ADMINISTRATIVE LAW

Rose Mary Bailly, Esq.[†] and William P. Davies[††]

CONTENTS

INTRODUCTION 731
I. JUDICIAL BRANCH 731
A. Due Process 732
B. Agency Interpretation of the Law 735
C. Arbitrary Administrative Action 745
D. Standing 754
E. Proper Remedy 758
F. Statute of Limitations 761
II. EXECUTIVE BRANCH 764
A. Department of Corrections and Community Supervision .. 764
B. Division of Alcohol Beverage Control 766
C. *Freedom of Information Law (FOIL) Access and Transparency* 767
D. Port Authority Reform 768
III LEGISLATIVE BRANCH 768
CONCLUSION 769

INTRODUCTION

This Article reviews developments in administrative law during 2015 in the judicial, executive, and legislative branches of New York State government. It was a busy year for administrative law.

I. JUDICIAL BRANCH

The decisions of the Court of Appeals covered a range of interesting topics which included: due process in a parole revocation hearing for individuals found incompetent to stand trial; the Department of Environmental Conservation's interpretation of federal and state law regarding municipal separate storm sewer systems; the application of the federal minimum wage law to a recipient of public assistance; the

† Rose Mary Bailly, Esq., is Special Counsel to the Government Law Center of Albany Law School, and an Adjunct Professor of Law at Albany Law School where she teaches New York State Administrative Law, among other courses.

†† William P. Davies, J.D., Albany Law School 2016. He was an Executive Editor for Notes & Comments on the Albany Law Review, Volume 79. He was also the Senior Student Editor for the NYSBA Government, Law and Policy Journal.

application by the Office of Temporary and Disability Assistance of child support arrears to public assistance funds; the interpretation by the New York City Department of Education of the Corrections Law regarding an applicant with a criminal record for the position of school bus driver; the standing of individual residents to challenge a land transaction by the Village of Painted Post; the proper remedy for a prisoner denied the opportunity to call a witness in his disciplinary proceeding; and the timing of the statute of limitations begins to run for purposes of challenging the termination of federal Section 8 housing benefits.

A. Due Process

In 1971, the Court of Appeals held that "a proceeding to revoke parole involves the right of an individual to continue at liberty or to be imprisoned. It involves a deprivation of liberty . . . and falls within the due process provision of section 6 of article I of our State Constitution."[1]

In *Lopez v. Evans*, the extent of due process owed to an incapacitated parolee was examined again.[2] Edwin Lopez, the plaintiff, was released from prison and placed on lifetime parole supervision following a conviction for murder.[3] Four years after his release, Lopez was charged with misdemeanor assault and committed to the custody of the Office of Mental Health (OMH) once he was found unfit to stand trial.[4] He remained in OMH custody through "a series of retention orders and voluntary admissions" under article 9 of the Mental Hygiene Law, which governs hospitalization of individuals with mental illness.[5] While in OMH custody, Lopez attacked another patient, and thereafter was charged with assault and harassment.[6] After psychologists found

1. People *ex rel.* Menechino v. Warden, 27 N.Y.2d 376, 382, 267 N.E.2d 238, 241, 318 N.Y.S.2d 449, 453 (1971) (omission in original) (quoting People *ex rel.* Combs v. La Valeee, 29 A.D.2d 128, 131, 286 N.Y.S.2d 600, 603 (4th Dep't 1968)).

2. *Lopez II*, 25 N.Y.3d 199, 31 N.E.3d 1197, 9 N.Y.S.3d 601 (2015).

3. *Id.* at 202–03, 31 N.E.3d at 1199, 9 N.Y.S.3d at 602.

4. *Id.* at 203, 31 N.E.3d at 1199, 9 N.Y.S.3d at 602. New York Criminal Procedure Law section 730.40(1) provides that if a criminal court determines after a hearing that an individual is an incapacitated person, it must issue an order committing the individual to the Commissioner of Mental Health. N.Y. CRIM. PROC. LAW § 730.40(1) (McKinney Supp. 2016). An incapacitated person is defined as "a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense." *Id.* § 730.10(1) (McKinney Supp. 2016).

5. *Lopez II*, 25 N.Y. 3d at 203, 31 N.E.3d at 1199, 9 N.Y.S.3d at 602 (citing N.Y. MENTAL HYG. LAW art. 9 (McKinney 2011 & Supp. 2016)).

6. *Id.*

that Lopez was not competent to stand trial because he suffered from dementia, the assault charges were dismissed and Lopez returned to OMH custody where he remained.[7]

Because of the assault and harassment charges filed against Lopez while in OMH custody, the New York State Department of Corrections and Community Supervision (DOCCS) charged him with violation of parole,[8] and began the parole revocation process.[9] Lopez's attorney argued that his due process rights were violated because the attorney was not given time to assess Lopez's mental condition.[10] Despite this claim and testimony of a social worker that "'the best thing' for Lopez would be for him to be restored to parole and returned to OMH's custody," the administrative law judge (ALJ) recommended revocation of parole, and the Division of Parole adopted the ALJ's recommendation.[11]

In an Article 78 proceeding commenced in August, 2010, Lopez argued that his due process rights were violated by the parole revocation hearing because he had been found unfit to stand trial for his earlier criminal charges which had subsequently been dismissed.[12] The supreme court found that "an assertion of incompetency does not bar parole revocation proceedings," granting the DOCCS motion to dismiss.[13] However, the appellate division reversed the dismissal, holding that due process prohibits going forward with a parole revocation proceeding if a parolee is not mentally competent.[14] The

7. *Id.*

8. *Id.* at 203, 31 N.E.3d at 1199, 9 N.Y.S.3d at 602–03 (citing N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.2(h) (2015) ("A releasee will not behave in such manner as to violate the provisions of any law to which he is subject which provides for penalty of imprisonment, nor will his behavior threaten the safety or well-being of himself or others")).

9. *Id.*

10. *Lopez II*, 25 N.Y.3d at 203, 31 N.E.3d at 1199, 9 N.Y.S.3d at 603.

11. *Id.* at 204, 31 N.E.3d at 1199–1200, 9 N.Y.S.3d at 603. His administrative appeal was subsequently denied. *Id.*

12. *Id.* at 204, 31 N.E.3d at 1200, 9 N.Y.S.3d at 604.

13. *Id.* at 204–205, 31 N.E.3d at 1200, 9 N.Y.S.3d at 604–05 (citing People *ex rel.* Newcomb v. Metz, 64 A.D.2d 219, 222, 409 N.Y.S.2d 554, 556 (3d Dep't 1978) (holding that the "Parole Board must consider a parolee's lack of mental competency as a mitigating factor when considering alleged parole violations, but 'a determination of this question is not a condition precedent to the parole revocation proceeding'")).

14. *Lopez II*, 25 N.Y.3d at 205, 31 N.E.3d at 1200, 9 N.Y.S.3d at 605 (citing Lopez v. Evans (*Lopez I*), 104 A.D.3d 105, 108, 957 N.Y.S.2d 59, 62 (1st Dep't 2012)). The Appellate Division stated in dicta that "the statute authorizing the Parole Board to determine whether a parolee has violated parole necessarily confers upon the Board authority to determine whether the parolee possesses the mental competence required for such a determination to be rendered in accordance with due process." *Id.* at 205, 31 N.E.3d at 1200–01, 9 N.Y.S.3d at 605 (quoting *Lopez I*, 104 A.D.3d at 111, 957 N.Y.S.2d at 64).

Division of Parole appealed as of right.[15]

The Court of Appeals affirmed the appellate division, holding that proceeding with a parole revocation hearing where "by reason of mental incapacity, [the parolee] is unable to understand, recall, or express . . . vital information" is inconsistent with due process.[16] The Court found that moving forward with such a proceeding implicates "constitutional concerns" about the fundamental fairness of sending a parolee to prison when he cannot make decisions on his own.[17] Additionally, "[a]n incompetent parolee is not in a position to exercise rights, such as the right to testify and the opportunity to confront adverse witnesses that are directly related to . . . fact-finding."[18]

The Court noted that this decision creates a situation where a parolee may "fall[] between the cracks," because if a parolee is found mentally incompetent, a parole board cannot return the parolee to prison.[19] Additionally, the Division of Parole may not "commit a mentally incompetent parolee to the custody of OMH," and has no other avenue to incarcerate a mentally incompetent, but dangerous, parolee charged with a crime.[20] As the Parole Board stated in its brief:

> [Its] only option would seemingly be to restore the mentally incompetent person to parole, even if in its judgment the person could not successfully comply with his parole conditions and would pose a risk to public safety. While the Parole Board could theoretically impose additional special parole conditions to address the parolee's mental condition, such conditions would serve no meaningful purpose if the Board would likely be unable to revoke parole for any subsequent violation.[21]

Concerned for the practical consequences of the current state of the law, the Court advised the Legislature to re-examine this area of law, and noted a proposed solution offered by the Mental Hygiene Legal Service, whereby "the Parole Board [would] apply something similar to the procedures set forth under CPL article 730 for an incapacitated defendant."[22]

15. *Lopez II*, 25 N.Y.3d at 205, 31 N.E.3d at 1201, 9 N.Y.S.3d at 606 (citing N.Y. C.P.L.R. 5601(b)(1) (McKinney 2014)).

16. *Id.* at 206, 31 N.E.3d 1201, 9 N.Y.S.3d at 604.

17. *Id.* at 206, 31 N.E.3d at 1201–02, 9 N.Y.S.3d at 605.

18. *Id.* at 206, 31 N.E.3d at 1202, 9 N.Y.S.3d at 605 (citing N.Y. COMP. CODES R. & REGS. tit. 9, 8005.18(b)(2), (4) (2015)).

19. *Id.* at 207, 31 N.E.3d at 1202, 9 N.Y.S.3d at 606.

20. *Lopez II*, 25 N.Y.3d at 207, 31 N.E.3d at 1202, 9 N.Y.S.3d at 605.

21. *Id.* at 207, 31 N.E.3d at 1202, 9 N.Y.S.3d at 605–06.

22. *Id.* at 208, 31 N.E.3d at 1203, 9 N.Y.S.3d at 606.

B. Agency Interpretation of the Law

A well-established principle of administrative law is the deference accorded to an agency's interpretation of the laws it is charged with regulating.[23] However, if the law has a plain meaning that does not require a specialized expertise to interpret, the courts are not bound by an agency's interpretation.[24]

The issues in *Natural Resources Defense Council, Inc. v. New York State Department of Environmental Conservation* were whether the application process created by the Department of Environmental Conservation (DEC) governing discharges of stormwater by municipal separate stormwater systems ("MS4s") violated the federal Clean Water Act[25] and the state's Environmental Conservation Law[26] and was arbitrary and capricious.[27] The case involved the interplay between the requirements of the national pollutant discharge elimination system (NPDES), the state's pollutant discharge elimination system (SPDES), and New York's General SPDES Permit as authorized by Environmental Protection Agency (EPA) regulations for certain municipal stormwater discharges.[28] In considering whether the allegations had merit, the courts faced a balancing of two important matters: the worthy goal of maintaining clean waterways in the State against conserving agency resources and achieving efficiencies.[29] The General SPDES Permit covers over 500 small MS4s.[30]

"Although the federal government plays the dominant role in water pollution control under the Clean Water Act, states may continue their own water pollution control regulations as long as they are at least as

23. *See* PATRICK J. BORCHERS & DAVID L. MARKELL, NEW YORK STATE ADMININSTRATIVE PROCEDURE AND PRACTICE § 8.6 (2d ed. 1998).

24. *Id.*

25. 33 U.S.C. § 1251 (2012).

26. N.Y. ENVTL. CONSERV. LAW § 17-0801 (McKinney 2006).

27. (*Nat. Res. Def. Council III*), 25 N.Y.3d 373, 411, 34 N.E.3d 782, 805, 13 N.Y.S.3d 272, 295 (2015).

28. *Id.* at 380–85, 34 N.E.3d at 786–88, 13 N.Y.S.3d at 274–77. EPA regulations permit "the issuance of a '[g]eneral permit[, which is] an NPDES "permit" issued under [40 CFR] § 122.28 authorizing a category of discharges under the CWA within a geographical area.' The provisions of section 122.28 are applicable to state NPDES programs, such as New York's SPDES program." Nat. Res. Def. Council, Inc. v. N.Y. State Dep't of Envtl. Conservation (*Nat. Res. Def. Council I*), 35 Misc.3d 652, 657, 940 N.Y.S.2d 437, 441 (Sup. Ct. Westchester Cty. 2012) (alterations in original) (quoting 40 C.F.R. § 123.25(a)(11) (2015)), *aff'd in part and rev'd in part*, 120 A.D.3d 1235, 994 N.Y.S.2d 125 (4th Dep't 2014), *aff'd*, 25 N.Y.3d 373, 34 N.E.3d 782, 13 N.Y.S.3d 272 (2015).

29. *Nat. Res. Def. Council III*, 25 N.Y.3d at 424–25, 34 N.E.3d at 815–16, 13 N.Y.S.3d at 304–05.

