ADMINISTRATIVE LAW

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OUTLOOK INTRODUCTION

This article reviews developments in administrative law and practice during the period of 2016–2017 in the Judicial, Executive, and Legislative branches of New York State government. The discussion focuses on decisions announced by the New York Court of Appeals, an update on climate change initiatives of the Cuomo administration, and legislation that affects the alcohol beverage control law.

I. JUDICIAL BRANCH

A. Ultra Vires

The doctrine of ultra vires is a classic ground available for challenging agency actions and rules as illegal.[1] In promulgating a rule, an agency cannot exceed the authority granted under its enabling

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1. PATRICK J. BORCHERS & DAVID L. MARKELL, N.Y. STATE ADMIN. PROCEDURE AND PRACTICE § 8.3 (2d ed. 1998).

legislation.[2] In determining whether the rule exceeded the agency's authority, courts generally will defer to an agency's interpretation of its enabling legislation and those statutes which it is charged with implementing, provided the interpretation is reasonable.[3] Where, however, interpretation does not involve an agency's special expertise, the court need not defer to the agency's interpretation.[4] The most noteworthy New York State case involving a determination that an agency acted ultra vires is *Boreali v. Axelrod*, holding that "the Public Health Council overstepped the boundaries of its lawfully delegated authority when it promulgated a comprehensive code to govern tobacco smoking in areas that are open to the public."[5] *Boreali* was considered an important decision about rulemaking.[6] *Boreali* articulated four considerations to be used in determining whether an agency had acted ultra vires, thus, crossing the "difficult-to-define line between administrative rule-making and legislative policy-making."[7] The Court noted that when these factors coalesce, the line has been crossed.[8] These factors that are to be considered in their totality are: 1) whether the action taken was a uniquely legislative function—weighing economic and social issues, 2) whether the agency was acting on a clean slate or filling in blanks in the law, 3) whether previous or current legislative debate in the subject area had occurred, and 4) whether the action required specific agency expertise and technical competence.[9]

Two recent cases before the Court of Appeals addressed the applicability of the *Boreali* factors to state regulations regarding smoking in parks and state regulations governing relicensing of individuals with drunk driving convictions.

On February 27, 2013, the Office of Parks, Recreation, and Historic Preservation (OPRHP) adopted new regulations, prohibiting smoking

2. *See* Boreali v. Axelrod, 71 N.Y.2d 1, 6, 517 N.E.2d 1350, 1351, 523 N.Y.S.2d 464, 466 (1987) (stating the Public Health Council overstepped its grounds under its enabling statute).

3. *See id.* (noting the Public Health Council exceeded its legislative mandate when it reached its own conclusions without legislative guidance); BORCHERS & MARKELL, *supra* note 1, § 8.3.

4. *See id.* at 14, 517 N.E.2d at 1356, 523 N.Y.S.2d at 471.

5. *Id.* at 6, 517 N.E.2d at 1351, 523 N.Y.S.2d at 466.

6. *See, e.g.*, Bernard Schwartz, *Administrative Law Cases During 1991*, 44 ADMIN. L. REV. 629, 648–49 (1992).

7. *Boreali*, 71 N.Y.2d at 11, 517 N.E.2d at 1355, 523 N.Y.S.2d at 469.

8. *Id.*

9. *See id.* at 11–15, 517 N.E.2d at 1355–56, 523 N.Y.S.2d at 469–71.

within New York City State Parks.[10] The petitioner, Citizens Lobbying Against Smoker Harassment (CLASH), is a nonprofit group dedicated to promoting the interests of tobacco users.[11] CLASH commenced an Article 78 proceeding, challenging the OPRHP regulations as "unconstitutional and in violation of the separation of powers doctrine."[12] The supreme court granted the petitioner's request and declared the relevant regulation invalid as a violation of the separation of powers doctrine.[13] The appellate division disagreed, reversing the trial court and finding that enactment of the regulation was a valid agency action under the OPRHP mandate to provide for the health, safety, and welfare of the public.[14]

The Court of Appeals accepted the case in order to decide whether the OPRHP regulation banning smoking within state parks "exceeds the parameters of the power granted by the legislature to the enacting agency—that is, 'if an agency was not delegated the authority to [establish the] rule[], then it would usurp the authority of the legislative branch by enacting th[at] [regulation].'"[15] In order to make this determination, the Court used factors enumerated in *Boreali v. Axelrod*.[16] The first factor is whether "the agency did more than 'balanc[e] costs and benefits according to preexisting guidelines,' but instead made 'value judgments entailing[ing] difficult and complex choices between broad policy goals' to resolve social problems."[17] CLASH argued that policy concerns weigh in its favor because the OPRHP regulation is an attempt at balancing competing considerations, an action that must be left to the legislature.[18] However, the Court declined to consider the argument,

10. NYC C.L.A.S.H., Inc. v. N.Y. State Office of Parks, Recreation, and Historic Pres. (*NYC C.L.A.S.H. III*), 27 N.Y.3d 174, 177, 51 N.E.3d 512, 515, 32 N.Y.S.3d 1, 4 (2016); *see* 9 N.Y.C.R.R. § 386.1 (2016).

11. *NYC C.L.A.S.H. III*, 27 N.Y.3d at 177, 51 N.E.3d at 515, 32 N.Y.S.3d at 4; *see* C.L.A.S.H., http://www.nycclash.com/ (last visited Mar. 2, 2018).

12. *NYC C.L.A.S.H. III*, 27 N.Y.3d at 177, 51 N.E.3d at 515, 32 N.Y.S.3d at 4 (quoting NYC C.L.A.S.H., Inc. v. N.Y. State Office of Parks, Recreation, and Historic Pres. (*NYC C.L.A.S.H. I*), 41 Misc. 3d 1096, 1097, 975 N.Y.S.2d 593, 595 (Sup. Ct. Albany Cty. 2013)); *see* N.Y. C.P.L.R. 7801 (McKinney 2008).

13. *NYC C.L.A.S.H. I*, 41 Misc. 3d at 1101, 975 N.Y.S.2d at 597–98.

14. NYC C.L.A.S.H., Inc. v. N.Y. State Office of Parks, Recreation, and Historic Pres. (*NYC C.L.A.S.H. II*), 125 A.D.3d 105, 112, 2 N.Y.S.3d 231, 237 (3d Dep't 2014).

15. *NYC C.L.A.S.H. III*, 27 N.Y.3d at 178, 51 N.E.3d at 516, 32 N.Y.S.3d at 5 (quoting Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n, 25 N.Y.3d 600, 608, 36 N.E.3d 632, 637, 15 N.Y.S.3d 725, 730 (2015) (alteration in original)).

16. *See id.* at 180–85, 51 N.E.3d at 518–21, 32 N.Y.S.3d at 6–10; Boreali v. Axelrod, 71 N.Y.2d 1, 11–13, 517 N.E.2d 1350, 1355–56, 523 N.Y.S.2d 464, 469–72 (1987).

17. *NYC C.L.A.S.H. III*, 27 N.Y.3d at 179–80, 51 N.E.3d at 517, 32 N.Y.S.3d at 6 (quoting *Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 610, 36 N.E.3d at 638, 15 N.Y.S.3d at 731).

18. *Id.* at 181, 51 N.E.3d at 518, 32 N.Y.S.3d at 7.

because it had not been made at trial or in front of the appellate division.[19]

Next, *Boreali* looks at "whether the agency 'merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance.'"[20] The Court found that the legislature had already spoken about the dangers of secondhand smoke and banned smoking in certain public areas, indoors and out.[21] Further, the legislature specifically gave state agencies authorization to prohibit smoking through regulation.[22] As the legislature had previously ruled on smoking bans, giving agencies the authority to enact greater prohibitions, this factor weighed in favor of OPRHP.[23]

The third factor asks whether the legislature has tried to reach a consensus on the issue, but was unsuccessful.[24] According to CLASH, the legislature has rejected twenty-four bills that attempted to restrict outdoor smoking over a thirteen year period.[25] Although the Court accepted this as a true statement, it also cautioned that there is danger in making the inference that the legislature does not want to restrict smoking, when the only evidence is a lack of legislative action.[26] That dearth of legislative action may be in part because the OPRHP enabling statute[27] contemplated future action on smoking through regulation rather than legislation.[28] The Court acknowledged a bill to ban smoking in all New York State Parks pending in the legislature, but did not accept that the bill showed legislative intent "to fill the vacuum" of smoking

19. *Id.* At trial, CLASH argued that this factor was not relevant to the proceeding, and in front of the appellate division, CLASH argued that OPRHP gave too much weight to economic considerations. *NYC C.L.A.S.H. I*, 41 Misc. 3d 1096, 1100 n.2, 975 N.Y.S.2d 593, 596 n.2 (Sup. Ct. Albany Cty. 2013); *NYC C.L.A.S.H. II*, 125 A.D.3d at 109, 2 N.Y.S.3d at 234. No mention was made prior to the Court of Appeals of policy considerations. *NYC C.L.A.S.H. III*, 27 N.Y.3d at 181, 51 N.E.3d at 518, 32 N.Y.S.3d at 7.

