Judicial Review of Administrative Action in New York: An Overview and Survey

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INTRODUCTION

Administrative agencies have in recent years assumed a significant role in adjudicating various disputes, particularly where strong public policy interests are implicated.\(^1\) This adjudicatory role is conferred upon administrative entities by statutes such as the New York Human Rights Law,\(^2\) the New York Social Services Law,\(^3\) and

\(^1\) As society became more complex, a "fourth branch" of government was needed. The administrative agency is better equipped than the courts to process large amounts of information and to create uniform rules, while it is more flexible than Congress in promulgating standards. The major duties of the agency are to license conduct by establishing norms and procedures for enforcement, and to make reparations to injured parties. See 1 K. DAVIS, ADMINISTRATIVE LAW § 1.05 (1958) [hereinafter cited as DAVIS]. As one commentator has noted, "[t]he vastness and efficiency of commercial and industrial transportation and communication, the mutual fairness of labor-management relations, and all other mundane concerns of present day governmental agencies are foundation supports to basic individual rights . . . ." Prettyman, The Nature of Administrative Law, 44 Va. L. Rev. 685, 698 (1958). See generally L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW (4th ed. 1976); Loewinger, The Administrative Agency as a Paradigm of Government—A Survey of the Administrative Process, 40 Ind. L.J. 287 (1965).

\(^2\) New York's Human Rights Law is contained in article 15 of the New York Executive Law and provides in part:

The State Division of Human Rights, by and through the commissioner or his duly authorized officer . . . shall have the following functions, powers and duties:

. . . .

To adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this article . . . .

To develop human rights plans and policies for the state . . . . and to make investigations . . . . appropriate to effectuate this article . . . . and to promote good-
the New York Worker's Compensation Law. Generally, agencies operate within the framework of legislative enactments which circumscribe their functions and prescribe a procedural context for the resolution of disputes. While administrative officials are frequently cast in the role of impartial arbiters, they are often simultaneously responsible for safeguarding the public interest, which, at times, may conflict with the interests of one of the parties to a dispute. Because of this dual role, judicial review is essential to ensure that an agency is not violating the legislative constraints placed upon its decision-making authority or too zealously pursuing its statutory mandate at the expense of fairness to the parties.

will and minimize or eliminate discrimination because of age, creed, color, sex or national origin.


Most agencies operate under an adversary system whereby complaints and answers are filed, a hearing is held and a decision is reached. See, e.g., N.Y. Exec. Law § 297 (McKinney 1977); N.Y. Lab. Law § 706 (McKinney 1977).

A distinction should be made between the "quasi-judicial" and "quasi-legislative" functions of an agency. A quasi-judicial action is one that directly affects an individual's rights. In such cases an adversary hearing is required. Professor Davis has stated:

A party who has a sufficient interest or right at stake in a determination of government action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination and argument, unfavorable evidence of adjudicative facts, except in the rare circumstance when some other interest . . . justifies an overriding of the interest in a fair hearing.


The hearing held by an administrative tribunal . . . may be more or less informal. Technical legal rules of evidence and procedure may be disregarded. Nevertheless, no essential element of a fair trial can be dispensed with unless waived. . . . [A] party whose rights are being determined must be fully apprised of the claims of the opposing party and . . . be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. . . .

Id. at 470, 121 N.E.2d at 425 (citations omitted); accord, Murray v. Murphy, 24 N.Y.2d 150, 247 N.E.2d 143, 299 N.Y.S.2d 175 (1969); Marchesi v. Cowen, 31 App. Div. 2d 765, 297 N.Y.S.2d 595 (2d Dep't 1969); see N.Y. Work. Comp. Law app. § 300.9 (McKinney Supp. 1977-1978) ("The board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure").

A quasi-legislative action focuses on the future and is usually applicable to an unspecified class of persons, rather than to a particular individual. In such cases the general rule is that no hearing is required. Quasi-legislative functions include the promulgation of rules by the agency. See Davis, Administrative Law of the Seventies §§ 5.01-6.13 (1976).

6 See, e.g., Reynolds v. Triborough Bridge & Tunnel Auth., 276 App. Div. 388, 94
The purpose of this Article is to examine the judicial function in reviewing the adjudication of disputes by administrative entities and to delineate the nature and extent of judicial review as established by the legislature and developed by the courts. The Article will focus on the scope of judicial review with respect to specific agencies as illustrative of the relationship between the court and the administrative agency. Two general areas of inquiry will be pursued: first, the standards governing judicial review of the agency's substantive determinations; and second, the constitutional and statutory restraints upon administrative authority.

JUDICIAL REVIEW OF AGENCY FINDINGS

Findings of Fact

Generally, determinations of whether "a phenomenon had happened or is or will be happening" present issues of fact to be resolved by the agency. As a result, in many cases it is provided by N.Y.S.2d 841 (1st Dep't 1950). In Reynolds, although the court noted that judicial review is limited by the "substantial evidence" standard, see notes 43-44 and accompanying text infra, it annulled the agency's determination to discharge petitioner, stating: "[A] court must consider on the one hand that . . . determinations may not be disturbed where there is substantial evidence to support them . . . . and on the other hand a reviewing court must also consider that insufficiency of evidence is, in the eyes of the law, no evidence . . . ." 276 App. Div. at 393, 94 N.Y.S.2d at 845. The court was particularly concerned with "the likelihood of error in the observations" made by witnesses alleging petitioner's misconduct. Id. at 393, 94 N.Y.S.2d at 846. Thus, the case was remitted for a hearing in light of "the seriousness . . . of the charges preferred against this petitioner, his prior good record of employment and his status as a war veteran." Id.; see, e.g., First Am. Natural Ferns Co. v. Picard, 175 Misc. 280, 23 N.Y.S.2d 39 (Sup. Ct. Albany County 1940). The courts are particularly concerned with the maintenance of fairness. Although a hearing need not follow strict procedural rules, see note 5 supra, administrative decisions have been invalidated where agency procedures encroach on basic rights. See, e.g., Finn's Liquor Shop, Inc. v. State Liquor Auth., 24 N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584 (1969) (illegally seized evidence may not be the basis of a denial of a liquor license); Murray v. Murphy, 24 N.Y.2d 150, 247 N.E.2d 143, 299 N.Y.S.2d 175 (1969) (notice of charges must be given); 24 Elmwood Avenue, Inc. v. State Liquor Auth., 14 App. Div. 2d 393, 222 N.Y.S.2d 117 (4th Dep't 1961), aff'd mem., 11 N.Y.2d 980, 183 N.E.2d 701, 229 N.Y.S.2d 422 (1962) (agency may not unduly limit cross-examination).

The administrative factfinding process, simply stated, involves the application of agency expertise to the evidence which has been gathered. Ultimately, the facts are measured against the relevant statutory standard and a decision is reached. See Saginaw Broadcasting Co. v. FCC, 96 F.2d 554 (D.C. Cir.), cert. denied, 305 U.S. 613 (1938). See generally Davis, supra note 1, § 16.06, at 450.

statute that an agency’s findings of fact “are conclusive if supported by sufficient evidence on the record considered as a whole.” This traditional deference to the agency in its fact-finding role is a result of the realization that administrative bodies, through consistent exposure to varying sets of facts, are able to develop a high level of expertise. Thus, while “the scope of judicial review of administrative actions ranges from . . . complete unreviewability to complete substitution of judicial judgment on all questions, the dominant tendency . . . is toward [application of] . . . the test of reasonableness in reviewing findings of fact.”

Inferences Drawn From Factual Findings

In addition to their fact finding function, administrative agencies in New York are empowered to draw inferences from the facts thereby established. An inference is “[a] process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from . . . a state of facts, already proved or admitted.” Generally, the issue whether a particular fact permits the agency to draw an inference having legal consequences presents a question of law within the province of the reviewing court. Since

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11. Davis, supra note 1, at § 29.01.
12. See Gordon v. New York Life Ins. Co., 300 N.Y. 662, 90 N.E.2d 898 (1950) (per curiam); Wiener v. Gabel, 18 App. Div. 2d 1025, 239 N.Y.S.2d 48 (2d Dep’t 1963). Generally inferences may be categorized as factual or legal in nature. “The process of inference from evidence to fact is based on ‘reasoning,’ on the application of the finder’s theory of experience.” Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239, 245 (1956) [hereinafter cited as Question of Law]. When based on the evidence before it, the agency is thus making a factual inference. As discussed by Professor Davis, however, a legal inference can result if a conclusion is routinely drawn from a particular set of circumstances. Davis, supra note 1, § 29.05.
other factors are operative in the decisional process in addition to
the factual record and the applicable statutory criteria, the process
of reaching legal conclusions on the basis of the evidence presented
may result in the obfuscation of the distinction between findings of
fact and conclusions of law. For example, the well-settled rule that
statistical proof alone is insufficient to establish a discriminatory
practice is founded on logic and experience rather than on a literal
reading of the statute. In developing such standards to govern the
legal significance of particular facts, the court is not usurping the
factfinding role of the agency but is merely exercising its right to
review questions of law. These rules governing the adjudicatory pro-
cess rest ultimately on common sense which cannot be excluded
from the dynamics of judicial decision making. What has evolved
is a legal rule articulated in case law which is drawn from common
experience.

Unemployment Benefits and the Doctrine of Provoked Discharge

Judicial control of an agency’s ability to draw inferences is
illustrated by the administratively created doctrine of provoked dis-
charge. Pursuant to the New York Labor Law, the validity of a
claim for unemployment benefits is initially determined by the in-
dustrial commissioner in accordance with regulations established by
him. A claimant or other affected party dissatisfied with the initial


The rule governing statistical proof in discrimination cases expresses the view that, if
relied upon for the legal conclusion that a discriminatory practice has occurred, statistical
evidence requires a foundation. With respect to employment practices, it must be established
that the group from which the statistical evidence is derived consists of persons who are
eligible for the position at issue. In addition, or alternatively, some proof of “employment
practices in the individual case” is required to “warrant the conclusion, based on direct
evidence or rational inference, or both that there is a . . . discriminatory practice.” State Div.
603, 611 (1974); see notes 10 supra & 58 infra. See generally Question of Law, supra note 12,
at 246.

