ADMINISTRATIVE LAW

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CONTENTS

This Article reviews developments in administrative law and practice during 2016 in the legislative, judicial, and executive branches of New York State government. The discussion highlights legislation that affects state agencies, certain decisions announced by the New York Court of Appeals, the Cuomo administration's ongoing promotion of juvenile justice, and the annual report of the Committee on Open Government.

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I. LEGISLATION

A. State Liquor Authority and the Alcoholic Beverage Control Law

In November 2015, Governor Cuomo announced the creation of an Alcohol Beverage Control Law Working Group, consisting of representatives of the three tiers of the beverage alcohol industry along with a representative of the New York City Community Boards to make recommendations to reform the Alcohol Beverage Control Law.[1] The Alcohol Beverage Control Law Working Group (the "Working Group") recommended changes "to improve the law and aid businesses" in April 2016.[2] The amendments, contained in Chapter 297 of the Session Laws of 2016, reflect the recommendations of the Working Group.[3]

Previously, all three members of the State Liquor Authority (SLA) held the title of Commissioner.[4] Under the new law, the SLA will have one Chairman and two Commissioners.[5] If the Chairman is removed for any reason, the Governor may appoint an interim Chairman for as long as nine months while a permanent successor is confirmed to fill the position.[6] Chapter 297 creates two new licenses, a combined craft-manufacturing license, and an importer's license.[7] Under the combined craft-manufacturing license, licensees will be able to consolidate multiple craft

1. *Governor Cuomo Announces New Industry Working Group to Modernize New York Alcohol Laws*, N.Y. ST. GOVERNOR (Nov. 9, 2015), https://www.governor.ny.gov/news/governor-cuomo-announces-new-industry-working-group-modernize-new-york-alcohol-laws.

2. Legislative Memorandum of Sen. Lanza, *reprinted in* 2016 McKinney's Sess. Law News no. 6, ch. 297, at A-362 (explaining the incorporation of recommendations by the Working Group); ALCOHOLIC BEVERAGE CONTROL LAW (ABCL) WORKING GRP., N.Y. STATE LIQUOR AUTH., REPORT ON PROPOSED REORGANIZATION OF, AND REVISIONS TO, THE ABCL 9 (2016) [hereinafter ABCL REPORT], https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/reportfinal41316.pdf. The Working Group's recommendations included many proposals that had been offered New York State Law Revision Commission in its *The New York State Law Revision Commission's Report on the Alcoholic Beverage Control Law and Its Administration*. ABCL REPORT, *supra*, at 4, 9, 17; *see generally* N.Y. STATE LAW REVISION COMM'N, THE NEW YORK STATE LAW REVISION 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 (providing an overview of the Alcoholic Beverage Control Law and its administration by the State Liquor Authority).

3. Legislative Memorandum of Sen. Lanza, *supra* note 2, at A-362 (explaining the incorporation of recommendations by the Working Group).

4. N.Y. ALCO. BEV. CONT. LAW § 10 (McKinney 2011) (amended 2016).

5. Act of Sept. 7, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 297, at 734 (codified at N.Y. ALCO. BEV. CONT. LAW § 10 (McKinney Supp. 2017)).

6. *Id.* (codified at N.Y. ALCO. BEV. CONT. LAW § 14(2)(a) (McKinney Supp. 2017)).

7. *Id.* at 736–37 (codified at N.Y. ALCO. BEV. CONT. LAW §§ 61-a, 61-b (McKinney Supp. 2017)).

brewing licenses into one license covering multiple activities.[8] The importer's license allows a business to import alcoholic beverages and resell only to wholesalers, without forcing the business to apply for a wholesaler permit, a more costly license than the newly created importer's license.[9] Additionally, the bill grants the SLA authority to impose civil penalties on combined manufacturer and importer licensees.[10]

Next, Chapter 297 amends laws that restrict when businesses may sell alcohol, gives businesses increased freedom to move products between establishments, and allows the sale of wrapping paper and gift bags. First, businesses may begin serving alcohol at 10:00 a.m. on Sundays rather than noon.[11] They may also obtain up to twelve one-day permits to open at 8:00 a.m. on Sundays, but the license is only available for cities with a population of less than one million.[12] Additionally, if someone owns a restaurant or bar and an adjacent grocery store, wine and liquor may be carried through the grocery store and into the restaurant.[13] Under the previous law, no one could carry wine and liquor through a grocery store, even if the sole reason for transporting the wine and liquor through the store was that it was the most direct path to the restaurant.[14] Finally, liquor stores will be able to sell gift bags and wrapping paper for their products, an activity prohibited as "engaging in another business" under the old law.[15]

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8. The combined license may combine a number of different licenses, including "farm brewery; micro-brewery; farm cidery; farm winery; micro-distillery; micro-rectifier; and farm distillery." *Id.* at 737 (codified at ALCO. BEV. CONT. § 61-a(4)).

9. *See* Legislative Memorandum of Sen. Lanza, *supra* note 2, at A-363 (explaining the cost effective nature of the new licenses).

10. Act of Sept. 7, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 297, at 735–36 (codified at N.Y. ALCO. BEV. CONT. LAW § 17(3) (McKinney Supp. 2017)).

11. *Id.* at 738 (codified at N.Y. ALCO. BEV. CONT. LAW § 106(5)(a) (McKinney Supp. 2017)).

12. *Id.* at 737–38 (codified at N.Y. ALCO. BEV. CONT. LAW § 99-h(1), (5), (6) (McKinney Supp. 2017)).

13. *Id.* at 738–39 (codified at N.Y. ALCO. BEV. CONT. LAW § 108(2) (McKinney Supp. 2017)).

14. *Compare* N.Y. ALCO. BEV. CONT. LAW § 108 (McKinney 2011) (amended 2016), *with* Legislative Memorandum of Sen. Lanza, *supra* note 2, at A-362 ("Prohibits a person with an on-premises liquor or wine license and an adjacent off-premises beer license from moving liquor or wine from a storage area, through the beer premises, and into the on-premises location.").

15. *Compare* N.Y. ALCO. BEV. CONT. LAW § 63(4) (McKinney 2011) (amended 2016) ("No licensee under this section shall be engaged in any other business on the licensed premises."), *with* Act of Sept. 7, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 297, at 737 (codified at N.Y. ALCO. BEV. CONT. LAW § 63(4) (McKinney Supp. 2017)) ("[T]he sale of gift bags, gift boxes, or wrapping . . . shall not constitute engaged in another business . . . .").

Previously, customers at a winery could only take home sealed bottles of wine.[16] Now, partially finished bottles of wine may be taken home, and wineries are allowed to fill or deliver reusable containers (including growlers) filled with wine to consumers.[17]

To ease the burden of hiring salespeople for small businesses, salespeople do not have to acquire a solicitor's permit if they only solicit orders for micro or farm brewing licensees.[18] For all other businesses, although salespeople must still obtain solicitor's permits, the business may apply for a temporary permit to employ solicitors for up to six months.[19] The temporary permit means an employee may begin working as a salesperson while his or her solicitor's permit is submitted and processed.[20] As a further relaxation of alcohol sales restrictions, salespeople with solicitor's permits no longer have to file a bond when applying for a solicitor's permit.[21]

The Legislature also passed other bills to address issues relating to the regulation of beverage alcohol outside the scope of Chapter 297.