30. *Id.* at 389, 34 N.E.3d at 790, 13 N.Y.S.3d at 280.

stringent as federal law demands."[31] Both the federal and state systems contemplate that each municipality wishing to discharge pollutants into waterways must obtain an individual permit if under the NPDES and SPDES;[32] however, the EPA's regulations allow a state to issue a general permit such as the one at issue here because of "the vast number of separate point sources from which pollutants may be discharged into the nation's waterways and water bodies, and the intolerable task that would be involved in considering and determining an individual application for each one."[33] Although states are not required to issue the general permit, New York chose to do so.[34] To decide whether New York's general permit violated federal and state law, the courts had to consider the extent to which the elements of the general permit could differ from the NPDES and SPDES individual permits.[35] The requirements at issue were: (1) the nature of the controls to reduce pollutant discharges to the maximum extent practicable; (2) compliance with water quality standards by establishing limits or the "total maximum daily load"[36] of man-made pollutants that could be absorbed by water without violating water quality standards; (3) procedures to monitor the discharges; and (4) public participation in the decision to issue a permit.[37]

In 2003, the DEC issued its first "SPDES General Permit for Storm Water Discharges from Municipal Separate Storm Sewer Systems (MS4s)" ("General SPDES Permit").[38] This General SPDES Permit was renewed in 2008 for two years[39] and then again in 2010 for five years.[40]

31. *Id.* at 381, 34 N.E.3d at 784, 13 N.Y.S.3d at 275; *see also* 33 U.S.C. § 1370 (2012) ("Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.").

32. *Id.*

33. *Nat. Res. Def. Council I*, 35 Misc.3d at 657, 940 N.Y.S.2d at 441.

34. *Id*. (citing N.Y. ENVTL. CONSERV. LAW § 70-0117(6) (McKinney 2015)).

35. *See generally id.*

36. *Id.* at 659–60, 940 N.Y.S.2d at 442–43.

37. *Id.*

38. *Nat. Res. Def. Council I*, 35 Misc.3d at 658, 940 N.Y.S.2d at 441.

39. *Id*. at 658, 940 N.Y.S.2d at 441–42.

As part of the renewals of the permit in 2008 and 2010, small MS4s which had not been included in the 2003 General SPDES Permit were added because of the large number of small MS4s (those serving populations of under 100,000) and the similarity of their issues.[41] The General SPDES Permit "requires these municipal systems to [create] and implement a Stormwater Management Program (SWMP)" that meets the DEC specifications which are designed to "limit the introduction of pollutants into stormwater to the maximum extent practicable."[42] To be covered by the 2010 General SPDES Permit, which would authorize a small MS4 to discharge stormwater, the MS4 must first submit a Notice of Intent (NOI) to the DEC.[43]

The petitioners were organizations whose members used waterways that were polluted by stormwater runoff discharged by MS4s in one or more counties covered by the 2010 MS4 Permit.[44] Petitioners commenced a hybrid Article 78 proceeding and proceeding for declaratory judgment declaring the 2010 General SPDES Permit invalid because it was affected by an error of law, namely that it violated state and federal law, and was arbitrary and capricious because it failed to provide for public participation in the permitting process.[45] The petitioners advanced several arguments. The first was that the EPA regulations regarding municipal stormwater sewer systems created an "impermissible self-regulatory" system and failed to provide for public participation as required by the Clean Water Act, thus rendering the New York General SPDES Permit invalid.[46] They argued that the NOI process for obtaining authorization to discharge stormwater should be treated the same as an application for an Individual SPDES permit and the DEC's creation of a different process for the approval of an NOI was fatal.[47] The petitioners alleged four causes of action relating to the 2010 General SPDES Permit: (1) it violated provisions of the Clean Water Act[48] and the Environmental Conservation Law[49] because it

40. *Id.* at 658, 940 N.Y.S.2d at 442.

41. *Id.*

42. *Nat. Res. Def. Council III*, 25 N.Y.3d 373, 379, 34 N.E.3d 782, 783, 213 N.Y.S.3d 272, 273 (2015).

43. *Id.* The Notice of Intent must specify the best management practices that the MS4 will employ to comply with the requirements of the General SPDES Permit. *Id.*

44. *Id.* at 379–80, 34 N.E.3d at 783–84, 213 N.Y.S.3d at 283–74. They included the Natural Resources Defense Council, Inc. and seven other petitioners. *Id.*

45. *Nat. Res. Def. Council III*, 25 N.Y.3d at 380, 34 N.E.3d at 784, 213 N.Y.S.3d at 274.

46. *Id.*

47. *See id.*

48. 33 U.S.C. § 1342(p)(3)(B)(iii) (2012).

failed to require MS4s to reduce their discharges of pollutants to the maximum extent practicable; (2) it failed to ensure compliance with water quality standards in violation of the Environmental Conservation Law;[50] (3) it failed to require MS4s to conduct any monitoring of their stormwater discharges in violation of federal law[51] and state law;[52] and (4) it violated the public participation requirements of federal law.[53] The DEC opposed the petition and asserted the affirmative defense that its determinations were "reasonable and rational and fully consistent with the law."[54]

The supreme court observed that the petitioners, along with other groups, had successfully challenged the underlying EPA regulation in the Ninth Circuit decision in *Environmental Defense Center, Inc. v. EPA*,[55] and agreeing with the Ninth Circuit decision, held that the EPA regulations did not meet the requirements of the Clean Water Act. The Act prohibited the issuance of municipal storm sewer discharge permits that lacked "controls to reduce the discharge of pollutants to the maximum extent practicable"[56] and permitted that, absent the regulatory agency's "meaningful review" of small MS4 controls, the municipal operator might "propos[e] or adopt[] a set of control measures" that did not meet the applicable standard.[57] The Ninth Circuit also concluded that Notices of Intent were "functionally equivalent" to NPDES permit applications, and therefore are "subject to the [same] public availability and public hearing requirements."[58] Relying on the Ninth Circuit decision, the supreme court concluded that the DEC failed to distinguish its 2010 General SPDES Permit procedure from the one invalidated by the Ninth Circuit.[59]

The supreme court sustained two of the four causes of action. It

49. N.Y. ENVTL. CONSERV. LAW §17-0808(3)(c) (McKinney 2015).

50. *Id.* §§ 17-0811(5), 17-0813 (McKinney 2015).

51. 33 U.S.C. § 1318(a) (2012).

52. N.Y. ENVTL. CONSERV. § 17-0815(8) (McKinney 2015).

53. 33 U.S.C. §§ 1251(e), 1342(a)(1), 1342(j) (2012); *Nat. Res. Def. Council III*, 25 N.Y.3d 373, 390–97, 34 N.E.3d 782, 789–96, 213 N.Y.S.3d 272, 280–86 (2015).

54. *Nat. Res. Def. Council I*, 35 Misc.3d 652, 660, 940 N.Y.S.2d 437, 443 (Sup. Ct. Westchester Cty. 2012).

55. *Id*. (citing Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832 (9th Cir. 2003)).

56. *Id.* at 660, 940 N.Y.S.2d at 443 (quoting 33 U.S.C. § 1342(p)(3)(B)(iii) (2012)).

57. *Id.* at 666, 940 N.Y.S.2d at 448 (citing *Envtl. Def. Ctr., Inc.*, 344 F.3d at 855).

58. *Envtl. Def. Ctr., Inc.*, 344 F.3d at 857.

59. *Nat. Res. Def. Council I*, 35 Misc.3d at 666, 940 N.Y.S.2d at 449. The court also observed that the Second Circuit used similar reasons to strike down an EPA regulation governing pollutant discharges from large concentrated animal farm operations in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 498–504 (2d Cir. 2005).

held that as to the first cause of action the 2010 MS4 permit violated both state and federal law because it impermissibly allowed the MS4 operators to engage in self-regulation rather than requiring prior review of the practices that a MS4 operator planned to use to reduce discharge of pollutants.[60] As to the third cause of action, the court held that the 2010 MS4 was not unlawful because it satisfied the statutory monitoring requirements through reporting and rendering obligations by covered entities.[61] As to the fourth cause of action, the court held that the permitting scheme omitted the public participation requirements in violation of the Clean Water Act.[62]

As to the second cause of action, the court held that "with one exception, the 2010 MS4 permit [did] not violate the statutory [requirement] that it insure compliance with applicable water quality standards."[63]

After some procedural maneuvers,[64] the Appellate Division, Second Department held that the General SPDES Permit did not violate the law regarding the requirement that the municipality reduce its pollutants to the "maximum extent practicable."[65] According to the court, the EPA did not define the term "maximum extent practicable" in a precise fashion;[66] rather, the EPA established minimum guidelines for small MS4s that the municipalities can implement through best management practices.[67] When the municipality notifies the regulatory authority that it intends to participate in the General Permit by filing an NOI with the authority, the DEC, as in this case, has the opportunity to review the best management practices identified by the municipality to ensure they are consistent with the requirement of reducing pollutants under the standard of "maximum extent practicable."[68] The General SPDES Permit, the court held, meets these requirements.[69] Although petitioner argued that the General SPDES Permit created a self-regulatory scheme because it does not require the DEC to review the

60. *Nat. Res. Def. Council I*, 35 Misc.3d at 668, 940 N.Y.S.2d at 449.

61. *Id.* at 673, 940 N.Y.S.2d at 452.

62. *Id.* at 673, 940 N.Y.S.2d at 453.

63. *Id.* at 668, 940 N.Y.S.2d at 449.

64. For a description of these activities, see Nat. Res. Def. Council, Inc. v. N.Y. State Dep't. of Envtl. Conservation (*Nat. Res. Def. Council II*), 120 A.D. 3d 1235, 1235, 994 N.Y.S.2d 125, 126 (2d. Dep't 2014), *aff'd*, 25 N.Y.3d 373, 34 N.E.3d 782, 13 N.Y.S.3d 272 (2015).

65. *Id.* at 1241, 994 N.Y.S.2d at 131.

66. *Id*.

67. *Id*.

68. *Id.* at 1241, 994 N.Y.S.2d at 131.

69. *Nat. Res. Def. Council II*, 120 A.D.3d at 1242, 994 N.Y.S.2d at 132.

Notice of Intent to ensure that the municipality has in fact selected procedures that will achieve a reduction in pollution. The court concluded that the period of public comment for a Notice of Intent, DEC ability to modify the terms of the General SPDES Permit, and require, if appropriate, a municipality to apply for an individual SPDES permit, as well as DEC's general enforcement authority regarding the statutory requirements, were sufficient to demonstrate that the municipality was not engaged in self-regulating[70] and that the standard of "maximum extent practicable" was applied through the General SPDES Permit requirements.[71]

The appellate court also held that the DEC did not act in an arbitrary and capricious fashion in limiting public hearings to situations when a new or modified General SPDES Permit was proposed because any requirements established in the General SPDES Permit through this process applied to all the municipalities covered by the General SPDES Permit.[72] The court agreed with the supreme court that the DEC's General SPDES Permit complied with the requirement of monitoring compliance with the water quality standards.[73] The court observed that the states were allowed discretion to develop programs to meet those standards,[74] and unlike the numerical limitations imposed by statute on industrial dischargers, the statutory standard of control on municipalities was "to the maximum extent practicable" because of the various types of pollutants and different circumstances of each MS4."[75] According to the court, the requirements of New York's General SPDES Permit were consistent with the more flexible standard for municipalities under federal law and thus entitled to deference.[76] Leave to appeal to the Court of Appeals was granted.[77]

The Court of Appeals affirmed the appellate division's decision, holding that the DEC's General SPDES permit process did not violate the Clean Water Act and that the DEC's decisions in developing and carrying out its review process were within its discretion.[78] After a

70. *Id.* at 1243, 994 N.Y.S.2d at 132–33.

71. *Id*. at 1244–45, 994 N.Y.S.2d at 133–34.

72. *Id.* at 1245, 994 N.Y.S.2d at 134.

73. *Id.* at 1246, 994 N.Y.S.2d at 135.

74. *Nat. Res. Def. Council II*, 120 A.D. 3d at 1246, 994 N.Y.S.2d at 135.

75. *Id.*

76. *Id.* at 1245, 994 N.Y.S.2d at 134.

77. Nat. Res. Def. Council, Inc. v. N.Y. Dep't of Envtl. Conservation, 24 N.Y.3d 914, 28 N.E.3d 36, 4 N.Y.S.3d 600 (2015) (granting leave to appeal).