See generally DAVIS, supra note 1, § 30.01–.14.

N.Y. LAB. LAW § 597 (McKinney 1977). The powers of the Industrial Commissioner
are set forth in New York Labor Law § 530 (McKinney 1977), which provides in part:

1. General powers. The commissioner shall administer this article and . . . he
shall have power to make all rules and regulations and . . . to appoint such officers
. . . as may be necessary in the administration of this article.

The commissioner is hereby further authorized, empowered and directed to
take such steps and to formulate such plans and to execute such projects as may
determination may request a hearing before a referee. The referee's decision may be appealed to the Unemployment Insurance Appeal Board which may decide the appeal on the basis of the existing record or may hold a hearing *de novo* and make its own findings.\(^{19}\)

It is also significant that a decision of the appeal board "shall be final on all questions of fact and, unless appealed from,\(^{20}\) shall be final on all questions of law."\(^{21}\)

Despite this strong statutory language with respect to the conclusiveness of Unemployment Insurance Appeal Board decisions, the New York Court of Appeals has intervened to prohibit the drawing of unjustified legal inferences by the appeal board. The administratively developed doctrine of "provoked discharge" provides an example of when and to what extent the court will intervene. The New York Labor Law provides for, *inter alia*, a denial of unemployment benefits when the claimant has "voluntarily" terminated employment "without good cause."\(^{22}\) "Provoked discharge" was recognized by the New York Court of Appeals in *In re Malaspina*\(^{23}\) to encompass cases where the employee can be said to have left his employment voluntarily by leaving his employer no choice but to discharge him.\(^{24}\) In *Malaspina*, the employee's collective bargaining

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\(^{19}\) N.Y. LAB. LAW § 621(3) (McKinney 1977).

\(^{20}\) Pursuant to section 624 of the New York Labor Law, appeal board determinations of questions of law may be appealed to the Appellate Division, Third Department. N.Y. LAB. LAW § 624 (McKinney 1977). The section specifically provides:

> [Any . . . party . . . affected by a decision of the appeal board] who appeared at the appeal before the board may appeal questions of law involved in such decision to the appellate division of the supreme court, third department. The board may also, in its discretion, certify to such court questions of law involved in its decisions.


\(^{22}\) N.Y. LAB. LAW § 593 (McKinney 1977). Other grounds for denial of benefits include: refusal of an offer of employment, misconduct, and criminal acts. *Id.*


\(^{24}\) "Provoked discharge" is distinguishable from dismissal due to misconduct; in the former situation the employer has no choice but to fire the recalcitrant employee because,
agreement provided that employees were required to join the union within 60 days after being hired and that failure to join or pay union dues would result in discharge by the employer. The claimant was informed of these provisions when hired. The Appellate Division upheld the initial determination of the industrial commissioner, finding that the claimant, by refusing to join the union, left his employment "voluntarily" and "without good cause." The New York Court of Appeals affirmed, holding that the claimant actually provoked his own discharge by refusing to join the union.

In James v. Levine, the Court of Appeals severely criticized the appeal board's extension of the "provoked discharge" doctrine beyond its limited application in Malaspina. The court asserted that the doctrine was a "legitimate and essential gloss on the statute to fill a gap" in light of the circumstances of Malaspina, but that the appeal board had expanded the doctrine to create a distinct justification for denial of unemployment insurance benefits. However beneficial its purpose in denying benefits on the ground of voluntary termination of employment rather than on the more serious grounds of misconduct, the error in the agency's reasoning was that the result was not authorized by the statute. Thus, the "provoked discharge" doctrine is unavailable in the situation in which an employer has a choice whether to discharge an employee


2 285 App. Div. at 567, 139 N.Y.S.2d at 524.
3 309 N.Y. at 418, 131 N.E.2d at 711.
4 34 N.Y.2d 491, 315 N.E.2d 471, 358 N.Y.S.2d 411 (1974). James combined three cases wherein the claimants appealed the determination of "provoked discharge." The first claimant was warned that she would be discharged if she appeared at work intoxicated. The Unemployment Insurance Appeal Board found that she voluntarily left work by showing up drunk and thus provoked her discharge. Id. at 496, 315 N.E.2d at 474, 358 N.Y.S.2d at 414. The second claimant was granted a 1-week leave to recuperate from an accident. The appeal board determined that she had provoked her discharge by being absent for 3 weeks without permission. Id. at 497, 315 N.E.2d at 474, 358 N.Y.S.2d at 415. In the third case the claimant left a meeting after being warned that it would be considered an act of insubordination, and was found to have provoked her discharge. Id. at 497-98, 315 N.E.2d at 474, 358 N.Y.S.2d at 415.

2 Id. at 494-95, 315 N.E.2d at 472, 358 N.Y.S.2d at 413.
3 The agency sought to justify the administrative extension of the doctrine on the salutary grounds of "the pre-1958 difference in eligibility periods between voluntary separation and misconduct," and secondly "the reluctance to stigmatize a discharged employee with misconduct." The court rejected these contentions as "logically mischievous." Id.
4 Although the court was distressed with the extension of the provoked discharge doctrine, it affirmed all three decisions since "the net effect would be only to substitute the correct category for the misapplied doctrine." Id. at 497, 315 N.E.2d at 474, 358 N.Y.S.2d at 415.
whose performance is unsatisfactory. In such cases, the acts of the employee resulting in discharge must amount to misconduct under the statute in order to justify denial of unemployment benefits.\textsuperscript{31}

While the limitation of the doctrine did not afford relief to the claimants in \textit{James} and its companion cases,\textsuperscript{32} the ruling therein was applied in \textit{De Grego v. Levine}\textsuperscript{33} to overturn a denial of benefits by the Unemployment Insurance Appeal Board. The claimant in \textit{De Grego} had been employed as a plumber’s helper for over 2 years and his employment was satisfactory. His duties consisted primarily of performing services on his employer’s premises and he was provided with a uniform bearing the company’s name. For 2 days prior to his discharge he wore on his uniform a button upon which was inscribed the statement “Impeachment with Honor.” On the second day, the company president informed the claimant that he could not wear the button if he wished to keep his job. De Grego believed he was entitled to express a personal political view and hence refused to remove the button. Consequently, he was fired.\textsuperscript{34}

Throughout the agency adjudicatory and review process, the claimant was denied unemployment benefits on the ground that he left his employment without good cause. The Appellate Division reversed on the ground that unemployment benefits could not be denied where the discharge was based on the claimant’s exercise of the freedom of expression,\textsuperscript{35} but the Court of Appeals, in affirming, did not find it necessary to reach the constitutional issue. The court reaffirmed the holding in \textit{James}:

Provoked discharge, a gloss over the statutory disqualification for voluntary separation without good cause (Labor Law § 593, subd. 1) is a narrowly drawn legal fiction designed to apply where an employee voluntarily engages in conduct which transgresses a legitimate known obligation and leaves the employer no choice but to discharge him.\textsuperscript{36}

In \textit{De Grego}, of course, there was no obligation upon the employee,\textsuperscript{37} the violation of which would literally compel his discharge

\textsuperscript{31} See note 24 supra.
\textsuperscript{32} See note 30 supra.
\textsuperscript{34} 39 N.Y.2d at 182-83, 347 N.E.2d at 612, 383 N.Y.S.2d at 251.
\textsuperscript{35} 46 App. Div. 2d at 255, 362 N.Y.S.2d at 209.
\textsuperscript{36} 39 N.Y.2d at 183, 347 N.E.2d at 613, 383 N.Y.S.2d at 251.
\textsuperscript{37} The record did not indicate the existence of any company policy or regulation prohibiting the wearing of buttons. By comparison, in \textit{Malaspina} joining the union was a condition precedent to employment, thus placing an affirmative obligation upon the employee. In re \textit{Malaspina}, 309 N.Y. at 418, 131 N.E.2d at 711.
as in *Malaspina*. In contrast to *James*, the court did not conclude that the claimant's acts amounted to misconduct, a separate ground for the denial of benefits pursuant to Labor Law section 593.35 The court, of course, was bound by the factual findings of the appeal board which had adopted the referee's findings that the claimant was discharged as a result of his failure to remove the button bearing his political statement. The court, therefore, did not invade the statutorily protected domain of the agency but rather exercised its own power to decide questions of law and curtail the agency from exceeding its legislative authority.39

The *Malaspina*, *James*, and *De Grego* cases demonstrate the manner in which the courts will control the agency's adjudicatory activity by insuring that it does not draw improper legal inferences from the record. Where the agency's application of the statute raises the question whether the statutory language has been misapplied or improperly extended, the court will reverse on the ground that the agency has exceeded its authority in developing a legal theory which essentially disregards the statutory criteria.40

**Ultimate Determinations**

Where the validity of an agency's ultimate determination is challenged, judicial review follows a somewhat different path.41 Al-

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35 39 N.Y.2d at 184, 347 N.E.2d at 613, 383 N.Y.S.2d at 252.

39 See note 41 infra.

40 As the court stated in *James*, there are cases "which appear to have tolerated the unauthorized expansion of the doctrine" beyond its legitimate use. 34 N.Y.2d at 495, 315 N.E.2d at 473, 358 N.Y.S.2d at 413 (1974); see, e.g., Gladstone v. Catherwood, 30 N.Y.2d 576, 281 N.E.2d 842, 330 N.Y.S.2d 793 (1972) (refusal to cut hair); Kreager v. Catherwood, 34 App. Div. 2d 1033, 311 N.Y.S.2d 69 (3d Dep't 1970), cert denied, 400 U.S. 910 (1970) (abusive conduct with clients).