Chapter 336 of the Session Laws of 2016 grants the SLA increased power to "revoke, cancel, or suspend" licenses to sell alcohol.[22] The bill increases the scope of "for cause" revocation to include situations when an applicant (1) deliberately misleads the authority as to the business' true nature or scope, or (2) when the applicant's business expands in a way "that clearly increases the incidence of local crime or disorderly conduct."[23] The law allows the SLA to better police those who apply for a

16. *Compare* N.Y. ALCO. BEV. CONT. LAW § 105(5), (11) (McKinney 2011) (amended 2016), *with* Legislative Memorandum of Sen. Lanza, *supra* note 2, at A-363 ("The ABCL also prohibits an individual from leaving a winery with an open bottle of wine.").

17. Act of Sept. 7, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 297, at 738 (codified at N.Y. ALCO. BEV. CONT. LAW §§ 105(5), (11), 106(3) (McKinney Supp. 2017)).

18. *Id.* at 737 (codified at N.Y. ALCO. BEV. CONT. LAW § 93(1) (McKinney Supp. 2017)).

19. *Id.* (codified at ALCO. BEV. CONT. § 93(1)). Previously, temporary permits were only valid for sixty days. *Compare* N.Y. ALCO. BEV. CONT. LAW § 93(4) (McKinney 2011) (amended 2016), *with* Legislative Memorandum of Sen. Lanza, *supra* note 2 at A-361 ("Section 9 of the bill would amend ABCL § 93(4) to extend the duration of a temporary solicitor's permit from sixty days to six months.").

20. *See* Act of Sept. 7, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 297, at 737 (codified at ALCO. BEV. CONT. § 93(4)).

21. *Compare* N.Y. ALCO. BEV. CONT. LAW § 112 (McKinney 2011) (amended 2016), *with* Act of Sept. 7, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 297, at 739 (codified at N.Y. ALCO. BEV. CONT. LAW § 112 (McKinney Supp. 2017)) ("[N]o bond shall be required to be filed by the holder of a solicitor's permit . . . .").

22. Legislative Memorandum of Assemb. Crespo, *reprinted in* 2016 McKinney's Sess. Law News no. 6, ch. 336, at A-401 ("[Enabling SLA] to revoke, cancel, or suspend the license of a business that sells alcoholic beverages, for on-premises consumption . . . .").

23. *Id.* ("Alcoholic Beverage Control Law (ABC) section 118(3) is amended to expand the definition of the term 'for cause' to include two new reasons to revoke, cancel, or suspend

liquor license for a small "tavern," but once approved, expand the business beyond the original proposal.[24] As the agency could not reexamine licenses to determine whether the business expanded beyond the approved scope, businesses were able get around more stringent application requirements for larger establishments without fear of license revocation.[25]

While Chapter 336 will grant the SLA more authority to police state licensees, Assembly Bill 10248, which was vetoed by the Governor, would have reduced the agency's authority to revoke liquor licenses based on conduct violating other state's laws.[26] The ability to revoke, cancel, or suspend a license "for cause" would no longer allow the SLA to discipline merchants for violation of another state's law unless that state found the licensee violated the law.[27] Previously, the SLA has taken disciplinary action against state licensees who ship wine to states that restrict direct shipment from an online manufacturer directly to consumers, even though those states have not sought to enforce the laws against the New York merchants.[28] The effort to curtail the SLA's jurisdiction failed.[29]

Chapter 328 of the Session Laws of 2016 amends the Alcoholic Beverage Control Law to allow farm breweries, wineries, and distilleries to expand the available market for their products.[30] According to this amendment, farm brewers will be able to sell wine and spirits manufactured by other farms, and farm wineries and distilleries will be able to sell beer and cider created by farm breweries.[31] Previously, state law re-

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such businesses' on-premises alcoholic beverage license.").

24. Such scaling up could include adding a backyard bar, or beginning to hold "evening entertainment attractions that purposefully draws in clientele that will disturb the local neighborhood and substantially increase crime in such area." *Id.* at A-401 to -402.

25. *See id.* ("This bill will give the Authority the tools that it needs to reexamine an already issued liquor license to ensure that it is operating within the confines of what the business represented itself to be.").

26. *Compare* Act of Sept. 29, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 336, at 809–10 (codified at N.Y. ALCO. BEV. CONT. LAW § 118(3) (McKinney Supp. 2017)), *with* N.Y. Assembly Bill No. 10248, 239th Sess., Veto 223 (2016) (vetoing the bill because it would create a regulatory gap by allowing "[s]tate licensees to break other states' laws with no fear of reprisal by the SLA. Furthermore, even if other states did pursue these entities, they would likely refuse to submit to the other states' jurisdiction.").

27. A. 10248, Veto 223.

28. N.Y. Assembly Bill No. 10248, 239th Sess., Legislative Memorandum of Assemb. Steck (2016).

29. A. 10248, Veto 223.

30. Act of Sept. 13, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 328, at 802 (codified at N.Y. ALCO. BEV. CONT. LAW §§ 51-a(2)(e), 76-a(2)(e) (McKinney Supp. 2017)).

31. *Id.* (codified at Alco. Bev. Cont. Law §§ 51-a(2)(e), 76-a(2)(e)).

stricted wineries and distilleries from selling farm brewed beer, and breweries could not sell farm manufactured wine or spirits.[32]

B. Access to Government

Chapter 304 and Chapter 490 of the Session Laws of 2016 allow the public to more easily access records of government activity online.[33] Under Chapter 304, whenever the State Register includes a summary of a proposed regulation rather than the full text, the full text must be posted on a state agency website.[34] Under current law, there is no requirement to post the full text, although the law does require an extension of the period for note and comment for an extra fifteen days when the State Register includes only a summary of the proposed rule.[35] This bill works in tandem with Chapter 490, which requires that the full text of the rulemaking document is posted before or on the date the rule summary is posted in the State Register.[36]

Chapter 319 will expand public access to ongoing legislative and agency meetings.[37] Currently, only state legislative proceedings are webcast and archived for future viewing.[38] Under this proposed bill, state

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32. *Compare* N.Y. Alco. Bev. Cont. Law §§ 51-a(2)(e), 76-a(2)(e) (McKinney Supp. 2016) (amended 2016), *with* Legislative Memorandum of Sen. Ritchie, *reprinted in* 2016 McKinney's Sess. Law News no. 6, ch. 328, at A-393 ("Presently, farm breweries and farm wineries are permitted to sell at their licensed beer, spirits, cider or wine, manufactured by the licensee of any other licensed farm brewery or farm winery for consumption on or off the licensed premises.").

33. Act of Sept. 9, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 304, at 762–64 (codified at N.Y. A.P.A. LAW §§ 201-a(2)(g), 202(1), 202(4-a) (McKinney Supp. 2017)); Act of Nov. 28, 2016, 2016 McKinney's Sess. Laws of N.Y., ch. 490, at 989–90 (to be codified at N.Y. A.P.A. LAW § 202(7)(d)).

34. Legislative Memorandum of Assemb. Zebrowski, *reprinted in* 2016 McKinney's Sess. Law News no. 6, ch. 304, at A-370 ("This bill . . . require[s] that when only a summary of the text of a proposed or revised rule or another regulatory document published in the State register, the full text must be made available to the public by posting on a state agency website."). Currently, summaries are posted when the proposed rule exceeds 2000 words. *Id.* at A-370 ("At present time [the State Administrative Procedure Act] extends the comment period for lengthy proposed rules (over 2000 words) that are only summarized in the State Register . . . .").

35. *Id.* at A-370 to -371 ("When the text of a proposed rule or other rulemaking document exceeds 2000 words . . . the comment period is expended from 45 days to 60 days.").

36. *Compare* Act of Sept. 9, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 304, at 762–64 (codified at N.Y. A.P.A. LAW § 202(1)(a) (McKinney Supp. 2017)) (requiring the full text of a proposed rule over 2000 words to be posted online), *with* Act of Nov. 28, 2016, 2016 McKinney's Sess. Laws of N.Y., ch. 490, at 989–90 (to be codified at N.Y. A.P.A. LAW § 202(7)(d)) (requiring the full text to be posted online and easily accessible for the entire notice period).

