USING ARTICLE 78 PROCEEDINGS TO GET FAR REACHING RESULTS

Friday, September 16, 2016

Albany Marriott

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This program is offered for education purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Patricia Spataro, LAP Director

1.800.255.0569

New York State Bar Association

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form-you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees: please complete, sign and return this form along with your evaluation, to the registration staff **before you leave** the program.

You MUST turn in this form at the end of the program for your MCLE credit.

Using Article 78 Proceedings to Get Results | Friday, September 16, 2016
New York State Bar Association's Committee on Legal Aid, Albany Marriott, Albany, NY

Name:
(Please print)

I certify that I was present for the entire presentation of this program

Signature: Date:

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NEW YORK STATE BAR ASSOCIATION

Live Program Evaluation (Attending In Person)

Please complete the following program evaluation. We rely on your assessment to strengthen teaching methods and improve the programs we provide. The New York State Bar Association is committed to providing high quality continuing legal education courses and your feedback is important to us.

Program Name: Benefits - Using Article 78 Proceedings To Get Results

Program Code: FRIBENB4

Program Location: Albany Marriott, Albany - NY

Program Date: September 16, 2016

1. What is your overall evaluation of this program? Please include any additional comments.

☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional Comments____

____

2. Please rate each Speaker's Presentation based on **CONTENT** and **ABILITY** and include any additional comments.

	CONTENT				ABILITY			
	Excellent	Good	Fair	Poor	Excellent	Good	Fair	Poor
Lester Helfman	☐	☐	☐	☐	☐	☐	☐	☐
Maryanne Joyce	☐	☐	☐	☐	☐	☐	☐	☐
	☐	☐	☐	☐	☐	☐	☐	☐
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(please turn over)

Additional comments (CONTENT)

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Additional comments (ABILITY)

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3. Please rate the program materials and include any additional comments.
☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional comments

_____

_____

4. Do you think any portions of the program should be **EXPANDED** or **SHORTENED**? Please include any additional comments.
☐ Yes – Expanded ☐ Yes – Shortened ☐ No – Fine as is

Additional comments

_____

_____

5. Please rate the following aspects of the program: **REGISTRATION**; **ORGANIZATION**; **ADMINISTRATION**; **MEETING SITE** (if applicable), and include any additional comments.

	Please rate the following:				
	Excellent	Good	Fair	Poor	N/A
Registration	☐	☐	☐	☐	☐
Organization	☐	☐	☐	☐	☐
Administration	☐	☐	☐	☐	☐
Meeting Site (if applicable)	☐	☐	☐	☐	☐

Additional comments

_____

_____

6. How did you learn about this program?
☐ Ad in legal publication ☐ NYSBA web site ☐ Brochure or Postcard
☐ Social Media (Facebook / Google) ☐ Email ☐ Word of mouth

7. Please give us your suggestions for new programs or topics you would like to see offered

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NEW YORK STATE BAR ASSOCIATION
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Using Article 78 Proceedings to Get Far-Reaching Results

NYSBA Partnership Conference

September 16, 2016

AGENDA

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USING ARTICLE 78 PROCEEDINGS TO GET FAR-REACHING RESULTS*

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* Based on materials previously written and prepared by Robert Bacigalupi, Ian Feldman, Les Helfman, Maryanne Joyce, and Judy Lacoff. Used by permission, and with thanks.

I. Introduction

The Article 78 proceeding gets its name from Article 78 of New York's Civil Practice Law and Rules (CPLR). The proceeding replaced the common law writs of certiorari, mandamus and prohibition and provides an expeditious procedure for judicial review of administrative agency decisions. The writ of mandamus to compel, covered in § 7803(1), is used to compel an agency or officer to perform a ministerial act that is required by law, when there is no discretion involved. The writ of prohibition, covered in § 7803(2), is used to prevent an officer or body from acting without authority. The writ of certiorari, covered in § 7803(4), is used to review the determination of an administrative agency after a judicial or quasi-judicial hearing when the determination was not based on substantial evidence. § 7803(3) provides for a mixed certiorari/mandamus standard of review, appropriate when a determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion. These will be discussed in greater detail below.

In the public benefits context, an Article 78 proceeding may be brought against the New York State Office of Temporary and Disability Assistance (OTDA), the Department of Health (DOH), or the Office of Children and Family Services (OCFS) to appeal a decision after fair hearing.[1] The proceeding may also be used to compel a local Department of Social Services (DSS) or other agency to comply with a decision after fair hearing. Exhaustion of administrative remedies is usually required before resorting to an Article 78, but in case of emergency, to avoid irreparable injury, or where a hearing would be futile, an Article 78 may be brought without an underlying hearing decision.

II. Applicable Statutes, Regulations, and Court Rules

Article 78 of the CPLR governs the Article 78 proceeding. As a special proceeding, where Article 78 is silent, the proceeding is governed by Article 4 on Special Proceedings. Where Articles 4 and 78 are both silent, look to the CPLR generally. The relevant statutes, regulations, and court rules that typically come into play are listed below.[2] Caveat: Always refer

[1] OTDA's Office of Administrative Hearings conducts fair hearings on behalf of its own agency as well as on behalf of DOH in medical assistance cases, and on behalf of OCFS in child care assistance and foster care and adoption payment cases.

[2] Sources of substantive law in this area include New York State Social Services Law, of which Articles 1 through 5 cover the powers and duties of OTDA and local social service districts generally, and the administration of shelter, public assistance, and Supplemental Nutrition Assistance Program (SNAP) benefits. Article 5 covers medical assistance for needy persons, also known as Medicaid, which is administered by DOH. Article 6 covers the powers and duties of OCFS including those regarding child care and foster care programs. (OTDA and OCFS are autonomous agencies which form the State Department of Family Assistance, formerly called the Department of Social Services.) Federal law and regulations governing SNAP are found at 7 U.S.C. § 2011 *et seq.* and 7 C.F.R. § 271.1 *et seq*. Federal law governing foster care benefits is at 42 U.S.C. § 670 *et seq*. Federal law and regulations governing Medicaid is found at 42 U.S.C. § 1396 *et seq.* and 42 C.F.R § 430 *et seq*. OTDA and OCFS regulations and regulations concerning Medicaid are found in Title 18 of New York Codes, Rules and Regulations (NYCRR).

to the statute establishing and/or regulating the administrative body or officer's authority for any special requirements or wrinkles. For example, New York Labor Law contains an independent provision for judicial review of decisions of the Unemployment Insurance Appeal Board by the Appellate Division, Third Department. *See* Labor Law § 624.