*De Grego* severely limited the provoked discharge doctrine by holding that "[a]side from the extreme situation presented in *Malaspina* . . . the concept of provoked discharge is without validity and may not be used to deny benefits." 39 N.Y.2d at 185, 347 N.E.2d at 613-14, 383 N.Y.S.2d at 252.

41 While administrative determinations of questions of law are totally reviewable by the courts, see, e.g., Fisher v. Levine, 36 N.Y.2d 146, 325 N.E.2d 151, 365 N.Y.S.2d 828 (1975); Van Teslaar v. Levine, 35 N.Y.2d 311, 319 N.E.2d 702, 361 N.Y.S.2d 388 (1974); Guardian Life Ins. Co. v. Bohlinger, 308 N.Y. 174, 124 N.E.2d 110 (1954), and questions of fact are subject to less searching review, see notes 44 & 45 infra, usually a mixed question of law and fact is involved, i.e., the making of legal determinations by applying an established rule to a set of narrow circumstances. In Construction Management Corp. v. Brown & Root, Inc., 41 Misc. 2d 894, 246 N.Y.S.2d 405 (Sup. Ct. N.Y. County), *modified*, 25 App. Div. 2d 843, 270 N.Y.S.2d 95 (1st Dep't 1964), the court stated:

If ambiguity is susceptible to interpretation within the four corners of the instrument, it is purely a question of law. But if there be need to resort to extraneous evidence, for construction rather than interpretation, then it is a mixed question;
though it is clear that review of factual findings and review of ultimate determinations are separate and distinct inquiries, the standard of review with respect to the latter is dependent on the nature of the factfinding process itself. The New York Civil Practice Law and Rules (CPLR) section 7803 contains a dual standard of review utilized when an agency determination is challenged by way of an article 78 proceeding:

[A] reviewing court may consider:

3. Whether a determination was arbitrary and capricious or an abuse of discretion.
4. Whether a determination made as a result of a hearing held and at which evidence was taken pursuant to direction of law is on the entire record, supported by substantial evidence.

The crucial factor in determining which standard is to be applied is whether a hearing is statutorily or constitutionally required. If an agency decision follows an adversary-type hearing at which all parties have an opportunity to present evidence and cross-examine witnesses, the reviewing court would apply the more stringent "substantial evidence" test. On the other hand, if the agency adju-

the ultimate law question depending for its resolution upon the preliminary determination of the fact question . . . .

41 Misc. 2d at 870, 246 N.Y.S.2d at 471 (citation omitted); see generally Question of Law, supra note 12.

" Article 78 of the New York Civil Practice Law and Rules (CPLR) was enacted primarily to abolish the common-law writs of certiorari, mandamus, and prohibition. Prior to enactment of article 78, a party would lose his claim if the wrong form was chosen. N.Y. Civ. Prac. Law § 7801 (McKinney 1977) combines these forms to allow proceedings without special designations.

Limitations on judicial review are specified within CPLR § 7801. Thus, no judicial review is permitted unless the agency’s decision is final and all other remedies have been exhausted. N.Y. Civ. Prac. Law § 7801 (McKinney 1977); see, e.g., Cormier v. Mosbacher, 80 Misc. 2d 172, 363 N.Y.S.2d 41 (Sup. Ct. N.Y. County 1974). See generally J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE [¶ 7801.04-.06 (1978) [hereinafter cited as NEW YORK CIVIL PRACTICE]; Weintraub, Statutory Procedures Governing Judicial Review of Administrative Action: From State Writs to Article 78 of the Civil Practice Law and Rules, 38 ST. JOHN'S L. REV. 86 (1965); see also State v. King, 36 N.Y.2d 59, 324 N.E.2d 351, 364 N.Y.S.2d 879 (1975).

The standard procedure in an article 78 action requires the action to be brought in the Supreme Court of appropriate jurisdiction. Petition, answer, and reply are filed and a trial results if there is a dispute over the facts. If the sufficiency of evidence is challenged, the action is transferred to the Appellate Division. N.Y. Civ. Prac. Law § 7804 (McKinney 1977); see Id., commentary at 181 (McKinney 1977).


dicatory process does not include a hearing because one is not mandated by statute or due process, then the "arbitrary and capricious" test should be utilized. Both standards are used to evaluate the substantive validity of an agency decision.

The distinction between the two standards is clear. The "substantial evidence" test calls for a more probing review of the agency determination because the court has before it a more complete record. Thus, it may be concluded that where the law requires a hearing there is less latitude in the exercise of discretion on the part of an administrative body and its decision must be more carefully justified by factual findings. Where the administrative agency has a wider range of discretion the "arbitrary and capricious" or "rational basis" test serves as a judicial control on the exercise of that discretion. The result of this distinction is that an administrative decision which does not satisfy the "arbitrary and capricious" test a fortiori will not meet the requirements of the "substantial evidence" test. Unfortunately, the relationship be-

The "substantial evidence" test was first promulgated by the New York Court of Appeals in Stork Restaurant Inc. v. Boland, 282 N.Y. 256, 26 N.E.2d 247 (1940), and conclusively affirmed in Miller v. Kling, 291 N.Y. 65, 50 N.E.2d 546 (1943).


These tests are the administrative equivalent of sufficiency of evidence requirements in the trial context. Just as the question whether a party has met his burden of proof always presents a question of law, similarly whether an agency determination is founded upon substantial evidence or alternatively, if there has been no hearing, is not arbitrary and capricious, always presents a question of law for the reviewing court.

See note 44 supra. It should be noted that although more agency discretion is allowed under the "arbitrary and capricious" test, judicial review is broader since it is not limited to the record and a trial de novo as to the factual issues is permitted. See, e.g., Mandle v. Brown, 5 N.Y.2d 51, 152 N.E.2d 511, 177 N.Y.S.2d 482 (1958); In re Caristo Constr. Corp., 30 Misc. 2d 185, 221 N.Y.S.2d 955 (Sup. Ct. Kings County), modified sub nom. Caristo Constr. Corp. v. Rubin, 15 App. Div. 2d 566, 222 N.Y.S.2d 998 (2d Dep't 1961), aff'd, 10 N.Y.2d 538, 180 N.E.2d 794, 225 N.Y.S.2d 502 (1962); see Masder Builders, Inc. v. Overton, 15 App. Div. 2d 551, 223 N.Y.S.2d 174 (2d Dep't 1961). See generally Administrative Process, supra note 10, at 45.
between the two standards has often led to a blurring of the distinction between them in court opinions.\footnote{An example of the way in which courts have failed to differentiate between the two tests is the case of Conley v. Zoning Board, 40 N.Y.2d 309, 353 N.E.2d 594, 386 N.Y.S.2d 681 (1976). In Conley, the New York Court of Appeals, finding substantial evidence in the record, concluded that the issuance of a zoning variance could not be considered arbitrary or capricious. \textit{Id.} at 316, 353 N.E.2d at 597, 386 N.Y.S.2d 685. The blurring of these tests is due to a more fundamental difficulty in determining which acts are considered administrative functions. For example, if agency action is determined to be administrative the court may only review on the basis of whether the decision was arbitrary or capricious. Conversely, a reviewing court must apply the "substantial evidence" test upon a determination that the agency action was judicial in nature. \textit{See} notes 52 & 54 and accompanying text infra.}

Application of the Dual Standard to State Administrative Agencies

The "substantial evidence" test and the "arbitrary and capricious" test are the primary standards applied by New York courts when reviewing administrative adjudications. While these standards appear simple on their face, their application is complicated where the agency itself has internal review procedures. The interplay of agency and judicial review can best be seen through an examination of the adjudicatory process of the New York State Human Rights Commission.

Pursuant to the New York Human Rights Law, as embodied in the New York Executive Law,\footnote{N.Y. Exec. Law §§ 290-301 (McKinney 1977 & Supp. 1977-1978).} complaints alleging discriminatory practices are filed with the State Division of Human Rights, which decides whether there is "probable cause" to believe that the alleged discriminatory practice is occurring.\footnote{Section 297 of the New York Executive Law provides that "[w]ithin fifteen days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, \ldots{} has engaged \ldots{} in an unlawful discriminatory practice." N.Y. Exec. Law § 297(2) (McKinney 1977).} If the state division, makes a finding of no probable cause, the complaint is dismissed. If probable cause is found and a conciliation agreement cannot be reached, the state division is empowered to conduct a hearing.\footnote{\textit{Id.} § 297-a(7) (McKinney 1977). The Human Rights Appeal Board may affirm, remand or reverse any order of the division or remand the matter to the division for further proceedings' \ldots{} provided, however, that the board shall limit its review to whether the order of the division is:}

d. supported by substantial evidence on the whole record; or

e. not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, the appeal board applies
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the "substantial evidence" test when a hearing precedes the state division decision and the "arbitrary and capricious" test where there is an initial finding of no probable cause. Judicial review of appeal board decisions is specifically authorized by section 298 of the New York Executive Law and may also be pursued under article 78. Although section 298 does not specify the scope of judicial review, the article 78 dual standard clearly controls.

The relationship between internal appeal board review of a division decision and judicial review of the appeal board's action is illustrated by the decision in State Division of Human Rights v. Columbia University. The case involved a complaint that Columbia University had been guilty of gender-based discrimination in rejecting the complainant’s application for a tenured appointment in the University's Department of Psychology. Following a hearing, the state division found that Columbia University had not engaged in any discriminatory practices. The appeal board overturned the state division's determination on the basis of a different view of the facts and of the weight of the evidence. In particular, the appeal board held that the state division's "restrictive designation" of the complainant's area of specialization was "against the weight of the evidence." The appeal board relied heavily on the bare "statistical fact" that far fewer women than men held tenured positions on the university's faculty.