37. *See* Act of Sept. 9, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 319, at 794 (codified at N.Y. PUB. OFF. LAW § 103(f) (McKinney Supp. 2017)).

38. Legislative Memorandum of Sen. Espaillat, *reprinted in* 2016 McKinney's Sess.

and local public benefit corporations would be subject to the same requirement.[39]

Finally, Chapter 487 makes it harder to prolong an agency's appeal of a FOIL request.[40] Currently, an agency has nine months to perfect an appeal of a court's decision to overturn the agency's denial of a FOIL request.[41] Under this amendment, the time to perfect appeals would be limited to sixty days.[42] Decreasing the time allowed for appeals means that petitioners are more likely to gain access to documents when the information is still useful.[43]

C. Upstate Transit Funding Board

Assembly Bill 8202-A, which the Governor vetoed, would have created a board to examine how to best increase state funding for public transit in Upstate New York.[44] According to the bill, current public transit fares are not sufficient to cover the entire cost of public transportation, and annual funding from the State is required to maintain the system.[45] The proposed board would have made "recommendations for the growth, stability and sustainability of State public transit funding options."[46] The Governor vetoed the bill on the grounds that its requirement that the board submit a report and recommendations by December 1, 2016 made the creation and staffing of the board and the actual production of a report virtually impossible.[47]

Law News no. 6, ch. 319, at A-385 ("Just as the state legislative proceeding are webcast and archived so should the entities that are delegated legislative authority.").

39. Act of Sept. 9, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 319, at 794 (codified at PUB. OFF. § 103(f)).

40. *See* Act of Nov. 28, 2016, 2016 McKinney's Sess. Laws of N.Y., ch. 487, at 986 (to be codified at N.Y. PUB. OFF. LAW § 89(4)(d), N.Y. C.P.L.R. 5521(b)).

41. Legislative Memorandum of Sen. Ranzenhofer, *reprinted in* 2016 McKinney's Sess. Laws of N.Y., ch. 487, at 1619 ("[T]he appealing party may file a notice of appeal and have up to 9 months to perfect the appeal."). According to the Second Department's FAQs, "[p]erfecting an appeal means doing all the acts necessary to place the case on the court's calendar." *Appellate Division Second Judicial Department: Frequently Asked Questions*, N.Y. ST. UNIFIED CT. SYS., https://www.nycourts.gov/courts/ad2/faqs.shtml (last visited May 22, 2017).

42. Act of Nov. 28, 2016, 2016 McKinney's Sess. Laws of N.Y., ch. 487, at 986 (to be codified at PUB. OFF. § 89(4)(d)(ii)(C)).

43. Such as when requesting documents in order to comment within the note and comment period of a proposed rule. *See* Legislative Memorandum of Sen. Ranzenhofer, *supra* note 41, at 1619 ("[D]elay . . . may make moot a petitioner's FOIL request and functionally deny the timely access to documents needed.").

44. N.Y. Assembly Bill No. 8202-A, 239th Sess., Veto 240 (2016).

45. N.Y. Assembly Bill No. 8202-A, 239th Sess. (2016).

46. *Id.*

47. A. 8202-A, Veto 240.

II. JUDICIAL DECISIONS

The decisions of the Court of Appeals covered a range of topics including disciplinary proceeding by the Department of Corrections,[48] when an appellate court may grant an Article 78 petitioner's requested relief without allowing a respondent the opportunity to answer,[49] when declaration of a mistrial will create double jeopardy issues,[50] the availability of statutory interest on reimbursement of down-payments to prospective condominium purchases,[51] and the unilateral reduction of the per diem pay of seasonal track employees.[52]

A. Bottom v. Annucci

In *Bottom v. Annucci*, the petitioner-inmate was found in possession of loose stamps on his way to the prison library.[53] The prison prohibited possession of loose stamps in the library and charged the petitioner with violation of the provision.[54] Although the petitioner admitted to possessing the stamps, he argued that (1) the rule prohibiting possession of loose stamps is not enforceable because it had not been filed with the Secretary of State,[55] (2) he did not violate the provision because he was not found in possession of the stamps in the library itself,[56] and (3) his mistake regarding possession of the stamps was unintentional.[57] After losing his administrative appeal, the petitioner filed an Article 78 petition.[58] The appellate division affirmed the administrative decision because the petitioner admitted to possessing loose stamps at his disciplinary hearing following the incident.[59]

On appeal, the Court of Appeals found that the petitioner had not

48. Bottom v. Annucci (*Bottom II*), 26 N.Y.3d 983, 985, 41 N.E.3d 66, 67, 19 N.Y.S.3d 209, 210 (2015).

49. McGovern v. Mount Pleasant Cent. Sch. Dist. (*McGovern II*), 25 N.Y.3d 1051, 1052, 33 N.E.3d 1280, 1281, 12 N.Y.S.3d 11, 11 (2015); Kickertz v. N.Y. Univ., 25 N.Y.3d 942, 943, 29 N.E.3d 893, 894, 6 N.Y.S.3d 546, 547 (2015).

50. Gorman v. Rice (*Gorman II*), 24 N.Y.3d 1032, 1036, 22 N.E.3d 1009, 1012, 998 N.Y.S.2d 141, 144 (2014).

51. CRP/Extell Parcel I, L.P. v. Cuomo (*CRP/Extell Parcel I, L.P. III*), 27 N.Y.3d 1034, 1036, 52 N.E.3d 1174, 1175, 33 N.Y.S.3d 148, 149 (2016).

52. Kent v. Lefkowitz (*Kent II*), 27 N.Y.3d 499, 502, 54 N.E.3d 1149, 1150, 35 N.Y.S.3d 278, 279 (2016).

53. *Bottom II*, 26 N.Y.3d at 985, 41 N.E.3d at 67, 19 N.Y.S.3d at 210.

54. *Id.*

55. *Id.* (citing N.Y. CONST. art. IV, § 8).

56. *Id.* at 985–86, 41 N.E.3d at 68, 19 N.Y.S.3d at 211.

57. *Id.* at 986, 41 N.E.3d at 68, 19 N.Y.S.3d at 211.

58. *Bottom II*, 26 N.Y.3d at 985, 41 N.E.3d at 67, 19 N.Y.S.3d at 210.

59. Bottom v. Annucci (*Bottom I*), 115 A.D.3d 1126, 1126, 982 N.Y.S.2d 808, 808 (4th Dep't 2014).

properly preserved the first claim for review because it was not raised at either his administrative proceeding or in his Article 78 petition.[60] The second claim, that the petitioner did not possess stamps in the library, failed because an attempted violation of the rules is subject to the same punishment as an actual violation, and the petitioner admitted to carrying the stamps "while on his way to the law library."[61] Finally, a lack of intent is not a defense to the charge, because the loose stamp prohibition had no intent requirement.[62] Accordingly, the Court affirmed the appellate division, finding that substantial evidence supported the prison's disciplinary determination.[63]

B. McGovern v. Mount Pleasant Central School District

The issue in this case was when an appeals court should remand a case to the trial court to allow the respondent to answer under Civil Practice Law and Rules (CPLR) 7804(f).[64] The petitioner, a teacher at the Mount Pleasant School District, was terminated before the end of her probationary period and denied tenure.[65] She brought an Article 78 proceeding contesting the decision, asking for reinstatement with tenure and back pay.[66] During the proceeding, the school district's defense was that McGovern had not served a timely notice of claim pursuant to Education Law § 3813(1), and therefore the claim was time barred.[67] The supreme court sided with the petitioner, holding that the notice of claim was not applicable in this situation because the claim was not required where there was a "positive-law exemption" to the notice of claim requirement when filing an Article 78 petition.[68] The appellate division reversed, and found that the exemption is not relevant when a teacher attempts to force his or her school district to grant tenure.[69] Additionally, the appellate

60. *Bottom II*, 26 N.Y.3d at 985, 41 N.E.3d at 67, 19 N.Y.S.3d at 210.