A. CPLR — Selected Provisions

§ 103 Form of Civil Judicial Proceeding

§ 217 Limitations of Time/Proceeding against Body or Officer

Article 3 — Jurisdiction and Service, Appearance and Choice of Court

Article 4 — Special Proceedings

§ 506 Venue/Where Special Proceeding Commenced

Article 9 — Class Actions

Article 11— Poor Persons

§ 3001 Declaratory Judgment

Article 55 — Appeals Generally

Article 57 — Appeals to the Appellate Division

Article 78 — Proceeding Against Body or Officer

B. State Social Services Law

§ 22 Appeals and Fair Hearings; Judicial Review

C. State Department of Family Assistance Regulations

18 NYCRR Part 358 — Fair Hearings

18 NYCRR Part 359 — Disqualification For Intentional Program Violation

DOH, OCFS, OTDA, and local policy documents can be found on the agencies' websites as well as in the Online Resource Center at http://onlineresources.wnylc.net, which has a wealth of useful information for attorneys and other advocates representing low-income clients.

D. Uniform Civil Rules for the Supreme Court and the County Court

22 NYCRR Part 202

E. Rules of the Appellate Divisions

22 NYCRR Part 600 — First Judicial Department, Appellate Division, Rules of Practice, Appeals

22 NYCRR Part 670 — Second Judicial Department, Appellate Division, Rules of Practice, Procedure in the Appellate Division

22 NYCRR Part 800 — Third Judicial Department, Appellate Division, Appeals, Rules Of Practice

22 NYCRR Part 1000 — Fourth Judicial Department, Appellate Division, Rules Of Practice

III. After the Fair Hearing

A. Decision After Fair Hearing

State regulations require the State agency to issue and the local DSS to comply with a Decision After Fair Hearing promptly but in no event more than ninety (90) days from the date of the request for the hearing.[3] In SNAP-only cases, OTDA and the local DSS have sixty (60) days to issue and comply with a decision.[4] If the appellant has requested an adjournment, the time frame is extended.

OTDA typically schedules a fair hearing within a month from the time that the request for fair hearing is made (assuming no adjournments). OTDA should issue a Decision After Fair Hearing a few weeks after the hearing. If the appellant does not receive a Decision After Fair Hearing within two or three weeks of the fair hearing, s/he may call OTDA at (518) 474-8781 or toll-free at (877) 209-1134, to file a complaint about the delay.

B. Compliance with the Decision After Fair Hearing

Social services agencies must comply with fair hearing decisions in accordance with state regulations. "For all decisions...definitive and final administrative action must be taken promptly."[5] Although the law mandates that the local DSS implement Decisions After Fair

[3] 18 NYCRR § 358-6.4.
[4] 18 NYCRR § 358-6.4(b).
[5] 18 NYCRR §§ 358-6.4, 358-4.4.

Hearing "promptly," it is not uncommon for the local DSS to ignore a decision with which it disagrees.

When OTDA issues a Decision After Fair Hearing, it sends copies to the appellant, the appellant's representative, and to the DSS. There is no need for the advocate to send an extra copy to DSS unless there is some special circumstance like an imminent eviction.[6]

State regulations require the local DSS to comply with a Decision After Fair Hearing within ninety (90) days of the appellant's request for a fair hearing[7] assuming that the appellant has not been responsible for any delays. OTDA has interpreted this ninety-day rule to mean that OTDA has sixty (60) days to issue a decision and the local DSS has thirty (30) days from receipt of the decision to comply. Accordingly, in non-emergency cases, the advocate may wish to wait thirty (30) days from the appellant's receipt of the decision before initiating a compliance complaint with OTDA, while advocating for compliance at the local level.

Once thirty (30) days have passed, or sooner, if an emergency exists, advocates should contact OTDA[8] and step up advocacy with DSS. In New York City, HRA has set up an e-mailbox for fair hearing compliance complaints. For all cash public assistance cases, including those that have SNAP and/or Medicaid issues, send e-mail to CASHFHCOMPL@hra.nyc.gov. For SNAP-only cases, send e-mail to SNAPFHCOMPL@hra.nyc.gov.

Advocates may lodge a complaint with OTDA about DSS failure to comply by mailing back the compliance complaint form that OTDA encloses with the copy of the Decision After Fair Hearing. Compliance requests or complaints can also be made online, by phone, or by mail, and, in Albany and NYC, in person. *See* http://otda.ny.gov/hearings/compliance/.

The issue of DSS failure to comply with Decisions After Fair Hearing was litigated in *Piron v. Wing*, NYLJ, June 27, 1997 at 25 (Sup. Ct. N.Y. County, Schlesinger, J.). As a result of *Piron*, the New York City Human Resources Administration/Department of Social Services agreed to an informal relief mechanism whereby NYC advocates may elicit the help of the *Piron* counsel if needed to obtain compliance.[9]

[6] In an emergency situation such as an imminent eviction, an advocate should fax a copy of the Decision After Fair Hearing to the local DSS with a cover letter explaining the emergency. If prompt compliance is critical and not forthcoming, the advocate should fax a compliance complaint to OTDA at 518-473-6735 or call 518-474-5603 or 877-209-1134.

[7] 18 NYCRR § 358-6.4(a).

[8] OTDA's Office of Administrative Hearings "will secure compliance by whatever means is deemed necessary and appropriate under the circumstances of the case." l8 NYCRR § 358-6.4(c).