78. *Nat. Res. Def. Council III*, 25 N.Y.3d 373, 380, 34 N.E.3d 782, 784, 13 N.Y.S.3d 272, 274 (2015).

recitation of the history of federal and state water pollution control, the Court of Appeals addressed the argument that the Ninth Circuit decision striking down the underlying EPA regulation was fatal to the DEC's 2012 General SPDES Permit.[79] The court pointed out that the Ninth Circuit decision was from a divided panel. It noted that the dissent had argued that under the deference owed to federal regulatory agencies, the EPA's determination to use a general permit system to administer the NPDES program and to treat NOIs as something other than a permit "require[d] a complicated weighing of policies (e.g., administrative streamlining vs. robust inquiry)," a balancing act agencies are designed to do and for which courts lack the resources or experience.[80] The Court of Appeals found favor with the dissent, adding that "the dissenting judge chided his colleagues for 'fail[ing] to give deference to EPA and impos[ing] the majority's own wishes instead.'"[81] The Court noted that the dissent explained that "where 'an agency promulgates rules after a deliberative process, it is incumbent upon [the federal courts] to respect the agency's decisions or else risk trivializing the function of that agency'; and that '[i]n this case, EPA made a permissible decision to create a general permit program supported by NOIs.'"[82] Moreover, the Court pointed out that the United State Court of Appeals for the Seventh Circuit in *Texas Independent Producers & Royalty Owners Ass'n v. EPA* reached a decision agreeing with the dissent in the Ninth Circuit case.[83] It held that the issuance of a general permit did not require a public hearing.[84] While the fact that the federal courts are split on the issue, it is, the Court observed, up to them "to sort this out."[85] But more importantly, "[u]nless and until EPA revises its 1999 regulations, DEC's SPDES general permitting program for small MS4s must comply with them (as it concededly does), and DEC need not go beyond the specifications of those regulations unless New York law requires it to do so."[86]

The Court rejected the argument for a more comprehensive

79. *Id.* at 390–92, 34 N.E.3d at 790–92, 13 N.Y.S.3d at 280–82.

80. *Id.* at 392, 34 N.E.3d at 792, 13 N.Y.S.3d at 282 (alteration in original) (quoting Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 881 (9th Cir. 2003) (Tallman, J., dissenting)).

81. *Id.*

82. *Id.* It seems like a charge that the majority would like to levy against the dissent in this case.

83. *Nat. Res. Def. Council III*, 25 N.Y.3d at 392, 34 N.E.3d at 792, 13 N.Y.S.3d at 282 (citing Tex. Ind. Producers & Royalty Owners Ass'n v. EPA, 410 F.3d 964 (7th Cir. 2005)).

84. *Id.* at 393, 34 N.E.3d at 793, 13 N.Y.S.3d at 283.

85. *Id.* at 394–95, 34 N.E.3d at 793–94, 13 N.Y.S.3d 283–84.

86. *Id.* at 395, 34 N.E.3d at 794, 13 N.Y.S.3d at 284.

regulatory review of the NOI; it observed that petitioners

> would like the DEC to treat an NOI as though it were, or at least more like, an application for an individual SPDES permit *to be issued* rather than what it really is—a request for coverage under a general SPDES permit that has *already been issued* pursuant to the full panoply of article 70 procedures [of the Environmental Conservation Law].[87]

To do that, the Court suggested, would reduce if not eliminate the conservation of agency resources that underlie the alternative approach of a general permit.[88] The Court concluded that the decisions of the DEC regarding the General DES Permit process is well within its discretion and expertise so that consistent with principles of administrative law, the Court should not second guess them.[89]

The dissent in the Court of Appeals believed that the DEC's scheme for MS4s violated statutory and regulatory requirements because it did not conduct a "pre-coverage substantive review of the MS4's intended stormwater discharge control measures" and it did not provide for the opportunity for a public hearing on a particular Notice of Intent and Sewer Water Maintenance Plan.[90] The dissent concluded that the DEC's failure to provide a pre-clearance review for compliance under federal and state law created a self-regulatory scheme which was impermissible even though it may result in administrative efficiency.[91] The existence of enforcement controls identified by the appellate division was irrelevant to the dissent because they come into play after the fact; there was no analysis of whether the controls adopted by the MS4 would achieve the legislative goal of pollution control to the maximum extent practicable.[92] As to the requirement of public participation, the dissent found that the NOI was a permit application in everything but its name, and to fail to provide an opportunity to request a hearing ignored the intent of public participation.[93]

At issue in *Carver v. State* was the relationship of the Fair Labor Standards Act (FLSA) to public assistance (PA) benefits, as interpreted

87. *Id.* at 396, 34 N.E.3d at 795, 13 N.Y.S.3d at 285 (emphasis in original).

88. *Nat. Res. Def. Council III*, 25 N.Y.3d at 397, 34 N.E.3d at 795–96, 13 N.Y.S.3d at 285–86.

89. *Id.* (citing Davis v. Mills, 98 N.Y.2d 120, 125, 778 N.E.2d 540, 543, 748 N.Y.S.2d 890, 893 (2002)).

90. *Id.* at 411, 34 N.E.3d at 805, 13 N.Y.S.3d at 295 (Rivera, J., dissenting in part).

91. *Nat. Res. Def. Council III*, 25 N.Y.3d. at 411–12, 34 N.E.3d 805–06, 13 N.Y.S.3d 295–96.

92. *Id.* at 417, 34 N.E.3d at 809, 13 N.Y.S.3d at 299.

93. *Id.* at 425, 34 N.E.3d at 815, 13 N.Y.S.3d at 305.

by the City of New York.[94] The petitioner participated in the Work Experience Program (WEP) of New York City's Human Resources Administration as a prerequisite to receiving public assistance benefits.[95] Carver worked thirty-five hours per week from 1993 to 2000, at which point he could no longer participate in the WEP.[96] During the seven years, Carver "received $176 every two weeks, along with food stamps" which "equaled the minimum wage for the amount of hours that he worked."[97]

In 2007, Carver won $10,000 in the New York State Lottery, half of which was appropriated by the government for reimbursement of public assistance benefits paid while Carver worked for the WEP.[98] Carver filed an Article 78 proceeding in April 2008, alleging that the state violated the FLSA by taking half of the winnings, because the money and food stamps he received in public assistance "equaled no more than the federal or New York State minimum wage."[99]

Initially, the state supreme court dismissed Carver's claims, finding that Carver was not an employee of WEP nor a federal protected worker, so he was not protected by federal minimum wage law.[100] However, the appellate division reinstated the FLSA claim, stating that "the State's interception of Carver's lottery prize winnings did not violate the state minimum wage law . . . but that it did violate the FLSA."[101] On remand, the lower court found for Carver, directing the return of his $5000 lottery winnings.[102]

The government appealed the appellate division's order on the sole issue of whether Carver's participation in the WEP as a prerequisite to receiving public assistance benefits entitled him to minimum wages under the FLSA.[103] As the FLSA is only applicable when the claimant is an employee, the Court applied the "economic reality" test to determine

94. *Carver v. State*, 26 N.Y.3d 272, 278, 44 N.E.3d 154, 157, 23 N.Y.S.3d 78, 82 (2015).

95. *Id.* at 276, 44 N.E.3d at 156, 23 N.Y.S.3d at 81.

96. *Id.*

97. *Id.*

98. *Id.* Apparently, Carver was required to pay taxes on the full amount even though he only received half the winnings. *See Carver*, 26 N.Y.3d at 285, 44 N.E.3d at 162, 23 N.Y.S.3d at 87.

99. *Id.* at 276–77, 44 N.E.3d at 156, 23 N.Y.S.3d at 81.

100. *Id. at* 277, 44 N.E.3d at 157, 23 N.Y.S.3d at 82.

101. *Id.* (citing Carver v. State, 87 A.D.3d 25, 29, 926 N.Y.S.2d 559 (2d Dep't 2011) (appellate division decision)).

102. *Id.* at 278, 44 N.E.3d at 157, 23 N.Y.S.3d at 82.

103. *Carver*, 26 N.Y.3d at 278, 44 N.E.3d at 157, 23 N.Y.S.3d at 82.

whether the City was Carver's employer.[104] Relevant factors in determining if the individual is an employee include: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[105] Applying the factors, the Court determined that the City was Carver's employer for FLSA purposes under the totality of the circumstances.[106]

The Court looked at federal cases applying the economic reality test, and concluded that its decision was consistent with Second Circuit and Supreme Court decisions applying the test, because Carver was "entirely dependent" on the benefits, and WEP workers qualify as employees under Title VII of the Civil Rights Act of 1964.[107] Accordingly, the Court held that federal minimum wage provisions of the FLSA protected Carver from losing his Lottery winnings to the State of New York.[108]

According to the dissent, applying the economic realities test to WEP workers thwarts the purpose of the FLSA, which is "focused primarily on rooting out abusive labor practices in traditional employment relationships established by commercial enterprises and their non-profit or governmental equivalents."[109] It asserted that turning directly to the economic realities test ignored the lack of legislative support for applying FLSA protections to public assistance or workfare recipients.[110] Finally, the dissent argued that even disregarding the lack of legislative intent, when "properly applied in light of the legislative scheme," the economic reality test showed that Carver was not an employee of the City under the FLSA, and therefore was not entitled to federal minimum wage protections.[111]

104. *Id.* at 279, 44 N.E.3d at 158, 23 N.Y.S.3d at 83.

105. *Id.* (quoting Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 139 (2d Cir. 1999)).

106. *Id.* at 280, 44 N.E.3d at 160, 23 N.Y.S.3d at 84. "The City had the power to hire and fire WEP workers . . . . [T]he City and its WEP agencies supervise and control the work schedule of the workers. Furthermore, the City and its agencies, such as HRA, maintain the employment records of the WEP workers." *Id.* at 293, 44 N.E.3d at 168, 23 N.Y.S.3d at 93.

107. *Carver*, 26 N.Y.3d at 281–83, 44 N.E.3d at 160, 23 N.Y.S.3d at 84–86; s*ee* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 301 (1985) (finding that being "entirely dependent" was a relevant factor in the economic reality test); United States v. City of New York, 359 F.3d 83, 86 (2d Cir. 2004) (determining that WEP recipients are employees within the meaning of Title VII of the Civil Rights Acts of 1964).

108. *Carver*, 26 N.Y.3d at 285, 44 N.E.3d at 162, 23 N.Y.S.3d at 87.

109. *Id.* at 287, 44 N.E.3d at 164, 23 N.Y.S.3d at 89 (Abdus-Salaam, J., dissenting).

110. *Id.* at 286, 44 N.E.3d at 163, 23 N.Y.S.3d at 88.

111. *Id.* at 291, 44 N.E.3d at 166, 23 N.Y.S.3d at 91.

C. Arbitrary Administrative Action

It is axiomatic that a governmental agency cannot act in an arbitrary and capricious manner.[112] The test is whether a rational basis exists for administrative orders other than those made after quasi-judicial hearings required by statute or law.[113] If there is evidence to support an agency's action, it will be upheld.[114]

The issue before the Court of Appeals in *Hawkins v. Berlin* was whether a determination of the New York Office of Temporary and Disability Assistance (OTDA) that no excess child support payments were owing to the petitioner-recipient of public assistance was arbitrary and capricious in light of its interpretation of the governing statute.[115]

Section 158(5) of the Social Services Law provides that an:

> Application for or receipt of safety net assistance shall operate as an assignment to the state and the social services district concerned of any rights to support that accrue during the period that a family receives safety net assistance from any other person as such applicant or recipient may have either on their own behalf or on behalf of any other family member for whom the applicant or recipient is applying for or receiving assistance. . . .[116]

When public assistance comes to an end, the assignment of current and future support terminates; however, the district may continue to seek payment of any arrears up to the amount of the public assistance received.[117] Any arrears collected that exceed the amount of public assistance belong to the individual.[118]

The petitioner had begun receiving public assistance through the New York City Human Resources Administration (HRA) in December 1989.[119] When her son Michael was born in May 1990, he was added to her case.[120] At that time, pursuant to section 158(5) of the Social Services Law, she assigned to HRA her right to child support from

112. *See* BORCHERS & MARKELL, *supra* note 23.

113. *Id.* (citing Pell v. Bd. of Educ., 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974)).

114. *See id.*; *see, e.g.*, Heintz v. Brown, 80 N.Y.2d 998, 1001, 607 N.E.2d 799, 801, 592 N.Y.S.2d 652, 654 (1992) (citing N.Y. SOC. SERV. LAW § 111–c(1), (2)(a) (McKinney Supp. 2016)).

115. (*Hawkins III*), 26 N.Y.3d 417, 421, 44 N.E.3d 907, 909, 23 N.Y.S.3d 609, 611 (2015).

116. N.Y. SOC. SERV. § 158(5) (McKinney Supp. 2016).

117. *Id*.

118. *Hawkins III*, 26 N.Y.3d at 422, 44 N.E.3d at 909–10, 23 N.Y.S.3d at 611–12 (citing N.Y. COMP. CODES R. & REGS. tit. 18, § 347.13(f)(3) (2015)).

119. *Id*. at 420, 44 N.E.3d at 908, 23 N.Y.S.3d at 610.