20. *NYC C.L.A.S.H. III*, 27 N.Y.3d at 182, 51 N.E.3d at 519, 32 N.Y.S.3d at 8 (quoting *Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 611, 36 N.E.3d at 639, 15 N.Y.S.3d at 732).

21. *Id.* at 182–83, 51 N.E.3d at 519, 32 N.Y.S.3d at 8; N.Y. PUB. HEALTH LAW § 1399-o(1)–(2), (4) (McKinney Supp. 2018).

22. *NYC C.L.A.S.H. III*, 27 N.Y.3d at 183, 51 N.E.3d at 519, 32 N.Y.S.3d at 8 (quoting N.Y. PUB. HEALTH LAW § 1399-r(3) (McKinney 2012)).

23. *See id.*

24. *Id.* (quoting *Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 611–12, 36 N.E.3d at 639, 15 N.Y.S.3d at 732).

25. *Id.* at 183, 51 N.E.3d at 519–20, 32 N.Y.S.3d at 8–9.

26. *Id.* at 183–84, 51 N.E.3d at 519–20, 32 N.Y.S.3d at 8–9 (quoting *In re* Oswald N., 87 N.Y.2d 98, 103 n.1, 661 N.E.2d 679, 681 n.1, 637 N.Y.S.2d 949, 951 n.1 (1995)).

27. *See* N.Y. PARKS REC. & HIST. PRESERV. LAW § 3.09 (McKinney 2013 & Supp. 2018).

28. *NYC C.L.A.S.H. III*, 27 N.Y.3d at 184, 51 N.E.3d at 520, 32 N.Y.S.3d at 9; PARKS REC. & HIST. PRESERV. § 3.09(5).

prohibition, which would put this factor in favor of CLASH.[29] Instead, it deemed the bill a "prophylactic measure introduced by an anti-smoking advocate protecting against the possibility that this matter is not resolved to that legislator's liking on appeal."[30] Therefore, this factor helped neither CLASH nor OPRHP.[31]

The final factor considered is whether OPRHP used any "special expertise or competence" to create the challenged regulation.[32] CLASH argued that parks management is the expertise of OPRHP, and a smoking ban is outside of the scope of parks management.[33] However, the Court found that OPRHP is tasked with both the operation and maintenance of property under its management, and a ban on smoking is within the realm of parks operation.[34] "OPRHP [] stated that the rule would . . . improve enjoyment of state parks[,] . . . promote healthy lifestyles[, and] provide operational savings . . . ."[35] The regulation also allowed park patrons to enjoy state parks without exposure to secondhand smoke and litter associated with smoking, such as cigarette butts.[36] Accordingly, the smoking ban was within the OPRHP realm of expertise and the *Boreali* factor here favors OPRHP.

As the Court found that all four factors were favorable to OPRHP, albeit some more heavily than others, the Court affirmed the appellate division order, upholding the smoking ban.[37] The Court emphasized that no value judgments were made between policy goals, because OPRHP was given authority over the health, safety, and welfare of the public within state parks by the agency enabling statute.[38]

In *Michael W. Carney v. New York State Department of Motor*

29. *NYC C.L.A.S.H. III*, 27 N.Y.3d at 184, 51 N.E.3d at 520, 32 N.Y.S.3d at 9 (citing N.Y. Senate Bill No. 3760, 238th Sess. (2015)).

30. *Id.*

31. *Id.* at 183–84, 51 N.E.3d at 520, 32 N.Y.S.3d at 9 ("The analysis of this *Boreali* consideration arguably is close, but we agree with OPRHP that, under these circumstances it does not weight in CLASH's favor.").

32. *Id.* at 184, 51 N.E.3d at 520, 32 N.Y.S.3d at 9 (quoting Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n, 25 N.Y.3d 600, 612, 36 N.E.3d 632, 640, 15 N.Y.S.3d 725, 733 (2015)).

33. *Id.* at 185, 51 N.E.3d at 520, 32 N.Y.S.3d at 9.

34. *NYC C.L.A.S.H. III*, 27 N.Y.3d at 184–85, 51 N.E.3d at 520–21, 32 N.Y.S.3d at 9–10 (quoting N.Y. PARKS REC. & HIST. PRESERV. LAW § 3.09(2) (McKinney 2012 & Supp. 2017)).

35. *Id.* at 185, 51 N.E.3d at 521, 32 N.Y.S.3d at 10; 49 N.Y. Reg. 11 (proposed Dec. 5, 2012) (to be codified at 9 N.Y.C.R.R. § 368.1).

36. 49 N.Y. Reg. at 11.

37. *NYC C.L.A.S.H. III*, 27 N.Y.3d at 185, 51 N.E.3d at 521, 32 N.Y.S.3d at 10.

38. *Id.* (quoting Boreali v. Axelrod, 71 N.Y.2d 1, 11, 517 N.E.2d 1350, 1355, 523 N.Y.S.2d 464, 469 (1987)) (first citing Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n, 25 N.Y.3d 600, 610, 36 N.E.3d 632, 638, 15 N.Y.S.3d 725, 731 (2015); and then citing PARKS REC. & HIST. PRESERV. § 3.09(2), (5)).

Vehicles, three individuals challenged "new recidivism rules" of the Department of Motor Vehicles (DMV),[39] claiming that they were ultra vires.[40] The petitioners also argued that the rules violated the separation of powers doctrine, conflicted with the Vehicle and Traffic Law, were arbitrary and capricious, and were impermissibly applied retroactively to the petitioners' relicensing applications.[41]

The DMV's regulations long have been aimed at curbing drunk driving by denying recidivists new licenses.[42] "[A] conviction for a drunk driving offense generally results in the automatic revocation of the offender's driver's license . . . ."[43] An individual can apply for a new license after a minimum time period.[44] Individuals with multiple convictions cannot obtain a new license unless the restriction is waived.[45] A waiver is possible depending on the conduct involved and the satisfaction of certain conditions; however, "the commissioner [of the DMV] may . . . refuse to restore a license which otherwise would be restored . . . in the interest of the public safety and welfare" on a case by case basis.[46] Generally, the Commissioner has discretion to issue a new license[47] but is limited in certain situations.[48]

As a result of continuing concern about the increase of incidents of drunk driving, in 2012 the DMV undertook a review of its regulations, and suspended relicensing pending the completion of its review so that it could "ensur[e] that drivers with similar records would be treated uniformly."[49]

The new regulations, issued on an emergency basis, imposed more restrictions on the Commissioner's reissuance of licenses to recidivist

39. Brief for Respondents at 8, Carney v. N.Y. State Dep't of Motor Vehicles, 133 A.D.3d 1150, 20 N.Y.S.3d 467 (3d Dep't 2015), *aff'd sub nom.* Acevedo v. N.Y. State Dep't of Motor Vehicles, 29 N.Y.3d 202, 77 N.E.3d 331, 54 N.Y.S.3d 614 (2017) (No. 520382).

40. *Id.* at 13.

41. Acevedo v. N.Y. State Dep't of Motor Vehicles (*Acevedo III)*, 29 N.Y.3d 202, 219, 77 N.E.3d 331, 341–42, 54 N.Y.S.3d 614, 624 (2017).

42. *Id.* at 214, 77 N.E.3d at 338, 54 N.Y.S.3d at 621.

43. *Id.* at 213, 77 N.E.3d at 337, 54 N.Y.S.3d at 620.

44. *Id.* (citing N.Y. VEH. & TRAF. LAW § 1193(2)(b) (McKinney 2011)).

45. *Id.*

46. *Acevedo III*, 29 N.Y.3d at 213, 77 N.E.3d at 337–38, 54 N.Y.S.3d at 20 (second alteration in original) (citing VEH. & TRAF. § 1193(2)(b)(12)(b)(ii), (e)).

47. *Id.* at 214, 77 N.E.3d at 338, 54 N.Y.S.3d at 621 (citing VEH. & TRAF. § 1193(2)(c)(2)–(3)).

48. VEH. & TRAF. § 1193(2)(c)(2)–(3).

49. *Acevedo III*, 29 N.Y.3d at 215, 77 N.E.3d at 338, 54 N.Y.S.3d at 621.

drunk drivers. Based on a review of a driver's lifetime driving record,[50] the regulations required denial of an application where the applicant has "five or more alcohol- or drug-related driving convictions or incidents in any combination within his or her lifetime"[51] or (2) "three or four alcohol- or drug-related driving convictions or incidents in any combination" and "one or more serious driving offenses"[52] within a "25 year look back period."[53] "[T]he Commissioner may in his or her discretion approve the application" of an applicant in category two who has no serious driving offenses within the twenty-five year look-back period, after the minimum statutory revocation period plus an additional five year period.[54] If a license is issued in these circumstances, it is subject to an A2 restriction for five years.[55] During that time the use of any motor vehicle owned or operated by such person is monitored by an ignition interlock device.[56]

In any event, the Commissioner may issue a license despite the regulations provided if it is done in "'unusual, extenuating and compelling circumstances,' in which case 'the applicant may be issued a license or permit with a problem driver restriction . . . and may be required to install an ignition interlock device.'"[57]

The petitioners, all of whom had multiple drunk driving convictions, each commenced an Article 78 proceeding asserting challenges to the new regulations after their licenses were revoked and the new regulations applied to their applications.[58] The supreme court dismissed the cases.[59]

50. *Id.* at 215, 77 N.E.3d at 339, 54 N.Y.S.3d at 621 (citing 15 N.Y.C.R.R. § 136.5(b) (2016)).