[9] The National Center for Law and Economic Justice acted as counsel in *Piron* and may be reached at 212-633-6967.

C. Meaningless Remands

The term "meaningless remand" refers to a Decision After Fair Hearing that appears to reverse DSS's determination, but, instead of issuing a specific order to DSS to remedy the problem, the hearing officer or administrative law judge (ALJ) merely remands the matter back to DSS for unspecified action "consistent with this decision." It is common when an ALJ issues a meaningless remand for DSS to make a second determination identical to the one that was the subject of the initial fair hearing, requiring the appellant to begin an entirely new fair hearing process.

This practice is contrary to state regulation which requires that the decision "direct specific action to be taken by the social services agency."[10] The practice has also been criticized by the New York State Bar Association.[11] When advocates receive a meaningless remand, they may request that the fair hearing be reopened with the instruction to issue a specific directive to DSS.

D. "Correct When Made"

OTDA instructs ALJs that they have the option of noting that although reversing a DSS action, the DSS action was "correct when made."[12] An ALJ may add this phrase to a reversal when the Decision After Fair Hearing was based on evidence not available to DSS at the time of the underlying determination. This practice should have no effect on the appellant's relief or DSS's obligation to comply with the decision.

E. Requesting that a Favorable Decision After Fair Hearing Be Amended

In some instances, an advocate may want OTDA to amend or correct a favorable Decision After Fair Hearing, if the right decision was arrived at for the wrong reasons. State regulations allow the Commissioner to correct any error found in a decision.[13] The advocate may request that OTDA amend the Applicable Law Section and apply the relevant law and regulation to the appellant's situation in the Discussion Section of the decision. In making such a request, an advocate should note the importance of a logical application of the relevant law for purposes of administrative *stare decisis*. An advocate may also wish to request correction or amendment of a favorable decision that includes spelling, typographical, or factual errors.

[10] 18 NYCRR § 358-6.1(a).
[11] *See* The New York State Bar Association, *Report of the Special Committee on Administrative Adjudication* (Oct. 21, 1999) at 57-58.
[12] *See* Memorandum from Russell J. Hanks to All Supervising ALJ's, dated April 3, 2001, available at http://onlineresources.wnylc.net/FairHearingResources/docs/hanks__04-03-01_memo__correct_when_made_.pdf.
[13] 18 NYCRR § 358-6.6(a).

If the requested correction is more serious than for a typographical or spelling error, the regulation requires notice to DSS, and DSS will have an opportunity to respond to the request.[14] Pending the outcome of OTDA's review, the original decision is binding and must be complied with by the local DSS.[15]

F. Options for Appellants Who Lose a Fair Hearing

There are two options to appeal an unfavorable Decision After Fair Hearing. One option is to contact OTDA to request a reopening or correction of the decision, pursuant to 18 NYCRR § 358-6.6. The second option is to bring an Article 78 proceeding in State Supreme Court.

Before deciding whether an appeal has merit, the attorney or advocate should first send for the hearing record and the audio recording of the fair hearing, if time permits.

1. Requesting the Fair Hearing Record

The appellant has the right to examine the entire fair hearing record, including the recommendations of the ALJ who presided over the fair hearing.[16] The appellant or the appellant's attorney should obtain a copy of the recording of the hearing, all documentary evidence submitted, and the hearing officer's report and recommendation, by sending a written request to OTDA. If the advocate did not represent the appellant at the hearing, a release from the appellant should accompany the request for the fair hearing record.

The request for the recording of the hearing as well as all documents presented at the hearing, and the hearing officer's report and recommendations, may be mailed to:

Transcript Unit Supervisor
Office of Fair Hearings, Transcripts Unit
New York State Office of Temporary and Disability Assistance
P.O. Box 1930
Albany NY 12201

Requests for fair hearing records may be sent by electronic mail to:

AdminRecords@otda.ny.gov

[14] 18 NYCRR § 358-6.6(a)(3).
[15] 18 NYCRR § 358-6.6(a)(4).
[16] l8 NYCRR § 358-5.11.

Requests for the record may be faxed to:

518-473-6735

Records can also be requested in person at two walk-in locations:

14 Boerum Place, 1st Floor, Brooklyn, NY 11201
40 North Pearl Street, Albany, NY 12243

2. Requesting a Correction or Reopening

Advocates may request a correction or reopening of a decision that contains an error of law or fact.[17] OTDA refers to such requests as "reconsideration" requests.

Do not assume that OTDA will waive the statute of limitations for an Article 78 proceeding when making a request for correction or reopening. Include a request for the waiver in any request for reopening and if necessary, call to confirm that OTDA has indeed agreed to an extension of the time to file an Article 78 appeal. OTDA's usual practice has been to agree to waive the four-month statute of limitations in these circumstances, extending the time to file an Article 78 proceeding to thirty days from its decision to grant or deny the request to reopen. OTDA will usually commit to the waiver in its initial written response to the reopening and waiver request. Request written confirmation if it does not accompany OTDA's initial response.

State regulations require notice to DSS which will have an opportunity to respond to a request of this kind.[18] DSS may object (without success) to OTDA's decision to waive the statute of limitations.

All requests for reopening or correction of a Decision after Fair Hearing should be addressed to:

Samuel Spitzberg
Deputy General Counsel
NYS OTDA
P.O. Box 1930
Albany, NY 12201-1930

Requests may be sent by mail to the address above, by fax to (518) 473-6735, or by email to litigationmail.hearings@otda.ny.gov.

[17] 18 NYCRR § 358-6.6.
[18] 18 NYCRR § 358-6.6.

Requests will be logged in and then appropriately assigned for reconsideration. At the time of this writing, OTDA was experiencing a large backlog in requests to re-open hearings and for corrected decisions. Determinations on these requests are taking many months. Advocates should take this into consideration when deciding whether to make the request or go directly to the Article 78 proceeding.

See Appendix A of these materials for a sample email request for fair hearing record and Appendix B for a sample "correction or reopening" request.

