles, 154 A.D.2d 949 (4th Dep't 1989); Mtr. of Desimone v. N.Y. State Liquor Auth., 12 A.D.2d 998 (4th Dep't 1961).

**9. Following the transfer of an article 78 proceeding to the Appellate Division for initial disposition pursuant to CPLR 7804(g), the petitioner in all Departments must "perfect" the proceeding in the same manner as an appeal.** Consult each Department's Rules of Practice for the time periods and the requirements to perfect.

**C. Determinations of Credibility are for the Hearing Officer in the First Instance, but the Ultimate Agency Decision Maker Can Substitute its Credibility Determinations if Supported by the Record**

**1. A hearing officer's credibility determination will be upheld if it is "not ... lacking in foundation or rationality."** Mtr. of Jones v. McCall, 278 A.D.2d 741 (3d Dep't 2000). As long as there is a "rational basis supported by fact" for the determination, it is virtually unreviewable. Mtr. of King v. N.Y. State Dep't of Health, 295 A.D.2d 743 (3d Dep't 2002); Mtr. of Wahba v. N.Y. State Dep't of Health, 277 A.D.2d 634 (3d Dep't 2000); Mtr. of Cohen v. Mills, 271 A.D.2d 826 (3d Dep't 2002); Mtr. of Singer v. Novello, 288 A.D.2d 777 (3d Dep't 2001); Mtr. of Goldberg v. DeBuono, 274 A.D.2d 846 (3d Dep't), lv. denied, 95 N.Y.2d 763 (2000); Mtr. of Gross v. DeBuono, 223 A.D.2d 789 (3d Dep't 1996). The agency determines both the weight and the credibility of the testimony—the court will not intervene even if it believes that (1) the reliability of the evidence is questionable and, (2) the credibility of a witness would support a contrary conclusion. Mtr. of King v. State of N.Y. Dep't of Correctional Servs., 289 A.D.2d 824 (3d Dep't 2001); see Mtr. of Rodriguez-Rivera v. Kelly, 3 N.Y.3d 656 (2004). Indeed, the Third Department has stated that:

"issues of witness credibility and the weight to be accorded the evidence are outside the scope of our review." Mtr. of King v. N.Y. State Dep't of Health

et al., 295 A.D.2d743(3d Dep't 2002); accord Mtr. of Lampidis v. Mills, 305 A.D.2d 876 (3d Dep't 2003). "[T]he weight accorded specific expert testimony ... is properly resolved in the administrative process (citation omitted).

Nor is it a violation of due process for the ultimate fact-finding determination to be made by a person who did not preside at the hearing. Mtr. of Theresa G. v. Johnson, 26 A.D.3d 726 (4<sup>th</sup> Dep't 2006).

2. **However, credibility determinations can be overturned by the ultimate decision maker as long as the determination is based on the record.** Mtr. of Benson v. Cuevas, 293 A.D.2d 927 (3d Dep't), lv. denied, 98 N.Y.2d 611 (2002) ("Although generally the decision of an ALJ which rests upon credibility should be given great weight, it is not conclusive and may be overruled by an administrative board, 'providing a board's determination is based upon substantial evidence' (multiple citations omitted);" Mtr. of Simpson v. Wolansky, 38 N.Y.2d 391, 394 (1975).

3. **Conflicting testimony will be deemed a matter of credibility within the province of the hearing officer to determine, especially in prisoner litigation.** Mtr. of Boddie v. Selsky, 18 A.D.3d 996 (3d Dep't 2005) ("Petitioner's assertion that the officer who wrote the misbehavior report did so in retaliation for petitioner having spoken with the sergeant presented an issue of credibility for the Hearing Officer to resolve"); Mtr. of Cody v. Goord, 17 A.D.3d 943 (3d Dep't 2005); ("To the extent that petitioner and his inmate witnesses gave conflicting or exculpatory testimony, these discrepancies presented credibility issues that were appropriately assessed and resolved by the Hearing Officer"); Mtr. of Reed v. Goord, 16 A.D.3d 796 (3d Dep't 2005); ("Although petitioner contends that the suspect language used in the letters amounted to nothing more than slang, nicknames or terms of endearment, this assertion raised a credibility issue for the Hearing Officer to resolve"); Mtr. of Gonzalez v. Selsky, 301 A.D.2d 1019 (3d Dep't 2003) ("The conflicting testimony at the hearing from petitioner and a representative of SYVA as to whether the amount of poppy seed crackers petitioner had eaten was likely to account for a false positive test result created a credibility issue for the Hearing Officer to resolve"); Mtr. of Calhoun v. Goord, 13 A.D.3d 785 (3d Dep't 2004) ("[P]etitioner's contention that he did not hear the correction officer's initial order to stop fighting presented a credibility issue for the Hearing Officer to resolve"); Mtr. of Hernandez v. Selsky, 308 A.D.2d 671 (3d Dep't 2003), lv. denied, 1 N.Y.3d 506 (2004) ("The hearing officer, who is authorized to make credibility determinations, found incredible both inmates' testimony that they could not identify their attackers, and did not credit petitioner's theory that he was merely a victim or acting in self-defense").