120. *Id.*

Michael's father.[121] HRA thereafter obtained a court order for support payments by Michael's father.[122] When the petitioner's second child was born in 2000, he also was added to her case and HRA obtained a separate court order for the payment of child support by his father.[123]

In 2007, the Social Security Administration (SSA) determined that her first child was entitled to Social Security Supplemental Income (SSI)[124] retroactive to September 2005.[125] The child's receipt of SSI made him ineligible for public assistance, so the district discontinued assistance for him in January 2007,[126] and the SSA also reimbursed the City for the payments made on behalf of Michael while his SSI application was pending.[127] The City however continued to collect child support arrears that had accrued prior to 2007.[128] The petitioner's case was closed in February 2007;[129] Michael was a part of the petitioner's case from his birth until 2007.[130] Her second child was on the petitioner's public assistance case from the date of his birth in 2000 through February 28, 2007.[131] Both she and her children received further assistance off and on until August 2011.[132]

In 2011, petitioner asked for and received a "first-level desk review" by HRA regarding whether the City owed her any excess child support for the period from September 2005 to August 2011.[133] The

121. *Hawkins v. Berlin* (*Hawkins II*), 118 A.D.3d 496, 496, 998 N.Y.S.2d 39, 40 (1st Dep't 2014).

122. *Id.*

123. *Id.* at 497, 998 N.Y.S.2d at 40.

124. Supplemental Security Income is a federal program that pays monthly benefits to individuals who are over the age of sixty-five, or to any individuals including children who are blind or have a disability, and have little or no income. *Supplemental Security Income,* SOC. SECURITY ADMIN., https://www.ssa.gov/ssi/ (last visited Apr. 19, 2016).

125. *Hawkins II*, 118 A.D.3d at 497, 998 N.Y.S.2d at 40.

126. *Hawkins III*, 26 N.Y.3d 417, 420, 44 N.E.3d 907, 908–09, 23 N.Y.S.3d 609, 610–11 (2015).

127. *Hawkins II*, 118 A.D.3d at 497, 998 N.Y.S.2d at 40.

128. Hawkins v. Berlin (*Hawkins I*), No. 400782/12, 2012 N.Y. Slip. Op. 32922(U), at 3 (Sup. Ct. N.Y. Cty. 2012). The city was also reimbursed by the SSA for the public assistance it had paid on behalf of the child while the SSI application was pending. *Hawkins II*, 118 A.D.3d at 497, 998 N.Y.S.2d at 40.

129. *Hawkins II*, 118 A.D.3d at 496, 998 N.Y.S.2d at 40. However, she reapplied for and received PA for a period that ended in "December 2011 when she was determined to be eligible for SSI." *Id.* "On December 13, 2011, SSA reimbursed HRA for interim assistance provided for petitioner from September 2010 through December 2011." *Id.*

130. *Id.* at 497, 998 N.Y.S.2d at 40 (for a period in 2009).

131. *Id.* (for a short period in 2009 and then from November 1, 2009 through the date of the petition).

132. *Hawkins II*, 118 A.D.3d at 497, 998 N.Y.S.2d at 40.

133. *Hawkins III*, 26 N.Y.3d 417, 420, 44 N.E.3d 907, 909, 23 N.Y.S.3d 609, 611 (2015). "A *desk review (DR)* is an accounting of the collections and disbursements made on

City calculated that no excess support payments were owed to her and provided her with the basis for its calculation.[134] The fact that public assistance was provided to the family off and on during that period of time was relevant to respondent's determination that there was no excess amount of child support payments.[135]

The petitioner took the matter to the next stage of administrative review at OTDA, a so-called "second level desk review."[136]

> Petitioner asserted that "any support collected . . . for Michael Jackson for the period from September 2005 through August 2011 should have been paid over to [petitioner] since Michael Jackson was not in receipt of public assistance since January, 2007, and any public assistance provided for his needs for September 2005 through January, 2007 was reimbursed from retroactive SSI paid on his behalf in September, 2007."[137]

After its review, OTDA confirmed the City's determination.[138] While the issue would seem to involve a straight forward arithmetic calculation,[139] the petitioner commenced an Article 78 proceeding to annul the determination.[140] The supreme court, noting that "[t]he parties are not in dispute that under [section] 158(5), petitioner's rights to child support are permanently assigned to the state and local social services district as long as the support payments received do not exceed the total amount of assistance paid to the family as of the date the family no

---

behalf of a current or former recipient of public assistance (PA) who is or was receiving child support enforcement services (recipient)." 18 N.Y. COMP. CODES R. & REG. tit. 18, § 347.25(a)(1) (2015). In the case of a family, such as petitioner's, that has ceased receiving aid to dependent children, a desk review may be sought where it is claimed that the amount of child support collected exceeded the amount of unreimbursed past assistance. *See* 18 NYCRR §§ 347.13(f)(3), 347.25(a)(2) (2015); *Hawkins II*, 118 A.D.3d 496, 497 988 N.Y.S.2d 39, 41 (1st Dep't 2014).

134. *Hawkins III,* 26 N.Y.3d at 420, 44 N.E.3d at 909, 23 N.Y.S.3d at 611.

135. *See id.*

136. *Hawkins II*, 118 A.D.3d at 497–98, 988 N.Y.S.2d at 41 (citing 18 NYCRR § 347.25(g) (2015)).

137. *Id.*

138. *Id.*

139. *Id.*

> In the determination that is under review, OTDA confirmed HRA's first-level desk review determination on the basis of OTDA's calculation of cash assistance received under petitioner's case number in the amount of $112,588.83 for the duration of her case (Dec. 1, 1989 through Aug. 1, 2011), minus the $1,232.50 received from SSA as reimbursement of interim assistance, and minus $57,524.00 from assigned child support, leaving $53,832.33 in unreimbursed assistance. OTDA's notification was accompanied by copies of the relevant worksheets.

Id.

140. *Id.*

longer receives public assistance," [141] dismissed the proceeding.[142] The petitioner appealed.[143]

At the appellate division, petitioner argued that she was entitled to any support arrears collected by HRA through January 2007 because HRA had been reimbursed for the assistance provided from 2005 through January 2007 from retroactive payments SSI paid on his behalf in September 2007.[144] The court noted that the petitioner acknowledged that the "[r]ights to child support are *permanently* assigned to the state and social services district as long as the support payments received do not exceed the *total amount of assistance paid to the family* as of the date the family no longer receives public assistance."[145] It concluded that the OTDA decision was not arbitrary and capricious because "the total amount of PA paid to petitioner and her family exceeded the amount of child support collected by HRA when her PA case closed in February 2007."[146] The dissent argued that the case should have been remanded back to the agency to recalculate the benefits paid to the family after 2007 by excluding the son, Michael, as a member of the household because he was receiving SSI.[147]

By the time the petitioner's case arrived at the Court of Appeals as of right,[148] it had sorted itself into three arguments: (1) she was entitled to any collected arrears because her assignment of the right to child support for Michael had terminated in 2005 when the SSA had determined him to be eligible for SSI retroactively; (2) she was entitled to any payments collected during the period of 2005 to 2007 because the City had been reimbursed by the SSA for PA benefits paid on Michael's behalf during that time; and (3) she was entitled to any support collected from Michael's father for any period after 2007 when Michael was no longer considered part of the petitioner's family for

141. *Hawkins I*, No. 400782/12, 2012 N.Y. Slip Op. 32922(U), at 5 (Sup. Ct. N.Y. Cty. 2012).

142. *Id*.

143. *Hawkins II*, 118 A.D.3d at 496, 988 N.Y.S.2d at 40.

144. *Id.* at 498, N.Y.S.2d at 41.

145. *Id.* at 499–500, 988 N.Y.S.2d at 42–43 (alteration in original) (emphasis added).

146. *Id.*

147. *Id.* at 500, 988 N.Y.S.2d at 50 (Gische, J., concurring in part and dissenting in part).

148. *Hawkins III,* 26 N.Y.3d 417, 421, 44 N.E.3d 907, 909, 23 N.Y.S.3d 609, 611 (2015) (citing N.Y. C.P.L.R. § 5601(a) (McKinney 2014) ("An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.")).

purposes of public assistance.[149]

The Court of Appeals held that the determination of the City and OTDA was not arbitrary and capricious.[150] As to the first argument, the Court held that the City's determination that her son Michael was no longer eligible for PA did not occur until January 2007, and that determination rather than the SSA's determination was the relevant one.[151] As to the second argument, that excess support payments were due her because the City had been reimbursed by the SSA for the PA furnished by the City, the Court held that the OTDA determination was correct because the public assistance furnished to the entire family far exceeded the SSA's reimbursement amount which had been properly credited to the family's account.[152] The Court did not address the third argument: that the City's right to collect and attribute support arrears to assistance paid to the family after Michael was no longer part of the family.[153] Instead, it pointed out that in any event during the period of 1989 to 2007, the family collected more in public assistance than the City recouped from child support arrears.[154]

The partially dissenting opinion noted what is obvious from the concluding paragraph of the majority opinion: the majority chose to ignore a question of statutory construction, namely whether an individual can be included in a household for purposes of determining the amount of public assistance even if the individual is not receiving public assistance.[155] The partially dissenting opinion argued that a failure to address the issue left petitioner at risk of future erroneous determinations.[156]

The denial of an application to be certified as a bus driver for the New York City Department of Education (DOE) was challenged as arbitrary and capricious in *Dempsey v. New York City Department of Education*.[157]

The petitioner informed DOE on his application that he had

149. *See generally id.*

150. *Id.*

151. *Id.* at 422, 44 N.E.3d at 910, 23 N.Y.S.3d at 611 (citing N.Y. SOC. SERV. LAW § 158(2) (McKinney Supp. 2016) (a person becomes ineligible for public assistance when he begins "receiving federal supplemental security income.").

152. *Id.* at 423, 44 N.E.3d at 907, 23 N.Y.S.3d at 612.

153. *Hawkins III*, 26 N.Y.3d at 423, 44 N.E.3d at 910, 23 N.Y.S.3d at 613.

154. *Id.*

155. *Id.* at 26 N.Y.3d at 424, 44 N.E.3d at 911, 23 N.Y.S.3d 609, 613.

156. *Id.*

157. (*Dempsey III*), 25 N.Y.3d 291, 294, 33 N.E.3d 485, 487, 11 N.Y.S.3d 529, 531 (2015).

worked as a school bus driver for pre-school children; had two drug-related felonies and three theft-related misdemeanors, one of which occurred when he was forty-one years old; that his criminal record involved a past drug addiction that he had overcome through rehabilitation; and that in 2002, he had received a certificate of relief from disabilities.[158] The DOE rejected his application, stating that the "petitioner had been 'convicted of an offense that render[ed] [him] unsuitable to perform duties associated with the transportation of school age children.'"[159] The bus company in turn terminated his employment.[160]

The petitioner[161] commenced an Article 78 proceeding alleging that DOE's decision to deny his application based on his criminal record was arbitrary and capricious.[162] The supreme court dismissed the petition.[163] The appellate division modified the trial court decision and remitted to the DOE to allow the petitioner "an opportunity to review the information upon which DOE's determinations were based and to submit statements and documents pursuant to Chancellor's Regulation C–105."[164] The regulation allows an applicant to submit written responses to any derogatory information that comes to light during the application process.[165] The petitioner provided several letters of recommendation from former employers as well as a copy of his 2002 certificate of relief from disabilities.[166] All this was to no avail; DOE denied his application again.[167] The DOE claimed that the petitioner was an unsuitable candidate to supervise children on a school bus because the serious nature of his criminal offenses as well as the fact that some

158. *Id.*

159. *Id.* at 294–95, 33 N.E.3d at 487, 11 N.Y.S.3d at 531 (alterations in original).

160. *Id.*

161. Along with several other similarly situated individuals. *Id.*

162. *Dempsey III*, 25 N.Y.3d at 301, 33 N.E.3d at 492, 11 N.Y.S.3d at 536.

163. *Id.* at 295, 33 N.E.3d at 487, 11 N.Y.S.3d at 531 (quoting Hasberry v. N.Y.C. Dep't of Educ., 78 A.D.3d 609, 609, 912 N.Y.S.2d 190, 190 (1st Dep't 2010)).

164. *Id.*

165. *Id.* at 295, 33 N.E.3d at 488, 11 N.Y.S.3d at 532. The regulation provides that "[i]f, prior to the conclusion of any background investigation, information of a derogatory nature is obtained which may result in denying the application for license, certification or employment, an applicant will be given an opportunity to review such information with [DOE's Office of Personnel Investigation] and to include in the investigatory file, any written statements or documents which refute or explain such information." *Id.* (citing N.Y.C. DEP'T OF EDUC., REGULATION OF THE CHANCELLOR C-105 § 2 (2003), http://docs.nycenet.edu/docushare/dsweb/Get/Document-55/C-105.pdf).

166. *Dempsey III*, 25 N.Y.3d at 295, 33 N.E.3d at 488, 11 N.Y.S.3d at 532 (alteration in original).

