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Demonstrating The 'Irrational'

Whatever Happened to Article 78?

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CPLR Article 78 gathers together the old writs used by the common law courts to review the work of administrative agencies. Section 7803 of that article limits the questions that can be raised in such proceedings to whether the agency failed to perform its duty, acted in excess of jurisdiction, violated lawful procedure, was affected by an error of law, was arbitrary and capricious, abused discretion, or acted in the absence of substantial evidence. Of these, the question that has come to dominate all the others is whether the agency was arbitrary and capricious.

As can readily be seen from this standard, there is a certain presumption of correctness of the agencies' actions built into the enunciated standard. However, it is clearly a rebuttable presumption. The question now most often asked both in the judicial decisions and in the corridors of the courthouses has become, "Although it cannot be denied that Article 78 assumes substantial judicial deference to administrative agencies, just how much deference to agency decisions is due?" While it is clear that the judicial function is not limited to being a rubber stamp for the agencies, such a large percentage of agency decisions are affirmed in the landlord-tenant context, that one is left to wonder just how egregiously wrong an agency must be before a court will step in to overturn it. Having examined the 334 reported landlord-tenant related article 78 proceedings from the past decade, the authors of this article have found that while the Court of Appeals tends to affirm agency decisions only roughly half the time, the downstate Appellate Divisions render such affirmances in approximately 85 percent of the cases they hear.[1]

There are some winnable Article 78 proceedings, but the standardized methods of researching a case will rarely be adequate to the client's goal. Achieving the extraordinary outcome of an actual victory will generally require both extraordinary facts and extraordinary technique.

Independent of the statistics, both practitioners and some few judges are complaining increasingly loudly that the courts are overstepping proper boundaries of deference to the administrative agencies. Although arguably complaining about no more than where things could end up, Justice Marlow wrote in his stinging dissent in *333 East 49th Assocs., L.P. v. DHCR*:[2]

> While I agree with the majority's statement of law that "[t]he administrative agency charged with enforcing a statutory mandate has broad discretion in evaluating pertinent factual data and inferences to be drawn therefrom, and its interpretation will be upheld so long as not irrational and unreasonable," I respectfully disagree that this record meets even that modest standard. Instead, I believe that a reviewing court must be presented with a record containing factually meaningful findings so as to enable appellate judges to draw those rational inferences to support, and thus affirm, a result that affects parties' legitimate and significant rights. Otherwise, this Court's mandate—intended to be a conscientious review power over governmental action—will be transformed into a superficial habit of "rubber stamping" the most vacuous statements paraded before us as findings of fact.

The key phrase in the *333 East 49th Assocs.* dissent is "conscientious review power over governmental action." Intriguingly, Justice Marlow cites to nothing to back up his assertion that Article 78 should be "conscientious" and there is much in the literature to suggest to the contrary.

A Range of Meanings

The problems originate in the statute itself, CPLR §7803(3) that directs the Supreme Court to consider whether the agency's actions were "arbitrary and capricious." Occasional decisions directly proceed under the "arbitrary and capricious" standard, but the overwhelming bulk of decisions hold that "arbitrary and capricious" means "irrational."[3] The problem with "irrational" is that it means a range of things: illogical, unreasonable, foolish, crazy, ridiculous, absurd, silly, unfounded, or groundless. Noting the range of nuance in these terms, we see it is a vastly different thing to say that a court may reverse an administrative decision because it is merely "unfounded" than to say that the administrator was "crazy." In truth, the "irrational" standard is rarely used at either of these extremes, although our research would

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suggest that without choosing a particular dictionary definition, the courts come closest to upholding all that which is not "crazy."

In one of its rare landlord-tenant decisions to overturn an agency decision, *Gilman v. DHCR*,[4] the Court of Appeals goes to the heart of its reasoning for overturning the agency without setting forth its latest understanding of when it is allowed to do so. There are two passages in the decision that afford some guidance, one where the court criticizes the DHCR for violating its own rules, and the other where the court accuses the DHCR of "extinguish(ing)…sound policy basis." Of course, "extinguishing sound policy" is a difficult standard to apply, but it does seem to be more severe than "unwarranted" and less extreme than "insane." So perhaps, this, insofar as it represents a standard, could be regarded as "violating public policy." If that is the rule, it is certainly more restrictive than Justice Marlow's "conscientious review power."

Where a court will overturn an agency will at times turn on interpretation of other CPLR §7803 grounds: failure to perform a duty, acting in excess of jurisdiction, abusing discretion, or acting without substantial evidence. The basis of the controversy may be that one side finds that one of these other grounds exists, but the other sees it really as the "arbitrary and capricious" standard. Thus in *I.G. Second Generation Partners L.P. v. DHCR*,[5] the majority saw a lack of jurisdiction for a result and the dissent saw that exercise of jurisdiction as having been rational. Although this is a view expressed in a dissent, it is nonetheless striking that an appellate justice could think that an agency can "rationally" arrogate to itself a power denied to it by statute. Yet, such has become the power of judicial reticence to employ Article 78 to overturn agencies, that such views could gain currency.