**D. "Reliable" Hearsay, Which Is the Type of Evidence That "Responsible People Are Accustomed to Rely on in Serious Affairs" Can Constitute Substantial Evidence**

**Reliable hearsay can support an administrative determination.** The "legal residuum" rule is dead in New York; "reliable hearsay" can constitute substantial evidence. What constitutes

reliable hearsay is *sui generis*. In general, it is the type of evidence that "responsible people are accustomed to rely on in serious affairs." Mtr. of Gray v. Adduci, 73 N.Y.2d 741 (1988); People ex rel. Vega v. Smith, 66 N.Y.2d 130 (1985); Mtr. of Eagle v. Paterson, 57 N.Y.2d 831 (1982); Mtr. of Sandra v. Monroe County, 9 A.D.3d 891 (4<sup>th</sup> Dep't 2004); 49th St. Mgmt. Co. v. N.Y. City Taxi & Limousine Comm'n, 277 A.D.2d 103 (1st Dep't 2000); Mtr. of Bhagoji v. Wing, 251 A.D.2d 133 (3d Dep't 1998); Mtr. of Robert OO v. Dowling, 217 A.D.2d 785 (3d Dep't 1995); Mtr. of Odierno v. Regan, 135 A.D.2d 898 (3d Dep't 1987). See also Mtr. of Bd. of Educ. v. Comm'r of Educ., 91 N.Y.2d 133 (1997); Mtr. of Foster v. Coughlin, 76 N.Y.2d 968 (1990); Mtr. of Sookhu v. Comm'r of Health, 31 A.D.3d 1012 (3d Dep't 2006).

In the substantial evidence context, "it is not the hearsay nature of the evidence that is important but whether that evidence is sufficiently relevant and probative to constitute substantial evidence (citation omitted)." Mtr. of Deleon v. Goord, 291 A.D.2d 607 (3d Dep't), *lv. denied*, 98 N.Y.2d 610 (2002); Mtr. of King v. N.Y. State Dep't of Health, 295 A.D.2d 743 (3d Dep't 2002). By petitioner's opening the door, the hearing officer can receive into evidence the hearsay report of a non-testifying doctor. Mtr. of Staley v. N.Y. State & Local Retirement Sys., 290 A.D.2d 721 (3d Dep't 2002); *but see* Mtr. of Galgano v. N.Y. State & Local Retirement Sys., 262 A.D.2d 728 (3d Dep't 1999), and Mtr. of Amodeo v. McCall, 257 A.D.2d 872 (3d Dep't 1999).

***BUT NOTE*** *Where hearsay evidence is "seriously controverted [it] may fail to provide the substantial evidence necessary to support the ... determination."* Mtr. of Ridge, Inc. v. N.Y. State Liquor Auth., 257 A.D.2d 625 (2d Dep't 1999).

**E. The Rules Of Evidence Do Not Apply.** The rules of evidence do not apply in administrative hearings. Mtr. of Sundaram v. Novello, 53 A.D.3d 804 (3d Dep't 2008); Mtr. of Sookhu v. Comm'r of Health, 31 A.D.3d 1012. Erroneous admission of evidence will only result in reversal when it "infects the entire proceeding with unfairness." Mtr. of Sundaram, 53 A.D.3d at 806.

**F. Specificity Of Charges.** The charges in an administrative proceedings need only be specific enough, in light of all the circumstances, to apprise the subject of the charges against him and enable him to prepare a defense. Mtr. of Block v. Ambach, 73 N.Y.2d 323, 332-34 (1989); Mtr. of Steckmeyer v. State Bd. for Prof'l Med. Conduct, 295 A.D.2d 815 (3d Dep't 2002).