The division shall be bound by the decision of the board. . . .

Id.; see note 42 supra.


N.Y. EXEC. LAW § 298 (McKinney 1977). Section 298 provides for judicial review of appeal board decisions and specifies that the "findings of fact" on which an appeal board order is based "shall be conclusive if supported by sufficient evidence on the record considered as a whole." Id.


Id. at 616, 350 N.E.2d at 398, 385 N.Y.S.2d at 21. The appeal board also found that petitioner had repeatedly sought employment at Columbia University and that recent deaths had opened faculty positions in the school.

Id. at 619, 350 N.E.2d at 400, 385 N.Y.S.2d at 22. The New York Court of Appeals
As the provisions of the statute indicate, the Human Rights Law places the appeal board in essentially the same position as a nisi prius reviewing court in an article 78 proceeding. Thus, where there has been a hearing at the state division, the appeal board may not reverse a determination that is supported by substantial evidence and thus substitute its own view of the weight of the evidence for that of the state division. This holds true even if there is substantial evidence to support a position adverse to the decision reached by the state division.

It was this statutory restriction upon appeal board action that led the New York Court of Appeals to annul the determination of the Columbia University appeal board. In order to reverse, therefore, the court first had to be convinced that substantial evidence supported the initial decision of the State Division.

The court's function in a situation, such as that presented in Columbia University, where the appeal board reverses a state division determination is somewhat paradoxical. While the appeal board decision may be based on "substantial evidence," it still may have exceeded its statutory power in substituting its view of the facts for that of the division. Furthermore, the reviewing court is not permitted to adopt the appeal board's conclusions merely because it agrees with the latter's view of the weight of the evidence. Rather, the court must look to the state division's decision and decide whether that decision is supported by substantial evidence.

In Columbia University, the appeal board had not controverted the findings concerning the adverse financial situation at Columbia University and the resultant restriction on tenured appointments in...
the psychology department. It was this evidence, as well as the evidence supporting the state division’s determination of Columbia’s lack of need for a tenured appointment in the complainant’s area of expertise that persuaded the court to annul the appeal board determination. Thus, Columbia University illustrates the interaction between the standard of judicial review and the nature of the agency’s factfinding process. An appreciation of this relationship is important since the scope of judicial review of an agency’s ultimate determination is often dictated by the method of fact finding utilized by the agency.

**Judicial Review of Supervening Questions of Law**

This Article will now discuss a firmly established area of judicial concern: review of “pure” questions of law. The first portion of the Article sought to analyze and achieve an understanding of the distinction between law and fact and the control that a reviewing court exercises over the making of legal inferences, findings of facts, and ultimate determinations. Now the discussion turns to an examination of those areas which are distinctly within the province of judicial review, into which a court will intrude without hesitation.

Challenges to administrative adjudication based on “pure” questions of law may be segregated into four general categories: (a) constitutional challenges; (b) statutory challenges claiming, for example, that the agency has acted in excess of the power conferred upon it by the Legislature; (c) challenges to agency regulations; and (d) challenges to penalties imposed or remedies granted by an agency. These categories, while well defined, may usually be distinguished from the question of the quantitative or evidentiary adequacy of an agency decision, but are in some cases related to the question of the substantiality of the underlying factual basis for the decision.

**Constitutional Challenges**

A threshold question which may be raised is whether an agency’s adjudicatory procedure violates constitutional standards of

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44 See note 56 supra.
45 39 N.Y.2d at 617-18, 350 N.E. 2d at 398, 385 N.Y.S.2d at 22.
46 See notes 71-106 and accompanying text infra.
47 See notes 107-142 and accompanying text infra.
48 See notes 143-149 and accompanying text infra.
49 See notes 151-167 and accompanying text infra.
50 See notes 116, 146, 150-153, 162 and accompanying text infra.
due process. This challenge is advanced when the agency adjudicates a dispute or a claim without affording the aggrieved party an opportunity to be heard. In these cases, courts have held that an administrative determination may be challenged on the ground that due process rights were violated. Such claims, however, are not often raised when an agency's adjudicatory procedures are clearly defined by statute because where statutory rights are created, a hearing is usually statutorily mandated. In addition, a hearing requirement may be imposed, even if not statutorily mandated, when an aggrieved party can demonstrate that the interest which he seeks to protect constitutes a "property right" under prevailing authority.

The fourteenth amendment to the Constitution provides that "[no] . . . State [shall] deprive any person of life, liberty, or, property, without due process of law." U.S. CONST. amend. 14, § 1. The constitutional guarantee of due process mandates "that the law shall not be unreasonable, arbitrary or capricious." Nebbia v. State of New York, 291 U.S. 502, 524-25 (1934). Compliance with due process would require an orderly proceeding in accordance with the law during which a person has the opportunity to be heard and to enforce his rights. In re Coates, 9 N.Y.2d 242, 173 N.E.2d 797, 213 N.Y.S.2d 74 (1961).

Under article 78, an agency action may be characterized as "judicial" or "administrative." NEW YORK CIVIL PRACTICE, supra note 42, at § 7803.07; see note 5 supra. For example, it has been held that the revocation of a press pass, New York Evening Enquirer, Inc. v. Kennedy, 18 Misc. 2d 950, 162 N.Y.S.2d 530 (Sup. Ct. N.Y. County 1957), the issuance of a building demolition order, Janks v. Syracuse, 47 Misc.2d 718, 263 N.Y.S.2d 227 (Sup. Ct. Onondaga County 1965), and the barring of a taxi driver from an airport, Bohrer v. Murphy, 31 Misc. 2d 1084, 223 N.Y.S.2d 71 (Sup Ct. N.Y. County 1961), were judicial determinations and accordingly should be preceded by a hearing. See generally 18 SYRACUSE L. REV. 203 (1966); 14 SYRACUSE L. REV. 178 (1962). An administrative agency is not required to afford a petitioner a hearing which would satisfy the constitutional standards of due process unless the action is determined to be judicial in nature. NEW YORK CIVIL PRACTICE, supra note 42, at § 7803.04. Even absent a specific statutory requirement, an adversary hearing will be implied where official agency action is characterized as judicial. See, e.g., Hecht v. Monaghan, 307 N.Y. 461, 121 N.E.2d 421 (1954), wherein the court held that although the bureau empowered to regulate licensing of taxi drivers is not required by statute to afford a hearing, where the judicial agency action adversely affects property rights a hearing requirement will be implied.


In Buschmann v. United New York Sandy Hook Pilots Association the court illustrated how controlling constitutional principles are to be applied by the courts to the administrative adjudicatory process, particularly when the agency is not subject to a clear statutory directive. The administrative entity in Buschmann was the Board of Commissioners of Pilots, a body created by section 87 of the New York Navigation Law and charged with the supervision of a legislatively sanctioned 4-year apprenticeship program for harbor pilots. Additionally, the Sandy Hook Pilots Association conducts a 31/2-year training program which culminates in appointment to the apprenticeship program. Individuals appointed to the apprenticeship program are concededly entitled to, prior to discharge from the program, the procedural safeguards afforded to "any . . . person connected with a pilot boat" by sections 94(4) and 94(5) of the Navigation Law. The Appellate Division

77 See note 74 and accompanying text supra; note 80 and accompanying text infra.
78 Section 90 of the New York Navigation Law provides in pertinent part:
Subject to the rules and regulations of the board of commissioners, the executive committee of the United New York Sandy Hook Pilots Benevolent Association . . . shall have sole control over 11 apprentices and be charged with the responsibility to instruct such apprentices in their duties as Sandy Hook pilots. No other apprenticeship shall be accepted by the commissioners.

77 The initial 31/2-year program is known as a "pre-apprenticeship" or "applicant apprentice" program which is neither mandated nor authorized by statute. 46 App. Div. 2d 391, 392, 362 N.Y.S.2d 556, 558.
70 Id. at 393, 362 N.Y.S.2d at 559 (quoting N.Y. NAV. LAW § 94(4) (McKinney Supp. 1977-1978)). Sections 94(4) and 94(5) provide:
4. It shall be the duty of the commissioners to hear and examine all complaints duly made in writing against any pilot or person connected with a pilot boat, for any misbehavior or neglect of duty, or breach of their rules or regulations, which they shall deem material to be investigated. They shall also hear and examine all complaints made in like manner by any licensed pilot against any master, owner, or seaman of a vessel, for any misbehavior toward such pilot in the performance of his duty, or any breach of such rules or regulations.
5. Before any person shall be proceeded against on any complaint, and before any pilot may be removed or suspended for longer than one month, such person or pilot shall be notified in writing, signed by the secretary, to appear before the board of commissioners. Such notice, which shall specify the nature and substance of such complaint, shall be served personally at least five days before the time fixed for appearance. The commissioners shall postpone or adjourn such hearing from time to time for just cause. The certificate of such commissioners, or of a majority of them, with proof of such service of notice, shall be prima facie evidence that the party upon whom the notice was served, and upon whom a fine or penalty was thereupon imposed, is liable to pay such fine or penalty.