3. Article 78 Proceedings

An advocate may also appeal an unfavorable Decision After Fair Hearing, or seek to compel compliance with a favorable one, by means of an Article 78 proceeding.

IV. The Article 78 Proceeding

A. Statute of Limitations [CPLR §217]

Unless otherwise provided in the statute governing a particular agency and/or type of administrative appeal, the statute of limitations for an Article 78 proceeding is "four months after the determination to be reviewed becomes final and binding upon the petitioner…or after the respondent's refusal, upon the demand of the petitioner…to perform its duty." [19] CPLR § 217.

PRACTICE NOTE: 4 months means 4 months, not 120 days. The limitations period will be a bit longer or shorter depending on the number of days in the months being counted. If a decision is dated June 10, 2016, the Article 78 must be filed by October 10, 2016. If the deadline falls on a day that the courts are closed, the deadline is extended to the next business day. General Construction Law § 25-a.

The safest view is that the 4 months begin to run from the date of the Decision After Fair Hearing. Some decisions hold that the 4 months start to run when the petitioner receives notice of the decision, but unless unavoidable, do not rely on date of receipt in determining the deadline to file. See NYS Ass'n of Counties v. Axelrod, 78 N.Y. 2d 158 (1991); Bludson v. Popolizio, 166 A.D.2d 346 (1st Dept. 1990).

When the case concerns a compliance issue — where the local agency has failed or refused to comply with a Decision After Fair Hearing — then the 4 months begins to run when the respondent refuses, upon the demand of the petitioner, to perform its duty. Advocates have

[19] The date upon which an agency action becomes final and the statute of limitations begins to run is not always easy to determine. *See, e.g., Essex County v. Zagata*, 91 N.Y.2d 447 (1998).

brought 78s to compel compliance up to several years after the date of issuance of a Decision after Fair Hearing.

If the case is a challenge to the constitutionality of a statute rather than to particular administrative conduct taken pursuant to legislation, then a declaratory judgment action, not an Article 78, is the proper vehicle, and the 4 month statute of limitations is not applicable. Advocates might also consider bringing federal § 1983 actions, if applicable, in lieu of an Article 78 proceeding or when the 4-month period for bringing an Article 78 has expired.

B. § 7801 Nature of Proceeding

The Article 78 proceeding is a special proceeding brought to obtain judicial review of the actions (or inactions) of an administrative body or officer. (It is also available to obtain relief against a judge in limited circumstances.) The court in an Article 78 proceeding is empowered to grant the relief previously available by way of the common law writs of *certiorari*, *mandamus* and *prohibition*. Judicial review of administrative determinations is confined to the facts and record adduced at the agency.[20]

PRACTICE NOTE: Despite the rule that evidence outside the record will not be considered, if the petitioner was pro se at the administrative hearing and failed to offer crucial documents into evidence, or offered documents which the hearing officer did not accept, or failed to testify to certain facts because s/he did not know what facts were important and relevant (and the hearing officer failed in his or duty to assist), the attorney can add these facts to the petition as an offer of proof. For example: "Although petitioner did not have a doctor's letter with her at the hearing, the hearing officer failed to advise her that this would be important evidence and that she could have an adjournment to obtain such a letter. If the hearing officer had offered petitioner an adjournment to obtain a doctor's letter, she would have offered into evidence a letter from her doctor stating that she was at the doctor's office on February 9, 2016. See Letter from Doctor M, attached hereto."

C. § 7802 Parties

1. Body or Officer — "Every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article."

2. The party commencing a special proceeding shall be styled the petitioner and any adverse party the respondent. After the proceeding is commenced, no parties may be joined or interpleaded, and no third-party practice is permitted without leave of the court. CPLR § 401.

[20] *See Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000); *Yarbough v. Franco*, 95 N.Y.2d 342, 347 (2000); *Rizzo v. New York State Div. of Housing & Cmty. Renewal*, 6 N.Y.3d 104 (2005).

3. In Article 78 proceedings other than prohibition seeking to restrain the action of one party in favor of another, in which case the latter must be joined, the joinder of potentially necessary parties is governed by CPLR § 1001. Under CPLR § 1001(a), a necessary party is someone "who ought to be [joined] if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action."[21]

D. § 7803 Questions Raised

1. Whether the body or officer failed to perform a duty enjoined upon it by law. Relief for such a failure is in the nature of a *writ of mandamus* to compel. This relief is available where there is a non-discretionary duty on an agency or officer to act.[22]

2. Whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction. Relief for such action is in the nature of a *writ of prohibition*. This relief is available to prevent or control the officer or body acting without authority.[23]

3. Whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed. This subdivision provides for a mixed *mandamus to review/certiorari* standard of review. The standard for reviewing the mode of penalty or discipline imposed is whether the punishment is so disproportionate to the offense as to be shocking to one's sense of fairness. In reviewing the penalty imposed, the court cannot look beyond the evidence in the administrative record.[24]

PRACTICE NOTE: Cases that review the penalty or discipline imposed are generally civil service employment cases or public housing eviction proceedings. We hope to see a decision one day that holds that the sanction of a reduction or discontinuance of benefits

[21] In *Feliz v. Wing,* 285 A.D.2d 426 (1st Dep't 2001), the Appellate Division held that the denial of respondents' motion to dismiss for failure to join HRA as a necessary party was proper as the proceeding challenged OTDA's affirmance of HRA's discontinuance of public assistance benefits and HRA "must comply with the ultimate resolution of this matter by the State respondents in the aftermath of the instant litigation and, accordingly, its joinder is unnecessary to afford complete relief.… Nor have respondents identified any interest of HRA that would be inequitably affected by the failure to join it in this proceeding" (internal citation omitted).

[22] The fact that the action sought to be compelled requires the exercise of discretion does not negate the requirement that the official take such action. *See Natural Resources Defense Council v. New York City Dep't of Sanitation*, 83 N.Y.2d 215 (1994); *Jiggetts v. Grinker*, 75 N.Y.2d 411 (1990).

[23] For the elements necessary to justify this type of relief, *see Town of Huntington v. New York State Div. of Human Rights*, 82 N.Y.2d 783 (1993).