## **X. DISCLOSURE**

**A. Discovery is presumptively improper in an article 78 proceeding.** Except for a request for admission pursuant to CPLR 3123, disclosure is not permitted in an article 78 proceeding without leave of court. CPLR 408. "[D]isclosure is available only by leave of court in a CPLR article 78 proceeding" (Stapleton Studios, LLC v. City of N.Y., 7 A.D.3d 273, 274-75 (1<sup>st</sup> Dep't 2004) (reversing Supreme Court order granting leave to conduct discovery in an article 78

proceeding); see also Town of Pleasant Valley v. N.Y. Bd. of Real Prop. Servs., 253 A.D.2d 8, 15 (2d Dep't 1999)), by motion pursuant to CPLR 408. The rationale behind denying discovery in an article 78 proceeding is that "discovery tends to prolong a case, and is therefore inconsistent with the summary nature of [an article 78] proceeding." Town of Pleasant Valley, 253 A.D.2d at 15; Mtr. of Shore v. Pappalardo, 109 A.D.2d 842, 843 (2d Dep't 1985); cf. Cox v. J.D. Realty Assocs., 217 A.D.2d 179, 183-84 (1<sup>st</sup> Dep't 1995) (noting "an exception to the general sentiment that 'discovery is antithetical to the purposes of a summary proceeding.'"). Courts may grant discovery in an article 78 proceeding where it is demonstrated that "the discovery sought [i]s likely to be material and necessary to the prosecution or defense of th[e] proceeding." Stapleton Studios, LLC, 7 A.D.3d at 275. However, a petitioner's request for discovery is properly denied because "[j]udicial review of an administrative determination is limited to the record before the agency and proof outside the administrative record should not be considered" Mtr. of Dolan v. N.Y. State Dep't of Civil Serv., 304 A.D.2d 1037, 1039 (3d Dep't), *lv. denied*, 100 N.Y.2d 512 (2003) (citing Mtr. of Piasecki v. Dep't of Soc. Servs., 225 A.D.2d 310 (1996)).

## XI. TRIAL

If a triable issue of fact is raised in an article 78 proceeding, it shall be tried forthwith (CPLR 7804(h)). Petitioner may be entitled to trial by jury in certain cases.

Mtr. of Green v. Comm'r of Envtl. Conservation, 94 A.D.2d 872 (3d Dep't 1983), *appeal dismissed*, 64 N.Y.2d 884 (1985)

## XII. POWERS OF AGENCIES AND COURTS WITH RESPECT TO ADMINISTRATIVE ACTION

### A. Agency Powers

1. **Prior to a determination becoming final the agency can order a rehearing.** At that juncture, the agency action is non-final, not subject to judicial review (see CPLR 7801 (1) "a proceeding under this article shall not be used to challenge a determination . . . which is not final") and administrative remedies are unexhausted. Consequently, the agency has the power to order a new hearing. Mtr. of Higgins v. Selsky, 27 A.D.3d 913 (3d Dep't 2006).

People ex rel. Victory v. Herbert, 277 A.D.2d 933 (4th Dep't 2000), *lv. denied*, 96 N.Y.2d 705 (2001) (Although instituted as a Habeas Corpus proceeding, the Court in Victory concluded that it was more properly maintained as an article 78 proceeding, and held that the agency, prior to final determination, could order a new hearing).

2. **After article 78 review is instituted to review final agency action an administrative agency may not order a rehearing, but may only totally reverse its own determination.** Once article 78 review is instituted, the administrative agency loses all jurisdiction with respect to reconsidering the questions presented in the determination under review. Mtr of Moore v. Goord, 31 A.D.3d 1075 (3d Dep't), lv. denied, 7 N.Y.3d 715 (2006) (agency precluded from unilaterally holding rehearing when matter is in court); Mtr. of Rahman v. Coughlin, 112 A.D.2d 591 (3d Dep't 1985) (same) . However, the agency may reverse its determination and grant the relief sought by the petitioner. Mtr. of Rouff v. Cunningham, 30 A.D.3d 787 (3d Dep't 2006); Mtr. of Gonzalez v. Jones, 115 A.D.2d 849 (3d Dep't 1985) (agency could reverse its holding and grant the petitioner full relief, thereby mooting the judicial proceeding).

3. **Timing is critical.** An agency cannot reverse itself after judicial review. Mtr. of El-Shabazz v. Coombe, 245 A.D.2d 1099 (4th Dep't 1997), lv. denied, 92 N.Y.2d 801 (1998).