167. *Id.*

were committed when he was older reflected poorly on his "fitness and/or ability to perform school bus duties and responsibilities safe[l]y and reliably," and were counter to DOE's role "to protect the safety and welfare of school children, parents and school employees."[168]

Petitioner commenced a second Article 78 proceeding, alleging that "DOE had violated Correction Law section 752."[169] Executive Law section 296(15),[170] and Administrative Code of the City of New York section 8–107(10)[171] declare that a failure to hire an individual based on his or her criminal record is a discriminatory practice under certain circumstances, and section 753 of the Corrections Law describes the factors to be considered in evaluating a prior criminal conviction.[172] DOE denied the allegations, reiterating its original reasons and also pointing to the fact that the petitioner had committed one of the offenses at the mature age of forty-one.[173]

The supreme court granted the petition on the ground that,

> [T]he DOE had "failed to consider all eight factors as set forth in

168. *Id.* at 295–96, 33 N.E.3d at 488, 11 N.Y.S.3d at 532.

169. N.Y. CORRECT. LAW § 752 (McKinney 2015) ("No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of 'good moral character' when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless: (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.").

170. N.Y. EXEC. LAW § 296(15) (McKinney Supp. 2016) ("It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of 'good moral character' which is based upon his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-A of the correction law. Further, there shall be a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervising a hiring manager, if after learning about an applicant or employee's past criminal conviction history, such employer has evaluated the factors set forth in section seven hundred fifty-two of the correction law, and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee.").

171. N.Y.C., N.Y. ADMINISTRATIVE CODE § 8-107 (Lexis through Oct. 2015).

172. The petitioner sought annulment of the determination, declaratory judgment, and an order directing the DOE to approve his application, as well as damages. *Dempsey III*, 25 N.Y.3d at 296, 33 N.E.3d at 488, 11 N.Y.S.3d at 532.

173. *Id.* at 296–97, 33 N.E.3d at 488–89, 11 N.Y.S.3d at 532–33.

> section 753 of the Correction Law . . . Respondent only considered petitioner's criminal history when reviewing his application and failed to consider his extensive evidence of rehabilitation. Petitioner's last conviction was eighteen years ago and he obtained a certificate of relief from disabilities."[174]

The appellate division reversed, focusing in particular on the fact that "the offenses were not youthful indiscretions (he was [forty-one] years old), but were of a serious nature since each involved narcotics."[175] The appellate division concluded that the supreme court had "improperly reweighed the factors set forth in the Correction Law and substituted its own judgment,"[176] in violation of one of the core principles of administrative law.

The dissent at the appellate division viewed the DOE determination as arbitrary and capricious because the decision made

> no reference to the time that had elapsed since the last conviction (now [twenty] years), petitioner's lengthy experience successfully driving school buses with the very same children or type of children he would be driving and supervising were the license granted, or the extensive evidence of complete rehabilitation that petitioner furnished.[177]

This disagreement at the appellate division and the fact that it ended up in the Court of Appeals by grant of leave of the appellate division illustrates the difficulty of analyzing whether a decision is arbitrary and capricious.

In considering this case, the Court of Appeals focused on *Acosta v. New York City Department of Education*,[178] a previous decision of the Court upon which the petitioner relied because it involved a successful claim of discrimination in a hiring decision based on the petitioner's criminal history.[179] In *Acosta*, the applicant sought employment with a not-for-profit agency that provided contracted pre-school educational services for DOE.[180] The required clearance revealed that the applicant had been convicted of four counts of armed robbery when she was seventeen years old and a senior in high school and she served three years of a four-year sentence in prison, as a result of her participation in

174. *Id*. at 297, 33 N.E.3d at 489, 11 N.Y.S.3d at 533 (quoting Dempsey v. N.Y.C. Dep't of Educ. (*Dempsey I*), 2012 N.Y. Slip Op. 30552(U), at 4 (Sup. Ct. N.Y. Cty. 2012)).

175. *Id*. (quoting Dempsey v. N.Y.C. Dep't of Educ. (*Dempsey II*), 108 A.D.3d 454, 456, 969 N.Y.S.2d 452, 455 (1st Dep't 2013)).

176. *Id*. (quoting *Dempsey II*, 108 A.D.3d at 456, 969 N.Y.S.2d at 455).

177. *Dempsey II*, 108 A.D.3d at 460, 969 N.Y.S.2d at 458 (Freedman, J., dissenting).

178. 16 N.Y.3d 309, 946 N.E.2d 731, 921 N.Y.S.2d 633 (2011).

179. *Dempsey III*, 25 N.Y.3d at 300, 33 N.E.3d at 491, 11 N.Y.S.3d at 535.

180. *Acosta*, 16 N.Y.3d at 314, 946 N.E.2d at 734, 921 N.Y.S.2d at 634.

a series of robberies that she committed with her then-boyfriend.[181] DOE notified Ms. Acosta that her security clearance was denied because the "serious nature of [her] convictions . . . pose[d] an unreasonable risk to the safety and welfare of the school community."[182] The not-for-profit terminated her employment and Ms. Acosta commenced an Article 78 proceeding to annul the DOE's determination on the grounds that it was arbitrary and capricious.[183] The Court of Appeals in *Acosta* held that DOE had acted arbitrarily and capriciously in failing to consider all the factors listed in section 753 of the Corrections Law in determining whether "the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."[184] The eight factors are: (1) the public policy of encouraging employment of individuals with prior convictions; (2) the specific duties and responsibilities of the position sought; (3) any bearing the criminal offenses underlying the prior convictions would have on the individual's ability to carry out the responsibilities of the position sought; (4) the amount of time that has passed since the criminal conduct; (5) the individual's age when he or she committed the crimes; (6) the seriousness of the crimes; (7) the nature of references submitted by or on behalf of the individual; and (8) the employer's legitimate interest "in protecting property, and the safety and welfare of specific individuals or the general public."[185] Consideration of these factors is mandatory such that a failure to demonstrate their consideration is a failure to comply with the statute.[186] The Court found that DOE failed to consider all the factors including a praiseworthy letter of reference from her previous employer.[187] The Court in *Acosta* concluded that DOE's denial was a pro-forma decision based on her past conviction.[188] The Court in *Dempsey* found that the *Acosta* facts were distinguishable from those before it.[189] It observed that the DOE may have given "greater weight" to the convictions than

181. *Id.*

182. *Id*. at 318, 946 N.E.2d at 735, 921 N.Y.S.2d at 636.

183. *Id.*

184. *Id*. at 315, 946 N.E.2d at 733, 921 N.Y.S.2d at 634 (quoting N.Y. CORRECT. LAW § 752(2) (McKinney 2014)).

185. *Acosta*, 16 N.Y.3d at 315–16, 946 N.E.2d at 733, 921 N.Y.S.2d at 635 (citing N.Y. CORRECT. LAW § 751(1) (McKinney 2014)).

186. *Id.* at 316, 946 N.E.2d at 733, 921 N.Y.S.2d at 635 (citing Arrocha v. Bd. of Educ., 93 N.Y.2d 361, 364, 712 N.E.2d 669, 671, 690 N.Y.S.2d 503, 505 (1999)).

187. *Id.* at 318, 946 N.E.2d at 735, 921 N.Y.S.2d at 637.

188. *Id*. at 320, 946 N.E.2d at 736, 921 N.Y.S.2d at 638.

189. *Dempsey III*, 25 N.Y.3d at 294, 33 N.E.3d at 487, 11 N.Y.S.3d at 531.

to his accomplishments and that to undo the DOE decisions would be to engage in its own weighing of the factors, which is beyond its purview.[190]

The dissenting judge, who had authored the majority opinion in *Acosta,* argued that the *Dempsey* majority failed to review the case in the spirit of Article 23 of the Corrections Law for which rehabilitation and subsequent employment are critical to individuals who are convicted of crimes.[191] The dissent engaged in a close comparative analysis of the facts of *Acosta* and *Dempsey* and, just as the majority had in *Acosta*, concluded that DOE virtually ignored the facts of rehabilitation in favor of what the dissent called an implicit "bright line rule that anyone with an adult drug felony conviction, no matter what the circumstances, is unfit to be a school bus driver."[192]

D. Standing

In order for a party to challenge government action, an individual must show that he, she, or it has suffered an injury that is within the zone of interests that the governing statute is intended to protect.[193] Standing, as the Court noted in *Society of the Plastics Industry,* is a "threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria."[194]

A well-known case, *Society of the Plastics Industry, Inc. v. County of Suffolk* involved a challenge to a Nassau County law banning the use of certain plastics to protect the environment. The Court held that the plaintiff, a national trade organization representing the plastic industries, was required to show in a land use case that it would suffer an "injury that is in some ways different from that of the public at large."[195] The Court noted:

> In land use matters . . . we have long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large. . . .
>
> The doctrine grew out of a recognition that, while directly

190. *Id*. at 300, 33 N.E.3d at 491, 11 N.Y.S.3d at 535.

191. *Id*. at 302, 33 N.E.3d at 492, 11 N.Y.S.3d at 536 (Lippman, J., dissenting).

192. *Id*. at 305, 33 N.E.3d at 494, 11 N.Y.S.3d at 538 (Lippman, J., dissenting).

193. *Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 9, 339 N.E.2d 865, 867, 377 N.Y.S.2d 451, 454 (1975).

194. Soc'y of the Plastics Indus., Inc. v. Cty. of Suffolk, 77 N.Y.2d 761, 769, 573 N.E.2d 1034, 1038, 570 N.Y.S.2d 778, 782 (1991).

195. *Id.* at 774, 573 N.E.2d at 1041, 570 N.Y.S.2d at 785.

> impacting particular sites, governmental action affecting land use in another sense may aggrieve a much broader community."[196]

In *Save the Pine Bush, Inc. v. Common Council*, a case following *Society of the Plastics Industry*, the Court held that the petitioners, who alleged "repeated" use of the Pine Bush, demonstrated standing "by showing that the threatened harm of which petitioners complain will affect them differently from 'the public at large.'"[197]

It has been argued that the subsequent judicial interpretation of this requirement of a special harm in land uses cases has added a third prong to the requirement of standing which in turn has effectively closed the court house doors to many plaintiffs in such cases.[198] In *Sierra Club v. Village of Painted Post,* the Court took the "opportunity to elucidate and further address the 'special injury' requirement of standing,"[199] seemingly an acknowledgment of this concern.

The case involved a State Environmental Quality Review (SEQRA) challenge to the determination of a municipality, the Village of Painted Post, regarding the sale of excess municipal water.[200] The Village had entered into a bulk water agreement to sell excess water from the municipal water supply[201] to "SWEPI, LP, a subsidiary of Shell Oil Co., which operates gas wells in Tioga County, Pennsylvania."[202] In furtherance of this agreement, the Village decided to construct a "water transloading facility on . . . land . . . previously used for industrial purposes," and to have trains transport the water along an existing rail line that traversed the entire village.[203] The Village had concluded that

196. *Id.* at 774, 573 N.E.2d at 1041–42, 570 N.Y.S.2d at 785–86.

197. 13 N.Y.3d 297, 305, 918 N.E.2d 917, 921, 890 N.Y.S.2d 409, 409 (2009).

198. *See* ASS'N OF THE BAR OF N.Y.C., REPORT ON LEGISLATION: SEQRA QUALITY REVIEW DETERMINATIONS 1 (2006), http://www.nycbar.org/pdf/report/SEQRA_Quality_Review_Determinations.pdf; *see also* Albert K. Butzel & Ned Thimmayya, *The Tyranny of Plastics: How* Society of Plastics, Inc. v. County of Suffolk *Prevents New Yorkers From Protecting Their Environment and How They Could Be Liberated from Its Unreasonable Standing Requirements*, 32 PACE ENVTL. L. REV. 1, 4–5 (2015).

199. (*Painted Post II*), 26 N.Y.3d 301, 306, 43 N.E.3d 745, 746, 22 N.Y.S.3d 388, 389 (2015) (quoting *Soc'y of the Plastics Indus.*, 77 N.Y.2d at 778, 573 N.E.2d at 1044, 570 N.Y.S.2d at 788).

200. *About*, PAINTED POST NY, http://paintedpostny.com/about.php (last visited Apr. 19, 2016). The Village of Painted Post is located west of Corning, New York in the Finger Lakes region of the State. *Id.* Its name derives from a wooden post carved with the figures of twenty-eight men painted red first observed on territory owned by Native Americans. *Id.* No explanation has been discovered for the significance of the wooden post. *Id.*

201. The source of the village's water supply is the Corning aquifer which lies under "the confluence of the Cohocton, Tioga and Chemung Rivers." *Painted Post II*, 26 N.Y.3d at 306, 43 N.E.3d at 746, 22 N.Y.S.3d at 389.