Id. §§ 94(4)-(5).
held, however, that where an individual is discharged from the pre-apprenticeship program without a hearing on the “ground that his continued participation in the training program was not in the best interest of the pilots,” there is no due process violation.\textsuperscript{81}

The New York Court of Appeals in Buschmann adopted the opinion of the dissenting justice in the Appellate Division who took the position that individuals participating in the 3½-year “pre-apprenticeship” program were entitled to procedural due process protection.\textsuperscript{82} It was reasoned that, since the so-called pre-apprenticeship program was a mandatory prerequisite for admission to apprenticeship training, the respondents Board of Commissioners of Pilots and Benevolent Association had, in effect, extended the apprenticeship training program from the statutorily required 4-year period to 7½ years.\textsuperscript{83} The pre-apprenticeship program, therefore, resulted in the creation of additional licensing requirements for pilots which were insulated from the due process benefits conferred by section 94 of the Navigation Law. This exclusion, whether or not intended, could not prevent a court from concluding that a “pre-apprentice’s” expectancy of appointment to the apprenticeship program and eventual license as a pilot was a sufficiently cognizable “property right” to trigger the application of the due process clause.\textsuperscript{84} Thus, it may be seen that the notice and hearing requirements which flow from the federal and state constitutions may be invoked to bar summary administrative action resulting in the loss of an expectancy of continued employment.

In confronting challenges to administrative adjudications based on asserted procedural due process violations, the courts often

\textsuperscript{81} 46 App. Div. 2d at 394, 362 N.Y.S.2d at 560. The Appellate Division majority reasoned: The availability of the procedural safeguards provided in the statute is limited to those persons who are connected in some statutorily-recognized manner with the pilotage service. Despite his enrollment in the pre-apprenticeship program, the petitioner was quite clearly not an apprentice within the statutory framework and not within the categories covered by the statute.

\textsuperscript{82} Id. at 393, 362 N.Y.S.2d at 559.

\textsuperscript{83} 38 N.Y.2d 774, 774, 345 N.E.2d 337, 337, 381 N.Y.S.2d 865, 865, rev’g 46 App. Div. 2d 391, 362 N.Y.S.2d 556 (2d Dep’t 1975).

Regarding the “pre-apprenticeship” program, Justice Shapiro, authoring the dissent in the Appellate Division, stated:

\textit{Realistically, . . ., it must be concluded that the 3-½ year pre-apprenticeship training course is \textit{a de facto} prerequisite to participation in the four-year apprentice program provided by section 90 of the Navigation law, and hence to eventual licensure as a harbor pilot by the Board of Commissioners of Pilots.}

\textsuperscript{84} Id. at 396, 362 N.Y.S.2d at 561.

\textsuperscript{85} Id.

\textsuperscript{86} Id. at 395-96, 362 N.Y.S.2d at 561-62 (Shapiro, J., dissenting).
eschew strong reliance on constitutional principles if there is an alternative basis for decision. This is consistent with the general trend to avoid deciding questions on constitutional grounds when possible. Two cases manifesting this judicial proclivity are White Plains Nursing Home v. Whalen and Hagood v. Berger.

In White Plains Nursing Home the Commissioner of Health reduced the medicaid reimbursement rate for the petitioner nursing home on the basis of his determination that the lease between the nursing home and its lessor was not entered into at arms length. Pursuant to regulation providing that the commissioner may alter the medicaid reimbursement rate to reflect the true cost of renting premises, the rate was retroactively and prospectively reduced to enable the department to recoup alleged overpayments to the nursing home. No hearing was held prior to this determination nor was any mandated by statute or departmental regulation. Rather, the agency was ostensibly exercising a ratemaking function which has traditionally been viewed by the courts as quasi-legislative rather than adjudicatory or quasi-judicial.

The trial court, concluding that the commissioner's determination was not supported by substantial evidence, remitted the matter "for further proceedings and determination." The Appellate Division affirmed, essentially on due process grounds, reasoning that while there was no property right in prospective medicaid reimbursement rates, there was a sufficient property right in the alleged overpayments sought to be recouped. The court held, however, that the hearing should inquire into both past payments and pro-

89 Id. at 839, 366 N.E.2d at 80, 397 N.Y.S.2d at 379 (1977). [1977] 10 N.Y.C.R.R. § 86-2.7 provides for a hearing, initiated by the health care facility, so that the petitioner may present and refute evidence that would adversely affect its interests in the event the proposed rate revision takes effect.
92 Id., 385 N.Y.S.2d at 393-94.
spective reimbursement rates so that there would be an adequate record for review.\footnote{Id., 385 N.Y.S.2d at 394.} The New York Court of Appeals, agreeing with the lower courts, held that the case should be remanded,\footnote{42 N.Y.2d 838, 840, 366 N.E.2d 79, 80, 397 N.Y.S.2d 378, 379 (1977)(mem.). The Appellate Division had concluded that the commissioner's "determination was not supported by substantial evidence" and remitted the matter for "proper proceedings and determination." 53 App. Div. 2d 926, 927, 385 N.Y.S.2d 392, 393 (3d Dep't 1976)(mem.). The Appellate Division affirmed essentially on due process grounds, reasoning that while there was no property right in prospective medicaid reimbursement rates, there was a sufficient property right in alleged past overpayments which the nursing home had expected and received. \textit{id.} The court, however, did not limit the hearing to the question of recoupment of past overpayments but held further that a hearing was required in order to establish an adequate record for review of the determination as to the prospective reimbursement rate as well. \textit{id.} The court felt that the report relied upon by the agency "was not established sufficiently" to enable it to determine whether the commissioner's decision was supported by substantial evidence. \textit{id.} \footnote{42 N.Y.2d at 840, 366 N.E.2d at 80, 397 N.Y.S.2d at 379. The court was particularly concerned with that portion of the determination that involved a reduction of medicaid reimbursement rates to allow for compensation of the alleged overpayments already received by petitioner. \textit{id.} It was this portion that the court expressly noted would affect petitioner's substantial interest, and thus would warrant a hearing. \textit{id.}}

The Court of Appeals in \textit{White Plains Nursing Home} avoided reliance upon the constitutional implications of the case. However, it is clear that, if a property right were not at stake, a hearing would not have been required by the court. Strictly speaking, where a hearing is not statutorily provided and the agency is acting in a quasi-legislative capacity, the "arbitrary and capricious" test rather than the "substantial evidence" test is applicable.\footnote{Freitag v. Marsh, 106 N.Y.S.2d 927 (1951), \textit{cause transferred}, 280 App. Div. 934, 115 N.Y.S.2d 838 (1952).} Nevertheless, all of the courts confronted with the case appeared concerned with the fact that the lack of a hearing and the specific findings which would flow therefrom would result in a determination which could not be subject to adequate judicial review. The lower courts proceeded further, however, partially because prospective rates were at issue, to articulate a substantive view of the agency's determination, \textit{i.e.}, that the quantum of evidence relied upon by the commissioner to sustain his ultimate determination was not substantial.\footnote{53 App. Div. 2d at 927, 385 N.Y.S.2d at 393.} Because of the nature of the problem, the Court of Appeals carefully avoided reference to the applicable standard of review or the constitutional issue. Involved were past reimbursement rates, a property right, as well as prospective rates, which obviously affected petitioner but did not in themselves trigger
procedural due process rights. If the court had required a hearing to adjudicate the contested factual issue only with respect to past reimbursement rates, an inconsistency in reasoning and perhaps in result would have occurred: different standards of review would have been applied, with perhaps different outcomes, to the same determination of ultimate fact.10

Another case in which the Court of Appeals avoided adoption of a broad constitutional ratio decidendi is *Hagood v. Berger.*9 *Hagood* arose under the New York Social Services Law which mandates a “fair hearing” before the denial of welfare benefits.100 The problem presented in the case illustrates the often close relationship between the due process issue and the question of the quantitative adequacy of the evidence supporting an agency decision.

The State Department of Social Services sought to discontinue welfare assistance to petitioner and her four children on the ground that she willfully concealed that her husband was fully employed and resided in the household.101 All of the evidence addressed by the

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9 It is clear that when there is deprivation of a property right, a hearing is required. However, had the *White Plains Nursing Home* court required a hearing to examine the past reimbursement rates only, subsequently, the reviewing court would apply the “substantial evidence” test to the determination regarding past rates and the “arbitrary and capricious” test to the administrative decision regarding prospective rates.

99 *Hagood* v. *Berger.*

100 The New York Social Services Law provides that any person making an application for medical assistance may appeal to the Department of Social Services for a hearing in the event such application is denied or is not acted upon within 30 days after filing or if the applicant claims that the assistance granted is inadequate. N.Y. Soc. Serv. Law § 366-a (McKinney 1976). The “fair hearing,” however, is not an adversary proceeding. *Henegar v. Wyman,* 63 Misc. 2d 688, 313 N.Y.S.2d 318 (Sup. Ct. Greene County 1970). The agency is under no obligation to advise petitioner of his legal rights, nor will the proceedings be annulled if petitioner is without representation by counsel. *Id.*

101 *Id.* at 902, 366 N.E.2d at 1345, 397 N.Y.S.2d at 992. The department's action against petitioner was triggered by a telephone call from an anonymous informant who did not testify at the hearing. *Id.* at 902, 366 N.E.2d at 1345, 397 N.Y.S.2d at 992. The proof offered by the department at the hearing was entirely documentary and was introduced by an agency representative who was not personally familiar with the facts. The evidence consisted of a lease of the apartment in which petitioner lived, prepared in the names of petitioner and her husband. The tenant's copy of the lease, however, the only copy produced at the hearing, was signed by the petitioner alone. *Id.* at 903, 366 N.E.2d at 1346, 397 N.Y.S.2d at 992. On a form request for information from the department to the husband's employer, the latter reported that the husband claimed six exemptions for tax purposes and gave his address as the home in which petitioner, her husband, and children lived before petitioner moved into public housing. Another form requesting information from postal authorities revealed, without identification of the source, that mail addressed to petitioner's husband was being delivered to her apartment. *Id.*

In response to the agency's proof, petitioner testified that although her husband accompanied her to the management offices of the housing authority when she applied for an apartment, he had never lived with the family there and she had informed the housing authority of this fact when she moved in. Petitioner also stated that the only mail received
agency consisted of hearsay; no agency personnel or other persons with personal knowledge of the facts were summoned as witnesses for the agency. It is well settled that administrative agencies are not bound by the rules governing evidence admissible in court and may consider and rely upon hearsay in their adjudications. However, in a number of decisions involving the same issue and the same scarcity of record proof, it has been held that reliance only upon such hearsay proof "does not even approach minimum standards of fairness." Therefore, the case is troubling from the standpoint of fairness, which is at the foundation of the due process guarantee. Conversely, the investigatory problem for the agency in ascertaining whether individuals receiving welfare assistance are fraudulently concealing sources of income presents a difficult and practical problem. Disturbed by the unfairness of the hearing afforded petitioner, yet reluctant to establish a constitutional precedent which would pose severe difficulties for an agency charged with disbursing a limited amount of public funds, the Court of Appeals chose a middle ground. Basing its decision on "substantial evidence" grounds, the court ordered a new hearing, thus allowing the agency to undertake a more thorough investigation to assure that no unfairness would result to the petitioner. Once again, therefore, the reluctance of the courts to utilize constitutional grounds in disposing of challenges to administrative determinations is illustrated.

at her address for her husband were insurance premium notices on an insurance policy naming petitioner and the children as beneficiaries. Id., 366 N.E.2d at 1347, 397 N.Y.S.2d at 933.