## B. Court Powers

1. **CPLR 7806 sets forth the relief that a court can impose in an article 78 proceeding.** Basically, the court may grant or dismiss the proceeding, or where there is an administrative determination, may "annul or confirm" the determination, in whole or in part, or modify it, and it "may direct or prohibit specified action by the respondent." Significantly, "restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner."

a. **If a monetary claim is the main relief sought, the matter would be dismissed for lack of subject matter jurisdiction-- it would have to be instituted as a claim in the Court of Claims.** See Safety Group No. 194 v. State of N.Y., 298 A.D.2d 785 (3d Dep't 2002); cf. Power Cooling, Inc. v. Univ. of N.Y., 284 A.D.2d 317 (2d Dep't 2001). (Note that the 6 month period to institute a new proceeding under CPLR 205(a) would apply to a dismissal for lack of subject matter jurisdiction). Indeed, a petitioner's claim for compensatory damages, predicated on alleged civil and constitutional violations, "seeks damages that are 'consequential', not 'incidental', to such relief, and, as such, cannot be awarded in the context of an article 78 proceeding." Loftin v. N.Y. City Dep't of Soc. Servs., 267 A.D.2d 78, 78 (1st Dep't 1999) (citations omitted), appeal dismissed, 95 N.Y.2d 897 (2000).

b. **Incidental damages.** However, where petitioner is not seeking compensation for some wrongdoing by the State, but merely is seeking to have respondent comply with a law which provides for payment to petitioner,

Supreme Court has subject matter jurisdiction over the proceeding. (CPLR 7806 provides that any “restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner “). Mtr. of Gross v. Perales, 72 N.Y.2d 231 (1988); Morell v. Balasubramanian, 70 N.Y.2d 297 (1987); Mtr. of Economic Opportunity Comm’n, Inc. v. Shaffer, 114 A.D.2d 628, 630 (3d Dep’t 1985).

2. **Upon judicial review of adjudicatory determinations, courts will not remand for a new hearing where there is an evidentiary failure at the hearing. Rather, the matter must be annul led.** Mtr. of Hartje v. Coughlin, 70 N.Y.2d 866 (1987), held that a court may not remand a case to an agency to correct an evidentiary deficiency. See also Mtr. of Police Benevolent Ass’n. v. Vacco, 253 A.D.2d 920 (3d Dep’t), lv. denied, 92 N.Y.2d 818 (1998); Mtr. of Bettis v. Coughlin, 186 A.D.2d 1080 (4th Dep’t 1992). Note that Hartje applies even if evidence is not available at the initial hearing. Mtr. of Dicaprio v. Trzaskos, 203 A.D.2d 759 (3d Dep’t 1994).
3. **Courts can reverse and remand for rehearing on procedural error.** See Mtr. of Police Benevolent Assoc. v. Vacco, 253 A.D.2d 920 (3d Dep’t), lv. denied, 92 N.Y.2d 818 (1998) (holding that remittal to an administrative agency is authorized to cure deficiencies in the record from, for example, inappropriate findings, or the application of an improper standard of proof, but not to cure evidentiary deficiencies); Mtr. of Hillard v. Coughlin, 187 A.D.2d 136 (3d Dep’t), lv. denied, 82 N.Y.2d 651 (1993) (holding that evidentiary errors; violations of fundamental due process rights; or other equitable considerations may prevent a remand for rehearing); Mtr. of Shipman v. Coughlin, 98 A.D.2d 823 (3d Dep’t 1983) (remanding for new hearing where witnesses improperly denied); cf. Mtr. of Dreher v. Smith, 65 A.D.2d 572, 573 (2d Dep’t 1978).
4. **Courts will not entertain issues that have not been raised in the administrative proceeding.** A petitioner may not raise new issues in an article 78 proceeding that were not raised before the administrative body whose determination is under review. Mtr. of Yarbough v. Franco, 95 N.Y.2d 342 (2000); Mtr. of Roggemann v. Bane, 223 A.D.2d 854 (3d Dep’t 1996); Mtr. of Syracuse Land Corp. v. Town of Clay, 112 A.D.2d 51, 52 (4th Dep’t), appeal dismissed, 65 N.Y.2d 1053 (1985).
5. **Courts will not entertain challenges to unexhausted, non-final, administrative determinations.** A failure to exhaust administrative remedies involves the failure to utilize an available procedure for further review. For example, the concept would embrace the failure to administratively appeal, or the failure to grieve a claim that falls within the

grievance procedures. A failure to exhaust is usually fatal to appellate review. Mtr. of Beyah v. Leonardo, 182 A.D.2d 868 (3d Dep't 1992); Mtr. of Crowley v. O'Keefe, 148 A.D.2d 816 (3d Dep't), appeal dismissed, 74 N.Y.2d 780 (1989).