61. *Id.* at 986, 41 N.E.3d at 68, 19 N.Y.S.3d at 211 (citing 7 N.Y.C.R.R. § 270.2(B)(14)(xii) (2016)).

62. *Id.*

63. *Id.* (first citing Vega v. Smith, 66 N.Y.2d 130, 139, 485 N.E.2d 997, 1002, 495 N.Y.S.2d 332, 337 (1985); and then citing Bryant v. Coughlin, 77 N.Y.2d 642, 647, 572 N.E.2d 23, 25, 569 N.Y.S.2d 582, 584 (1991)).

64. *McGovern II*, 25 N.Y.3d 1051, 1052, 33 N.E.3d 1280, 1281, 12 N.Y.S.3d 11, 11 (2015); N.Y. C.P.L.R. 7804(f) (McKinney 2008).

65. *McGovern II*, 25 N.Y.3d at 1052, 33 N.E.3d at 1281, 12 N.Y.S.3d at 11.

66. *Id.*

67. *Id.* at 1052–53, 33 N.E.3d at 1281, 12 N.Y.S.3d at 11; N.Y. EDUC. LAW § 3813(1) (McKinney 2015).

68. *McGovern II*, 25 N.Y.3d at 1053, 33 N.E.3d at 1281, 12 N.Y.S.3d at 11.

69. McGovern v. Mount Pleasant Cent. Sch. Dist. (*McGovern I*), 114 A.D.3d 795, 795, 980 N.Y.S.2d 522, 523 (2d Dep't 2014).

court held that the notice of claim provision does not apply when the relief sought includes monetary damages as well as equitable relief.[70]

The petitioner appealed to the Court of Appeals. However, she had not preserved either of her arguments for review.[71] Accordingly, the Court affirmed the reversal of the trial court order and denied the petition.[72]

C. Kickertz v. New York University

The petitioner brought an Article 78 proceeding contesting her expulsion from New York University's (NYU) School of Dentistry, asking the court to reinstate her in the school, and grant her a Degree of Dental Surgery.[73] The trial court dismissed the petition, but the appellate division reversed, granting the petition without giving NYU a chance to submit an answer in trial court following the appeal.[74] NYU argued that the petition should have been remanded to the trial court so that NYU could file an answer pursuant to CPLR 7804(f).[75]

The Court of Appeals held that an appeals court need not permit a respondent to answer under 7804(f) if it is clear based on the parties' submissions that "no dispute as to the facts exists and no prejudice will result from the failure to require an answer."[76] Here, the Court found that NYU could still show that it had "substantially observed" its published rules, and triable issues of fact existed regarding the school's compliance with its rules.[77] Therefore, the appellate division should have remanded the case to allow NYU the opportunity to submit an answer.[78]

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70. *Id.* at 795–96, 980 N.Y.S.2d at 523.

71. *McGovern II*, 25 N.Y.3d at 1053, 33 N.E.3d at 1282, 12 N.Y.S.3d at 12 ("McGovern contends that she is exempt from section 3813 (1)'s notice-of-claim requirement for two reasons: the monetary damages that she demands are merely incidental to her primary claim for equitable relief; and/or she seeks to enforce tenure rights by estoppel." (citing Brown v. New York, 60 N.Y.2d 893, 894, 458 N.E.2d 1248, 1249, 470 N.Y.S.2d 571, 572 (1983))).

72. *Id.*

73. Kickertz v. N.Y. Univ., 25 N.Y.3d 942, 943, 29 N.E.3d 893, 894, 6 N.Y.S.3d 546, 547 (2015).

74. *Id.*

75. *Id.* at 944, 29 N.E.3d at 894, 6 N.Y.S.3d at 547 ("[CPLR 7804(f)] specifies that where a respondent moves to dismiss a CPLR article 78 petition and the motion is denied 'the court *shall* permit the respondent to answer, upon such terms as may be just.'" (quoting N.Y. C.P.L.R. 7804(f) (McKinney 2008))).

76. *Id.* (quoting Nassau BOCES Cent. Council of Teachers v. Bd. of Coop. Educ. Servs., 63 N.Y.2d 100, 102, 469 N.E.2d 511, 511, 480 N.Y.S.2d 190, 190 (1984)).

77. *Id.* at 944, 29 N.E.3d at 895, 6 N.Y.S.3d at 548 (quoting Tedeschi v. Wagner Coll., 49 N.Y.2d 652, 660, 404 N.E.2d 1302, 1306, 427 N.Y.S.2d 760, 764 (1980)).

78. *See Kickertz*, 25 N.Y.3d at 944, 29 N.E.3d at 895, 6 N.Y.S.3d at 548.

D. Gorman v. Rice

In this case, the Court of Appeals confirmed that a judge's declaration of mistrial may be rescinded at any time before the jury is dismissed.[79] The defendant was charged with driving while intoxicated after losing control of her car.[80] During the proceeding, the judge declared a mistrial after the defendant's lawyer stated that he intended to file a complaint against the judge.[81] However, the judge rescinded his decision and left it up to the defendant, who decided "to go with the mistrial."[82] After a month, the defendant moved to dismiss the charges asserting a double jeopardy defense.[83] When the trial court rejected the motion, the defendant filed an Article 78 petition attempting to prohibit retrial.[84] The state supreme court granted the Article 78 motion and barred further prosecution under double jeopardy, finding that the judge's initial declaration of a mistrial could not be rescinded, and the declaration was made without consent of the defendant.[85] However, the appellate division reversed, holding that a mistrial may be rescinded prior to discharge of the jury.[86]

On appeal, the Court of Appeals stated that "a court may rescind its previous declaration of mistrial" until the jury is discharged.[87] A judge need not make a formal rescission of his or her declaration of a mistrial but must make clear that the decision is left up to the defendant in order to avoid double jeopardy claims.[88] Therefore, when a judge declares a mistrial after giving a defendant the final say, there is no violation of double jeopardy. The Court affirmed the appellate division's reversal and dismissed the Article 78 proceeding prohibiting retrial.[89]

E. CRP/Extell Parcel I, L.P. v. Cuomo

The issue in *CRP/Extell Parcel I, L.P. v. Cuomo* was whether the supreme court, in an Article 78 proceeding where the developer challenged that ruling, had jurisdiction post-judgment to add statutory interest

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79. *Gorman II*, 24 N.Y.3d 1032, 1036, 22 N.E.3d 1009, 1012, 998 N.Y.S.2d 141, 144 (2014).

80. *Id.* at 1033–34, 22 N.E.3d at 1010, 998 N.Y.S.2d at 142.

81. *Id.* at 1034, 22 N.E.3d at 1010–11, 998 N.Y.S.2d at 142–43.

82. *Id.* at 1035, 22 N.E.3d at 1011, 998 N.Y.S.2d at 143.

83. *Id.*

84. *Gorman II*, 24 N.Y.3d at 1035, 22 N.E.3d at 1011, 998 N.Y.S.2d at 143.