[24] Thus, the reviewing court may not consider facts or circumstances occurring after the administrative determination was made. *See Featherstone v. Franco*, 95 N.Y.2d 550 (2000).

for 90 days (or 150 or 180) for one missed appointment is "so disproportionate to the offense as to be shocking to one's sense of fairness."

4. Whether a determination made as a result of a hearing held,[25] and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence. Relief from such a determination is in the nature of a *writ of certiorari*. Substantial evidence is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact."[26] [27]

E. § 7804 Procedure [See also CPLR §§ 402 – 404]

1. An Article 78 proceeding is governed by the procedures set forth in that article. But since it is a "special proceeding," unless contravened by a specific provision in Article 78, it is also governed by the provisions of CPLR Article 4, which covers special proceedings.

2. Subject Matter Jurisdiction and Venue

Subject matter jurisdiction over Article 78 proceedings lies in the Supreme Court. Generally, venue lies in any county within the judicial district where the challenged administrative action or refusal to act, or the material events, took place, or where the principal office of the respondent is located. *See* CPLR §§ 506(b) and 7804(b). However, proceedings against a few enumerated bodies or officers have special venue provisions.

PRACTICE NOTE: Do not confuse judicial district with judicial department.

[25] The fact that a statutorily required evidentiary hearing was held does not necessarily mean that the substantial evidence standard applies. *See, e.g., Rukenstein v. McGowan*, 273 A.D.2d 21 (1st Dep't 2000) (hearing decision "arbitrary and capricious"); *Leon v. Wing*, 3 Misc. 3d 578 (Sup. Ct. N.Y. County 2003) (no question with respect to substantial evidence presented; only issue is whether agency's interpretation and application of the pertinent regulations arbitrary and capricious).

[26] *300 Gramatan Ave. Assoc. v. State Div. Of Human Rights*, 45 N.Y.2d 176, 180 (1978). Where there is substantial evidence to support the administrative agency's determination, the reviewing court may not substitute its own judgment for the agency's. *Mittl v. New York State Div. of Human Rights*, l00 N.Y.2d 326, 331 (2003) ("It is irrelevant that the record could also support [a different determination]").

[27] It is sometimes difficult to distinguish between the arbitrary and capricious standard and the substantial evidence standard. *See Pell v. Board of Educ*., 34 N.Y.2d 222, 231 (1974). "The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact" [but] "[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard." The practical difference is that substantial evidence questions require transfer to the Appellate Division. *See also Poster v. Strough,* 299 A.D.2d 127, 142 (2d Dep't 2002) for discussion of difference between § 7803(3), "mandamus to review," and § 7803(4) "certiorari."

3. Petitioner's Papers [§ 7804(c), (d)]

Unless brought by order to show cause, the petition is to be served on the adverse party at least 20 days before the petition is noticed to be heard. The answer is to be served at least 5 days before the return date. Any reply is to be served at least one day before the return date. If proceeding against a state body or officer (like OTDA), service must also be made on the attorney general.

PRACTICE NOTE: Redaction Cover Page — Rule 202.5(e) of the Uniform Rules for Trial Courts requires the redaction of certain confidential personal information in papers submitted to the court for filing, including Social Security or tax i.d. numbers, date of birth (except the year), full names of minors, and financial account numbers. See 22 NYCRR 202.5(e). A Redaction Cover Page must accompany the filing and can be found at https://www.nycourts.gov/FORMS/redaction/.

a. Notice of Petition

This is the functional equivalent of a combination of summons and notice of motion. The return date in the Notice of Petition is chosen by the petitioner and must be at least twenty (20) days after its service.

b. Order to Show Cause

An Order to Show Cause is used instead of a Notice of Petition when an early return date is needed and/or where interim relief is being requested. The return date on the order, the time period within which it must be served on the respondent(s), and the manner of service are determined by the court.

c. Verified Petition

The petition is the functional equivalent of a complaint in a plenary action. It must be verified [CPLR §7804(d)].

The petition should include: Introduction/Preliminary Statement; Statements of Venue and Parties; Statement of Applicable Law (important because it is your chance to frame the case and likely first to be read); Statement of Facts; Claims for Relief/Causes of Action; Attorneys' Fees; Wherefore Clause; Signature; and Verification, preferably signed by client. Think of what you would want to appear in the appellate record. See Appendix H of these materials for sample verified petitions.

d. Affidavits (if any, including Affidavit of Translation)

e. Exhibits

Exhibit A will usually be the Decision After Fair Hearing being appealed. You may also want to include other Decisions After Fair Hearing, or State or local policy directives or other documents which the court might otherwise have difficulty locating but which you cite to in your papers. As discussed above, consider attaching documentary evidence that petitioner would have brought to hearing had s/he known it was relevant or had the hearing officer offered an opportunity for an adjournment.

f. Memorandum of Law to be served with Petition

PRACTICE NOTE: In past years the standard practice was to write a memorandum of law after receiving the respondent's answer along with the certified transcript of the hearing. The rule to serve *the memorandum with the petition was "honored in the breach." More recently, the State has raised objections to a memorandum of law being submitted for the first time with the reply, arguing that § 202.8(c) of the Uniform Rules, made applicable to special proceedings by 22 NYCRR § 202.9, obligates the moving party to "serve copies of all affidavits and briefs upon all other parties at the time of the service of notice of [petition]" in an Article 78 proceeding. If at all possible, serve the memorandum with the petition. Note that if up against the statute of limitations, attorney may file the Notice of Petition and Petition with the County Clerk by the deadline and will have 15 days to serve (and to write the memorandum), see CPLR § 306-b.*

g. Reply to counterclaims, to new matter raised in answer, or where accuracy of proceedings annexed to answer is disputed.