51. *Id.* (citing 15 N.Y.C.R.R. § 136.5(b)(1)).

52. *Id.* at 215, 77 N.E.3d at 339, 54 N.Y.S.3d at 622 (citing 15 N.Y.C.R.R. § 136.5(b)(2)). "A serious driving offense includes: (i) 'a fatal accident'; (ii) 'a driving-related Penal Law conviction'; (iii) 'conviction of two or more violations for which five or more points are assessed' on the applicant's driving record; or (iv) '20 or more points from any violations.'" *Id.* (citing 15 N.Y.C.R.R. § 136.5(a)(2)).

53. *Acevedo III*, 29 N.Y.3d at 215, 77 N.E.3d at 339, 54 N.Y.S.3d at 622 (citing 15 N.Y.C.R.R. § 136.5(b)(2)).

54. *Id.* at 215–16, 77 N.E.3d at 339, 54 N.Y.S.3d at 622 (citing 15 N.Y.C.R.R. § 136.5(b)(3)(ii)).

55. *Id.* at 216, 77 N.E.3d at 339, 54 N.Y.S.3d at 622. "An A2 restricted license is limited to operation to and from specified destinations—for instance, 'the holder's place of employment or education.'" *Id.* (first quoting 15 N.Y.C.R.R. § 135.9(b) (2016); and then quoting 15 N.Y.C.R.R. § 3.2(c)(4) (2016)).

56. *See* 15 N.Y.C.R.R. § 136.5(b)(3)(ii).

57. *Acevedo III*, 29 N.Y.3d at 216, 77 N.E.3d at 339, 54 N.Y.S.3d at 622 (quoting 15 N.Y.C.R.R. § 136.5(d)).

58. *Id.* at 217, 77 N.E.3d at 340, 54 N.Y.S.3d at 623.

59. Carney v. N.Y. State Dep't of Motor Vehicles, 43 Misc. 3d 674, 680, 982 N.Y.S.2d 298, 302 (Sup. Ct. Albany Cty. 2014); Acevedo v. N.Y. State Dep't of Motor Vehicles, No. 2393/13, 2014 N.Y. Slip Op. 30422(U), at 40–41 (Sup. Ct. Albany Cty. Feb. 21, 2014);

The appellate division affirmed each dismissal with dissents.[60] Each Third Department panel held that the regulations were not ultra vires, did not conflict with the Vehicle and Traffic Laws, and that their application retroactively was permissible.[61] The dissents concluded that the Commissioner had abdicated the authority to exercise her discretion "in favor of a hard and fast rule."[62]

The Court of Appeals found all petitioners' arguments unavailing. The Court brushed past the standing argument raised by the DMV and made quick work of the argument that the regulations conflicted with the Vehicle and Traffic Law, noting that a driver convicted of drunk driving has never been entitled to renew his or her license, and the Commissioner's discretion has not been restrained but rather formalized.[63] This formality, according to the Court, ensures consistency and uniformity and equal treatment of applicants.[64]

As to the ultra vires argument, the Court invoked the *Boreali* factors discussed earlier. As to the first factor, whether the agency merely did a cost benefit analysis, the court concluded that while the agency did engage in a deliberate analysis of the costs involved in the application of the regulations, the ultimate goal was to protect the public against the consequences of drunk driving; a goal supported by the broad mandate the legislature delegated to the DMV.[65]

As to the second factor, whether the agency was acting to fill the interstices of existing legislation or writing on a clear slate, the Court observed that the legislature had already created a statutory scheme with constraints and consequences for drunk driving so that the DMV was elaborating on them rather than adopting a new policy.[66]

As to the third factor, legislative failures or inaction, the Court was

Matsen v. N.Y. State Dep't of Motor Vehicles, No. 2767/13, 2014 N.Y. Slip Op. 33735(U), at 38 (Sup. Ct. Albany Cty. June 3, 2014).

60. Acevedo v. N.Y. State Dep't of Motor Vehicles (Acevedo II), 132 A.D.3d 112, 126, 14 N.Y.S.3d 790, 801 (3d Dep't 2015); Carney v. N.Y. State Dep't of Motor Vehicles (Carney II), 133 A.D.3d 1150, 1156, 20 N.Y.S.3d 467, 472 (3d Dep't 2015); Matsen v. N.Y. State Dep't of Motor Vehicles (Matsen II), 134 A.D.3d 1283, 1288, 21 N.Y.S.3d 441, 446 (3d Dep't 2015)).

61. *Acevedo II*, 132 A.D.3d at 119, 14 N.Y.S.3d at 796; *Carney II*, 133 A.D.3d at 1153, 20 N.Y.S.3d at 470; Matsen II, 134 A.D.3d at 1284–85, 21 N.Y.S.3d at 444.

62. *Acevedo II*, 132 A.D.3d at 125, 14 N.Y.S.3d at 800 (Lynch, J., dissenting); *see Carney II*, 133 A.D.3d at 1155, 20 N.Y.S.3d at 472 (Lynch, J., dissenting); *Matsen II*, 134 A.D.3d at 1288, 21 N.Y.S.3d at 446 (Lynch, J., dissenting).

63. *Acevedo III*, 29 N.Y.3d 202, 220, 77 N.E.3d 331, 342, 54 N.Y.S.3d 614, 625 (citing N.Y. VEH. & TRAF. LAW § 1193(2)(b)(12)(b) (McKinney 2011)).

64. *Id.*

65. *Id.* at 223, 77 N.E.3d at 344, 54 N.Y.S.3d at 627.

66. *Id.* at 224, 77 N.E.3d at 345, 54 N.Y.S.3d at 628.

not persuaded that the legislature's failure to adopt additional legislation over the previous years had any probative value.[67] Rather, the Court observed:

> Notably, DMV has been regulating in the realm of post-revocation relicensing since 1980. In the ensuing decades, the legislature—though fully capable of corrective action—has done nothing to curb the Commissioner's authority or otherwise signal disapproval. To the contrary, the legislature has, for nearly forty years, left the Commissioner's authority intact, demonstrating the legislature's ongoing reliance on DMV's expertise. Given the absence of any legislative interference over this extended time period, "we can infer, to some degree, that the legislature approves" of the Commissioner's actions.[68]

Finally, as to the fourth factor of agency expertise, the Court pointed out that the legislature had charged the DMV with collecting, maintaining, and analyzing statistics on drunk driving so that it could develop regulations to address the issue, thus demonstrating its expertise.[69] The Court concluded that as applied to the DMV regulations, the *Boreali* factors favored the DMV.[70]

As to arbitrariness of the regulations, the Court held that the petitioners did not meet the burden of demonstrating that they were lacking in reason.[71]

Although the impermissibility of retroactive application has a certain surface appeal, the Court disposed of that challenge by observing that

> the Regulations did not rescind petitioners' existing licenses on the basis of prior conduct. Rather, the Regulations applied only to the Commissioner's prospective consideration of petitioners' pending relicensing applications—a "future transaction[]." The Commissioner's consideration of "antecedent events"—petitioners' driving records—does not, by itself, render the Regulations "retroactive" in nature.[72]

67. *Id.* at 225, 77 N.E.3d at 346, 54 N.Y.S.3d at 629.

68. *Acevedo III*, 29 N.Y.3d at 225, 77 N.E.3d at 346, 54 N.Y.S.3d at 629 (quoting Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n, 25 N.Y.3d 600, 612, 36 N.E.3d 632, 639, 15 N.Y.S.3d 725, 732 (2015)).

69. *Id.* at 225–26, 77 N.E.3d at 346, 54 N.Y.S.3d at 629 (quoting N.Y. VEH. & TRAF. LAW § 216-a (McKinney 2005)).

70. *Id.* at 226, 77 N.E.3d at 346, 54 N.Y.S.3d at 629 (citing Boreali v. Axelrod, 71 N.Y.2d 1, 11–14, 517 N.E.2d 1350, 1355–56, 523 N.Y.S.2d 464, 469–71 (1987)).

71. *Id.* at 227, 77 N.E.3d at 347, 54 N.Y.S.3d at 630.

72. *Id.* at 229, 77 N.E.3d at 348, 54 N.Y.S.3d at 631 (first quoting Forti v. N.Y. State Ethics Comm'n, 75 N.Y.2d 596, 609–10, 554 N.E.2d 876, 881, 555 N.Y.S.2d 235, 240

B. Arbitrary and Capricious Standard of Review

"An [agency's] action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts."[73] "If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable."[74] A determination found to have a rational basis will be upheld even if the facts would support a different result.[75]

In *ACME Bus Corp. v. Orange County*, the issue before the Court was whether Orange County's decision not to accept the petitioner's bid for a school bus transportation contract was arbitrary and capricious.[76] Orange County had solicited proposals to provide school bus transportation for "preschool special education services in three transportation zones" of the county.[77] The County is required to provide such services in accordance with Public Health Law § 2559-a[78] and Education Law § 4410(8).[79]

The Request for Proposals (RFP) invited applicants to submit plans for a three-year contract for services,[80] with the possibility that the winning contract would have the option of two one-year extensions.[81] The terms of the RFP provided that each proposal would be evaluated in

(1990); and then quoting Leon St. Clair Nation v. City of New York, 14 N.Y.3d 452, 457, 928 N.E.2d 404, 407, 902 N.Y.S.2d 22, 25 (2010)).

