

CPLR 7801: State Comptroller May Not Be Compelled To Challenge the Legality of the State Budget

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influenced by the fact that the item constituting the consequential damages was fully litigated without objection.²²⁸ Not only does the decision reaffirm the view that the precise arbitration agreement between the two parties is determined by a reading of the contract-in-chief plus the arbitration clause and any supplements to it, but further indicates that any limitation on a general clause such as the one involved in the instant case must be an express one and that any implied limitation will have little effect in restricting the arbitrator's broad remedy power.

ARTICLE 78 — PROCEEDING AGAINST BODY OR OFFICER

CPLR 7801: State comptroller may not be compelled to challenge the legality of the state budget.

When an officer fails to perform a statutory duty which is purely ministerial, an article 78 proceeding in the nature of mandamus can be commenced to compel such performance. This remedy is not available, however, where the matter in issue is within the discretion of the officer.²²⁰

In *Posner v. Levitt*,²³⁰ the Appellate Division, Third Department, affirming the Supreme Court, Albany County, held that the state comptroller could not be compelled to institute a declaratory judgment action to test the constitutionality of the state budget.²³¹

The fact that the comptroller has the prerequisite standing to maintain such an action does not require him to prosecute it if he deems it unwise.²³² Pointedly, the state constitution does not necessitate such a course of action.

²²⁸ Where parties to the arbitration litigate a particular issue not within the expressed description of the matters set forth in the submission, the parties waive the right to object that such issue is not arbitrable. *Ingardia Constr. Co. v. Dyker Bldg. Co.*, 14 App. Div. 2d 23, 216 N.Y.S.2d 978 (1st Dep't 1961).

²²⁹ *Gimprick v. Board of Educ.*, 306 N.Y. 401, 118 N.E.2d 578 (1954) (the grant of credit for prior teaching experience by board of examiners is discretionary); *Frey v. McCoy*, 35 App. Div. 2d 1029, 316 N.Y.S.2d 166 (3d Dep't 1970) (mem.) (State Director of Probation is not mandated under the correction law to conform with formulated staffing and caseload standards; where workloads assigned do not conform to standards, the denial of state funds is within the discretion of the proper official).

²³⁰ 37 App. Div. 2d 331, 325 N.Y.S.2d 519 (3d Dep't 1971).

²³¹ *Id.* at 333, 325 N.Y.S.2d at 521, citing *Cortellini v. City of Niagara Falls*, 257 App. Div. 615, 14 N.Y.S.2d 924 (4th Dep't), *reargument denied*, 258 App. Div. 852, 16 N.Y.S.2d 694 (1939) (mem.); *Goldberg v. Wagner*, 9 Misc. 2d 663, 168 N.Y.S.2d 16 (Sup. Ct. N.Y. County 1957), *aff'd*, 5 App. Div. 2d 857, 172 N.Y.S.2d 526 (1st Dep't) (mem.), *cert. denied*, 357 U.S. 943 (1958).

²³² 37 App. Div. 2d at 333, 325 N.Y.S.2d at 521.