6. **Courts will not entertain issues that have been waived in the administrative proceeding.** Waiver involves the express, intentional relinquishment of a known right. Only "waiver" can relinquish a right of constitutional dimension (Mtr. of Johnakin v. Racette, 111 A.D.2d 579, 580 (3d Dep't 1985)), such as inmates' rights to assistance (Mtr. of Krall v. Selsky, 309 A.D.2d 1027 (3d Dep't 2003)), to be present at their disciplinary hearings (Mtr. of Rush v. Goord, 2 A.D.3d 1185 (3d Dep't 2003)), or to call witnesses (Mtr. of Johnson v. Coombe, 244 A.D.2d 664 (3d Dep't 1997)). For example, the failure to object to the hearing officer's denial of a witness does not constitute a waiver. On the other hand, an express statement that petitioner no longer wishes to call a particular witness may constitute a waiver. Mtr. of Huggins v. Coughlin, 76 N.Y.2d 904 (1990), aff'g for reasons stated at A.D., 155 A.D.2d 844, 846 (3d Dep't 1989).
7. **Courts will not entertain issues that have not been preserved in the administrative proceeding.** Mtr. of Khan v. N.Y. State Dep't of Health, 96 N.Y.2d 879 (2001) ("Judicial review of administrative determinations pursuant to CPLR article 78 is limited to questions of law [citation omitted]. Unpreserved issues are not issues of law. Accordingly, the Appellate Division had no discretionary authority or interest of justice jurisdiction in reviewing the agency's determination of guilt below [citation omitted]"). Preservation embraces a failure to object when the objection would have alerted the hearing officer to the issue, enabling to him to address it. Mtr. of Vale v. Selsky, 234 A.D.2d 714 (3d Dep't 1996); Mtr. of Stanbridge v. Hammock, 55 N.Y.2d 661, 663 (1981). There are potentially four places where the failure to preserve arguments in challenges to administrative determinations may be fatal. The first is at the hearing, the second on administrative appeal, the third in petitioner's article 78 proceeding and the fourth in petitioner's brief (see abandonment below). However, as stated above, rights of constitutional dimension can only be waived by express, knowing statements or conduct constituting the necessary voluntary relinquishment.
8. **Courts will not entertain issues that have been forfeited in the administrative proceeding.** Forfeiture occurs by operation of law as a consequence of conduct with respect to issues which, as a matter of policy, the law does not permit to be reviewed. For example, a defendant in a criminal trial cannot contest his removal from a trial where there is a finding that he willfully absented himself from the courtroom. He has forfeited his

right to be present. This concept has been applied by the state courts to prisoner litigation. Mtr. of Watson v. Coughlin, 72 N.Y.2d 965 (1988), aff'g for reasons stated in A.D., 132 A.D.2d 831 (3d Dep't 1987); Mtr. of Berrian v. Selsky, 306 A.D.2d 771 (3d Dep't), appeal dismissed, 100 N.Y.2d 631 (2003), cert denied, 543 U.S. 841 (2004); Mtr. of Christianson v. Rodriguez, 176 A.D.2d 1134 (3d Dep't 1991), lv. denied, 79 N.Y.2d 752 (1992). Note that a petitioner may be removed from a hearing for contumacious conduct. Mtr. of Acevedo v. Goord, 32 A.D.3d 1143 (3d Dep't 2006).

9. **Courts will not entertain issues that have been abandoned on appellate judicial review.** The failure to raise a legal argument in a brief may constitute "abandonment" of that issue on review. The abandonment of an argument in a brief, although the argument was properly raised throughout the matter and is properly in the case, is generally fatal to its consideration by the court. Mtr. of Tafari v. Selsky, 33 A.D.3d 1029 (3d Dep't), lv. denied, 7 N.Y.3d 717 (2006) (abandonment even applies to substantial evidence); Mtr. of Dawes v. Selsky, 286 A.D.2d 806 (3d Dep't 2001); Mtr. of E. Harlem Bus. & Residential Alliance, Inc. v. Empire State Dev. Corp., 273 A.D.2d 33 (1st Dep't 2000); Mtr. of Brenda H. v. Johnson, 269 A.D.2d 787 (4th Dep't 2000), appeal dismissed, 95 N.Y.2d 790 (2000), cert. denied, 531 U.S. 935 (2000).
  