102 Scarpitta v. Glen Cove Hous. Auth., 48 App. Div. 2d 647, 367 N.Y.S.2d 542 (2d Dep't 1975) (mem.) (hearsay admissible in administrative proceeding, but, in some instances, such evidence would result in unfair hearing); see Erdman v. Ingraham, 28 App. Div. 2d 5, 280 N.Y.S.2d 865 (1st Dep't 1967) (hearsay evidence cannot be utilized to "deprive a party of the right to a fair hearing where that right is guaranteed by law"); W. Richardson, Evidence § 208 (10th ed. J. Prince 1973).


105 Petitioner initially sought to appeal to the New York Court of Appeals as of right on the constitutional grounds, but the appeal was dismissed on the ground that no substantial constitutional question was presented. 39 N.Y.2d 1057, 387 N.Y.S.2d 1034 (1976). However, the court later granted petitioner's motion for leave to appeal, 40 N.Y.2d 804, 387 N.Y.S.2d 1032 (1976), and ultimately reversed the Appellate Division decision which had upheld the administrative agency's decision to discontinue petitioner's benefits. 42 N.Y.2d 901, 366 N.E.2d 1345, 397 N.Y.S.2d 991 (1977).

106 42 N.Y.2d at 905, 366 N.E.2d at 1347, 397 N.Y.S.2d at 993.
Statutory Challenges

A frequently asserted challenge to administrative adjudication is that the agency has acted in excess of the power conferred upon it by the Legislature. This contention usually involves a challenge to the agency’s interpretation of its governing statute and thus presents a question of statutory construction for the courts. Even though an agency decision is based upon substantial evidence or is not arbitrary and capricious, it may nonetheless be assailable if the agency has acted beyond its statutory authority. The courts, therefore, exercise general control over the authority asserted by administrative agencies, assuring that the latter do not exceed their legislative mandates or act in derogation of the power conferred thereby.

A court’s interpretation of the nature and, particularly, the extent of the legislative mandate may be contrary to that of the administrative agency. In that case, of course, it is always the judicial view which prevails. Thus, for example, in an article 78 proceeding, the CPLR provides that a petitioner may raise the question “whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction.”

Illustrative of a case squarely raising this type of claim is New York Times Co. v. City of New York Commission on Human Rights. In this case, the City Commission on Human Rights found that the New York Times aided and abetted discriminatory employment practices by publishing advertisements for employment opportunities in South Africa. The advertisements, which were for managerial positions in corporations and faculty appointments in South African universities, were not racially discriminatory on their face. The anti-discrimination provisions of the New York City Administrative Code prohibit employers or employment agencies from printing or causing to be printed any statement, advertisement or publication which “expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin or sex or any intent to make such limitation, specification or discrimination as to age, race, creed, color, national origin or sex or any intent to make such limitation, specification or discrimination as to age, race, creed, color, national origin or sex.”

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112 Id. at 347, 361 N.E.2d at 965, 393 N.Y.S.2d at 314.
discrimination, unless based upon a bona fide occupational qualification.”

It is similarly unlawful for any person to “aid, abet, incite, compel or cause the doing of any acts forbidden” by the anti-discrimination law. The New York Times successfully challenged the commission’s determination in the lower courts on the ground that the commission was without jurisdiction to intrude into activities conducted in foreign countries.

In the New York Court of Appeals the commission maintained that the courts were limited in their review to determining whether there was substantial evidence to support its decision. The majority of the court disagreed and clearly delineated the nature and scope of its review, stating that “it would be both wrong and inappropriate to apply the ‘substantial evidence test.’ The issue is simply whether the commission properly analyzed the law and we hold that it did not.” The majority concluded that as a matter of law the New York Times’ advertisements contained no expression prohibited by the Administrative Code provisions either directly or by implication and, therefore, that the New York Times had not violated the anti-discrimination provision by printing the advertisements. There was no use of “code words” or other subterfuge to circumvent the purpose of the code. In essence, the majority rejected the notion that the mere use of the geographical reference “South African” was per se discriminatory.

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114 Id. at subd. 6. Following the filing of complaints by several parties, the commission found probable cause to believe that the New York Times aided in a discriminatory practice by publishing the advertisements because it knew or should have known of the South African government’s racial policies. 41 N.Y.2d at 347, 361 N.E.2d at 965, 393 N.Y.S.2d at 314.
115 41 N.Y.2d at 347, 361 N.E.2d at 966, 393 N.Y.S.2d at 314. The commission held a hearing at which evidence was presented demonstrating that racially discriminatory employment practices were prevalent in South Africa. The New York Times did not dispute the evidence and the commission found that no findings of fact were necessary. Id. at 348, 361 N.E.2d at 966, 393 N.Y.S.2d at 314. The commission concluded that the racially discriminatory system of South Africa was widely known and that the very term South Africa denoted “white supremacy.” Id. The New York Times was therefore ordered to cease and desist from printing the South African employment advertisements. Id., 361 N.E.2d at 965, 393 N.Y.S.2d at 315.

The trial court set aside the commission’s determination, reasoning that jurisdiction did not extend to activities conducted in foreign countries. Id. The Appellate Division affirmed, holding that the actual language printed in the New York Times’ advertisements did not “indicate an intent on the part of petitioner to participate in a program of discrimination” and granted permission to appeal to the Court of Appeals. 49 App. Div. 2d 851, 374 N.Y.S.2d 9 (1975).

116 Id. at 350, 361 N.E.2d at 966, 393 N.Y.S.2d at 315.
117 Id. at 350, 361 N.E.2d at 966, 393 N.Y.S.2d at 316.
118 Id.
New York Times involved a pure question of statutory construction and the application of a statute to an uncontroverted set of facts. The "quantity" of the evidence supporting the administrative determination was not at issue. The issue to be resolved was the extent and reach of the anti-discrimination provisions of the code.

Another recent decision involving the anti-discrimination laws posed an even more difficult problem of statutory interpretation and reconciliation. Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board\textsuperscript{119} involved a particularly knotty dilemma of statutory construction because two statutes appeared to be in direct conflict. In Brooklyn Union Gas and its companion cases, the Human Rights Appeal Board concluded that, under the New York Human Rights Law, the deprivation of disability and sick leave benefits to women due to pregnancy constituted unlawful discrimination.\textsuperscript{120} Judicial review of the decision of the appeal board was complicated by a provision in the New York Disability Benefits Law which stated that any disability "caused by or arising in connection with a pregnancy" was excepted from the minimum benefits required by the statute.\textsuperscript{121} The courts were thus asked to determine legislative intent in the face of an apparent conflict between two statutes. The solution devised by the majority was that the Disability Benefits Law established minimum requirements for the provision of benefits, while the Human Rights Law with its all-embracing proscription against gender-based employment discrimination evidenced a legislative intent to require that employers subject to its provisions afford the same benefits for pregnancy as for other types of disabilities.\textsuperscript{122}

\textsuperscript{119} 41 N.Y.2d 84, 359 N.E.2d 393, 390 N.Y.S.2d 884 (1976).
\textsuperscript{120} Id. at 85-86, 359 N.E.2d at 395, 390 N.Y.S.2d at 886. Section 296 of the Executive Law provides in pertinent part:

Unlawful discriminatory practices.

1. It shall be an unlawful discriminatory practice:
   (a) For an employer, . . . because of the age, race, creed, color, national origin [or] sex . . . of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.


\textsuperscript{122} 41 N.Y.2d at 86-87, 359 N.E.2d at 395, 390 N.Y.S.2d at 887. In so reconciling the
The *Brooklyn Union Gas* case is an apt illustration of the judicial role in resolving disputes regarding legislative intent. Administrative agencies charged with the administration and enforcement of various statutory programs tend to be vigorous advocates of their statutory mandate and usually do not curtail their perceived statutory authority *sua sponte*. Thus, it is necessary that the reviewing court act as the impartial arbiter of disputes relating to the applicability and interpretation of statutes governing an administrative agency's jurisdiction and mandate.