85. *Id.*

86. Gorman v. Rice (*Gorman I*), 106 A.D.3d 1000, 1000, 965 N.Y.S.2d 601, 602 (2d Dep't 2013).

87. *Gorman II*, 24 N.Y.3d at 1036, 22 N.E.3d at 1011, 998 N.Y.S.2d at 143 (citing People v. Dawkins, 82 N.Y.2d 226, 229, 624 N.E.2d 162, 164, 604 N.Y.S.2d 34, 36 (1993)).

88. *Id.* at 1036, 22 N.E.3d at 1012, 998 N.Y.S.2d at 144.

89. *Id.*

in the amount of approximately five million dollars to the judgment awarded to the condominium purchasers.[90] The case was complicated by a scrivener's error, making it a hard lesson for the drafting lawyer.[91]

The condominium developer was creating The Rushmore, a set of luxury condominiums in Manhattan.[92] Its offering plan, filed with the Attorney General's Office pursuant to General Business Law § 352-e,[93] provided that a prospective purchaser was required to make a down payment toward the purchase price of the unit when he or she signed the purchase agreement.[94] Apparently, the offering plan identified the commencement date for the first year of operations in the building and the projected first closing date as September 1, 2008.[95]

The plan further provided that in the event the first closing did not occur on September 1, 2008, the purchasers would be entitled to rescind the purchase agreement and receive a refund of their down payment.[96] Moreover, section 20.3(o)(12) of the regulations would require CRP/Extell to offer purchasers a right to rescind if the first closing in the building was delayed twelve months beyond the anticipated commencement of the first year of operations, September 1, 2008.[97]

The first closing did not occur on September 1, 2008, as set forth in the plan, but rather on February 12, 2009.[98] When 41 purchasers sought

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90. *CRP/Extell Parcel I, L.P. III*, 27 N.Y.3d 1034, 1036, 52 N.E.3d 1174, 1175, 33 N.Y.S.3d 148, 149 (2016).

91. CRP/Extell Parcel I, L.P. v. Cuomo (*CRP/Extell Parcel I, L.P. I*), No. 113914/2010, 2012 N.Y. Slip Op. 50073(U), at 3 (Sup. Ct. N.Y. Cty. Jan. 19, 2012).

92. *Id.* at 2.

93. The General Business Law requires a developer to file the offering plan with the Attorney General's Office which in turn reviews the plan and related documents to ensure that the plan complies with the law. *Id.*

94. *Id.*

95. *Id.* at 3.

96. The plan stated,

> It is anticipated that the First Closing will occur by the commencement date for the First Year of Condominium Operation as set forth in Schedule B which is September 1, 2008. If the First Closing does not occur by September 1, 2008, as such date may be extended by duly filed amendment to the Plan, Sponsor will amend the Plan to update the budget and to offer Purchasers the right to rescind their Agreements within fifteen (15) days after the presentation of the amendment disclosing the updated budget, and any Purchaser electing rescission will have their Deposits and any interest earned thereon returned.

CRP/Extell Parcel I, L.P. I, 2012 N.Y. Slip Op. 50073(U), at 3. This element of the plan was consistent with the terms of 13 N.Y.C.R.R. § 20.3(o)(12), which requires that the plan "[s]tate when Sponsor expects the first closing of a unit to occur and provide for rescission if the date is delayed twelve (12) months or more." *Id.* at 2 (citing 13 N.Y.C.R.R. § 20.3(o)(12) (2016)).

97. *Id.* at 3.

98. Brief for Respondents at 7, CRP/Extell Parcel I, L.P. v. Cuomo (*CRP/Extell Parcel I, L.P. II*), 124 A.D.3d 560, 2 N.Y.S.3d 116 (1st Dep't 2015) (No. 13515), 2014 WL 8044907,

refunds, the developer refused to return the funds, claiming that the September 1, 2008 date was a "'scrivener's error' and that the actual rescission date should have been September 1, 2009."[99] The developer also asked for reformation of the agreement.[100] In the face of the developer's stand, the purchasers then applied to the Attorney General for the return of their money.[101] The Attorney General ruled that CRP/Extell should return the sixteen million dollars in funds, together with any accrued interest in the escrow account.[102] CRP/Extell then commenced a hybrid Article 78 in which it challenged the decision of the Attorney General as arbitrary and capricious and sought to have the offering plan reformed based on the alleged scrivener's error.[103] It also sought a stay from the enforcement of the Attorney General's determination.[104] It is axiomatic that a governmental agency cannot act in an arbitrary and capricious manner.[105] "[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law."[106] If there is evidence to support an agency's action, it will be upheld.[107]

In the Article 78 proceeding, petitioner-developer alleged harm from its inability to conduct discovery, have a hearing, or otherwise obtain testimony before the Attorney General's Office ruled.[108] It argued that it was further limited because "the Attorney General did not share with CRP/Extell the evidence it had received during ex parte meetings with the Stroock [law] firm, in which the drafter of the language admitted that he had typed the 2008 date into the provision by mistake."[109] Finally it argued that the determination suffered from clear legal error as the Attorney General misapprehended "the law of contracts, pursuant to which a fact-finder must consider the extrinsic evidence of the parties' intent in deciding whether the contract at issue reflects a scrivener's error and,

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at *7.

99. *CRP/Extell Parcel I, L.P. III*, 27 N.Y.3d 1034, 1036, 52 N.E.3d 1174, 1175, 33 N.Y.S.3d 148, 149 (2016).

100. *CRP/Extell Parcel I, L.P. I*, 2012 N.Y. Slip Op. 50073(U), at 4.

101. *Id.*

102. *Id.* at 1.

103. *Id.* at 7.

104. *Id.* at 4.

105. *See* 26 PATRICK J. BORCHERS & DAVID L. MARKELL, NEW YORK STATE ADMINISTRATIVE PROCEDURE AND PRACTICE § 8.6 (2d ed. 1998).

106. *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)).

107. *See id.* (citing Heintz v. Brown, 80 N.Y.2d 998, 1003–04, 607 N.E.2d 799, 802, 592 N.Y.S.2d 652, 655 (1992)).

108. *CRP/Extell Parcel I, L.P. I*, 2012 N.Y. Slip Op. 50073(U), at 4.

109. *Id.*

thus, warrants reformation."[110] The supreme court and the appellate division confirmed the Attorney General's decision as not arbitrary and capricious.[111] The developer then returned the down-payments.[112] In the interim, however, the purchasers had filed a post judgment motion in supreme court seeking statutory interest.[113] The court granted the motion and awarded the purchasers $4.9 million.[114] The appellate division reversed, holding that the trial court lacked the jurisdiction to grant an award because it had dismissed the proceeding.[115] The Court of Appeals affirmed the decision of the First Department, holding that the supreme court's dismissal of the petitioner developer's Article 78 petition left it without authority to order post judgment interest.[116]

F. Kent v. Lefkowitz

Kent v. Lefkowitz considered whether the Public Employees Relations Board (PERB) acted in an arbitrary and capricious manner in applying the duty of satisfaction in dismissing a challenge to the New York State Racing and Wagering Board[117] (Racing Board)'s twenty-five percent reduction in the per diem wages of seasonal track employees.[118] In 1995, the State and the Public Employees Federation, AFL-CIO (PEF), the "certified collective bargaining representative for the Professional, Scientific and Technical Services Unit of New York State employees" entered into a collective bargaining agreement (CBA) for the period 1995 through 1999.[119] A Side Letter to the CBA related to track seasonal employees who are exempt from civil service classification and appointed

110. *Id.* at 5.

111. *CRP/Extell Parcel I, L.P. III*, 27 N.Y.3d 1034, 1036, 52 N.E.3d 1174, 1175, 33 N.Y.S.3d 148, 149 (2016).