10. **Courts may only set aside the error upon judicial review of agency determinations; it is a violation of separation of powers and an improper exercise of judicial authority, for the court to direct agency action.** Burke's Auto Body, Inc. v. Ameruso, 113 A.D.2d 198 (1st Dep't 1985), said it best:

In an article 78 proceeding, the judicial function is limited to the review of the propriety of the determination in terms of whether the administrative body acted in an arbitrary or capricious manner. The court's jurisdiction is restricted by CPLR 7803 and does not afford 'original jurisdiction to direct the manner in which an administrative agency shall perform its functions' (citation omitted). While the court is empowered to determine whether the administrative body acted arbitrarily, it may not usurp the administrative function by directing the agency to proceed in a specific manner which is within the jurisdiction and discretion of the administrative body in the first instance. The appropriate procedure, upon a finding that the agency acted arbitrarily, is to remand the matter to the administrative agency for further proceedings in accordance with the opinion (multiple citations omitted).

In Mtr. of Steen v. Governor's Office of Employee Relations, 1 A.D.3d 644 (3d Dep't 2003), the Court upheld the dismissal of a contempt motion and article 78 proceeding brought by Steen's union lawyers, claiming that GOER violated a previous order of the A.D.3d granting Steen's petition in an out-of-title case. In the previous case, petitioners, who were paid at grades 14 and 17, sought to annul a determination of GOER rejecting their out-of-title grievances. Their petition also sought back pay at a grade 25 level. The Third Department held that petitioners were working out-of-title. Subsequently, GOER, upon examining the out-of-title duties, ruled that petitioners were only entitled to back pay at a grade 17 level.

Petitioners then instituted a civil contempt proceeding, arguing that because the Appellate Division decretal paragraph on the out-of-title case stated: "determination annulled and petition granted" GOER's failure to pay them at grade 25 was contemptuous. Petitioners also brought a new article 78 proceeding challenging the back pay determination. The Third Department affirmed the dismissal of both proceedings in a decision that is noteworthy for its reaffirmance of core principles of administrative law. The court applied the:

well-established rule that our powers of review do not include substituting our judgment for that of the administrative agency (see Mtr. of Skorin-Kapov. v. State Univ. of N.Y. at Stony Brook, 281 A.D.2d 632, 633 [2d Dep't], lv. denied, 96 N.Y.2d 720 [2001]; Mtr. of Bridger v. N.Y. State Office of Vocational & Educ. Servs. for Individuals with Disabilities, 218 A.D.2d 850, 852 [3d Dep't 1995]; Mtr. of McCormack v. Posillico, 213 A.D.2d 913, 914 [3d Dep't 1985]; Burke's Auto Body v. Ameruso, 113 A.D.2d 198, 200-201 [1st Dep't 1985]). We did not intend to "usurp the administrative function by directing the agency to proceed in a specific manner, which is within the jurisdiction and discretion of the administrative body in the first instance" (Burke's Auto Body v. Ameruso, *supra*, at 201). The administrative body not having made a determination that salary grade 25 was appropriate, it cannot be successfully argued that we reviewed and approved granting petitioners' back pay at grade 25. The effect of our decision was to annul the original determination and remit the issue to the agency for further proceedings.

The Third Department's acknowledgment that the agency makes the determination and the Court's duty is fulfilled by setting aside the error, is an important point in article 78 practice. In addition, where an agency

determination on remand is alleged to have violated the proscriptions of the remanding court, Steen provides a basis for arguing that the agency makes the determination, albeit without the error that caused the remand.

11. **Courts will give administrative agency determinations "great deference" and may not substitute their judgment for that of the agency.** It is well settled that an agency's interpretation of a statute that it administers and the regulations implementing it is entitled to great weight and judicial deference. Matter of Howard v. Wyman, 28 N.Y.2d 434, 438 (1971). "[T]he construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld". Id.; Kenton Assoc. v. Div. of Hous. and Comty. Renewal, 225 A.D.2d 349 (1st Dep't 1996). Moreover, under the limited scope of judicial review of administrative determinations, courts will not weigh the evidence or substitute their judgment for that of an agency if a rational basis exists in the record for the agency's determination. Pell v. Bd. of Educ., 34 N.Y.2d 222 (1974). See also Mtr. of Walker v. State Univ. Of N.Y., 19 A.D.3d 1058 (4th Dep't), lv. denied, 5 N.Y.3d 713 (2005).

### **XIII. HANDLING AN ARTICLE 78 PROCEEDING IN SUPREME COURT WITH AN EYE TOWARD THE APPEAL/TRANSFER**

The following advice offered with respect to article 78 litigation in Supreme Court is based on experiences in the Appeals and Opinion Bureau (A&O). The issues listed below can help the client to prevail when the proceeding goes up on appeal.