A further example of a judicial determination of the scope and applicability of statutory law is *Dumbleton v. Reed*. This case is of interest because it involves the interplay between federal and state standards in the area of social services. In *Dumbleton*, the local social services department and the State Commission of Social Services determined that petitioner and his family were ineligible for medical benefits. In an article 78 proceeding, the petitioner contended that the agency had erred in including social security or FICA taxes deducted from his wages as income available to him for purposes of determining medicaid eligibility. The agency practice of including FICA tax deductions as available income for medicaid eligibility purposes was not codified in any department regulation but, rather, was the agency's interpretation of the state statutory standard. In contrast, the Department of Health, Education and Welfare has issued regulations under the Social Security Act

Divergent statutory provisions, the majority declined to rely on the doctrine of implied repeal which requires a strong showing that a subsequently enacted statute was intended to nullify an earlier enactment. *Id.* at 87, 359 N.E.2d at 396, 390 N.Y.S.2d at 887.


125 *Id.* at 588, 357 N.E.2d at 365, 388 N.Y.S.2d at 894. Section 366 of the Social Services Law provides that the Department of Social Services shall take into account "only such income and resources, in accordance with federal requirements, as are available to the applicant or recipient" in establishing eligibility standards. N.Y. SOC. SERV. LAW § 366 (9)(b) (McKinney Supp. 1977-1978).

The federal standards to which the state standards are required to conform are contained in the Social Security Act, 42 U.S.C. § 1396 (1970), and regulations of the Department of Health, Education and Welfare.

128 Section 352.31 of the regulations of the New York Social Services Department states that overpayments caused by "a recipient's willful withholding of information concerning his income, resources or other circumstances which may have affected the amount of public assistance payment" should be recouped from the individual's present income. [1977] 18 N.Y.C.R.R. § 352.31[d]. In determining the amount of recoupment, the statute also provides that it "shall be limited on a case-by-case basis so as not to cause undue hardship." *Id.* at § 352.31[d](4).

127 42 U.S.C. § 1396a(a)(17). The Social Security Act provides that a state plan for medical assistance must take into account "only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient." *Id.*
which require that "with respect to . . . the medically needy, a State plan must: Provide that only such income and resources as are actually available will be considered and that income and resources will be reasonably evaluated." The New York Court of Appeals majority, focusing on the controlling federal standards, disagreed with the agency's view of the meaning of "income available."
The court recognized that amounts deducted for social security taxes do not in reality represent income "actually available" to an individual. The taxes are deducted directly by the employer from the employee's wages and are never actually possessed by the employee. Indeed, the interpretation of "income available" given by the Commissioner of Social Services might result in the employee never obtaining or being eligible for benefits under the Social Security Act.

The dissenting judges contended that the agency's construction of the state statute was reasonable, especially in light of the failure on the part of the legislature to expressly exempt FICA taxes from consideration in determining medicaid eligibility. Thus, one essential difference between the majority and dissent in Dumbleton is the rationality of interpreting the state Social Services Law as requiring the inclusion of FICA taxes as "income available." The dissent resorted to the general axiom that construction of statutes by agencies responsible for their administration will usually be upheld if not "irrational or unreasonable." This often cited rule of reason, however, contains little substantive content and is applied only if, in fact, the reviewing court perceives the agency's view of the meaning of the statute as a rational and reasonable interpretation thereof.

129 40 N.Y.2d at 588, 357 N.E.2d at 365, 388 N.Y.S.2d at 894-95. Thus, the majority concluded that "reason, fairness, and the plain language of the Federal regulation require that respondents exclude FICA taxes from an applicant's income in determining eligibility for medical assistance." Id., 357 N.E.2d at 365, 388 N.Y.S.2d at 895.
130 Id. The court noted that the Internal Revenue Code requires an employer to deduct FICA taxes directly from an employee's wages, and that failure to do so could result in criminal and personal liability. Id., 357 N.E.2d at 365, 388 N.Y.S.2d at 894. Therefore, the court concluded that this lack of control by the employee over these monies should properly warrant a determination that FICA taxes should be excluded from petitioner's income for the purpose of medical assistance eligibility. Id. at 588, 357 N.E.2d at 365, 388 N.Y.S.2d at 895.
131 Id. at 589, 357 N.E.2d at 366, 388 N.Y.S.2d at 895 (Jones, J., dissenting). Judge Jones authored the dissent, in which Chief Judge Breitel and Judge Jasen concurred.
The "rule of reason," applicable in cases of administrative construction of controlling statutes, also obtains in the area of taxation, despite the greater judicial deference to a taxing authority's determination. The courts appear willing to afford the taxing authorities a greater degree of latitude in applying taxing statutes to a specific set of facts. Thus, the New York Court of Appeals has held that "[w]here the question is one of a specific application of a broad statutory term in which the agency administering the statute must determine it initially, the court's function is limited." However, the rule of reason ensures that the taxing agency's determination, not be "erroneous, arbitrary or capricious."

Great Lakes Dredge & Dock Co. v. Department of Taxation and Finance exemplifies the instances in which a reviewing court will defer to the taxing agency's application of a statute to a particular set of undisputed facts. The decisive issue in this type of case is whether the facts satisfy certain statutory criteria.

Section 115(a)(8) of the New York Tax Law exempts from the New York State sales and use tax "[c]ommercial vessels primarily engaged in interstate or foreign commerce and property used by such vessels." Great Lakes commenced an article 78 proceeding to review the decision of the Department of Taxation and Finance, rendered after a hearing, that Great Lakes' business operations did not fall within the exemptive language of the statute. Great Lakes operated dredges, cranes, scows and other maritime dredging equipment in New York State. While the equipment had been transported across state lines to the site of dredging operations in New York, the equipment was utilized at a site within New York where it was anchored to the harbor or river bed. The primary question in the case was whether the petitioner's activity in New York was sufficiently localized to make it subject to taxation in New York.
The court, relying on prior interpretations of "localized activity" and on the rule articulated in *Young v. Bragalini*,\(^{14}\) sustained the agency's conclusion that the exemptive provision was not applicable to petitioner's business.\(^{141}\) The *Young* rule places the burden upon the taxpayer to establish entitlement to an exemption where the taxing agency has made a determination that the exemption does not apply.\(^{142}\)

The element of fairness and the consideration of parallel legal authority are fundamental ingredients in judicial review of administrative interpretation and construction of statutes. It therefore ap-

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\(^{14}\) *3 N.Y.2d 602, 148 N.E.2d 143, 170 N.Y.S.2d 805 (1958).* The court concluded that although the dredging machinery was movable from one state to another, the "movement is incidental to the localized activity of dredging." *39 N.Y.2d at 79, 346 N.E.2d at 798, 382 N.Y.S.2d at 960.* In so holding, the court noted that it had previously held that general activities, local and separate from interstate commerce, were subject to local taxation. *Id.* at 80, 346 N.E.2d at 798-99, 382 N.Y.S.2d at 960-61 (citing Niagara Junc. Ry. v. Creagh, 2 App. Div. 2d 299, 164 N.Y.S.2d 229 (4th Dep't 1956), affd, *3 N.Y.2d 831, 144 N.E.2d 720, 166 N.Y.S.2d 74 (1957)(mem.).*

\(^{141}\) *39 N.Y.2d at 79-80, 346 N.E.2d at 798, 382 N.Y.S.2d at 960.*

\(^{142}\) *3 N.Y.2d at 605, 148 N.E.2d at 145, 170 N.Y.S.2d at 807.* There are, however, instances, albeit rare, where the courts will set aside the unjustified application of a taxing statute. For example, in *Quotron Systems v. Gallman*, *39 N.Y.2d 428, 348 N.E.2d 604, 384 N.Y.S.2d 147 (1976)*, a company which manufactured, installed, and maintained electronic equipment for the transmission of stock market information sought a declaratory judgment that it was not subject to a state tax on utility services. *Id.* at 430, 348 N.E.2d at 605, 384 N.Y.S.2d at 147. The issue presented in *Quotron Systems* was whether the petitioner should be considered a company which supplied telegraphic services, which would thus classify it as a "utility" within the tax law. The statute characterized a utility, for the purpose of taxation, as "every person subject to the supervision of the state department of public service . . . and . . . every person (whether or not such a person is subject to such supervision) who sells gas, electricity, steam; water, refrigeration, telephony or telegraphy . . . ." *N.Y. Tax Law § 186-a(2)* (McKinney Supp. 1977-1978). Since Quotron was not "subject to the supervision of the state department of public service" and because it was more than a conduit for information, the court concluded that "Quotron cannot be said to be 'directly in competition with ordinary [telegraph companies]' and therefore is not a 'utility' as defined by section 186-a of the Tax Law." *39 N.Y.2d at 432, 348 N.E.2d at 606, 384 N.Y.S.2d at 149.* The New York Court of Appeals agreed with the petitioner on the ground that Quotron not only acted as a mere conduit of information, but that the company also determined the input of its transmissions by securing data from various sources and storing it in a computer for transmission upon the request of a customer. *Id.* at 431-32, 348 N.E.2d at 606, 384 N.Y.S.2d at 149. In granting the declaratory judgment, the court rejected the Tax Commission's reliance on New York Quotation Co. v. Bragalini, 7 App. Div. 2d 586, 184 N.Y.S.2d 924 (3d Dep't 1959), distinguishing it on the facts. *39 N.Y.2d at 432-33, 348 N.E.2d at 606, 384 N.Y.S.2d at 149.* In contrast to *Quotron Systems*, New York Quotation Company had been given stock market information by the New York Stock Exchange, "serving merely as a conduit or transmitter of the information to its customers. . . . [This] suggests that it could be considered to have been 'directly in competition with ordinary [telegraph companies].'") *Id.* at 493, 348 N.E.2d at 607, 384 N.Y.S.2d at 149.
appears that the content of this "rule of reason" governing statutory construction is twofold. First, there is a practical element in which the reviewing court applies its own jurisprudential sense of fairness, as an impartial arbiter in reviewing the agency's interpretation of its mandate. Second, there is a key judicial element in that the reviewing court will look to prior authority interpreting both the statute in question and related statutes in its own and other jurisdictions.