112. *Id.*

113. *Id.*

114. *Id.*

115. *CRP/Extell Parcel I, L.P. II*, 124 A.D.3d 560, 560, 2 N.Y.S.3d 116, 117 (1st Dep't 2015).

116. *CRP/Extell Parcel I, L.P. III*, 27 N.Y.3d at 1037, 52 N.E.3d at 1175, 33 N.Y.S.3d at 149 (first citing N.Y. C.P.L.R. 7806 (McKinney 2008); and then citing De Paula v. Memory Gardens, Inc., 90 A.D.2d 886, 886, 456 N.Y.S.2d 522, 523–24 (3d Dep't 1982)).

117. In 2012, the Governor signed Chapter 60 of the Session Laws of 2012, which created the New York State Gaming Commission by merging the Racing Board with the New York State Division of the Lottery. Act of Mar. 30, 2012, 2012 McKinney's Sess. Laws of N.Y., ch. 60, at 645–60 (codified at N.Y. RAC. PARI-MUT. WAG. & BREED. LAW arts. 1, 12, §§ 252(1), (3), 330, 431(3) (McKinney Supp. 2017), N.Y. GEN. MUN. Law §§ 186(2), 476(2) (McKinney Supp. 2017), N.Y. EXEC. LAW §§ 169(1), 432(1) (McKinney Supp. 2017), N.Y. TAX LAW §§ 1602, 1603, 1612(h) (McKinney Supp. 2017)).

118. *Kent II*, 27 N.Y.3d 499, 502, 54 N.E.3d 1149, 1150, 35 N.Y.S.3d 278, 279 (2016).

119. *Id.* at 502, 54 N.E.3d at 1151, 35 N.Y.S.3d at 280. The CAB was arrived at pursuant to the authority of the Taylor Law, "a statutory scheme that grants public employees the rights

by the Racing Board to work during a specific track meet.[120] The Side Letter concerned, among other items, the per diem basis, holiday pay, workers' compensation

> salary increases for eligible employees . . . for specific fiscal years covered . . . [and] the effect on a seasonal employee's rate of compensation "[i]f during the term of [the CBA] the rate of compensation of any employee in a seasonal position [wa]s increased at the discretion of the Director of the Budget for the purpose of making such rate equal to the [f]ederal minimum wage level." . . .
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> . . .
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> . . . The parties [in this case did] not dispute that per diem compensation rates must be negotiated. Instead, the parties disput[ed] whether this duty to negotiate was satisfied by the negotiation of the [Side Letter]."[121]

Pursuant to Civil Service Law § 205, PERB has the authority to establish "procedures for the prevention of improper employer[122] and employee

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of organization and collective representation in order to ameliorate conditions that can lead to strikes and other interruptions in the orderly flow of government services." Brief on Behalf of Respondent N.Y. State Pub. Emp't Relations Bd., at 2, Kent v. Lefkowitz (*Kent I*), 119 A.D.3d 1208, 991 N.Y.S.2d 154 (3d Dep't 2014) (No. 518219), 2014 WL 8514130, at *2 [hereinafter Brief on Behalf of Respondent].

120. *Kent II*, 27 N.Y.3d at 502, 54 N.E.3d at 1150–51, 35 N.Y.S.3d at 279–80.

121. *Id.* at 503–04, 54 N.E.3d at 1151–52, 35 N.Y.S.3d at 280–81 (second, third, and fourth alterations in original).

122. N.Y. CIV. SERV. LAW § 209-a(1)(a)–(g) (McKinney Supp. 2017) ("Improper employer practices. It shall be an improper practice for a public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two of this article for the purpose of depriving them of such rights; (b) to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights; (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization; (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees; (e) to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article; (f) to utilize any state funds appropriated for any purpose to train managers, supervisors or other administrative personnel regarding methods to discourage union organization or to discourage an employee from participating in a union organizing drive; or (g) to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized under this article when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action. If representation is requested, and the employee is a potential target of disciplinary action at the time of questioning, a reasonable period of time shall be afforded to the employee to obtain such representation. It shall be an affirmative defense to any improper practice charge under paragraph (g) of this subdivision that the employee has the right, pursuant to statute, interest

organization practices"[123] as defined in Civil Service Law § 209-a[124] and to enjoin such practices.[125] The wages for those employees who work from an opening to closing date of a track meet are set by the Racing Board subject to the approval of the Director of the Budget.[126]

In January 1996, during the period covered by the CBA and the Side Letter, the Chair of the Racing Board issued a memorandum stating that the per diem wages of the seasonal employees were reduced by twenty-five percent.[127] There was no negotiation of the wage reduction.[128] PEF, representing track seasonal employees, filed an improper practice charge against the State with PERB.[129] The State responded by asserting the affirmative defense that PERB had "'waived' its right to negotiate concerning the reduction in wages."[130] At the subsequent hearing in 2005,[131] the State introduced evidence both of waiver and duty satisfaction, meaning that "the subject sought to be bargained has already been negotiated to completion, that the employer and the union have bargained and reached agreement on a subject and the employer is thereafter privileged to act in conformance with that agreement."[132]

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arbitration award, collectively negotiated agreement, policy or practice, to present to a hearing officer or arbitrator evidence of the employer's failure to provide representation and to obtain exclusion of the resulting evidence upon demonstration of such failure. Nothing in this section shall grant an employee any right to representation by the representative of an employee organization in any criminal investigation.").

123. CIV. SERV. § 209-a(2) ("Improper employee organization practices. It shall be an improper practice for an employee organization or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of the rights granted in section two hundred two, or to cause, or attempt to cause, a public employer to do so; (b) to refuse to negotiate collectively in good faith with a public employer, provided it is the duly recognized or certified representative of the employees of such employer; or (c) to breach its duty of fair representation to public employees under this article.").

124. N.Y. CIV. SERV. LAW §§ 205(5)(d), 209-a (McKinney 2011 & Supp. 2017).

125. CIV. SERV. § 205.

126. *Kent II*, 27 N.Y.3d at 502, 505–06, 54 N.E.3d at 1151, 1153, 35 N.Y.S.3d at 280, 282 (citing N.Y. STATE FIN. LAW §§ 44, 49 (McKinney 2014)).

127. *Id.* at 503, 54 N.E.3d at 1151, 35 N.Y.S.3d at 280.

128. *See* Brief on Behalf of Petitioner-Appellant at 6, *Kent I*, 119 A.D.3d 1208, 991 N.Y.S.2d 154 (3d Dep't 2014) (No. 518219), 2014 WL 8514129, at *6.

129. *Id.* at 6.

130. Brief on Behalf of Respondent, *supra* note 119 at 6.

131. Brief on Behalf of Petitioner-Appellant, *supra* note 128, at 7. The reasons for the interval between the wage reduction memorandum and the hearing on the challenge involved whether PERB had jurisdiction to bring the challenge, which was resolved by arbitration in its favor, as well as efforts by the parties to negotiate a narrowing of the issues. Brief on Behalf of Respondent, *supra* note 119, at 6–7.

132. *Kent I*, 119 A.D.3d at 1210, 991 N.Y.S.2d at 156 (quoting Amalgamated Transit Union Local 1342, 41 P.E.R.B. ¶ P4566 (2008)).