202. *Id.*

203. *Id.* at 307, 43 N.E.3d at 746, 22 N.Y.S.3d at 389.

the bulk water agreement was not subject to SEQRA review as a Type II transaction because it did not involve a purchase or sale of "land, radioactive material, pesticides, herbicides, or other hazardous materials."[204] The Village also concluded that the lease agreement involving the construction of the water loading facility was likewise exempt from SEQRA review as a Type I transaction that would not have an adverse impact on the environment.[205]

Shortly after construction began on the loading facility, the petitioner associations and several village residents[206] commenced an Article 78 proceeding against the Village and SWEPI, LP as well as other respondents,[207] seeking to annul the transaction and to enjoin the respondents from engaging in such transactions unless and until they complied with all federal and state laws.[208]

The Village and the other respondents moved to dismiss the SEQRA cause of action on the grounds that the petitioners lacked standing to assert such a claim, and the other claims for lack of jurisdiction.[209] The supreme court held that the organizations had failed to allege the particularized injuries (different from those that the the public at large would suffer) required to confer standing.[210] The court concluded that the individual residents likewise failed to allege a specific harm different from the general public harm.[211] The only

204. *Id.* at n.1 (citing N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5(c)(25) (2015)).

205. *Id.*

206. The not-for-profit organization petitioners included the Sierra Club, People for a Healthy Environment, Inc., and Coalition to Protect New York. *Painted Post II*, 26 N.Y.3d at 308, 43 N.E.3d at 747, 22 N.Y.S.3d at 390.

207. The other respondents included Painted Post Development, L.L.C. and Wellsboro & Corning Railroad. *Id.* at 307, 43 N.E.3d at 747, 22 N.Y.S.3d at 390.

208. *Id.* at 307–08, 43 N.E.3d at 747, 22 N.Y.S.3d at 390. Respondents sought a court order:

> (1) annulling the Village's Type II determination for the water sale agreement; (2) annulling the Village's negative declaration for the lease of the rail loading facility; (3) annulling the Village's water sale agreement with SWEPI and the lease to Wellsboro; (4) requiring the Village to issue a positive declaration and complete an environmental impact statement for the totality of the plan rather than segmenting the water sale and the lease; (5) enjoining the Village from entering into the water sale and lease agreements until the Village complied with all federal and state laws; and (6) preliminarily enjoining any water shipments or work at the rail loading facility site until the Village complied with all federal and state laws.

Id.

209. Sierra Club v. Vill. of Painted Post (*Painted Post I*), No. 2012/00810, 2013 N.Y. Slip Op. 52342(U), at 1 (Sup. Ct. Steuben Cty. 2013).

210. *Id.* at 5 (citing Dental Soc'y of N.Y. v. Carey, 61 N.Y.2d 330, 333, 462 N.E.2d 362, 363, 474 N.Y.S.2d 262, 263 (1984)).

211. *Id.* at 7.

exception was one resident who lived less than a block from the proposed transloading facility and thus his complaint of rail noise was availing to show harm distinct from that suffered by the general public.[212] Because one resident had standing, the court addressed the merits.[213] The court annulled the village's Type II designation of the water sale agreement as arbitrary and capricious and annulled the designation of the lease agreement as a Type I as an improper segmenting of the SEQRA review of the lease from the water sale agreement.[214]

The appellate division reversed.[215] It dismissed the petition on the grounds that the individual resident lacked standing.[216] While it noted that the noise levels were within the zone of interests to be protected by SEQRA,[217] it concluded that the resident had failed to show that he suffered any injury distinct from other residents as the noise complaint involved a train which "moves throughout the entire Village, as opposed to the stationary noise of the transloading facility."[218]

Given its dismissal of the petition for lack of standing, the appellate division did not reach the merits of the SEQRA challenge.[219]

After reviewing the facts, the Court of Appeals got straight to the point. It stated that the appellate division had "applied an overly restrictive analysis of the requirement to show harm 'different from the public at large,' reasoning that because other Village residents also lived along the train line, [the petitioner/resident] did not suffer noise impacts different from his neighbors."[220] It then repeated its statement in *Society of the Plastics Industry* that the

> doctrine [of a need for a particularized harm different from the public at large] grew out of a recognition that, while directly impacting particular sites, governmental action affecting land use in another sense may aggrieve a much broader community. The location of a gas station may, for example, directly affect its immediate neighbors but indirectly affect traffic patterns, noise levels, air quality and aesthetics

212. *Id.* at 6 (quoting Soc'y of the Plastics Indus., Inc. v. Cty. of Suffolk, 77 N.Y.2d 761, 775, 573 N.E.2d 1043, 1042, 570 N.Y.S. 2d 778, 786 (1991)).

213. *Id.* at 9.

214. *Painted Post I*, No. 2012/00810, 2013 N.Y. Slip Op. 52342(U), at 13.

215. Sierra Club v. Vill. of Painted Post (*Painted Post II*), 115 A.D.3d 1310, 1310, 983 N.Y.S.2d 380, 382 (4th Dep't 2014).

216. *Id.* at 1312–13, 983 N.Y.S.2d at 383.

217. *Id.* at 1312, 983 N.Y.S.2d at 383.

218. *Id.* at 1312–13, 982 N.Y.S.2d at 383.

219. *Id.* at 1313, 982 N.Y.S.2d at 383.

220. *Painted Post III*, 26 N.Y.3d at 310, 43 N.E.3d at 749, 22 N.Y.S.3d at 392 (quoting *Painted Post II*, 115 A.D.3d at 1312, 983 N.Y.S.2d at 383).

> throughout a wide area.[221]

The example referred to in the quoted language, according to the Court, should not be interpreted to limit standing if "more than one resident is directly impacted by the noises created by increased train traffic."[222] If that were the case according to the court, standing would never be available.[223] "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."[224] The Court held that,

> as in *Save the Pine Bush*, [the petitioner] alleges injuries that are "real and different from the injury most members of the public face." Thus, his allegation about train noise caused by the increased train traffic keeping him awake at night, even without any express differentiation between the train noise running along the tracks and the noise from the transloading facility, would be sufficient to confer standing.[225]

E. Proper Remedy

When the petitioner in *Texeira v. Fischer* had successfully challenged his prison disciplinary proceeding on the ground that his constitutional right to call a witness was violated, the issue before the Court of Appeals was whether the disciplinary action should be expunged from his prison record or the matter should be remanded for a new hearing.[226]

"Petitioner was charged in a misbehavior report for violating prison disciplinary rules while an inmate at Attica Correctional Facility."[227] One of the witnesses that the petitioner requested be called, refused to testify.[228] Concerned that the witness may have been confused about the location of the incident, the petitioner requested that the hearing officer contact the witness again.[229] Although the hearing

221. *Id.* (quoting Soc'y of the Plastics Indus. Inc. v. Cty. of Suffolk, 77 N.Y.2d 761, 774–75, 573 N.E.2d 1034, 1042, 570 N.Y.S.2d 778, 786 (1991)).

222. *Id.* (emphasis omitted).

223. *Id.*

224. *Id.* at 311, 43 N.E.3d at 749, 22 N.Y.S.3d at 392 (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688 (1973)).

225. *Painted Post III*, 26 N.Y.3d at 311, 43 N.E.3d at 750, 22 N.Y.S.3d at 393 (quoting Save the Pine Bush, Inc. v. Common Council, 13 N.Y.3d 297, 306, 918 N.E.2d 917, 922, 890 N.Y.S.2d 405, 410 (2009)).

226. Texeira v. Fischer, 26 N.Y.3d 230, 232, 43 N.E.3d 358, 359, 22 N.Y.S.3d 148, 149 (2015).

227. *Id.*

228. *Id.*

229. *Id.*

officer agreed to do so, when the hearing reconvened, the witness did not testify and the hearing officer provided no explanation.[230] The hearing officer then determined that the petitioner was guilty on all charges.[231] The decision was affirmed by the Commissioner of the Department of Corrections and Community Supervision.[232]

The petitioner then commenced an Article 78 proceeding to annul the determination and have it stricken from his record.[233] The supreme court agreed to annul the determination and remitted the matter to DOCCS for a new hearing.[234] The petitioner appealed from that portion of the decision that remitted the matter to DOCCS.[235] The Appellate Division, Third Department held that the supreme court's decision was correct.[236] The petitioner then appealed to the Court of Appeals arguing that "expungement is the exclusive remedy for violation of an inmate's right to call a witness at a prison disciplinary hearing."[237]

The Court began by acknowledging that a prisoner has minimal due process rights under the Fourteenth Amendment of the Constitution, including the calling of a witness, so long as "permitting [the inmate] to do so [would] not be unduly hazardous to institutional safety or correctional goals," citing the United States Supreme Court in *Wolff v. McDonell*.[238] The Court also acknowledged that a prisoner's right to call witnesses is codified in the DOCCS regulations.[239] The regulations echo the requirement that allowing a prisoner to call a witness must not create a hazard, but also provides that "[i]f permission to call a witness is denied, the hearing officer shall give the inmate a written statement stating the reasons for the denial, including the specific threat to institutional safety or correctional goals presented."[240] The Court observed that in an earlier decision, an infringement on a prisoner's right to call a witness resulted in the expungement of the proceeding.[241]

230. *Id.*

231. *Texeira*, 26 N.Y.3d at 233, 43 N.E.3d at 359, 22 N.Y.S.3d at 149.

232. *Id.*

233. *Id.*

234. *Id.* at 233, 43 N.E.3d at 359–60, 22 N.Y.S.3d at 149–50.

235. *Id.* at 233, 43 N.E.3d at 360, 22 N.Y.S.3d at 150.

236. *Texeira*, 26 N.Y.3d at 233, 43 N.E.3d at 360, 22 N.Y.S.3d at 150.

237. *Id.*

238. *Id.* at 233–34, 43 N.E.3d at 360–61, 22 N.Y.S.3d at 150–51 (quoting Wolff v. McDonnell, 418 U.S. 539, 566 (1974)).

239. *Id.* at 234, 43 N.E.3d at 360, 22 N.Y.S.3d at 150 (citing N.Y. COMP. CODES R. & REGS. tit. 7, § 254.5(a) (2015)).

240. 7 NYCRR 254.5(a).

241. *Texeira*, 26 N.Y.3d at 234, 43 N.E.3d at 360, 22 N.Y.S.3d at 150 (citing Barnes v. LeFevre, 69 N.Y.2d 649, 650, 503 N.E.2d 1022, 1022, 511 N.Y.S.2d 591, 591 (1986)).

Although the Court did not review the facts of the earlier case of *Barnes v. LeFevre,* they present an interesting juxtaposition to the facts of *Texeira v. Fischer*.[242] In *Barnes*, the petitioner sought the expungement of the finding of guilt in a disciplinary proceeding on the ground that he was denied his right to call witnesses.[243] The petitioner wished to call a witness whose name he did not know, but when the witness was located, he refused to testify.[244] Prison officials offered no reason for his refusal or any description of their efforts to learn the reason, as required by the regulations in effect at the time.[245] The hearing continued and the petitioner was found guilty.[246] The Court of Appeals held the record of the hearing should be expunged because the prison officials violated the prison regulations by denying the petitioner the right to have a witness testify without any explanation.[247] Notwithstanding the precedent of *Barnes*, the Court separated the requirements of *Wolff* and the regulatory requirement of providing a statement of reasons, not mandated by *Wolff*, and concluded that it would be possible to satisfy the limitation in *Wolff*, namely that some hazard would be entailed in allowing the witness to testify, but violate the regulation by not providing a written statement of the reasons.[248] The Court concluded that while the prison authorities clearly violated the regulation, it was unclear whether they had violated the requirement of *Wolff*.[249] For that reason, the Court concluded that remittal was appropriate rather than expungement.[250] Recognizing that *Barnes* had not been overruled, the Court concluded that while the possibility of a

> convergence of the constitutional and regulatory commands [existed], . . . under these circumstances, where respondent clearly violated the regulation, but where the court cannot determine if respondent violated the due process requirements of *Wolff,* we are unpersuaded that any interplay between section 254.5 and the federal

242. *See generally Barnes*, 69 N.Y.2d 649, 503 N.E.2d 1022, 511 N.Y.S.2d 591.

243. *Id.* at 650, 503 N.E.2d at 1022, 511 N.Y.S.2d at 591–92.

244. *Id.* at 650, 503 N.E.2d at 1023, 511 N.Y.S.2d at 592.

245. *Id.*; 7 NYCRR 254.5(a) ("The inmate may call witnesses on his behalf provided their testimony is material, is not redundant, and doing so does not jeopardize institutional safety or correctional goals. If permission to call a witness is denied, the hearing officer shall give the inmate a written statement stating the reasons for the denial, including the specific threat to institutional safety or correctional goals presented.").

246. *Barnes*, 69 N.Y.2d at 650, 503 N.E.2d at 1023, 511 N.Y.S.2d at 592.

247. *Id.* (citing 7 NYCRR 254.5(a)).

248. Texeira v. Fischer, 26 N.Y.3d 230, 234–35, 43 N.E.3d 358, 360–61, 22 N.Y.S.3d 148, 150–51 (2015).

249. *Id.* at 235, 43 N.E.3d at 361, 22 N.Y.S.3d at 151.