73. Ward v. City of Long Beach, 20 N.Y.3d 1042, 1043, 985 N.E.2d 898, 899, 962 N.Y.S.2d 587, 588 (2013) (quoting Peckham v. Calogero, 12 N.Y.3d 424, 431, 911 N.E.2d 813, 816, 883 N.Y.S.2d 751, 754 (2009)).

74. *Id.* (citing *Peckham*, 12 N.Y.3d at 431, 911 N.E.2d at 816, 883 N.Y.S.2d at 754).

75. *Id.* (citing *Peckham*, 12 N.Y.3d at 431, 911 N.E.2d at 816, 883 N.Y.S.2d at 754).

76. (*ACME Bus Corp. III*), 28 N.Y.3d 417, 421, 68 N.E.3d 671, 672, 45 N.Y.S.3d 852, 853 (2016).

77. *Id.*

78. N.Y. PUB. HEALTH LAW § 2559-a (McKinney 2012) ("The municipality in which an eligible child resides shall, beginning with the first day of service, provide either directly, by contract, or through reimbursement at a mileage rate authorized by the municipality for the use of a private vehicle or for other reasonable transportation costs, for suitable transportation pursuant to section twenty-five hundred forty-five of this title. All contracts for transportation of such children shall be provided pursuant to the procedures set forth in section two hundred thirty-six of the family court act, using the date on which the child's IFSP is implemented, in lieu of the date the court order was issued; provided, however, that the city of New York shall provide such transportation in accordance with the provisions of chapter one hundred thirty of the laws of nineteen hundred ninety-two, if applicable.").

79. N.Y. EDUC. LAW § 4410(8) (McKinney 2016 & Supp. 2018) ("The municipality in which a preschool child resides shall, beginning with the first day of service, provide either directly or by contract for suitable transportation, as determined by the board, to and from special services or programs . . . ."); *see* Brief for Respondents at 3, 43, ACME Bus Corp. v. Orange Cty., 28 N.Y.3d 417 (2016) (No. 2013-09516) [hereinafter ACME Respondent Brief].

80. *ACME Bus Corp. III*, 28 N.Y.3d at 421, 68 N.E.3d at 672, 45 N.Y.S.3d at 853.

81. *Id.*

nine categories, the first eight categories measuring performance on a range of five to twenty points[82] and the ninth category evaluating cost, worth twenty points for the lowest cost proposal.[83] Points for costs given to the other applicants would be "based on percentage to points ratio,"[84] as illustrated by the example described in the RFP: "[I]f the total cost [difference] between the lowest Offeror and the next lowest Offeror is ten percent then Offeror two will have two points deducted from the maximum score of twenty."[85] The RFP also stated that

> [t]he submission of a proposal implies the Offeror's acceptance of the evaluation criteria and Offeror's acknowledgment that subjective judgments must be made by the Evaluation Committee . . . . The County reserves the right to: accept other than the lowest priced offer, waive any informality, or reject any or all proposals, with or without advertising for new proposals, if in the best interest of the County."[86]

Three applicants submitted proposals: ACME Bus Corp., which held the contract at the time, submitted two alternative proposals (both more costly than either of the other proposals): "[O]ne containing pricing for each of the zones, and one providing an estimate for all three zones combined, at a discounted price"[87]; Quality Bus Service, Inc. submitted a proposal for all three zones[88]; VW Trans, LLC submitted a proposal for one zone.[89] The bids otherwise met all the RFP requirements.[90] The County awarded contracts to Quality Bus Service, Inc. for two zones, and to VW Trans, LLC for one zone.[91] The County thereafter exercised its renewal option for one year.[92]

ACME Bus Corp. commenced an Article 78 proceeding against the County and the other bidders, alleging that

> (a) The RFP failed to identify a specific methodology or formula regarding the evaluation of the cost proposals; (b) VW did not meet the requisite qualifications under the RFP; (c) the transportation contracts were not awarded to the highest scoring proposer (alleging upon information and belief, that ACME was); (d) Quality and VW failed to

82. *Id.*
83. *Id.*
84. *Id.*
85. *ACME Bus Corp. III*, 28 N.Y.3d at 421, 68 N.E.3d at 672, 45 N.Y.S.3d at 853 (alteration in original).
86. *Id.* at 421–22, 68 N.E.3d at 672, 45 N.Y.S.3d at 853.
87. *Id.* at 422, 68 N.E.3d at 672, 45 N.Y.S.3d at 853.
88. *Id.*
89. *Id.*
90. ACME Respondent Brief, *supra* note 79, at 9.
91. *ACME Bus Corp. III*, 28 N.Y.3d at 422, 68 N.E.3d at 672, 45 N.Y.S.3d at 853.
92. *Id.*

> meet vehicle and equipment requirements in addition to bid and performance bond requirements.[93]

Ultimately, ACME's argument centered on the formula used to deduct points for the submissions with higher costs.[94] It argued that by applying the "percentage to points ratio deduction for cost, it would have . . . achieved a higher total score than VW in the third zone."[95] The County acknowledged, however, that it could not apply the cost differential set out in the RFP example because the percentage differences between the costs of the parties' proposals were less than the ten percent; thus, using that example would have resulted in no deductions for proposals with higher costs.[96]

The supreme court granted the County's motion to dismiss, holding that the County's determination had a rational basis and did not evince any impropriety.[97] ACME appealed and the Second Department affirmed.[98] The Court of Appeals granted leave to appeal and reversed.[99]

The Court agreed with ACME that the County's deviation for the formula described in the RFP was arbitrary and capricious.[100] According to the Court, the county was bound by § 104-b of the General Municipal Law which provides that any procurement must "*guard against* favoritism, improvidence, extravagance, fraud and corruption"[101] and its own internal policies which provided "that the County's award of a contract pursuant to an 'RFP must be made in accordance with the evaluation criteria specified in the RFP.'"[102] The Court concluded that in applying a new formula, the County violated its own policy, making it arbitrary and capricious[103] but more importantly in doing so, it gave rise to speculation that the County's decision was influenced by "favoritism, improvidence, extravagance, fraud or corruption," thus violating § 104-b

93. ACME Respondent Brief, *supra* note 79, at 11–12.

94. *See ACME Bus Corp. III*, 28 N.Y.3d at 423, 68 N.E.3d at 673, 45 N.Y.S.3d at 854.

95. *Id.* at 422, 68 N.E.3d at 673, 45 N.Y.S.3d at 854.

96. *See* ACME Respondent Brief, *supra* note 79, at 34.

97. ACME Bus Corp. v. Cty. of Suffolk, No. 23129/2013, 2015 BL 149208, at 5 (Sup. Ct. Suffolk Cty. May 05, 2015).

98. ACME Bus Corp. v. Orange Cty., 126 A.D.3d 688, 690, 5 N.Y.S.3d 231, 232 (2d Dep't 2015).

99. *ACME Bus Corp. III*, 28 N.Y.3d at 427, 68 N.E.3d at 677, 45 N.Y.S.3d at 857; ACME Bus Corp. v. Orange Cty., 26 N.Y.3d 906, 906, 40 N.E.3d 575, 575, 18 N.Y.S. 597, 597 (2015) (granting leave to appeal).

100. *ACME Bus Corp. III*, 28 N.Y.3d at 421, 68 N.E.3d at 672, 45 N.Y.S.3d at 853.

101. *Id.* at 423–24, 68 N.E.3d at 674, 45 N.Y.S.3d at 855 (quoting N.Y. GEN MUN. LAW § 104-b (McKinney 2016).

102. *Id.* at 424, 68 N.E.3d at 674, 45 N.Y.S.3d at 855 (citing County of Orange Procurement Policy part V[E] (Mar. 2012)).

