

Whatever Happened to Article 78?

By Adam Leitman Bailey and Dov Treiman

The courts hearing cases challenging administrative agencies stand accused of rubber stamping the most vacuous statements paraded before them as findings of fact.¹ Indeed, an analysis of landlord-tenant cases over the past 10 years arising from the First and Second Judicial Departments² reveals some amazing patterns, sustaining the overall impression common in the landlord-tenant bench and Bar that Article 78 so rarely results in a victory for the petitioner that pursuing it has become nearly futile.

CPLR Article 78 gathers together the old writs used by the common law courts to review the work of administrative agencies. Section 7803 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.

The question that demanded answering is whether a raw count of the numbers of times courts affirm the agencies sustains the accusation of “rubber-stamping.”

Meaningful research must focus on the work of three courts: The Court of Appeals and the Appellate Divisions for the First and Second Departments. There are four possible substantive outcomes to an Article 78 proceeding: affirming the decision

of the agency (“Aff’d”), affirming it as modified (“Mod”),³ reversing it (“Rev’d”), and remanding the matter to the agency for further processing (“Rem”).⁴ In order for an analysis of judicial decisions to have any meaning, one must navigate between the necessity for enough decisions to display a statistical trend and having the decisions close enough to each other in time to show then “current” thinking. In order to achieve both goals, we present our data in 10-, five-, and three-year chunks.⁵

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In examining the record of cases decided over the past 10 years by these courts, we examined numbers of cases on landlord-tenant matters as follows:

Courts	3 yrs	5 yrs	10 yrs
All	68	137	334
Court of Appeals (“CoA”)	2	6	13
App. Div. 1st Dep’t (“1st”)	41	87	230
App. Div. 2d Dep’t (“2d”)	24	44	91

The chart below gives the percentages of each of affirmances, reversals, modifications, and remands in ten (“10”), five (“5”), and three (“3”) year study periods.⁶

Courts	Aff’d 10	Aff’d 5	Aff’d 3	Rev’d 10	Rev’d 5	Rev’d 3	Mod 10	Mod 5	Mod 3	Rem 10	Rem 5	Rem 3
All	84%	82%	84%	4%	16%	3%	2%	2%	0%	10%	4%	12%
CoA	54%	50%	50%	8%	0%	0%	8%	17%	0%	30%	33%	50%
1st	86%	90%	88%	3%	2%	2%	2%	0%	0%	9%	8%	10%
2d	85%	73%	83%	5%	9%	4%	2%	5%	0%	8%	14%	13%

Certain additional facts emerge from a study of the data. For example, in 1999 and almost all of 2000, 100% of landlord-tenant based Article 78 proceedings before the Second Department sustained the agency’s rulings. In the past five years, the Court of Appeals has never reversed an agency on a landlord-tenant matter. Unlike past practice, these courts have not modified any landlord-tenant agency decisions for the past three years. For the First Department that handled 69% of the cases in the study,⁷ it has been nearly a decade since it modified an agency decision.

We find that for the entire study period, the Appellate Divisions tend to sustain the agency outright roughly 85% of the time, but the Court of Appeals only sustains the agencies roughly half the time. Those data would at least suggest that the Appellate Divisions are misreading the will of the Court of Appeals. However, given the fact the high court has only been averaging slightly more than one landlord-tenant related Article 78 proceeding a year, there is limited validity to any statement made on statistics alone.⁸ The remands to the agency reinforce this idea that the Appellate Divisions are not following the Court of Appeals’ lead. While the Appellate Divisions remand to the agency in roughly 10% of cases, the Court of Appeals does so in the 30%-50% range.⁹

Independent of the statistics, both practitioners and some few judges are complaining increasingly loudly that Article 78 has become a mere “rubber stamp” for agency action. As Justice

Marlow wrote in his stinging dissent in *333 East 49th Assocs., LP v. DHCR*,¹⁰

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 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.

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."¹¹ 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 suggest that 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*,¹² 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 LP v. DHCR*,¹³ the majority saw a lack of

jurisdiction for a result and the dissent saw that exercise of jurisdiction as having been rational. Amazingly, a court could think that an agency can "rationally" arrogate to itself a power denied to it by statute. Yet, such has become the power of the Article 78 rubber stamp.

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 LP v. DHCR*,¹⁴ 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., LP 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*,¹⁵ 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.¹⁶

In examining the judicial literature in this field, one is perhaps most shocked by passages such as that found in *Verbalis v. DHCR*,¹⁷ in which the First Department found that the Supreme Court had "exceeded its authority in determining that DHCR's decision on remand was inequitable." It justifies this shocking statement with 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 hurt by that application of the law. Lewis Carroll's Queen of Hearts¹⁸ would certainly approve.

Endnotes

1. Justice Marlow's dissent at 333 *East 49th Assocs., LP v. DHCR*, 40 A.D.3d 516 (1st Dep't 2007).
2. Article 78 proceedings in the Third and Fourth Judicial Departments regarding landlord-tenant matters are almost entirely unheard of.
3. In the statistical analysis presented in this article, no attempt is made to differentiate among the various kinds of modifications.
4. In *Peckham v. DHCR*, N.Y.L.J., July 2, 2008, 26:1, the First Department insisted on affirming the DHCR over the latter's objection and refused a requested remand!
5. Both the raw data and a more complex analysis of them are available at www.alblawfirm.com/rubberstamp.pdf.
6. Cases in which the agency was sustained on Article 78 review are referred to as "*Aff'd*," those in which the agency was reversed on such review, "*Rev'd*," those in which the agency's action modified, "*Mod.*" and those for which the Article 78 court decided to remand the matter to the agency for further consideration, "*Rem.*"
7. The Court of Appeals handled 4%, the Second Department, 27%.
8. On the other hand, the Court of Appeals has not once reversed an agency ruling on a landlord-tenant matter in some five years. It did reverse agencies some 16% of the time from the period 10 years ago to five years ago.
9. In our judgment, for statistical purposes, it was not meaningful to compile numbers for reversals and affirmances of the Appellate Divisions by the Court of Appeals. The point of this article is how much deference the courts show the agencies, not each other.
10. *Supra* note 1.
11. See *Nehorayoff v. Mills*, 95 N.Y.2d 671 [2001]; *County of Monroe v. Kaladjian*, 83 N.Y.2d 185 [1994]; *Pell v. Board of Educ.*, 34 N.Y.2d 222, [1974].
12. 99 N.Y.2d 144 (2002).
13. 34 A.D.3d 379 (1st Dep't 2006).
14. 46 A.D.3d 425 (1st Dep't 2007).
15. 44 A.D.3d 525 (1st Dep't 2007).
16. Actually it was, as the team from Adam Leitman Bailey, P.C. argued, double and triple hearsay in places, but the Appellate Division's decision was silent on the hearsay issue.
17. 1 A.D.3d 101, (1st Dep't 2003).
18. In Lewis Carroll's *Alice's Adventures in Wonderland*, the character of the Queen of Hearts is most famous for her repeated line, "Off with their heads!" Yet, the underlying premise of her justice system is all the more appropriate to this study of CPLR Article 78 in landlord tenant proceedings: "Sentence before verdict."

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