4. Respondent's Papers [§ 7804 (d)-(f)]

a. Verified Answer

The answer responds to allegations in the petition. The respondent(s) may admit or deny allegations, deny knowledge sufficient to form a belief; make objections in point of law such as lack of personal jurisdiction, failure to properly serve papers or parties, statute of limitations, failure to exhaust; may assert that petitioner has another remedy at law, for example an appeal, or that the issue is not justiciable.

b. Affidavits (if any)

c. Certified transcript of the record of the administrative proceedings

d. Respondent may make objections in point of law in the answer or by motion to dismiss. The motion to dismiss shall be made upon notice within the time allowed

for the answer. If the motion is denied, the court shall grant the respondent time to serve and file an answer.

5. Transfer to Appellate Division [CPLR §7804(g)]

Where no substantial evidence question is raised, the court in which the proceeding is commenced shall dispose of the issues in the proceeding. Where the substantial evidence question specified in § 7803(4) is raised, the court shall first dispose of such other objections as could terminate the proceeding, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court must transfer the proceeding to the Appellate Division.

PRACTICE NOTE: This provision has been read to empower the Supreme Court to determine whether the challenged administrative action should be annulled for another reason on the merits, e.g., if the administrative decision was arbitrary and capricious or failed to comply with due process.[28] *Where the Supreme Court erroneously transfers a proceeding, the Appellate Division has the power to hear the case, in the interest of judicial economy.*[29] *Conversely, where a proceeding is decided by the Supreme Court on the merits but should have been transferred, the Appellate Division will correct the error on appeal by disregarding the Supreme Court decision and treat the case as if it had been properly transferred in the first instance by reviewing the matter de novo.*[30]

6. Disclosure [CPLR § 408]

No disclosure is permitted without leave of the court, except for a notice to admit pursuant to CPLR § 3123.

7. Trial [CPLR §7804(h)]

If there is a triable issue, trial shall be held forthwith. If the proceeding is transferred to the Appellate Division, the proceeding is tried by a referee or by a justice of the supreme court.

[28] *See Earl v. Turner*, 303 A.D.2d 282 (1st Dep't 2003) (petitioner's due process claims dispositive and sufficient to terminate the proceeding within the meaning of CPLR § 7804(g)); *Cannings v. State of New York Dep't of Motor Veh. Appeals Bd.*, 84 A.D.3d 610 (1st Dep't 2011).
[29] *See 125 Bar Corp. v. State Liquor Auth.,* 24 N.Y.2d 174 (1969); *Matter of Rossi v. New York City Dep't of Parks & Recreation*, 127 A.D.3d 463, 467 (1st Dep't 2015).
[30] *See Stroman v. Franco*, 253 A.D.2d 398 (1st Dep't 1998); *Masullo v. City of Mount Vernon*, 31 N.Y.S.3d 607, 610 (2d Dep't 2016).

F. § 7805 Stays

The court is empowered to stay further proceedings or the enforcement of any determination under review.

G. § 7806 Judgment

The judgment may grant or dismiss the petition (with or without prejudice); may annul or confirm a determination in whole or in part, or modify it; or may direct or prohibit specified action by the respondent. Any restitution or damages must be incidental to the primary relief sought by the petitioner.[31]

V. Poor Person's Relief [CPLR § 1101]

Under CPLR § 1101(e),

> Where a party is represented in a civil action by a legal aid society or a legal services or other nonprofit organization, which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working on behalf of or under the auspices of such society or organization, all fees and costs relating to the filing and service shall be waived without the necessity of a motion and the case shall be given an index number, or, in a court other than the supreme or county court, an appropriate filing number, provided that a determination has been made by such society, organization or attorney that such party is unable to pay the costs, fees and expenses necessary to prosecute or defend the action, and that an attorney's certification that such determination has been made is filed with the clerk of the court along with the summons and complaint or summons with notice or third-party summons and complaint or otherwise provided to the clerk of the court.

VI. Filing, Service, and Scheduling

PRACTICE NOTE: *The section below is based on the procedure followed in New York County Supreme Court. Check local court rules and county clerk and court websites, and consult with local practitioners for any variations in local practice.*

A. Preparation of Papers and Court Forms[32]

1. Application for Poor Person's Relief/Attorney Certification

[31] *See Gross v. Perales*, 72 N.Y.2d 231 (1988) (upheld award of $20 million in incidental monetary relief to the City of New York from the State Department of Social Services (now OTDA)); *Adams v. Welch*, 272 A.D.2d 642, 644 (3d Dep't 2000).

[32] As of this writing, Article 78 proceedings are not subject to mandatory e-filing and continue to be filed in hard copy.

2. Redaction Cover Page
3. Notice of Petition or Order to Show Cause
4. Verified Petition; Supporting Papers
5. Request for Judicial Intervention (RJI) 22 NYCRR § 202.6.
6. Memorandum of Law *(Should be served with Petition if at all possible.)*

PRACTICE NOTE: *Notice of Petition and Petition are usually blue backed together. Be sure to write "Oral Argument Requested" conspicuously on the front of your papers if you want to maximize the chance of making your argument to a judge instead of getting a decision based solely on the papers. Be sure to make a sufficient number of copies to file with county and court clerks and to serve on all parties, and to retain an office copy.*

B. Procedure for Commencing Article 78 Proceeding by Notice of Petition

1. Obtain index number at County Clerk's office, Room 141B — File Poor Person's Certification and Redaction Cover Page with copy of Notice of Petition and Verified Petition. Insert index number on all copies of papers. Stamp original and copies "FILED," using stamp at Law and Equity desk.[33]

2. Serve copies of completed RJI, Notice of Petition and Verified Petition (along with Memorandum of Law if available), on respondent(s) pursuant to CPLR §§ 307, 308.