That the administrative agencies mete out a substantial amount of injustice is clear even from the very cases that affirm their actions. For example, in *Partnership 92 L.P. v. DHCR*,[6] the agency took 21 years to process an application and, in doing so, applied a law passed more than a decade after the proceeding had been filed. In *333 East 49th Assocs., L.P. v. DHCR*, supra, the Appellate Division sustained a rent reduction order based on the agency making a finding that there was "filth" even though the agency's own record had no evidence to back that up. In *Hersh v. HPD*,[7] the agency delayed two years before beginning the processing of an application for a certificate of no harassment and, upon doing so, substantially relied upon hearsay. Actually it was double and triple hearsay in places and much of it years stale, but the Appellate Division's decision was silent on these issues.[8]

In examining the judicial literature in this field, one is perhaps most shocked by passages such as that found in *Verbalis v. DHCR*,[9] in which the First Department found that the Supreme Court had "exceeded its authority in determining that DHCR's decision on remand was inequitable." As the basis for this statement the court gives the well familiar adage, "If the agency's decision is rational, it must be upheld, even though the court, if viewing the case in the first instance, might have reached a different conclusion." We must underline what is happening here: The second highest court in the state of New York is saying that fundamental fairness and equity are *irrelevant* in Article 78 proceedings. So long as there is some non-insane way of seeing the agency's decision as obeying the law, it does not matter how badly a litigant is unfairly or inequitably hurt by that application of the law.

Litigation Tools

With these limitations in place, the truly ethical practitioner needs a set of tools by which to measure a case and advise a client before undertaking representing that client in an Article 78 proceeding. And no matter how well those tools are applied, this same practitioner must advise the client that from a purely statistical analysis of the Article 78 decisions that have come down, only those cases that make their way all the way to the Court of Appeals stand an even chance of success.

The first tool is analysis of the facts.

If there is any question about the actual factual findings of the agency, there is only the most miniscule chance that the courts will find the facts differently. So, if the battle is over the facts of the case, a client is best advised not to pursue the matter. By statute, the facts can only be overturned if the agency's finding was made without "substantial evidence."[10] It is extraordinarily rare for such an Article 78 proceeding even to be filed and even more rare for the agency to be overturned on this basis. If, however, this is the basis of the proceeding, the local branch of the Supreme Court does not even have the jurisdiction to hear the case. All it can do is transfer the case to be heard in the first instance by the Appellate Division.[11]

The second tool that a careful practitioner can use is to conduct a thorough scan of all previous proceedings before the affected agency on the same subject matter. Agencies that come out with opposite results on the same facts without acknowledging such and without giving reasons are subject to reversal by the courts. Here, it is not enough simply to find cases that would indicate a contrary result. The agency can often find a way to distinguish one case from another and the courts are wont to support the agencies efforts at doing such. But when the agency has decided a case diametrically opposite from a decision it rendered on the identical facts in an earlier case, then one can be reasonably assured of winning a reversal of the second decision. As the Court of Appeals noted in *Matter of Field Delivery Service Inc. v. Roberts*[12]:

> Absent an explanation by the agency, an administrative agency decision which, on essentially the same facts as underlaid a prior agency determination, reaches a conclusion contrary to the prior determination is arbitrary.

The key phrase in this holding is "absent an explanation by the agency." *Matter of Field* discusses at some length how the agency is free to use the same kinds of stare decisis principles as a court to argue that its prior holding is no longer valid for whatever reason. It is where the agency fails to cite or argue away from its previous contrary holding that it is acting arbitrarily as a matter of law.

However, since there is such scarcity of reporting of decisions from the agencies, one is going to have to step outside of normal research patterns. For this purpose, the major electronic publishers may be essentially useless except insofar as they may report judicial decisions that reference agency decisions. A vastly superior tool for finding these decisions is the Housing Court Reporter,[13] a reporter that makes finding the decisions very easy. However, judicial decisions themselves are of no use to build the case against the agency decision, unless, judicial decision in hand, one FOILs a copy of the underlying agency decision.

If one makes a habit of sending in copies of administrative decisions to CHIP (Community Housing Improvement Program) or the RSA (Rent Stabilization Association) one can ask what they have in their archives of similar subject matter.

Finally, one can search one's own files for other decisions from the agency and one can even get assistance from other firms who have had their own encounters with the agencies. Here collegiality with one's competitors and even adversaries can wind up working extraordinarily effectively for one's clients. Indeed, this is not the time to be shy about asking one's own client for help. The client may have the prior contrary agency decision and may not have mentioned it during the intake interview.

Finally, one should read every single bit that the agency in question has ever written on the subject matter of the proposed Article 78 proceeding—every bulletin, every newsletter, every handout, every flyer. If the agency in question has written anything contrary to its holding in the case one seeks to challenge in the courts, one has a substantial basis to bring the proceeding.

There are almost no judicial proceedings that are easy to bring, but Article 78 proceedings are among the toughest possible to win. The statute which sets the standard of review on its face appears to set the bar very high, but when one looks at how the courts actually process these cases, especially in the downstate appellate divisions, the bar is higher still. In most cases, the best advice to give to a client is simply not to bother unless the client is prepared to go to the Court of Appeals where chances of success are no better than even. There are some winnable Article 78 proceedings, but the standardized methods of researching a case will rarely be adequate to the client's goal. Achieving the extraordinary outcome of an actual victory will generally require both extraordinary facts and extraordinary technique.

1. The full study listing the cases analyzed and the results obtained may be viewed at www.alblawfirm.com/rubberstamp.pdf.

2. 40 AD3d 516 (1st Dept. 2007).

3. See *Matter of Nehorayoff v. Mills*, 95 NY 2d 671 [2001]; *Matter of County of Monroe v. Kaladjian*, 83 NY 2d 185 [1994]; *Matter of Pell v. Board of Educ.*, 34 NY 2d 222, [1974]).

4. 99 NY2d 144 (2002).

5. 34 AD3d 379 (1st Dept. 2006).