103. *Id.* at 425, 68 N.E.3d at 675, 45 N.Y.S.3d at 856.

of the General Municipal Law.[104] The Court rejected the County's argument about its attempt to address the failure of the formula in fairly evaluating the cost element, pointing out that the County could have rejected all the bids and restarted the process.[105] The Court viewed its decision as sending a message regarding the competitive bidding process; namely that

> [o]ur holding promotes the goals of fairness and the prevention of fraud and corruption in the bidding process. The offeror is given notice of the standards to be applied and acts accordingly. When different standards are applied, the process is subverted. Changing the expressly defined rules midway gives rise to speculation of fraud or corruption.[106]

The dissent argued that the County should not be hamstrung by the example in the RFP.[107] It expressed the view that in the absence of any proffered example in the RFP, the County would have been able to employ a different formula without challenge when confronted with the costs contained in the proposals.[108] What seems to get lost in the arguments is that ACME's bid was, in any event, without question, "the most expensive."[109]

The issue in *Corrigan v. NY State Office of Children and Family Services* was whether a decision by the New York State Office of Children and Family Services (OCFS) not to expunge certain child abuse reports was arbitrary and capricious.[110] When a report of child abuse or other related misconduct is filed, OCFS may choose one of two tracks; a traditional Child Protective Services investigation, or a less adversarial process known as Family Assessment Response (FAR).[111] FAR was put in place to help families that could benefit from a "service-oriented approach," instead of an investigation leading to criminal charges.[112]

104. *Id.* (first citing AAA Carting & Rubbish Removal, Inc. v. Town of Southeast, 17 N.Y.3d 136, 144, 951 N.E.2d 57, 61, 927 N.Y.S.2d 618, 622 (2011); and then citing N.Y. GEN. MUN. LAW §§ 103, 104-b (McKinney 2016)).

105. *ACME Bus Corp. III*, 28 N.Y.3d at 426–27, 68 N.E.3d at 676, 45 N.Y.S.3d at 857 (citing *AAA Carting & Rubbish Removal, Inc.*, 17 N.Y.3d at 144, 951 N.E.2d at 62, 927 N.Y.S.2d at 623).

106. *Id.* at 426, 68 N.E.3d at 675, 45 N.Y.S.3d at 856.

107. *Id.* at 429, 68 N.E.3d at 678, 45 N.Y.S.3d at 859 (Garcia, J. dissenting).

108. *Id.* (quoting GEN. MUN. § 104-b(1)).

109. *Id.* at 428, 68 N.E.3d at 677, 45 N.Y.S.3d at 858.

110. *Corrigan II*, 129 A.D.3d 1073, 1073, 12 N.Y.S.3d 216, 216 (2d Dep't 2015).

111. *Id.* at 1073, 12 N.Y.S.3d at 216–17 (quoting N.Y. SOC. SERV. LAW § 427-a(4)(d)(i) (McKinney 2010 & Supp. 2018)) (citing 18 N.Y.C.R.R. § 431.13 (2016)).

112. Corrigan v. N.Y. State Office of Children & Family Servs. (*Corrigan III*), 28 N.Y.3d 636, 640, 71 N.E.3d 537, 539, 49 N.Y.S.3d 46, 48 (2017) (quoting Legislative Memorandum of Sen. Rath, *reprinted in* 2008 McKinney's Sess. Law, ch. 452, at 1958 (supporting a bill

Under the traditional "investigative track" those accused of child abuse may request a determination that the report be erased if the charges were unfounded.[113] However, the FAR program has no such mechanism, instead requiring automatic expunction of unfounded reports ten years after filing.[114]

In this Article 78 proceeding, the petitioners argued that they should be able to expunge reports of alleged child abuse when the case was handled under FAR, and the failure of OCFS to do so was arbitrary and capricious.[115] According to the petitioner, denying them the chance to expunge the report also constitutes an abuse of discretion.[116] Previously, the supreme court and appellate division affirmed the administrative decision, stating that the lack of statutory mechanism to request early expunction is an intentional exclusion, not an oversight by the legislature.[117] Under the traditional investigative approach, the court looked at whether the report contained false claims that had been refuted during the OCFS investigation.[118] The FAR track does not look at truthfulness of the report, and therefore, "it stands to reason that the legislature would not have deemed it necessary or appropriate to provide an avenue for early expunction of reports and records in those cases assigned to the FAR track."[119]

The petitioner argued before the Court of Appeals that the right to seek early expunction may be inferred under Social Services Law § 427-a, the statute allowing OCFS to choose FAR instead of a traditional investigation, because the statute is silent on the matter of early expunction.[120] The Court declined to adopt that view, stating that "the failure of the Legislature to include a substantive, significant prescription

proposing a program to implement a more service-oriented program to address allegations of child abuse and maltreatment)).

113. *Id.* at 641, 71 N.E.3d at 540, 49 N.Y.S.3d at 49 (citing N.Y. SOC. SERV. LAW § 422(5)(c) (McKinney 2010)).

114. *Id.* at 642, 71 N.E.3d at 540, 49 N.Y.S.3d at 49 (citing SOC. SERV. § 427-a). These records are kept sealed throughout the process. *See id.*

115. *Id.* at 639, 71 N.E.3d at 538, 49 N.Y.S.3d at 47.

116. *Corrigan III*, 28 N.Y.3d at 639, 71 N.E.3d at 538, 49 N.Y.S.3d at 47.

117. *Id.* at 639, 71 N.E.3d at 539, 49 N.Y.S.3d at 48 (citing *Corrigan II*, 129 A.D.3d 1073, 1076, 12 N.Y.S.3d 216, 219 (2d Dep't 2015)).

118. *Corrigan II*, 129 A.D.3d at 1076, 12 N.Y.S.3d at 219 (citing SOC. SERV. § 422(5)(c)).

119. *Id.*

120. *Corrigan III*, 28 N.Y.3d at 642, 71 N.E.3d at 540, 49 N.Y.S.3d at 49 (citing N.Y. SOC. SERV. LAW § 472-a (McKinney 2010) (illustrating that the statute does not mention the issue of early expunction for FAR cases)).

in a statute is a strong indication that its exclusion was intended."[121] Additionally, it reasoned that this result was supported by the fact that the traditional investigation and FAR statutes were not enacted at the same time and do not pertain to the same subject matter.[122] Accordingly, the Court affirmed the appellate division.[123]

C. Substantial Evidence Standard of Review

The substantial evidence standard of review "consists of proof within the whole record [that] . . . a conclusion or ultimate fact may be extracted reasonably—probatively and logically."[124] In 2010, the Department of Labor found that some yoga instructors—those working as "nonstaff" rather than staff instructors for Yoga Vida—had been misclassified as independent contractors.[125] Yoga Vida initially succeeded in fighting the re-classification in front of an administrative law judge, but lost on appeal to the Unemployment Insurance Appeal Board.[126]

After losing in front of the Board, Yoga Vida commenced an Article 78 proceeding for review of the Unemployment Insurance Appeal Board decision.[127] The decision of a state board would be upheld by the appeals courts as long as it is supported by substantial evidence.[128] The appellate division upheld the Board's determination, finding that where an employer exercises control over the results or means used to achieve those results, the individual doing the work is an employee, and not an independent contractor.[129] The appellate division referenced Yoga Vida's control over advertising, time, and duration of classes held by nonstaff

121. *Id.* (quoting People v. Finnegan, 85 N.Y.2d 53, 58, 647 N.E.2d 758, 761, 623 N.Y.S.2d 546, 549 (1995)) (citing Pajak v. Pajak, 56 N.Y.2d 394, 397, 437 N.E.2d 1138, 1139, 452 N.Y.S.2d 381, 382 (1982)).

122. *Id.* at 642–43, 71 N.E.3d at 541, 49 N.Y.S.3d at 50.

123. *Id.* at 643, 71 N.E.3d at 541, 49 N.Y.S.3d at 50.

124. Yoga Vida NYC, Inc. v. Comm'r of Labor (*Yoga Vida II*), 28 N.Y.3d 1013, 1015, 64 N.E.3d 276, 278, 41 N.Y.S.3d 456, 458 (2016) (citing 300 Gramatan Ave. Assocs. v. State Div. of Human Rights, 45 N.Y.2d 176, 181, 379 N.E.2d 1183, 1187, 408 N.Y.S.2d 54, 57 (1978)).

125. Yoga Vida NYC, Inc. v. Comm'r of Labor (*Yoga Vida I*), 119 A.D.3d 1314, 1314, 989 N.Y.S.2d 710, 711 (3d Dep't 2014).

126. *Yoga Vida II*, 28 N.Y.3d at 1015, 64 N.E.3d at 278, 41 N.Y.S.3d at 458.

127. *Yoga Vida I*, 119 A.D.3d at 1314, 989 N.Y.S.2d at 711.

128. *Id.* (quoting John Lack Assocs., LLC v. Comm'r of Labor, 112 A.D.3d 1042, 1043, 977 N.Y.S.2d 760, 761 (3d Dep't 2013)) (citing Concourse Ophthalmology Assocs., P.C. v. Comm'r of Labor, 60 N.Y.2d 734, 736, 456 N.E.2d 1201, 1201, 469 N.Y.S.2d, 78, 78 (1983)).