250. *Id.* at 232, 43 N.E.3d at 359, 22 N.Y.S.3d at 149.

constitution mandates expungement.[251]

F. Statute of Limitations

The Court of Appeals in *Banos v. Rhea* consolidated two appellate court decisions holding that the termination of Section 8 benefits[252] are not final and binding unless the New York City Housing Authority (NYCHA) sends three separate letters notifying the recipient of termination.[253] The Court of Appeals reversed, holding that receipt of the final letter by itself establishes a final and binding decision to terminate housing benefits.[254]

Under what is known as the "*Williams* first partial consent judgment," NYCHA must follow a three-step process before terminating Section 8 benefits.[255] NYCHA must send a warning letter to the recipient "stating the basis for the termination and, if appropriate, seeking the participant's compliance," followed by a Notice of Termination (T-1 Letter), and finally a Notice of Default (T-3 Letter) "advising the participant that the rent subsidy will be terminated and the grounds therefor and affording the participant another opportunity to request a hearing."[256] Under *Williams*, the consent judgment becomes

251. *Id.* at 235, 43 N.E.3d at 361, 22 N.Y.S.3d at 151. The Third Department has consistently made the distinction. *See* Rivera v. Prack, 122 A.D.3d 1226, 1227, 995 N.Y.S.2d 862, 864 (3d Dep't 2014) (first citing Clark v. Fischer, 114 A.D.3d 1116, 1117, 981 N.Y.S.2d 187, 188–87 (3d Dep't 2014); Whitted v. N.Y. State Dep't of Correctional Servs., 100 A.D.3d 1303, 1304, 954 N.Y.S.2d 278, 279–80 (3d Dep't 2012); Jamison v. Fischer, 78 A.D.3d 1466, 1466, 913 N.Y.S.2d 350, 351 (3d Dep't 2010); then citing Texeira v. Fischer, 115 A.D. 3d 1137, 1138, 982 N.Y.S.2d 795, 796 (3d Dep't 2014), *aff'd on other grounds*, 26 N.Y.3d 230, 43 N.E.3d 358, 22 N.Y.S.3d 148 (2015); Saez v. Fischer, 113 A.D.3d 961, 978 N.Y.S.2d 473 (3d Dep't 2014); Griffin v. Prack, 110 A.D.3d 1287, 1287, 973 N.Y.S.2d 476, 476–77 (3d Dep't 2013); Moulton v. Fischer, 100 A.D.3d 1131, 1131, 952 N.Y.S.2d 922, 923 (3d Dep't 2012), *appeal dismissed*, 20 N.Y.3d 1021, 983 N.E.2d 1242, 960 N.Y.S.2d 57 (2013)) (stating that "[it has] held that constitutional violations related to a Hearing Officer's failure to investigate a witness's refusal to testify or the outright denial of the right to call a witness results in expungement . . . while regulatory violations of such right do not" and citing among other cases, its decision in *Texeira v. Fischer*)).

252. 42 U.S.C. § 1437f (2012). Under Section 8 of the Federal Housing Act, low-income individuals and families receive rent subsidies from the federal government which allow them to rent privately-owned housing. *Id.* § 1437f(a). The Section 8 program in New York City is administered by the New York City Housing Authority through a contract with the federal government. *See* Banos v. Rhea (*Banos II*), 25 N.Y.3d 266, 273, 33 N.E.3d 471, 473, 11 N.Y.S.3d 515, 517 (2015) (citing 42 U.S.C. § 1437f (2012)).

253. *Banos II*, 25 N.Y.3d at 274, 33 N.E.3d at 474, 11 N.Y.S.3d at 518.

254. *Id.* at 278, 33 N.E.3d at 476–77, 11 N.Y.S.3d at 520–21.

255. *Id.* at 273, 33 N.E.3d at 473, 11 N.Y.S.3d at 517 (citing Williams v. N.Y.C. Hous. Auth., 975 F. Supp. 317 (S.D.N.Y. 1997)).

256. *Id.* at 273, 33 N.E.3d at 473, 11 N.Y.S.3d at 517 (quoting Fair v. Finkel, 284 A.D.2d 126, 127–28, 727 N.Y.S.2d 401, 402–03 (1st Dep't 2001)). A T-2 letter is never

final and binding upon receipt of the T-3 letter, triggering the four-month statute of limitations during which the recipient may challenge the termination of benefits.[257]

In *Banos v. Rhea*, the plaintiff alleged that she did not receive any of the required letters before the termination of her Section 8 benefits on June 30, 2010.[258] However, she contacted NYCHA in June 2010, and received a letter the next month stating that her benefits had been terminated effective June 30, 2010.[259] The plaintiff commenced an Article 78 proceeding in February 2012 challenging termination of benefits, alleging violation of due process, and seeking reinstatement of her benefits.[260] NYCHA moved to dismiss the action as time-barred, because the four-month statute of limitations had run prior to commencement of the action.[261] The appellate division held that "the record shows that the NYCHA failed to mail to the petitioner either the warning letter or the notice of termination letter [T-1 letter]," and, therefore, the statute of limitations did not begin to run.[262] In *Dial v. Rhea*, the plaintiff also contended that she did not receive any of the required letters prior to termination of housing benefits effective October 31, 2007.[263] She sent letters to NYCHA in 2008 and 2010, seeking reinstatement of benefits, both of which NYCHA responded by declining to reinstate housing benefits.[264] The plaintiff commenced an Article 78 action challenging the termination in May 2011.[265] As in *Banos*, NYCHA moved to dismiss based on the statute of limitations, but the Court held that NYCHA failed to prove that the warning letter or T-1 letter were mailed, and as a result, the statute of limitations was not triggered.[266]

---

mentioned. *Id.*

257. *Banos II*, 25 N.Y.3d at 276–77, 33 N.E.3d at 475–76, 11 N.Y.S.3d at 519–20; *see generally Williams*, 975 F. Supp. at 317.

258. *Banos II*, 25 N.Y.3d at 274, 33 N.E.3d at 473, 11 N.Y.S.3d at 517.

259. *Id.* at 274, 33 N.E.3d at 473–74, 11 N.Y.S.3d at 517–18.

260. *Id.* at 274, 33 N.E.3d at 474, 11 N.Y.S.3d at 518.

261. *Id.*

262. Banos v. Rhea (*Banos I*), 11 A.D.3d 707, 708, 975 N.Y.S.2d 87, 88 (2d Dep't 2013); *Banos II*, 25 N.Y.3d at 274, 33 N.E.3d at 474, 11 N.Y.S.3d at 518. Specifically, the NYCHA failed to show they sent the plaintiff a warning letter or a T-1 letter, only providing proof that a T-3 letter had been mailed to the plaintiff. *Banos I*, 11 A.D.3d at 707–08, 975 N.Y.S.2d at 88; *Banos II*, 25 N.Y.3d at 274, 33 N.E.3d at 474, 11 N.Y.S.3d at 518.

263. *Banos II*, 25 N.Y.3d at 275, 33 N.E.3d at 474, 11 N.Y.S.3d at 518 (cases consolidated); *see Dial v. Rhea*, 111 A.D.3d 720, 974 N.Y.S.2d 516 (2d Dep't 2013), *rev'd and appeal dismissed*, *Banos II*, 25 N.Y.3d at 266, 33 N.E.3d at 471, 11 N.Y.S.3d at 515.

264. *Banos II*, 25 N.Y.3d at 275, 33 N.E.3d at 474, 11 N.Y.S.3d at 518

265. *Id*.

266. *Id.* at 275–76, 33 N.E.3d at 474–75, 11 N.Y.S.3d at 518–19.

The Court of Appeals found that the question presented by these cases "revolve[d] around the proper interpretation of the applicable provision of [the] consent judgment" in *Williams*.[267] According to NYCHA, paragraph 22(f) of the consent judgment "states that a determination is final and binding upon the tenant's receipt of the T-3 letter, without any mention of the warning letter or T-1 letter."[268] Therefore, according to NYCHA, they need only prove that a tenant received the T-3 letter and failed to commence an Article 78 proceeding within four months of its receipt.[269] Plaintiffs in *Banos* and *Dial* argued that paragraph 22(f) cannot be read by itself, but must be interpreted jointly with the rest of the judgment.[270] Under their interpretation, the T-3 letter is only final and binding if NYCHA also sent a warning letter and a T-1 letter.[271]

The Court of Appeals held that the plain language of 22(f) makes termination final and binding for purposes of the statute of limitations upon receipt of the T-3 letter, whether or not a warning letter and T-1 letter were sent.[272] However, while receipt of only the T-3 letter is sufficient to prevent challenges outside the statute of limitations, "termination of benefits [would] not [have been] upheld on the merits if timely challenged."[273] This means a terminated recipient may successfully challenge NYCHA's termination if NYCHA cannot prove it sent all three letters.[274] However, as neither the plaintiffs in *Banos* nor *Dial* challenged the termination before expiration of the statute of limitations, the Court reversed the lower courts and granted NYCHA's motions to dismiss in both cases.[275]

267. *Id.* at 276, 33 N.E.3d at 475, 11 N.Y.S.3d at 519.

268. *Id.* at 277, 33 N.E.3d at 476, 11 N.Y.S.3d at 520.

269. *Banos II*, 25 N.Y.3d at 277, 33 N.E.3d at 476, 11 N.Y.S.3d at 520.

270. *Id.*

271. *Id.* at 277–78, 33 N.E.3d at 476, 11 N.Y.S.3d at 520.

272. *Id.* at 279, 33 N.E.3d at 478, 11 N.Y.S.3d at 522 (citing Parks v. N.Y.C. Hous. Auth., 100 A.D.3d 407, 408, 952 N.Y.S.2d 892, 892 (1st Dep't 2012); Lopez v. N.Y.C. Hous. Auth., 93 A.D.3d 448, 448–49, 939 N.Y.S.2d 846, 846 (1st Dep't 2012); Fernandez v. NYCHA Law Dep't, 284 A.D.2d 202, 726 N.Y.S.2d 266, 267 (1st Dep't 2001)) ("[W]e hold that the timeliness of a proceeding against NYCHA challenging a termination of Section 8 benefits is measured from the tenant's receipt of the T-3 letter, regardless of whether NYCHA proves that it mailed the other two notices.").

273. *Id.* at 278, 33 N.E.3d at 477, 11 N.Y.S.3d at 521.

274. *See Banos II*, 25 N.Y.3d at 278–79, 33 N.E.3d at 477, 11 N.Y.S.3d at 521 ("While the consent judgment provides the added protection of two additional notices—*without which a termination of benefits will not be upheld on the merits if timely challenged*—the T-3 letter contains sufficient information to put tenants on notice of the termination and their rights with respect thereto . . . ." (emphasis added)).

275. *Id.* at 281, 33 N.E.3d at 479, 11 N.Y.S.3d at 523.

The dissent argued that the purpose of *Williams* was to provide standardized "termination of Section 8 benefits through a trinity of notices."[276] The consent judgment refers to the written warnings as a single unit, suggesting that all three notices must be sent to accomplish the purpose of the consent judgment.[277] According to the dissent, the majority's ruling requires the unsophisticated and elderly to interpret the T-3 notice without sufficient warning—"a tack that is simply contrary to the notice and mailing procedure of the consent judgment."[278]

II. EXECUTIVE BRANCH

Several noteworthy executive branch initiatives were undertaken in 2015.

A. Department of Corrections and Community Supervision

New York and North Carolina are the only remaining states to process as adults individuals who are sixteen and seventeen years of age who are alleged to have committed crimes.[279] However, research has shown that treating these youths as adults can adversely affect them, with suicide and a high rate of recidivism at the top of the list.[280] A large number of these individuals are African Americans and Latinos.[281] The proposal to raise the age of criminal responsibility to eighteen originated in New York with a proposal by the Honorable Jonathan Lippman.[282] The proposal was criticized as too narrow and ultimately did not move in the legislature.[283] In 2014, a commission created by Governor Andrew Cuomo[284] issued a series of recommendations[285]

276. *Id.* at 288, 33 N.E.3d at 483, 11 N.Y.S.3d at 527 (Fahey, J., dissenting).

277. *Id.* at 288, 33 N.E.3d at 483–84, 11 N.Y.S.3d at 527–28 (Fahey, J., dissenting).

278. *Id.* at 288, 33 N.E.3d at 484, 11 N.Y.S.3d at 528 (Fahey, J., dissenting).

279. *Get the Facts*, RAISE THE AGE NY, http://raisetheageny.com/get-the-facts (last visited Apr. 19, 2016).

280. *Id.* Other consequences include high risk of sexual assault, assault by prisoner guards, and placement in solitary confinement. *Id.*

281. *Id.*

282. At that time, Judge Lippman was the Chief Judge of the State of New York. He resigned on December 31, 2015, having reached the mandatory retirement age of seventy. James C. McKinley, Jr., *New York's Chief Judge Leaving a Legacy of Reforms Inspired by Social Justice,* N.Y.TIMES (Dec. 29, 2015), http://www.nytimes.com/2015/12/30/nyregion/jonathanlippmansteppingdownaschiefjudgeofnewyorkcourtofappeals.html?_r=0.

283. *Legislative Memo: Regarding Legislation to Raise the Age*, N.Y. CIV. LIBERTIES UNION (Mar. 26, 2015), http://www.nyclu.org/content/regarding-legislation-raise-age.