**Challenges to Agency Application of Regulations**

An aggrieved party may claim that an administrative agency has misapplied or misinterpreted its own regulations. Such was the case in *Reyes v. Dumpson*\(^4\) in which the court sustained petitioner's claim that limitations imposed by a Department of Social Services regulation upon the recoupment of welfare overpayments resulting from a recipient's willful concealment of information were applicable to the recoupment of advance shelter allowances granted pursuant to another regulation.\(^4\) The Appellate Division and the Court of Appeals majorities both reasoned that there is no rational basis for distinguishing recoupment of fraudulently obtained benefits from recoupment of advance shelter allowances necessitated by mismanagement of assistance funds.\(^4\) Again, as in statutory challenges, it can be seen that despite the usual judicial deference to agency construction of governing statutes and regulations, if the court perceives that the agency has acted in an unreasonable manner, it will annul the agency decision.\(^4\) The *Reyes* majority relied largely on considerations of fairness, concluding that the agreement, pursuant to regulation requiring a recipient of advance shelter allowances to repay the amount advanced over a 6-month period, could not be deemed a fully voluntary choice in light of the alternative of eviction.\(^4\) The majority also drew upon other authority to sustain its decision: federal regulations restricting recoupment.\(^4\) Thus, the *Reyes* decision indicates that the rule of reason, discussed above, is equally applicable to challenges to agency application of its own regulations.\(^4\)


\(^{14}\) Id. at 727, 358 N.E.2d at 512, 389 N.Y.S.2d at 829.

\(^{14}\) Id.; 51 App. Div. 2d 903, 905, 38 N.Y.S.2d 58, 60 (1976)(mem.).

\(^{14}\) See notes 132-133 and accompanying text supra.

\(^{14}\) Id. at 729, 368 N.E.2d at 512, 389 N.Y.S.2d at 830.

\(^{14}\) Id. at 729, 368 N.E.2d at 513, 389 N.Y.S.2d at 830. Federally funded programs are similarly restricted by federal regulation in that recoupment must not result in undue hardship. See 45 C.F.R. § 233.20 [f] (1977).

\(^{14}\) See text following note 142 supra.
Challenges to Administrative Penalties and Remedies

Courts exercise minimal control over relief granted or penalties inflicted as a result of agency decision. However, claims that an agency has exceeded its statutory power or acted arbitrarily and capriciously with respect to dispositions following decision are often advanced. The rule applied in such cases was articulated in Butterly & Green v. Lomenzo. Administrative sanctions will be set aside only if "so disproportionate to the offense in light of the circumstances as to be shocking to one's sense of fairness and disproportionately unfair."

In Butterly & Green, which concerned the Department of State's regulation of real estate brokers, the court expressed the view that the licensing agency should be granted considerable latitude in imposing punishment because of its overall responsibility for regulating a profession for the protection of the public. There have been cases, however, in which administrative penalties have been overturned as an abuse of discretion. In Ahsaf v. Nyquist, the New York Civil Practice Law and Rules itself envisions review of such matters by providing that a court may decide "whether a determination . . . was arbitrary and capricious or an abuse of discretion, including abuse of discretion as the the measure or mode of penalty or discipline imposed . . . .” N.Y. Civ. Prac. Law § 7803 (McKinney 1977); see cases cited in note 149 supra.

In the area of licensing, agencies have broad discretionary powers and their actions will be measured according to the "arbitrary and capricious" standard. See note 145 supra; see, e.g., Wager v. State Liquor Auth., 4 N.Y.2d 465, 151 N.E.2d 869, 176 N.Y.S.2d 311 (1958); Quintard Assoc. Ltd. v. State Liquor Auth., 57 App. Div. 2d 462, 394 N.Y.S.2d 960 (4th Dep't 1977); Pasta Chef, Inc. v. State Liquor Auth., 54 App. Div. 2d 1112, 389 N.Y.S.2d 72 (4th Dep't 1976)(mem.).


155 Id. at 256, 326 N.E.2d at 803, 367 N.Y.S.2d at 234 (1975). Butterly affirmed a determination by the Secretary of State that the brokers in question engaged in unfair sales methods by limiting the client's choice of housing according to race.

York Court of Appeals found that the license of a practical nurse had been revoked by the Board of Regents on the basis of alleged misconduct that had not been charged or proven during the disciplinary proceedings.\textsuperscript{157} The hearing panel had found the petitioner guilty of two of the charges against her, addiction to the use of narcotics and unprofessional conduct resulting from such addiction, and placed petitioner on probation for 5 years.\textsuperscript{158} The Regents Committee decided against the probationary retention of petitioner's license on an asserted finding of "lack of candor," an offense not specifically charged and to which she had no opportunity to respond.\textsuperscript{159} The court concluded that the board's imposition of a harsher penalty under such circumstances constituted an abuse of discretion and thus remanded the case to the Board of Regents for reconsideration of the penalty.\textsuperscript{160}

The increased likelihood of judicial intervention in cases where the licensing agency imposes the drastic sanction of outright license revocation is also illustrated by \textit{Shore Haven v. State Liquor Authority}.\textsuperscript{161} In \textit{Shore Haven}, the State Liquor Authority cancelled a license and denied the petitioner's application for a renewal when it was found that the licensee had failed to maintain adequate business records on the premises.\textsuperscript{162} The record, however, revealed no evidence of "willful deception or corruption or the likelihood of either" and thus the court concluded that revocation of petitioner's license constituted an abuse of discretion.\textsuperscript{163} The court was careful to reaffirm the narrow scope of review in administrative penalty cases, established in \textit{Butterly & Green}, emphasizing that there was no evidence of "prejudice to the public interest."\textsuperscript{164} While in rare cases then, the courts will set aside penalties inflicted by licensing agencies, generally the judiciary will exercise great restraint in reviewing the propriety of administrative penalties and will defer to the exercise of administrative discretion.

\textsuperscript{157} Id. at 185, 332 N.E.2d at 882, 371 N.Y.S.2d at 708.

\textsuperscript{158} Id.

\textsuperscript{159} Id. at 185-86, 332 N.E.2d at 842, 371 N.Y.S.2d at 708.

\textsuperscript{160} Id. at 186, 332 N.E.2d at 882, 371 N.Y.S.2d at 709.

\textsuperscript{161} Id. at 187, 332 N.E.2d at 883, 371 N.Y.S.2d at 710.

\textsuperscript{162} Id. The Alcoholic Beverage Control Law provides that "[e]ach retail licensee for on-premises consumption shall keep and maintain upon the licensed premises, adequate books and records of all transactions involving the business . . . Such books and records shall be available for inspection by any authorized representative of the liquor authority." N.Y. Alco. Bev. Cont. Law § 106(12) (McKinney 1970).

\textsuperscript{163} 37 N.Y.2d at 189, 332 N.E.2d at 884, 371 N.Y.S.2d at 711.

\textsuperscript{164} Id. at 190-91, 332 N.E.2d at 885, 371 N.Y.S.2d at 712-13.
Finally, it is important to note that the same wide degree of discretion available to an agency in imposing a penalty also applies when relief is granted. The courts, however, have not hesitated to set aside remedies which may be deemed "erroneous as a matter of law." Typically, this signifies that supervening public policy limits the agency's exercise of discretion. In *New York State Institute of Technology v. State Division of Human Rights* the New York Court of Appeals held that the specialized balancing of subjective and objective criteria which results in a tenure decision should not be overridden by administrative officials who have no expertise in the area of education and whose interests are conditioned by their singular responsibility to enforce the anti-discrimination laws. The court cautioned, however, that in extraordinary cases where an institution has failed to eliminate discriminatory practices, and no other redress for such practices would be effective, the remedy of tenure may be appropriate.

**Conclusion**

This Article has sought to examine the methodology of judicial review of various types of decisions made by administrative agencies. In treating this broad subject the focus has been placed upon certain issues which are frequently raised and recent cases of particular interest.

It is important to understand that the degree to which the court will engage in review of administrative decisions varies with the nature of the issue raised. As to matters of fact, the courts will defer to and are generally bound by the factual findings of the administrative agency. Nevertheless, as to ultimate determinations and the drawing of legal inferences the court is likely to subject the agency's decision to a greater degree of scrutiny. When the issues raised by an individual challenging agency action concern matters of law such as

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167 *Id.* at 326, 353 N.E.2d at 604, 386 N.Y.S.2d at 691. The court, however, exercised great caution in recognizing this possibility:

*Only where the institution's tenure procedures are irreparably tainted and further recourse to them would be futile, rendering a fair consideration impossible, might the commissioner consider bypassing the normal university channels .... Moreover even in the extraordinary case where a grant of tenure might serve as an appropriate remedy, the commissioner should not impose such a requirement without consulting with the administration of the institution and without considering the effect of such an order on the institution and its faculty.*

*Id.*
as constitutional and statutory controls on agency action, the court is free to intervene in the administrative process. Two values are counterbalanced when statutory challenges are advanced. An agency's interpretation of its own statutory mandate will be afforded some weight by a reviewing court. On the other hand, courts recognize that administrative officials are charged with the responsibility of enforcing a particular statute and that these officials are sometimes myopic in their eagerness to assert what they perceive to be their legislatively conferred authority. Thus, the courts, applying a rule of reason, act as the final arbiter over the administrative exercise of statutory authority. Once the substantive administrative decision has passed judicial muster, the courts will only interfere in the administrative grant of a remedy or imposition of a penalty in extraordinary circumstances.

This Article has sought to identify the variety of factors that are important to an understanding of judicial review of administrative decisions in New York. As Professor Davis has stated, however, "the scope of review in any particular case depends much more upon the various factors that guide the exercise of judicial discretion than it depends upon judicial fidelity to any verbal formula."168

168 Davis, supra note 1, § 30.14.