129. *Id.* (quoting Anwer v. Comm'r of Labor, 114 A.D.3d 1114, 1115, 981 N.Y.S.2d 186, 187 (3d Dep't 2014)) (citing *John Lack Assocs., LLC*, 112 A.D.3d at 1043, 977 N.Y.S.2d at 761).

instructors.[130] Additionally, the appellate division held that the level of supervision by Yoga Vida over the nonstaff instructors satisfied the substantial evidence standard.[131] The supervision referenced includes the company president's assurance that all nonstaff instructors were certified and had adequate training, and his intervention in classes if he thought nonstaff instructors were "engaged in conduct that he found objectionable."[132]

The Court of Appeals looked at the Board determination and found that substantial evidence did not support the Board decision. Specifically, the Court found that non-staff instructor choices regarding how they would be paid, lack of payment if a set number of people did not show up to class, and the lack of a noncompete agreement showed that Yoga Vida did not exercise sufficient control over the results or the means used to achieve results necessary for an employer-employee relationship.[133] Other factors the court looked at were mandatory meetings and training for staff members that nonstaff were not required to attend or complete.[134]

The dissent argued that the Unemployment Appeals Insurance Board satisfied the substantial evidence standard.[135] The dissent pointed out that according to previous Court of Appeals decisions, judicial review does not encompass "evidence in the record that would have supported a contrary conclusion."[136] Appeals courts should only determine whether the Board determination met the substantial evidence standard, and whether the evidence the Board relied on "reasonably supports the Board's choice."[137] The dissent's view is that the Court usurped the role of the Board by substituting its own judgment, when the Court should only have reviewed the determination on the substantial evidence standard.[138]

130. *Id.*

131. *Id.* at 1315, 989 N.Y.S.2d at 712.

132. *Yoga Vida I*, 119 A.D.3d at 1314–15, 989 N.Y.S.2d at 711–12.

133. *Yoga Vida II*, 28 N.Y.3d 1013, 1015, 64 N.E.3d 276, 278, 41 N.Y.S.3d 456, 458 (2016).

134. *Id.*

135. *Id.* at 1016, 64 N.E.3d at 279, 41 N.Y.S.3d at 459 (Fahey, J., dissenting).

136. *Id.* (quoting Concourse Ophthalmology Assocs., P.C. v. Comm'r of Labor, 60 N.Y.2d 734, 736, 456 N.E.2d 1201, 1201, 469 N.Y.S.2d 78, 78 (1983)) (citing MNORX, Inc. v. Indus. Comm'r, 46 N.Y.2d 985, 986, 389 N.E.2d 823, 824, 416 N.Y.S.2d 228, 229 (1979)).

137. *Id.* at 1017, 64 N.E.3d at 280, 41 N.Y.S.3d at 460 (quoting *MNORX Inc.*, 46 N.Y.2d at 986, 389 N.E.2d at 824, 416 N.Y.S.2d at 229).

138. *See Yoga Vida II*, 28 N.Y.3d at 1018, 64 N.E.3d at 280, 41 N.Y.S.3d at 460 (Fahey, J., dissenting).

D. Due Process in Disciplinary Proceedings

"An inmate at a prison disciplinary hearing retains the constitutional right to procedural due process, 'implemented by the prison regulations in this State.'"[139] That right includes the right to "call witnesses on his [or her] behalf provided their testimony is material, is not redundant, and doing so does not jeopardize institutional safety or correctional goals."[140]

Petitioner Rafael Cortorreal was charged with two violations of inmate behavior standards after a corrections officer found marijuana inside a waste container that the petitioner could access.[141] The officer searched the container "after receiving tips from two confidential informants implicating [the] petitioner."[142] After the charges were initially reversed, a rehearing found the petitioner guilty, imposing a punishment of twelve months in special housing unit.[143] Although the petitioner submitted requests for witness testimony, all witnesses with information relevant to the appeal refused to testify.[144] Additionally, one witness completed an affidavit stating that a correction officer prevented the witness from testifying on the petitioner's behalf through intimidating behavior.[145] In this Article 78 proceeding, the petitioner argued first that other inmates' refusal to testify was not proper, and second, that the hearing officer did not conduct an adequate inquiry into coercion allegations.[146] Previously, the supreme court dismissed the petition and the appellate division affirmed the dismissal.[147]

When an inmate is asked to testify in front of a hearing officer, he may refuse, but must supply a reason for the refusal.[148] Here, several inmates called by the petitioner did not wish to testify, and checked this as the reason for refusal.[149] The petitioner argued that the reason for refusal must meet a certain standard under case law, and an inmate cannot

139. Cortorreal v. Annucci, 28 N.Y.3d 54, 58, 64 N.E.3d 952, 954, 41 N.Y.S.3d 723, 725 (2016) (quoting Laureano v. Kuhlmann, 75 N.Y.2d 141, 146, 550 N.E.2d 437, 440, 551 N.Y.S.2d 184, 187 (1990)).

140. *Id.* (quoting 7 N.Y.C.R.R. § 254.5(a) (2017)) (citing Wolff v. McDonnell, 418 U.S. 539, 566 (1974)).

141. *Id.* at 56–57, 64 N.E.3d at 953, 41 N.Y.S.3d at 724.

142. *Id.* at 57, 64 N.E.3d at 953, 41 N.Y.S.3d at 724.

143. *Id.* at 58, 64 N.E.3d at 954, 41 N.Y.S.3d at 725.

144. *Cortorreal*, 28 N.Y.3d at 57, 64 N.E.3d at 953, 41 N.Y.S.3d at 724.

145. *Id.* at 57–58, 64 N.E.3d at 953–54, 41 N.Y.S.3d at 724–25.

146. *Id.* at 58, 64 N.E.3d at 954, 41 N.Y.S.3d at 725.

147. Cortorreal v. Annucci, 123 A.D.3d 1337, 1338, 996 N.Y.S.2d 924, 925 (3d Dep't 2014).

148. *See Cortorreal*, 28 N.Y.3d at 59, 64 N.E.3d at 954, 41 N.Y.S.3d at 725 (quoting Jamison v. Fischer, 119 A.D.3d 1306, 1306, 989 N.Y.S.2d 706, 707 (3d Dep't 2014)) (citing Tulloch v. Fischer, 90 A.D.3d 1370, 1371, 935 N.Y.S.2d 696, 698 (3d Dep't 2011)).

149. *Id.* at 57, 64 N.E.3d at 953, 41 N.Y.S.3d at 724.

refuse to testify because he or she does not want to.[150] The Court of Appeals disagreed, stating that under *Barnes v. LeFevre*,[151] due process is satisfied where the refusing inmate states that he or she does not wish to testify.[152] Accordingly, the Court held that

> when a requested inmate witness refuses to testify, a simple statement by the inmate on a refusal form that he or she does not want to be involved or does not wish to testify is sufficient to protect the requesting inmate's right to call that witness.[153]

Next, the Court dealt with the witness affidavit regarding coercion. The hearing officer in possession of the affidavit did not contact the inmate or the corrections officer named in the affidavit.[154] According to the record, the only person the hearing officer contacted was the officer present when the witness signed the refusal to testify.[155] This officer denied any coercion and stated that the witness did not mention "prior intimidation."[156] The Court held that the hearing officer's failure to further investigate the alleged coercion was a violation of the petitioner's right to call witnesses.[157] Accordingly, the Court reversed the dismissal, and the petitioner's record was cleared of the charges.[158]

Jevon Henry, the petitioner and an inmate in the New York State Correctional system, commenced an Article 78 proceeding claiming "that he was denied requested documents, and that the Hearing Officer never provided an explanation for one inmate's refusal to testify."[159] The supreme court dismissed the petition, and on appeal the appellate division affirmed, stating that the petitioner's failure to specifically raise objections at the hearings left the matters unpreserved for review.[160] Prior

150. *Id.* at 59, 64 N.E.3d at 954–55, 41 N.Y.S.3d at 725–26.

151. 69 N.Y.2d 649, 650, 503 N.E.2d 1022, 1023, 511 N.Y.S.2d 591, 592 (1986) ("[W]here the record does not reflect any reason for the [] refusal to testify, or that any inquiry was made of him [or her] as to why he [or she] refused or that the hearing officer communicated with the witness to verify his [or her] refusal to testify, there has been a denial of the inmate's right to call witnesses as provided in the regulations.").

152. *Cortorreal*, 28 N.Y.3d at 59, 64 N.E.3d at 955, 41 N.Y.S.3d at 726.

153. *Id.* at 60, 64 N.E.3d at 955, 41 N.Y.S.3d at 726.

154. *Id.* at 58, 64 N.E.3d at 954, 41 N.Y.S.3d at 725.

155. *Id.*

156. *Id.*

157. *Cortorreal*, 28 N.Y.3d at 61, 64 N.E.3d at 956, 41 N.Y.S.3d at 727.