284. N.Y. Exec. Order No. 131, N.Y. COMP. CODES R. & REGS. tit. 9, § 8.131 (2014).

285. GOVERNOR'S COMM'N ON YOUTH, PUB. SAFETY & JUSTICE, FINAL REPORT OF THE GOVERNOR'S COMMISSION ON YOUTH, PUBLIC SAFETY AND JUSTICE: RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM IN NEW YORK STATE 150–53 (2014),

which led to a legislative proposal.[286] The Raise the Age legislation[287] would "include a comprehensive set of reforms to accomplish this goal, from removing young people from adult facilities to creating support services designed to reduce recidivism and give young people who offend a second chance."[288] Because the Legislature was unable to reach an agreement on this legislation, the Governor issued an executive order to address on an interim basis the goals expressed in the legislation.[289] The executive order directs DOCCS, pursuant to its own statutory authority under various sections of the Corrections Law[290] to work in collaboration with the Office of Children and Family Services (OCFS)[291] and the Office of Mental Health, to move "female and medium- and minimum-security classified male youth separately from adult prisoners who are age [eighteen] or older" into a separate facility and to create programs and services to address the particular issues facing such youth.[292]

https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ReportofCommissionon YouthPublicSafetyandJustice_0.pdf. The Members of the Commission are: Jeremy M. Creelan, Jenner & Block, Partner (Co-Chair); Soffiyah Elijah, Correctional Association of New York, Executive Director (Co-Chair); Juan Cartagena, Latino-Justice PRLDEF, President & General Counsel; Joel Copperman, CASES, CEO & President; Janet DiFiore, District Attorney, Westchester County; Elizabeth Glazer, New York City Mayor's Office of Criminal Justice, Director; Michael Hardy, National Action Network, Executive Vice President & General Counsel; Melanie Hartzog, Children's Defense Fund-New York, Executive Director; Steven Krokoff, Chief of Police, City of Albany; Joseph Mancini, Director of Probation, Schenectady County; Hon. Lawrence K. Marks, New York State Unified Court System, First Deputy Chief Administrative Judge; Anthony J. Picente, Jr., County Executive, Oneida County; Allen Riley, Sheriff, Madison County; Elaine Spaull, Center for Youth, Executive Director, and Rochester City Council Member; Emily Tow Jackson, The Tow Foundation, Executive Director; Cyrus R. Vance, Jr., District Attorney, New York County; Jacquelyn Greene, Commission on Youth, Public Safety and Justice, Executive Director. *Id.* at iv.

286. N.Y. CIV. LIBERTIES UNION, *supra* note 283.

287. Act of December 18, 2015, ch. 56, Part J, 2015 McKinney's Sess. Laws of N.Y. (Westlaw through 2016).

288. N.Y. CIV. LIBERTIES UNION, *supra* note 283.

289. N.Y. Exec. Order No. 150, 9 NYCCRR 8.150 (2015).

290. *Id.* (first citing N.Y. CORRECT. LAW § 70(2) (McKinney 2014) (creating and maintaining any type pf program not inconsistent with existing law), then citing N.Y. CORRECT. LAW § 70(3) (McKinney 2014) (creating and maintaining new corrections facilities), and then citing N.Y. CORRECT. LAW § 70(8) (McKinney 2014) (contracting for professional services)).

291. *Id.* (citing N.Y. EXEC. LAW § 501 (McKinney 2013) (operating or contracting programs for the treatment of youth)).

292. *Id.*

B. Division of Alcohol Beverage Control

In December 2009, the New York State Law Revision Commission,[293] issued its *Final Report on the Alcohol Beverage Control Law and its Administration*.[294] Although the Commission concluded that the Alcohol Beverage Control Law, which had been enacted in 1934 in the wake of the end of Prohibition, was fundamentally sound, it also found many of its provisions to be outdated, overly complex and confusing.[295] The Commission made a series of recommendations to update the law and clarify its provisions.[296] The State Liquor Authority made many changes that could be accomplished pursuant to its administrative authority, and the Legislature made several changes regarding the policies guiding the law. For example, 2014 N.Y. Laws chapter 406 expands the regulatory policy of the state to include "to the extent possible, supporting economic growth, job development, and the state's alcoholic beverage production industries"[297] and 2014 N.Y. Laws chapter 431 affords local manufacturers of beverage alcohol greater marketing opportunities.[298] Both laws are based on the Commission's 2009 Final Report.[299] In 2015, Governor Cuomo convened a working group charged with making recommendations to modernize the Alcoholic Beverage Control Law.[300] The group has held several meetings,[301] and using the

293. The Commission is charged by statute with among other activities, the duty to "examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms." N.Y. LEGIS. LAW § 72(1) (McKinney 2015).

294. The report is available at the Commission's website. N.Y. STATE LAW REVISION COMM'N, THE NEW YORK STATE LAW REVIEW COMMISSION REPORT ON THE ALCOHOLIC BEVERAGE CONTROL LAW AND ITS ADMINISTRATION (2009), https://nyslawrevision.files.wordpress.com/2014/07/12-15-09-report-on-abc-law.pdf.

295. *Id.* at 7–31.

296. *Id.* at 24–31.

297. N.Y. ALCO. BEV. CONT. § 2 (McKinney Supp. 2016); *see also* Act of Oct. 21, 2014, ch. 406, § 2, 2014 N.Y. Laws 1183, 1183.

298. Act of Nov. 13, 2014, ch. 431, 2014 N.Y. Laws 1207; 2014 *McKinney's Sess. Law News LM 431* (legislative memorandum).

299. 2014 *McKinney's Sess. Law News LM 406* (legislative memorandum); 2014 *McKinney's Sess. Law News LM 431* (legislative memorandum).

300. Press Release, N.Y. Governor's Press Office, Governor Cuomo Announces New Industry Working Group to Modernize New York Alcohol Laws (Nov. 9, 2015), https://www.governor.ny.gov/news/governor-cuomo-announces-new-industry-working-group-modernize-new-york-alcohol-laws. The members of the group include Rose Mary Bailly, Executive Director, New York State Law Revision Commission; Robert Bookman, Counsel, New York City Hospitality Alliance; Jean Marie Cho, General Counsel at William Grant & Sons; Keven Danow, Partner, Danow, McMullan & Panoff; Lester Eber, Vice President, Southern Wine and Spirits; Tom Edwards, President, New York State Liquor Store Association; Ralph Erenzo, Founder and Master Distiller, Tuthilltown Spirits; Steve

Commission's 2009 Final Report as a foundation, is developing a set of recommendations about the statute.[302] Its final recommendations are anticipated in early 2016.[303] Based on the recommendations of the Working Group, the Governor plans to introduce legislation in 2016.[304]

C. Freedom of Information Law (FOIL) Access and Transparency

After vetoing two bills which would have attempted to address issues regarding enforcement of FOIL,[305] the Governor issued Executive Order 149 regarding the FOIL appeals process directing "all state agencies to adhere to the spirit of Assembly Bill 114, and move post-haste in filing a notice of appeal, settling the record on appeal, and filing a brief, within 60 days, absent extremely complex matters or extraordinary circumstances outside agency control."[306] The Governor expressed his intention to introduce legislation that would address the perceived flaws of the recent legislation.[307] Stay tuned.[308]

Harris, President, New York State Beer Wholesalers Association; Noreen Healey, Counsel, Phillips Nizer; Steve Hindy, Co-Founder, Brooklyn Brewery; Mark Koslowe, Managing Partner, Buchman Law Firm; Nick Matt, Chairman and CEO, F.X. Matt Brewing Company; Michael Rosen, President and CEO, Food Industry Alliance of New York State; Ebenezer Smith, District Manager, Community Board 12, Manhattan; Jim Trezise, President, New York Wine & Grape Foundation; Scott Wexler, Executive Director, Empire State Restaurant & Tavern Association. *Id.*

301. N.Y. STATE LIQUOR AUTH., https://www.sla.ny.gov/ (last visited Apr. 19, 2016).

302. *See* ANDREW CUOMO, BUILT TO LEAD: 2016 STATE OF THE STATE 70–71 (Jan. 13, 2016) ("In 2016, the Governor will introduce legislation to modernize the ABC law by addressing the issues stated in the above along with those identified by the working group.").

303. *Id.*

304. *Id.* at 70.

305. N.Y. Exec. Order No. 131, N.Y. COMP. CODES R. & REGS. tit. 9, § 8.149 (2015) (criticizing A. 114 and A. 1438-B as narrow and myopic in scope and seriously flawed).

306. *Id.*

307. Press Release, N.Y. Governor's Press Office, Governor Cuomo Signs Executive Order Expediting Freedom of Information Law Appeals Process (Dec. 12, 2015), https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-expediting-freedom-information-law-appeals-process.

308. In mid-June, the Legislature and Governor reached an agreement to adopt the recommendations of the Governor's Alcoholic beverage Control Law Working Group. Press Release, N.Y. Governor's Press Office, Governor Cuomo and Legislative Leaders Announce Agreement to Modernize New York's Alcoholic Beverage Control Law (June 14, 2016), https://www.governor.ny.gov/news/governor-cuomo-and-legislative-leaders-announce-agreement-modernize-new-yorks-alcoholic.

D. Port Authority Reform

The Governor introduced legislation in 2015 to reform the governance of the Port Authority of New York and New Jersey.[309] Among other provisions, the bill proposed a rotating chairmanship of the board of commissioners every two years, a prohibition on any Commissioner serving as Chief Executive Officer of the Authority while serving as a Commissioner (or holding any other office on the Authority), financial disclosure to the Legislature, that board members take an oath to uphold their fiduciary duties as board members and executive officers, and establishing whistle blower protections.[310] The bill reflected the recommendations of the 2014 Bi-State Special Panel of the Future of the Port Authority, created by Governors Andrew Cuomo and Chris Christie.[311] The bill passed in the New York State Legislature and was signed into law as 2015 N.Y. Laws chapter 559 but the New Jersey legislature failed to pass it, explaining that it intended to introduce its own measure after the provision regarding legislative oversight was removed from the bill.[312]

III. LEGISLATIVE BRANCH

Perhaps the most significant legislative activity regarding administrative law is the enactment of 2015 N.Y. Laws chapter 559, known as the Port Authority of New York and New Jersey Transparency and Accountability Act of 2015.[313] As noted earlier, this legislation reflects recommended reforms put forth by the 2014 Bi-State Special Panel of the Future of the Port Authority established by Governors Cuomo of New York and Christie of New Jersey to review

309. Press Release, N.Y. Governor's Press Office, Statements from Governor Andrew Cuomo and Governor Chris Christie on Port Authority Reform Legislation (June 18, 2015), https://www.governor.ny.gov/news/statements-governor-andrew-cuomo-and-governor-chris-christie-port-authority-reform-legislatio-0.

310. N.Y.A. 8298, 238th Leg., 2015 Reg. Sess. (2015), http://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/GPB_10_PORT_AUTHORITY_REFORM_BILL.pdf (Governor's Program Bill Number 10).

311. N.Y.A. 8298, 238th Leg., 2015 Reg. Sess. (2015), Memorandum of Governor Cuomo, http://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/GPB_10_PORT_AUTHORITY_REFORM_MEMO.pdf (regarding Governor's Program Bill Number 10).

312. Act of December 18, 2015, ch. 559, 2015 McKinney's Sess. Laws of N.Y. (Westlaw through 2016) (codified at N.Y. UNCONSOL. §§ 6405, 6416-A, 6408-b, 6408-c, 6508-d); Ryan Hutchins, *N.J. Democrats Insist on Legislative Oversight in Port Authority Reforms*, POLITICO NEW JERSEY (Sept. 10, 2015), http://www.capitalnewyork.com/article/new-jersey/2015/09/8576499/nj-democrats-insist-legislative-oversight-port-authority-reforms.

313. Act of December 18, 2015.

the function and role of the Authority.[314]

The goal of the legislation is to create stronger accountability by the authority.[315] To that end, a Commissioner, including the Chairperson, is prohibited from serving as the Authority's Chief Executive Officer or in any other office while he or she is serving as a Commissioner.[316] A Chief Ethics and Compliance Officer shall enforce compliance with applicable laws and best practices and enhance the authority of the Inspector General for the Authority and establish a whistleblower access and assistance program.[317] Commissioners of the Authority shall be required to take an oath of fiduciary duty and allegiance to the Authority.[318] The Authority shall be required to adopt a conflicts of interest policy and maintain a record of all contacts with lobbyists by Commissioners, officers, and employees.[319] The Authority shall also be required to provide public notice of Authority meetings and make them open to the public.[320]

Advocates for transparency should not celebrate yet. New Jersey has not passed similar legislation and chapter 559 does not become effective until it does so.[321]

CONCLUSION

As always a look back at administrative decisions of the past year demonstrates both the court's adherence to fundamental principles and the executive branch's desire to respond to social changes.

314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*
318. Act of December 18, 2015.
319. *Id.* (legislative memorandum).
320. *Id.*
321. *Id.*