#### **A. Err on the Side of Over-inclusiveness**

**1. Objections in point of law.** You should always fully investigate the availability of all legal defenses, called "objections in point of law." CPLR 7804(f). These include threshold objections such as statute of limitations, lack of personal jurisdiction and res judicata, that are separate from the merits and can result in dismissal of the proceeding. See Mtr. of Hop-Wah v. Coughlin, 118 A.D.2d 275, 276-77 (3d Dep't 1986) (describing objections in point of law as akin to affirmative defenses and referring generally to CPLR 3211(a) for the kinds of defenses that can be raised as objections in point of law), rev'd on other grounds, 69 N.Y.2d 791 (1987).

Because many objections are waived if not raised in either an answer or a motion to dismiss, be sure to raise any defense that appears to have merit even if you are unable to determine with certainty that the defense is valid, and include any evidence you have to support it. If an objection ultimately fizzles, nothing is lost. If, on the other hand, it turns out to be meritorious, it will do us no good unless you have raised it. Of course, you should not raise objections when there is no basis at all to do so.

**2. Evidence.** Given that we have only one opportunity to put in all the evidence supporting our position, it is of critical importance to make that showing as comprehensive as possible. Always go to the original source. For example, put in original documents, not simply an affidavit describing or explaining what a document contains. Wherever possible, affidavits should be from people with direct personal knowledge of the facts, not from those who are merely relaying what they have been told by others.

For the most part, an affidavit from an AAG adds little or nothing to the record. To the extent it recites facts attested to elsewhere, it is redundant; to the extent it brings up new facts, it is not probative unless the facts asserted are based on personal knowledge; to the extent it makes legal arguments, it is being misused as a memorandum of law.

As a general matter, the record in a certiorari-type proceeding that will be transferred to the Appellate Division pursuant to CPLR 7804(g) is comprised exclusively of the record created before the administrative agency. However, there are rare occasions when it is both appropriate and necessary to supplement that record with additional materials. This occurs when the petition alleges as grounds for relief matters that are outside the scope of the hearing record. For example, if it is alleged that a hearing officer failed to record part of a hearing, an affidavit controverting this or at least explaining what happened should be obtained. At the same time, however, remember that further evidence with respect to matters that are contained within the administrative record may not be submitted. Thus, you may not submit additional evidence on the merits in order to provide "substantial evidence" in support of the administrative determination.

#### **B. Refrain from Inappropriate Motions to Dismiss**

It is usually less time-consuming to file a motion to dismiss than an answer. However, filing inappropriate motions is not only wrong, it can cause problems later on. Thus, it is important to understand when a motion is called for and when it is not, and to guide one's litigation strategy accordingly.

Motions to dismiss are appropriate, and indeed preferable, for raising objections in point of law such as those discussed above that are independent of the merits. In addition, one may move to dismiss for failure to state a cause of action. This ground is not, however, a substitute for an answer on the merits and should be used sparingly.

Remember, on a motion to dismiss, the factual allegations in the petition are taken as true. See, e.g., Northway 11 Cmtys., Inc. v. Town Bd. of Malta, 300 A.D.2d 786 (3d Dep't 2002). Therefore, the petition fails to state a cause of action only if there is no ground for relief even if the alleged facts are assumed to be true. If, in order to defeat the petition, it is necessary to controvert it by submitting evidence, the petition does not fail to state a cause of action—it merely fails on the merits. In such situations, the proper response is an answer.

### **C. Handle Confidential Evidence with Care**

Whenever confidential materials are submitted to the court for in camera inspection, make sure they are submitted separately from your other papers. Confidential materials should be placed in an envelope clearly marked "CONFIDENTIAL - FOR IN CAMERA INSPECTION ONLY. NOT TO BE FILED WITH THE COUNTY CLERK. RETURN TO ASSISTANT ATTORNEY GENERAL \_\_\_\_\_ WHEN INSPECTION COMPLETED." (or words to that effect) and handed directly to the judge or his or her clerk. Do not attach such materials to the judge's copy of your pleadings. Follow up after the case is decided and make sure the materials are in fact returned to you. In a transfer case, the materials should be returned to you when the transfer order is made. Unless these procedures are followed, it is possible that the confidential materials will wind up being filed in the county clerk's office where they will be publicly available. In past years, this was a significant problem. Happily, it is far less so now.

### **D. Understand the Transfer Process.**

Under CPLR 7804(g), if a proceeding raises a substantial evidence question, "the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred" to the appropriate Appellate Division.