158. *Id.*

159. Henry v. Fischer, 28 N.Y.3d 1135, 1137, 68 N.E.3d 1221, 1223, 46 N.Y.S.3d 491, 492 (2016).

160. Henry v. Fischer, 120 A.D.3d 868, 868–69, 990 N.Y.S.2d 421, 421–22 (3d Dep't 2014) (first citing Love v. Prack, 89 A.D.3d 1307, 1308, 932 N.Y.S.2d 595, 596 (3d Dep't 2011); and then citing Brown v. Selsky, 37 A.D.3d 891, 891, 828 N.Y.S.2d 731, 732 (3d Dep't 2007)).

to his hearing, the petitioner requested reports and logbook entries relevant to the incident and a copy of the unusual incident report.[161] "At the hearing, an offender rehabilitation coordinator testified that" according to his investigation and confidential sources, the petitioner was involved in a retaliatory, gang-related assault with a weapon.[162] The petitioner had not received the documents he requested by the time of the hearing, and the hearing officer denied the petitioner's request because "the unusual incident report did not name Henry, the 'to/from' report was confidential, and the logbook had no description of the incident."[163] The petitioner stated twice during the hearing that he objected "to the whole hearing."[164]

On review, the Court of Appeals held that an inmate charged with violating prison regulations has a right "to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[165] As the petitioner requested witnesses and documents, and some of those requests were denied, the petitioner's objections to the whole hearing were sufficient to preserve these issues for judicial review.[166] Accordingly, the Court reversed the appellate division ruling and remanded to the supreme court for further proceedings.[167]

E. Final Order

"A proceeding under CPLR Article 78 'shall not be used to challenge a determination which is not final or can be adequately reviewed by appeal to a court or to some other body or officer.'"[168] The issue before the Court in *East Ramapo Central School District v. King* was the finality of the decision of the Department of Education regarding the district's dispute resolution practices.[169]

School districts must have in place certain dispute resolution procedures in order to comply with the Individuals with Disabilities

161. *Henry*, 28 N.Y.3d at 1136–37, 68 N.E.3d at 1222, 46 N.Y.S.3d at 492.

162. *Id.* at 1137, 68 N.E.3d at 1222, 46 N.Y.S.3d at 492.

163. *Id.* at 1137, 68 N.E.3d at 1223, 46 N.Y.S.3d at 492.

164. *Id.*

165. *Id.* at 1138, 68 N.E.3d at 1223, 46 N.Y.S.3d at 493 (quoting Wolff v. McDonnell, 418 U.S. 539, 566 (1974)) (citing Laureano v. Kuhlmann, 75 N.Y.2d 141, 146, 550 N.E.2d 437, 439, 551 N.Y.S.2d 184, 186 (1990)).

166. *Henry*, 28 N.Y.3d at 1138, 68 N.E.3d at 1223, 46 N.Y.S.3d at 493.

167. *Id.* at 1138, 68 N.E.3d at 1224, 46 N.Y.S.3d at 493.

168. E. Ramapo Cent. Sch. Dist. v. King (*Ramapo II*), 29 N.Y.3d 938, 939, 73 N.E.3d 342, 343, 51 N.Y.S.3d 2,
3 (2017) (quoting N.Y. C.P.L.R. 7801 (McKinney 2008)).

169. *Id.*

Education Act (IDEA).[170] In 2012, the State Education Department "determined that [the] petitioner's dispute resolution practices violated federal and state law and directed [the] petitioner to take certain corrective action."[171] The petitioner school district commenced an Article 78 proceeding, arguing that the State Education Department had no substantial evidence to support the determination.[172] However, the IDEA does not grant a right of action to contest State Education Department determinations.[173] Accordingly, the Court had to determine whether the petitioner had standing to bring the action.[174]

Previously, the appellate division examined the legislative history of IDEA, and determined that there was no congressional intent to create such a private right of action.[175] The Court of Appeals affirmed, but on different grounds.[176]

The Court of Appeals decision stated that it upheld the appellate division ruling because the enforcement action by the State Education Department was not a final determination.[177] The Court found that the petitioner district had not "exhausted its administrative remedies, and the District is unable to articulate any actual, concrete injury that it has suffered at this juncture."[178] The Court made no ruling on whether there is an implied private right of action in IDEA as discussed by the appellate division, or whether a school district may commence an Article 78 proceeding when the government has made a final determination.[179]

F. Review of Judicial Misconduct

The Court of Appeals has broad constitutional and statutory authority to review a determination of judicial misconduct and determine

170. 20 U.S.C. § 1415(a) (2012); *Ramapo II*, 29 N.Y.3d at 939, 73 N.E.3d at 343, 51 N.Y.S.3d at 3.

171. E. Ramapo Cent. Sch. Dist. v. King (*Ramapo I*), 130 A.D.3d 19, 21, 11 N.Y.S.3d 284, 286 (3d Dep't 2015).

172. *Id.*

173. *Id.* (first citing Lake Washington Sch. Dist. No. 414 v. Office of Superintendent of Pub. Instruction, 634 F.3d 1065, 1068 (9th Cir. 2011); then citing Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ., 615 F.3d 622, 627 (6th Cir. 2010); then citing Lawrence Twp. Bd. of Educ. v. New Jersey, 417 F.3d 368, 371 (3d Cir. 2005); and then citing Cty. of Westchester v. New York, 286 F.3d 150, 152 (2d Cir. 2002)).

174. *Ramapo II*, 29 N.Y.3d at 939, 73 N.E.3d at 343, 51 N.Y.S.3d at 3.

175. *Ramapo I*, 130 A.D.3d at 23, 11 N.Y.S.3d at 288.

176. *Ramapo II*, 29 N.Y.3d at 939, 73 N.E.3d at 343, 51 N.Y.S.3d at 3.

177. *Id.* at 939–40, 73 N.E.3d at 343, 51 N.Y.S.3d at 3.

178. *Id.* at 940, 73 N.E.3d at 343, 51 N.Y.S.3d at 3.

179. *Id.* at 939, 73 N.E.3d at 343, 51 N.Y.S.3d at 3.

the appropriate sanction.[180] Alan M. Simon was a Justice of the Spring Valley Village Court and Ramapo Town Court of Rockland County.[181] On March 29, 2016, the New York Commission on Judicial Misconduct issued a determination removing Alan Simon from his position as justice.[182] The report discussed four charges against Simon, including grabbing a student by the arm and threatening him, imposing invalid sanctions, threatening to find individuals in contempt of court with no lawful basis, and acting in a rude and discourteous manner to other government officials.[183] According to the Commission's determination, the charges ranged from attempting to drag a student intern out of the office because Simon had no say in the hiring, to threatening certain village employees with arrest and contempt of court.[184]

Mr. Simon petitioned the Court to review the Commission's determination, asking that he be censured rather than wholly removed from his office.[185] The Court found that removal was appropriate, because although removal is a sanction reserved only for "truly egregious circumstances," justices must be held to a higher standard of conduct than others.[186] Further, if a justice abuses his or her power in a way that damages the court's integrity, removal is warranted.[187] Referencing the same incidents as the Commission, the Court termed Simon's conduct "truly egregious."[188] Other factors important to the Court's decision were Simon's lack of contrition for his actions, false testimony on his own behalf, and his involvement in "the election of an office other than his own."[189] According to the Commission determination, Mr. Simons informed the local media about another judge's acceptance of improper campaign donations, and Simons consented to the use of his name in an

180. Simon v. State Comm'n on Judicial Conduct, 28 N.Y.3d 35, 37, 63 N.E.3d 1136, 1137–38, 41 N.Y.S.3d 192, 193–94 (2016) (citing Aldrich v. State Comm'n on Judicial Conduct, 58 N.Y.2d 279, 282, 447 N.E.2d 1276, 1277, 460 N.Y.S.2d 915, 916 (1983)).

181. *Id.* at 37, 63 N.E.3d at 1137, 41 N.Y.S.3d at 193.

182. *Alan M. Simon*, N.Y. COMMISSION ON JUD. CONDUCT (Determination Mar. 29, 2016), http://cjc.ny.gov/Determinations/S/Simon.Alan.M.2016.03.29.DET.pdf.

183. *Id.*

184. *Id.*

185. *Simon*, 28 N.Y.3d at 37, 63 N.E.3d at 1137, 41 N.Y.S.3d at 193.

186. *Id.* at 37–38, 63 N.E.3d at 1138, 41 N.Y.S.3d at 194 (quoting Restaino v. State Comm'n on Judicial Conduct, 10 N.Y.3d 577, 589, 890 N.E.2d 224, 231, 860 N.Y.S.2d 462, 469 (2008)).

187. *See id.* at 38, 63 N.E.3d at 1138, 41 N.Y.S.3d at 194 (first quoting VonderHeide v. State Comm'n on Judicial Conduct, 72 N.Y.2d 658, 660, 532 N.E.2d 1252, 1254, 536 N.YS.2d 24, 26 (1988); and then quoting McGee v. State Comm'n on Judicial Conduct, 59 N.Y.2d 870, 871, 452 N.E.2d 1258, 1259, 465 N.Y.S.2d 930, 931 (1983)).

188. *Id.* at 39, 63 N.E.3d at 1139, 41 N.Y.S.2d at 195 (quoting *Restaino*, 10 N.Y.3d at 590, 890 N.E.2d at 231, 860 N.Y.S.2d at 469).

189. *Id.*

article titled "Judge Alan Simon: [The Candidate For Village Justice] Knew of Slumlord Donation before 2009 Election."[190]

In the Court's view, "[a]llof the foregoing actions reflect a pattern of calculated misconduct that militates against [the] petitioner's assertion that the misbehavior complained of will not be repeated if he is allowed to remain on the bench."[191] Accordingly, the Court accepted the Commission's determination and affirmed Mr. Simon's removal from office.[192]

II. EXECUTIVE BRANCH

Governor Cuomo has taken the position that "[c]limate change is a reality, and not to address it is gross negligence by government and irresponsible as citizens."[193] Consistent with that view, New York has been proactive in addressing climate change for several years, and this past year is no exception.