The Assistant Director of PERB determined that the State had violated Civil Service Law § 209-a(1) by unilaterally reducing the seasonal workers' wages and recommended remedial action.[133]

Both the State and PEF filed objections to the decision, the State objected to the basis for the decision and PEF objected to the nature of the remedies.[134]

Upon reviewing the decision of the Assistant Director, PERB reversed it and dismissed PEF's challenge, concluding,

> While the Side Letter did not explicitly address the State Budget Director's authorizing a decrease in the *per diem* rates for seasonal employees at the commencement of each meet, the Side Letter is *reasonably clear* that both parties intended the Side Letter to act as a negotiated limitation upon the State Budget Director's discretion with respect to unilateral adjustments in the rates of compensation for seasonal positions in the unit.[135]

PEF then commenced an Article 78 proceeding.[136] The supreme court dismissed the action.[137] The Third Department reversed, holding that although the Side Letter need not specifically address the subject of the challenge, namely a wage reduction, the State had failed to show as required by a duty satisfaction defense that it was reasonably clear that the parties intended that the subject matter to be covered by the Side Letter.[138] While recognizing that PERB is to be afforded deference in its interpretation of the terms of collective bargaining agreements on the basis of its expertise,[139] the appellate court stated that PERB's interpretation of the Director of the Budget's discretion as set forth in the Side Letter was too expansive to demonstrate the parties' intent to have addressed all compensation issues covered by the Director's discretion.[140] The dissent disagreed, observing that the Side Letter was comprehensive and placed no limitation on the Chair's discretion to reduce the wages of the track seasonal employees.[141] Both PEF and PERB appealed as of right.[142]

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133. Pub. Emps. Fed'n., 43 P.E.R.B. ¶ 4503 (2010).

134. *Kent I*, 119 A.D.3d at 1209–10, 991 N.Y.S.2d at 155.

135. Pub. Emps. Fed'n, 45 P.E.R.B. ¶ 3041 (2012) (second emphasis added).

136. *Kent I*, 119 A.D.3d at 1210, 991 N.Y.S.2d at 156.

137. *Id.*

138. *Id.* at 1212, 991 N.Y.S.2d at 157 (quoting Amalgamated Transit Union Local 1342, 41 P.E.R.B. ¶ P4566 (2008)).

139. *Id.* at 1210, 991 N.Y.S.2d at 156 (citing Monroe County v. N.Y. State Pub. Emp't Relations Bd., 85 A.D.3d 1439, 1441, 926 N.Y.S.2d 188, 190 (3d Dep't 2011)).

140. *Id.* at 1212, 991 N.Y.S.2d at 157.

141. Kent I, 119 A.D.3d at 1213–14, 991 N.Y.S.2d at 158 (Stein, J., dissenting).

142. Kent II, 27 N.Y.3d 499, 504, 54 N.E.3d 1149, 1152, 35 N.Y.S.3d 278, 281 (2016).

The Court of Appeals reversed.[143] It concluded that the Side Letter was comprehensive in addressing all conditions of employment for seasonal employees for 1995 to 1999.[144] The Court focused on the fact that while the Side Letter included specific pay increases for specific years, it did not contain them "for the fiscal year in which the 25% reduction took effect."[145] Also, the Court viewed the Side Letter as not ruling out pay reductions and observed that it "did not impose any conditions precedent to pay reductions."[146] Thus, the Court concluded that "PERB's conclusion that it was 'reasonably clear' that both sides intended the [Side Letter] 'to act as a negotiated limitation upon the State Budget Director's discretion' as to compensation for seasonal employees was not arbitrary and capricious."[147] Hence, the Court accorded PERB's decision "deference as a decision within its area of expertise."[148] The dissent concluded that PERB's determination should not be upheld and argued that the majority confused the quantity of items covered in the Side Letter with specificity which was missing in the Side Letter as to a reduction in compensation.[149]

III. EXECUTIVE BRANCH

A. Executive Chamber

The Governor's concern for juvenile justice is ongoing. In his 2014 State of the State Address, the Governor stated, "Our juvenile justice laws are outdated. Under New York State law, 16- and 17-year-olds can be tried and charged as adults. . . . It's not right and it's not fair. We must raise the age."[150] On April 9, 2014, the Governor had announced the creation of the Commission on Youth, Public Safety and Justice (the "Commission").[151] This Commission was designed to "(a) develop a plan to raise the age of juvenile jurisdiction, and (b) make other recommendations as to how New York's justice systems can improve outcomes for

143. *Id.* at 507, 54 N.E.3d at 1154, 35 N.Y.S.3d at 283.

144. *Id.* at 506, 54 N.E.3d at 1153, 35 N.Y.S.3d at 282.

145. *Id.*

146. *Id.*

147. *Kent II*, 27 N.Y.3d at 506, 54 N.E.3d at 1153, 35 N.Y.S.3d at 282.

148. *Id.* at 506, 54 N.E.3d at 1154, 35 N.Y.S.3d at 283.

149. *Id.* at 508, 54 N.E.3d at 1155, 35 N.Y.S.3d at 284 (Fahey, J., dissenting).

150. Yamiche Alcindor, *N.Y., N.C. Consider Changes to Juvenile Justice Laws*, USA TODAY (Mar. 1, 2014, 9:03 A.M.), https://www.usatoday.com/story/news/nation/2014/03/01/new-york-and-north-carolina-consider-juvenile-justice-changes/5280573/.

151. *Governor Cuomo Announces Members of Commission on Youth, Public Safety & Justice*, N.Y. ST. GOVERNOR (Apr. 9, 2014), https://www.governor.ny.gov/news/governor-cuomo-announces-members-commission-youth-public-safety-justice.

youth while promoting community safety."[152] The Commission was formed in response to concerns that New York is one of only two states who prosecute individuals between the ages of 16 and 17 in adult criminal courts despite data showing that "felony recidivism rate in one state was 34 percent higher for youth whose cases were handled in adult court compared to youth whose cases were handled outside of adult court."[153]

The Commission issued its report, *Recommendations for Juvenile Justice Reform in New York State*, on December 31, 2014.[154] Among its recommendations were raising the age for jurisdiction over juveniles to 18 and the lower age of juvenile jurisdiction to 12, excepting homicide offenses, where the age should be raised to 10,[155] expanding the current juvenile practice regarding parental notification of arrest and using "Office of Court Administration-approved rooms for questioning by police to 16- and 17-year-olds,"[156] and videotaping "custodial interrogations of 16- and 17-year olds for felony offenses."[157]

Although "Raise the Age" legislation was introduced, the Legislature was not able to agree on its parameters.[158] The Governor, desirous of continued pursuit of reform and an interim measure to accomplish the goal of "Raise the Age" legislation, on December 22, 2015, issued Executive Order 150 *Establishing One or More Correctional Facilities Within the Department of Corrections and Community Supervision Exclusively for Youth*.[159] Acting in accordance with the Correction Law,[160] the Executive Law,[161] and the Mental Hygiene Law,[162] the Order provides that the Commissioner of the New York State Department of Corrections and Community Supervision (DOCCS) together with the cooperation and expertise of the Office of Children and Family Services, the Office of Men-

152. 9 N.Y.C.R.R. § 8.131(B)(1) (2016) (establishing the commission on Youth, Public Safety and Justice by Executive Order).

153. *Id.* § 8.131.

154. COMM'N ON YOUTH, PUBLIC SAFETY & JUSTICE, FINAL REPORT OF THE GOVERNOR'S COMM'N ON YOUTH, PUBLIC SAFETY AND JUSTICE 150 (2014), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ReportofCommissiononYouthPublicSafetyandJustice_0.pdf.

155. *Id.*

156. *Id.*

157. *Id.*

158. NY Lawmakers Agree to "Raise the Age" of Criminal Responsibility from 16 to 18, RAISE AGE N.Y., http://raisetheageny.com/newitem/ny-lawmakers-agree-raise-age-criminal-responsibility-16-18 (last visited May 22, 2017).

159. *See* 9 N.Y.C.R.R. § 8.150(3) (2016).

