

Article 78 Appropriate Remedy to Annul Administrative Penalty Previously Served

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ARTICLE 78—PROCEEDINGS AGAINST BODY OR OFFICER

Petition to compel mayor to fill judicial vacancies denied.

In the case of *Blaikie v. Wagner*,²⁷⁵ petitioner sought to compel the Mayor of New York City to fill several long-standing judicial vacancies. Special term, in denying the petition, held that since petitioner was not "personally aggrieved" he had no standing to sue under Article 78. The court stated that there are only three recognized exceptions to this requirement, *i.e.*, in matters involving civil service,²⁷⁶ election laws²⁷⁷ and common-law nuisances on public highways,²⁷⁸ which are justified as in the interest of the general public.²⁷⁹ However, the court did not convincingly indicate why the filling of judicial vacancies was not in the general public interest. It would appear, moreover, that the court based its decision on other grounds. Mandamus is a highly discretionary form of relief. It is appropriately invoked only to compel positive and specifically defined behavior.²⁸⁰ In the *Blaikie* case, the relevant statutes required only that vacancies be filled as they arose.²⁸¹ The court found these provisions to be directory rather than mandatory and thus, that mandamus did not lie. This construction has full statutory support²⁸² and, when taken with the court's abhorrence to exercise a regulatory function over administrative affairs and a justified fear of the voluminous litigation that would ensue from a contrary result, the decision is more than tenable.

Article 78 appropriate remedy to annul administrative penalty previously served.

In a recent case,²⁸³ petitioner sought to annul a commissioner's determination which suspended his license to sell theater tickets. Respondent contended that since the penalty had been met, the

²⁷⁵ 46 Misc. 2d 441, 259 N.Y.S.2d 890 (Sup. Ct. N.Y. County 1965).

²⁷⁶ See *Cash v. Bates*, 301 N.Y. 258, 93 N.E.2d 835 (1950).

²⁷⁷ See *McCabe v. Voorhis*, 243 N.Y. 401, 153 N.E. 849 (1926).

²⁷⁸ *People ex rel. Pumpysky v. Keating*, 168 N.Y. 390, 61 N.E. 637 (1901).

²⁷⁹ *Blaikie v. Wagner*, 46 Misc. 2d 441, 444, 259 N.Y.S.2d 890, 893 (Sup. Ct. N.Y. County 1965); see *People ex rel. Pumpysky v. Keating*, *supra* note 278, at 393, 61 N.E. at 637; *United Press Ass'ns v. Valente*, 281 App. Div. 395, 400, 120 N.Y.S.2d 174, 180 (1st Dep't 1953).

²⁸⁰ 8 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 267, ¶7803.03; see CPA § 1284; *Walsh v. La Guardia*, 269 N.Y. 437, 441, 199 N.E. 652, 653 (1936).

²⁸¹ See, *e.g.*, N.Y. CONST. art. VI, §§ 13, 15, 21; CCA § 22(2).

²⁸² See N.Y. CONSOL. LAWS, STATUTES §§ 172, 177.

²⁸³ *Leo Newman's Theatre Ticket Office, Inc. v. DiCarlo*, 46 Misc. 2d 549, 260 N.Y.S.2d 221 (Sup. Ct. N.Y. County 1965).

issue was academic and at most, petitioner was entitled to a declaratory judgment. Special term rejected this contention, holding that petitioner should not be denied what would otherwise be appropriate relief²⁸⁴ on the sole ground that he had complied with an administrative determination. Standing was justified by the fact that petitioner was still amenable to further sanctions.²⁸⁵

It has long been settled that some form of review is available to one who has complied with an administrative penalty. Declaratory judgment has been the most obvious form of relief, but certiorari²⁸⁶ and direct appeal²⁸⁷ have likewise been allowed. This case clarifies the fact that Article 78, which is most expedient, may serve as an alternative to declaratory judgment to review administrative penalties which have been served.²⁸⁸

MVAIC

MVAIC endorsement reducing award to insured to extent of workmen's compensation benefits held valid.

In the case of *Durant v. MVAIC*,²⁸⁹ petitioner sought arbitration as an "insured person" under the terms of an MVAIC endorsement contained in his motor vehicle insurance policy. This endorsement, which is required in all New York motor vehicle policies,²⁹⁰ provided that workmen's compensation benefits would serve to reduce any MVAIC award. The appellate division held that the statutory power of MVAIC to prescribe "terms and conditions"²⁹¹ did not include the authority to so limit the award.²⁹² The Court of Appeals reversed, construing the statute as authorizing MVAIC to "prescribe the conditions of coverage" and thus to limit the arbitration award.²⁹³

²⁸⁴ See generally 8 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 267, ¶ 7801.02.

²⁸⁵ *Leo Newman's Theatre Ticket Office, Inc. v. DiCarlo*, *supra* note 283, at 551, 260 N.Y.S.2d at 223.

²⁸⁶ See *People ex rel. Albrecht v. Harnett*, 221 App. Div. 487, 224 N.Y. Supp. 97 (4th Dep't 1927).

²⁸⁷ See *People v. Marks*, 64 Misc. 679, 120 N.Y. Supp. 1106 (Gen. Sess. 1909).

²⁸⁸ By this decision, the court necessarily held that declaratory judgment is inadequate alternative relief. Otherwise, CPLR 7801(1) would have required dismissal of the petition.

²⁸⁹ 15 N.Y.2d 408, 207 N.E.2d 600, 260 N.Y.S.2d 1 (1965).

²⁹⁰ N.Y. INS. LAW § 167(2-a).

²⁹¹ *Ibid.* See N.Y. INS. LAW § 606 for the expressly delegated powers of MVAIC.

²⁹² *Durant v. MVAIC*, 20 App. Div. 2d 242, 246, 246 N.Y.S.2d 548, 553 (2d Dep't 1964); see *The Biannual Survey of New York Practice*, 38 Sr. JOHN'S L. REV. 406, 458 (1964).

²⁹³ *Durant v. MVAIC*, 15 N.Y.2d 408, 411, 207 N.E.2d 600, 260 N.Y.S.2d 1, 2 (1965).