A. The Methane Reduction Plan

In May 2017, New York published the Methane Reduction Plan, an initiative put together between five New York state agencies that will address the principal sources of methane in the state, and propose new standards and programs to reduce future emissions.[194] In the recent New York State Greenhouse Gas Inventory, the three areas with the greatest room for methane reduction are oil and gas, landfills, and agriculture.[195] The report claims that if all recommendations are followed, greenhouse gas emissions will be at eighty percent of the level emitted in 1990 by the year 2050.[196]

190. *Alan M. Simon*, N.Y. COMMISSION ON JUD. CONDUCT (Determination Mar. 29, 2016), http://cjc.ny.gov/Determinations/S/Simon.Alan.M.2016.03.29.DET.pdf.

191. *Simon*, 28 N.Y.3d at 39, 63 N.E.3d at 1139, 41 N.Y.S.2d at 195 (citing N.Y. CONST. art. VI, § 22(h) (McKinney 2006)).

192. *Id.* at 40, 63 N.E.3d at 1139, 41 N.Y.S.2d at 195; *see* Lanning Taliaferro, *Bullying Judge Should Be Ousted, NY Commission Says*, PATCH (Apr. 6, 2016, 5:07 PM), http://patch.com/new-york/newcity/state-ramapo-spring-valley-justice-should-be-removed-bullying-court-staff-others.

193. *Leading on Climate Change & Protecting Our Environment*, N.Y. ST., https://www.ny.gov/programs/leading-climate-change-protecting-our-environment (last visited Mar. 4, 2018).

194. NEW YORK STATE DEP'T OF ENVTL. CONSERVATION ET AL., METHANE REDUCTION PLAN 1 (2017) [hereinafter METHANE REDUCTION PLAN], http://www.dec.ny.gov/docs/administration_pdf/mrpfinal.pdf.

195. *Id.* at 3–4; NEW YORK STATE RESEARCH & DEV. AUTH., NEW YORK STATE GREENHOUSE GAS INVENTORY: 1990–2014, at S-10 (2016), http://www.nyserda.ny.gov/-/media/Files/EDPPP/Energy-Prices/Energy-Statistics/greenhouse-gas-inventory.pdf.

196. METHANE REDUCTION PLAN, *supra* note 194, at 4.

In the oil and gas sector, methane is emitted from gas storage facilities, transmission and distribution networks, and natural gas wells.[197] Leakage from these sources is responsible for one percent of greenhouse gas emissions in the state.[198] State agencies, including the Department of Environmental Conservation and Department of Public Service, have pledged to reduce leakage from the sources named above, institute enhanced reporting requirements, and improve the consistency of current leakage regulation.[199]

Landfills emit methane when gas recovery systems installed at the site fail to capture all gas emitted from the decomposing organic waste.[200] Therefore, the two options to reduce methane buildup at landfills are to refrain from putting organic waste in landfills, or to reduce the emissions coming from organic waste that goes into landfills.[201] Reducing the organic waste that gets to landfills involves outreach to large waste producers.[202] This may be through educating producers on recycling and composting, and showing waste producers the financial incentives of reducing organic waste in landfills.[203] Reducing emissions will involve analysis of current landfills, including those active, inactive, and closed.[204] A particular issue is that there is already a system of credits for voluntary destruction of methane that landfill operators may sell to methane producers in "offset credits."[205]

Finally, agriculture is a large methane producer, specifically through manure management and animal digestion.[206] If organic waste management systems are set up close to agricultural districts that would otherwise send the waste to landfills, it would decrease the amount of methane in landfills without further landfill management of emissions.[207]

B. Northeast Region Cap and Trade

New York is an original participant in the Regional Greenhouse Gas Initiative (RGGI), a program designed to reduce carbon dioxide

197. *Id.*
198. *Id.*
199. *Id.* at 5.
200. *Id.* at 8.
201. METHANE REDUCTION PLAN, *supra* note 194, at 8.
202. *Id.*
203. *Id.* at 9.
204. *Id.* at 10.
205. *Id.*
206. METHANE REDUCTION PLAN, *supra* note 194, at 11.
207. *See id.* at 11–12.

emissions from power plants.[208] Rather than give out free carbon allowances, RGGI auctions the credits to the highest bidder.[209] The money generated from bidding is "invested by the states in energy efficiency, renewables, and consumer benefit programs . . . ."[210]

A recent report estimates that investments from RGGI as a whole will save over $2.3 billion in lifetime energy bills for households and businesses participating in RGGI funded programs.[211] From 2008 to 2015, New York received $896 million from the auction proceeds, and $633.1 million of those proceeds have gone to energy efficiency programs, renewable energy investments, and greenhouse gas abatement programs.[212]

III. LEGISLATIVE BRANCH

Among the Chapter Laws of 2017 impacting the work of state agencies are several that amend the Alcohol Beverage Control Law. The primary goal of the amendments is the promotion of economic development in the alcohol-beverage industry.[213] For example, Chapter 103 aims to create parity in the authority of various craft beverage licenses to provide tastings and retail sales by amending the Alcoholic Beverage Control Law to allow farm distilleries "to conduct tastings of and sell at retail for consumption on or off the premises . . . ."[214] The goal of the legislation is "to promote New York farm sector beverages and to support economic growth for New York State agriculture."[215] Chapter 171 likewise is intended to promote economic growth of the agriculture sector by expanding the products that farm cideries, a relatively new addition to the craft beverage industry in New York, can sell both wholesale and retail.[216]

208. BRIAN M. JONES ET AL., MJB&A, A PIONEERING APPROACH TO CARBON MARKETS 3–4 (2017), http://www.mjbradley.com/sites/default/files/rggimarkets02-15-2017.pdf.

209. *Id.* at 4.

210. *Id.* at 5.

211. REG'L GREENHOUSE GAS INITIATIVE, THE INVESTMENT OF RGGI PROCEEDS IN 2015, at 3 (2017), https://www.rggi.org/docs/ProceedsReport/RGGI_Proceeds_Report_2015.pdf.

212. *Id.* at 35 tbl.

213. Legislative Memorandum of Sen. Amedore, *reprinted in* 2017 McKinney's Sess. Law News no. 3, ch. 103, at A-142 ("Crosspromotion is critical to the success of these businesses as well as to the value they add to the agricultural sector.").

214. N.Y. ALCO. BEV. CONT. LAW § 61(2-c)(a)(v) (McKinney Supp. 2018).

215. Legislative Memorandum of Sen. Amedore, *supra* note 213, at A-142.

216. Legislative Memorandum of Assemb. Magee, *reprinted in* 2017 McKinney's Sess. Law News no. 4, ch. 171, at A-225 ("The purpose if this bill is to promote the agricultural economy of New York State by expanding, to a limited extent, the licensees and parties that a farm cidery may sell its products and the products manufactured by other farm cideries and that produce New York State labeled cider.").

Two new laws represent private work-around from the "200 foot rule" in the Alcoholic Beverage Control Law in an effort to promote economic development and foster community initiative. The "200 foot rule," dating from New York's licensing scheme before Prohibition, prohibits the locating of package stores or on-premises liquor establishments within 200 feet of a building in which a school or house of worship is located.[217] "The '200 foot rule' is a complete ban on granting of such licenses," and special private legislation is often enacted to circumvent it when the legislature deems it appropriate.[218] Such are the results of Chapter 47 and Chapter 362.

Chapter 47 amends § 64-a of the Alcoholic Beverage Control Law to exempt two new on-premises establishments in Binghamton, New York.[219] Chapter 362 creates an exemption for the Lewiston Fire Company to serve liquor on-premises at a reception area in the newly renovated firehouse.[220] Both locations are within 200 feet of a house of worship, and in both instances the churches support the parties' applications.[221]

These two instances of private legislation demonstrate that the statutory "200 foot rule" should be amended to provide the State Liquor Authority with flexibility in the application of the rule to address cases where the community supports the activity and economic development of the area will be promoted.[222]

217. NEW YORK STATE LAW REVISION COMM'N, REPORT ON THE ALCOHOLIC BEVERAGE CONTROL LAW AND ITS ADMINISTRATION 15 (Dec. 2009) [hereinafter REPORT ON ALCOHOLIC BEVERAGE CONTROL LAW], http://nyslawrevision.files.wordpress.com/2014/07/12-15-09-report-on-abc-law.pdf.

218. *Id.*

219. Legislative Memorandum of Assemb. Lupardo, *reprinted in* 2017 McKinney's Sess. Law News no. 3, ch. 47, at A-88 (stating that the purpose is to amend the current law for two establishments that are within 200 feet of a church).

220. Legislative Memorandum of Assemb. Morinello, *reprinted in* 2017 McKinney's Sess. Law News no. 5, ch. 361, at A-428 ("This legislation would create an exemption for the Lewiston Fire Company Number 1 as it pertains to the 200 foot rule for on premise consumption of alcohol.").

221. Legislative Memorandum of Assemb. Lupardo, *supra* note 219, at A-88; Legislative Memorandum of Assemb. Morinello, *supra* note 220, at A-429.

222. REPORT ON ALCOHOLIC BEVERAGE CONTROL LAW, *supra* note 217, at 15.