160. N.Y. CORRECT. LAW § 45(6-b) (McKinney 2014).

161. N.Y. EXEC. LAW § 530(2)(a)–(b) (McKinney 2013).

162. N.Y. MENTAL HYG. LAW § 9.51(d) (McKinney 2011).

tal Health, and the Office of General Services was directed by the Governor to create a plan to move 16 and 17 year olds from adult facilities to facilities with the necessary programs, services and staff to medium- and minimum-security classified male 16 and 17 year olds,[163] and provide the programmatic, staffing, and service needs for the facility to address the needs of these juveniles.[164] Executive Order 150 directs the agencies to implement the plan.[165]

B. Committee on Open Government Annual Report

The Committee on Open Government (COG) was formed under the original Freedom of Information Law (FOIL)[166] in 1974 "to offer advice and assistance based on the language of the law and its judicial interpretation to anyone having a question."[167] The Committee's annual report outlines its work for the past year, including suggested actions that will advance government transparency through further legislation.[168]

First, COG recommends repealing or amending Civil Rights Law § 50-a, which prohibits disclosure of police records used to evaluate employment and opportunity for promotion.[169] Section 50-a prevents effective use of body cameras because it could be used to prohibit disclosure of evidence used to evaluate an officer's performance.[170] The report cites sources that have run articles criticizing the law, including the *New York Times*, *Newsday*, *The Albany Times-Union*, and *Time Magazine*.[171] There is currently a proposed bill in the Legislature that would prevent application of section 50-a to prohibit disclosure of body camera footage worn by police officers.[172] However, COG argues that repeal is a better option, because section 50-a also covers other government employees, and the prohibition would continue to apply to these other groups even if the

163. 9 N.Y.C.R.R. § 8.150.

164. *Id.*

165. *Id.*

166. *See* COMM. ON OPEN GOV'T, 40 YEARS OF FOIL AND THE COMMITTEE ON OPEN GOVERNMENT 1 (2014), http://www.dos.ny.gov/coog/pdfs/Timeline2014.pdf; *see also* N.Y. PUB. OFF. LAW §§ 84–90 (McKinney 2008 & Supp. 2017).

167. Comm. on Open Gov't, Meeting the Public's Legitimate Right to Information Concerning Government is Good Government 4 (2015) [hereinafter Comm. on Open Gov't 2015 Annual Report], https://www.dos.ny.gov/coog/pdfs/2015%20Annual%20Report.pdf.

168. *See id.* 19–22.

169. *Id.* at 5.

170. *See id.*

171. *Id.* at 5–7.

172. COMM. ON OPEN GOV'T 2015 ANNUAL REPORT, *supra* note 167, at 8 (first citing N.Y. Senate Bill No. 6030-A, 238th Sess. (2015), and then citing N.Y. Assembly Bill No. A8368-B, 238th Sess. (2015)).

amendment passes.[173]

Next, COG proposes that FOIL and the Open Meetings laws apply to the Joint Committee on Public Ethics (JCOPE).[174] Municipal ethics bodies are already subject to FOIL requests, and JCOPE serves the same function, acting as investigator where public officers and employees may have violated state ethical conduct statutes.[175] Additionally, JCOPE has come under fire for its lack of transparency,[176] and making it subject to FOIL will require the committee to keep track of how its members vote.[177] As FOIL provides protections against disclosure of sensitive information, there is no reason JCOPE should continue to be exempt from disclosure.[178]

Although previously rejected by the Legislature, COG continues to recommend that agencies disclose information proactively rather than wait until a citizen sends in a FOIL request.[179] This means that "records of significance" would have to be posted online whenever practicable to avoid the need for citizens to file FOIL requests.[180] Additionally, COG wants to expand the State Legislature's disclosure requirements. The report recommends that FOIL apply to the State Legislature as well as state and local agencies, with safeguards in place to prevent disclosure of communications between a legislator and his or her constituents.[181]

Under FOIL, commercial entities have multiple opportunities to block the dissemination of trade secrets that are held by agencies subject to FOIL.[182] COG recommends eliminating indefinite trade secret designations and speeding up FOIL appeals made by entities seeking to block document disclosure. First, they propose that a designation of records as "trade secrets" last only five years.[183] Presently, when a company marks a record as a trade secret, if someone FOIL's that document, the company is notified and given an opportunity to contest the disclosure before the

173. The law has expanded to include corrections officers, firefighters, paramedics, and certain peace officers. *Id.* at 8.

174. *See id.* at 9.

175. *Id.*

176. *Id.*

177. COMM. ON OPEN GOV'T 2015 ANNUAL REPORT, *supra* note 167, at 9.

178. *Id.*

179. The Legislature previously rejected a bill that proposed proactive disclosure. *Id.* at 10 (first citing N.Y. Assembly Bill No. 107, 236th Sess. (2013), then citing N.Y. Senate Bill No. 3438, 236th Sess. (2013)).

180. *Id.*

181. *Id.*

182. COMM. ON OPEN GOV'T 2015 ANNUAL REPORT, *supra* note 167, at 11.

183. *Id.*

agency holding the record decides whether or not to disclose the document.[184] Under the proposed system, the company must resubmit trade secret requests every two years after the initial five-year period to continue being notified when the document is subject to a FOIL request.[185] In the past, COG also recommended that commercial entities are penalized for bringing lawsuits seeking to prohibit disclosure of documents through an award of attorney's fees to the agency attempting to disclose a contested document if the agency wins the lawsuit.[186] This option has not been welcomed in the Legislature, so an alternative proposal would be to fast track such commercial lawsuits seeking to prohibit disclosure.[187] Under the alternative, the lawsuit would be finished within 120 days of filing.[188]

Tentative collective bargaining agreements are subject to FOIL, but may be withheld when disclosure would damage negotiations between public employers and unions.[189] COG argues that this exception should not apply following distribution of an agreement to workers within the union, because negotiations are concluded before distribution of the document.[190] This issue has avoided litigation because by the time a denied FOIL request can be heard by a judge, the bargaining agreement has already been signed and the issue is moot.[191] Accordingly, COG argues that it should be codified that such a negotiated contract may not be withheld from FOIL requests where the contract has been distributed to union members for approval.[192]

Rounding out the report, COG makes a number of "quick fix" recommendations for increasing transparency and efficiency. First, allow FOIL requests of the phone number and location of 911 calls throughout the state.[193] Next, individuals could FOIL records identifying victims of

184. *Id.*

185. *Id.* at 12.

186. *Id.* at 14.

187. COMM. ON OPEN GOV'T 2015 ANNUAL REPORT, *supra* note 167, at 14–15.

188. The company must bring a lawsuit within fifteen days of notification that the agency intends to disclose the records at issue. Upon commencement, the suit must be argued within forty-five days. Appeal of a judgment must be filed within fifteen days following the trial court's judgment. Then, the appeal must be argued within sixty days, and if appeal is not made within thirty days of the judgment, it would be deemed abandoned. *Id.* at 15.

189. *Id.* at 16.

190. Additionally, the key issue behind withholding the records revolves around inequality of knowledge between the negotiating parties, but when all members of a union are in possession of the agreement, "knowledge of the terms is widespread, but the public is often kept in the dark." *Id.*

191. *Id.*

192. COMM. ON OPEN GOV'T 2015 ANNUAL REPORT, *supra* note 167, at 15–16.

193. *Id.* at 16–17.

sex offenders if the victim's identity is redacted from any disclosed documents.[194] Finally, give judges case-by-case discretion to allow cameras in courtrooms, which is the current practice in at least forty-five other states.[195]

194. This would allow public officials to disclose documents without fear of a lawsuit as long as a victim who had not been previously identified has had their identity hidden through redactions. *Id.* at 17–18.

195. *Id.* at 18–19.