Thus, in a substantial evidence case, as in any other case, it is important to raise all objections in point of law either by motion or in the answer (preferably by motion since it is more economical and focuses the court's attention on the objections) in order to avoid waiving them and to have them addressed by the Supreme Court prior to transfer. If the Supreme Court does not dismiss the petition based on our objections, we must answer if we have not already done so and the whole proceeding is then transferred for disposition to the Appellate Division.

In a transfer case, it is not necessary to file a Notice of Appeal in order to obtain appellate review of a lower court's refusal to dismiss the petition.<sup>1</sup> In other words, after transfer, the entire case, including any rulings made by the lower court, is before the Appellate Division for review. See Schultz v. Roberts, 138 A.D.2d 980 (4<sup>th</sup> Dep't 1988) (citing Desmone v. Blum, 99 A.D.2d 170, 176-77 (2d Dep't 1984)).

The answer in a typical transfer case should be a relatively abbreviated affair that, most importantly, specifically identifies the items comprising the administrative record, which is submitted with the answer. As discussed above, in most transfer cases there is no need or

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<sup>1</sup> Indeed, an intermediate order in an article 78 proceeding, such as an order denying a motion to dismiss, is not appealable as of right but only by permission. See CPLR 5701(b), (c) and Point III(B), *infra*.

justification for including with the answer any affidavits or other materials beyond the administrative record.

Note that a petition does not have to contain the words "substantial evidence" in order for such a question to be raised. As a general matter, a petition that disputes the agency's evidentiary findings or the inferences the agency drew from the facts is raising a substantial evidence question and should be transferred. Also note that whether there is substantial evidence to support a determination is a question of law; thus, even where the underlying facts are undisputed, whether those facts support the inferences and conclusions in the determination is still a question of substantial evidence.

Finally, be aware that a substantial evidence question can be raised only where the hearing was required to be held by law. See CPLR 7803(4). There is no substantial evidence question raised by a proceeding that challenges the results of a discretionary hearing, even if that hearing had all the trappings of an adjudicatory proceeding.

#### **XIV. APPEALS TO THE APPELLATE DIVISION**

**A. Appealability Generally.** Unlike federal law, state law provides for almost unlimited appeals as of right to the Appellate Division from any final or interlocutory action of Supreme Court. See CPLR 5701(a).

**B. Limitation in Article 78 proceedings.** However, under CPLR 5701(b)(1), there is no appeal as of right from an "order" made in an article 78 proceeding. The purpose of this limitation is to avoid delay and piecemeal litigation in what is designed to be an expeditious, summary proceeding. Thus, for example, an order denying a motion to dismiss the petition cannot be appealed as of right, although permission to appeal can be sought. See CPLR 5701(c).

In addition, an intermediate order will be brought up for review if the matter is ultimately appealed after judgment is entered. CPLR 5501(a)(1).

**C. Determining When There is an Appealable "Judgment."** An article 78 proceeding concludes in a "judgment." CPLR 7806. Thus, it would seem to be a fairly straightforward matter to determine whether a court has issued a nonappealable order or an appealable judgment: If the court's directive is the last judicial action contemplated in the proceeding, it should be viewed as an appealable judgment. Put another way, an "order" is issued in response to a motion (see CPLR 2211) made within the article 78 proceeding; a "judgment" is a directive that disposes of the petition altogether.

Unfortunately, it is not so simple. The courts have held from time to time that in order for an agency to have an appeal as of right, the Supreme Court's action must be "final", see, e.g., Mtr. of Elcor Health Servs. v. Novello, 295 A.D.2d 772, 773 n.2 (3d Dep't 2002), aff'd, 100 N.Y.2d 273

(2003), as that term of art is understood in the context of Court of Appeals jurisdiction. See generally CPLR 5601, 5602; Cohen & Karger, "Powers of the New York Court of Appeals" (Reprinted 1992), §§ 9, 12.

If this is so, then a directive from Supreme Court annulling a determination and remitting the matter to the agency for further, non-ministerial action is not appealable as of right, even though it is the last judicial act in the proceeding. Thus, for example, it would appear that any directive from Supreme Court annulling a Parole Board determination denying parole release and remanding to the agency for a new determination is not appealable. Nevertheless, A&O regularly appeal in these situations, without, to my knowledge, anyone questioning our right to do so.

While A&O urged the Court of Appeals in Elcor to address the question of whether there is an appeal as of right to the Appellate Division whenever the adjudication of an article 78 proceeding in Supreme Court has concluded, regardless of technical "finality," the Court did not need to address the question and chose not to. See Mtr. of Elcor, 100 N.Y.2d at 278 n.4. So this issue remains open.

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