PRACTICE NOTE: Service must be made within 120 days of commencement of proceeding, but not later than l5 days after the date on which the applicable statute of limitations expires. CPLR § 306-b.

a. Service on municipal respondent is by personal delivery to the officer or to the person designated for the receipt of service. CPLR 311(a) lists the titles of the individuals upon whom service may be made when suing a local governmental agency, e.g, in New York City, the Corporation Counsel or other designated official; when suing another city or town, the designated local official.

b. Service on a State officer or agency is by personal delivery or by certified mail, marked "URGENT LEGAL MAIL" in capital letters, to that agency or officer (or a designated agent) at her/his principal place of business. CPLR § 307(2).

c. Service *must also* be made on the New York State Attorney General who receives papers at the Justice Building, Empire State Plaza, Albany NY, 11224; 120

[33] While New York County Supreme Court's website instructs: "When the matter commenced is an authorized hard-copy special proceeding, … the filing attorney should file original papers with the County Clerk and a duplicate original with the General Clerk's Office (Room 119)," *see* www.nycourts.gov/courts/1jd/supctmanh/Commencement-of-Cases-2.shtml, the County Clerk will most likely ask for a copy, not the original papers.

Broadway, 24th Floor, New York, NY 10241; or at any regional office. *See* http://www.ag.ny.gov/service-oag-person. CPLR § 307(1).

PRACTICE NOTE: Not every State agency has an agent designated to receive service in a convenient location. CPLR §307(2) permits service on a State agency or officer by certified mail clearly marked "URGENT LEGAL MAIL."

The New York State Office of Temporary and Disability Assistance may be served at 14 Boerum Place, 1st Floor, Brooklyn, NY 11201 or 40 North Pearl Street, Albany, New York 12243. The New York State Department of Health may be served at Corning Tower, Empire State Plaza, Albany, New York 12237, and the Office of Children and Family Services may be served at Capital View Office Park, 52 Washington Street, Rensselaer, New York 12144 in person, or by certified mail marked URGENT LEGAL MAIL.

d. When serving the papers, have the recipient stamp the original and an office copy as well as a copy of the RJI.

3. After service of papers on all respondents, go to the General Clerk's Office in Room 119. The clerk will review the papers and approve purchase of the RJI.

4. Take one original and one copy of the RJI and an original Poor Person's Certification to the County Clerk's cashier's office, Room 160. Make or request copy of the filed RJI, which should be stamped "NO FEE."

5. File RJI, Notice of Petition and Verified Petition, along with proof of service, with the General Clerk, Room 119, within five days of service pursuant to § 202.8(b) of the Uniform Civil Rules for the Supreme Court.

6. The proceeding is returnable in the Motion Support Part, Room 130, on the date stated in the Notice of Petition. The Motion Support Part is a calendar part. Answer(s) or motions to dismiss and any reply should be served in accord with CPLR § 7804, or as agreed upon by counsel, and must be filed on the return date. Once all papers in the proceeding have been served and filed, the proceeding is referred to the judge to whom it has been assigned. Papers received by the clerk of the court on or before the return date shall be deemed submitted as of the return date. The assigned judge, in his or her discretion or at the request of a party, thereafter may determine that the proceeding be orally argued and may fix a time for oral argument. 22 NYCRR § 202.8(d).

7. Adjournments.

After being served with initiating papers, local and State respondents will often ask for an adjournment of the original return date, either to consider settlement, or to obtain

the transcript of the hearing. Stipulations of adjournment must be in writing and should be submitted in the Motion Support Courtroom on the original return date. No more than three stipulated adjournments for a total of 60 days may be submitted without prior permission of the court. Absent agreement by the parties, a request by any party for an adjournment shall be submitted in writing, upon notice to the other party on or before the return date. The court will notify the requesting party whether the adjournment has been granted. 22 NYCRR § 202.8(e).

PRACTICE NOTE: Consult the New York Law Journal, at http://judges.newyorklawjournal.com/partrule.aspx, or the Supreme Court website, www.nycourts.gov/courts/1jd/supctmanh/index.shtml for the individual justices' rules and other information on court procedures. To track the scheduling of cases, or to sign up for electronic alerts, go to: iapps.courts.state.ny.us/webcivil/etrackLogin.

C. Procedure for Commencing Article 78 Proceeding by Order to Show Cause

1. Obtain index number at County Clerk's office, Room 141B: File Poor Person's Certification and Redaction Cover Page with copy of Verified Petition. Insert index number on all copies of papers. Stamp original and copies "FILED," using stamp at Law and Equity desk.

PRACTICE NOTE: According to the rules for proceeding by order to show cause on the N.Y. County Supreme Court website: Proposed orders to show cause (OSC) must be submitted to Room 315. The Ex Parte Office reviews proposed OSCs for form, in a process similar to the initial examination of motions on notice by the General Clerk's Office. CPLR 6313(a) precludes the ex parte issuance of a temporary restraining order (TRO) against a public officer, board, or municipal corporation of the State (which includes New York City) to restrain the performance of statutory duties. If an applicant seeks such relief, advance notice to the Corporation Counsel's Office, the Office of the Attorney General, or agency counsel if the municipality is so represented is required.
See www.nycourts.gov/courts/1jd/supctmanh/ex_parte_applications.shtml, accessed June 22, 2016.

If the attorney is requesting interim relief, s/he must contact the respondent's attorney to give respondent an opportunity to appear in opposition to the application. Or, the attorney must provide an affirmation demonstrating that there will be significant prejudice to the party seeking the restraining order by the giving of notice. In the absence of such prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the restraining order is sought of the time, date and place that the application will be made sufficient to permit the party an opportunity to appear in response to the application.

It is recommended to advise the local and State agencies the day before, if

possible, of your intention to file the OSC and to fax or email a copy of the papers in advance of applying for the OSC. Obtain the name/number of the assigned attorney(s) for respondents, to call when the appearance before the judge is scheduled.

2. Take original RJI, Order to Show Cause and Verified Petition to the Ex Parte Clerk's office, Room 315. The clerk will review the papers for form. If the papers are satisfactory, Ex Parte office staff will mark them accordingly and direct the attorney to present the proposed OSC to the County Clerk's cashier's office in Room 160.

3. Take one original and one copy of the RJI, and an original Poor Person's Certification to Room 160. The papers will be stamped "NO FEE."

4. Return to the Ex Parte Clerk, Room 315, to submit the RJI, Order to Show Cause and Verified Petition. The clerk will advise you when and whether you will need to return to appear before a judge. You should inform your adversary of the date, time, and place to appear.

5. After the judge has signed the Order to Show Cause, conform a sufficient number of copies for service and for your files. If your adversary is present, s/he may accept service at that time.

6. Serve Order to Show Cause, Verified Petition and RJI on each respondent (if not already served, see #5 above).

7. File proof of service with the court, pursuant to § 202.8(b) of the Uniform Civil Rules for the Supreme Court. Proof of service consists of a copy of the papers served with an acknowledgment of service, or affidavit(s) of service.

8. The proceeding is returnable at the time and place indicated in the Order to Show Cause.

D. Calendar Practice and Oral Argument

l. When Proceeding by Notice of Petition.

The proceeding should be made returnable in the Motion Support Part, Room 130. On the return date, all responding papers, including respondent's answer or motion to dismiss, petitioner's reply, if any and memoranda of law, if any, should be submitted to the court clerk. The proceeding will be marked "submitted" and referred to the assigned judge. The judge may decide the case based on the papers alone, or may schedule the case for oral argument. If oral argument is scheduled, appear on time in the courtroom of the assigned judge for argument. To obtain notice of scheduling of oral argument, or any update or decision made in the case,

check the New York Law Journal, the court's website or sign up for notification through e-courts at *http://iapps.courts.state.ny.us/webcivil/etrackLogin.*

2. When Proceeding by Order to Show Cause.

Appear in the courtroom on the date and at the time indicated in the signed Order to Show Cause for oral argument.

VII. Transferring the Article 78 Proceeding to the Appellate Division

If the proceeding is transferred to the Appellate Division pursuant to CPLR § 7804(g), it is treated much like an appeal from that point forward. Thus, you must follow the procedures set forth in Articles 55 and 57 of the CPLR, as well as the Rules of the Appellate Division for the Department to which the proceeding was transferred. The rules for the First Department are found at 22 NYCRR § 600 *et seq*. The rules for the Second Department are found at 22 NYCRR § 670 *et seq*. The rules for the Third Department are found at 22 NYCRR § 800 *et seq*. The rules for the Fourth Department are found at 22 NYCRR §1000 *et seq*. You may perfect the proceeding by any of the methods set forth in CPLR §§ 5525–5528, i.e. a reproduced full record, the appendix method, an agreed upon statement in lieu of record, or on the original papers. *See, e.g.* 22 NYCRR § 600.5. This writer is of the opinion that using the reproduced full record is the most efficient method in the overwhelming number of cases. This method also ensures that each of the appellate division judges gets his/her own copy of the record.

VIII. Strategic Considerations

A. Finality of Decision Under Review

The decision being reviewed in the Article 78 proceeding must be final. A decision that remands the matter to the agency for a new determination is not final. A determination is "final" where the "initial decision maker" has come to "a definitive position" that caused "an actual, concrete injury."[34]

B. Exhaustion of Administrative Remedies

Since the Article 78 proceeding is limited to the review of *final* determinations of an administrative body or officer, exhaustion of administrative remedies prior to the commencement of the proceeding is generally required.[35] However, one need not exhaust administrative remedies where the agency action challenged is either unconstitutional or wholly

[34] *Dozier v. New York City*, 130 A.D.2d 128, 133 (2[d] Dep't 1987) (distinguishing finality from exhaustion, which requires requesting administrative review of the "final" decision).
[35] *See Young Men's Christian Assoc. v. Rochester Pure Waters Dist.,* 37 N.Y. 2d 371 (1975).

beyond its grant of power; when resort to an administrative remedy would be futile; or when its pursuit would cause irreparable injury.[36]

C. Choosing Respondents

When challenging a state agency's administrative action (or inaction), that state agency will naturally have to be named as a respondent in the Article 78 proceeding. But what happens if the state affirms a local agency determination? You will need to decide whether to also name the local agency as a respondent in the Article 78 proceeding.

1. Legal Considerations — If the local agency's joinder is not necessary to afford the petitioner complete relief, and if the local agency has no interest that would be inequitably affected, it need not be joined.[37] Since the local agency is normally bound by the state agency's decision, there may be no need to join the local agency as a party.

2. Strategic Considerations

a. Will the local agency's inclusion in the lawsuit muddy or clarify the issues ?

b. Will the local agency's inclusion in the lawsuit increase or decrease the likelihood of obtaining relief?

c. Are you requesting systemic relief or policy change specific to the local agency?

d. Might the inclusion or exclusion of the local agency in the lawsuit result in unwanted motion practice or other delays?

e. Have there been other rulings against the local agency on the issue raised in this Article 78 proceeding?

D. Crafting Claims for Relief/Causes of Action

1. Typically, the claims for relief in an Article 78 proceeding will track the language of one or more of the subdivisions in § 7803. Claims in the nature of *mandamus* to compel should specify the source of the legal duty enjoined on the official to perform. § 7803(1). Claims in the nature of prohibition should specify the action sought to be enjoined and lack of authority to perform it. § 7803(2). Actions or omissions that are challenged as arbitrary and capricious, or in violation of lawful procedure, should specify what those lawful procedures are and how they were violated. § 7803(3).

[36] *Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52, 57 (1978).
[37] *See, e.g. Feliz v. Wing,* 285 A.D. 2d 426 (1st Dep't 2001).

2. Substantial Evidence Claims.

Since substantial evidence claims are inherently difficult to win because of the low bar set by the law for affirmance,[38] and because they require transfer to the Appellate Division, avoid pleading claims as substantial evidence claims. § 7803(4).

E. Declaratory Judgment [CPLR § 3001]

When a 78 proceeding challenges policies or practices of the agency that contravene regulations, statutes or constitutional guarantees, consider filing a combined Article 78 and Declaratory Judgment action. *See* CPLR § 3001. Sample combined Article 78/Declaratory Judgment petitions are at Appendix H of these materials.

PRACTICE NOTE: While not specifically authorized by the CPLR, New York courts have historically considered combined Article78/Declaratory Judgment proceedings.[39] In April 2010, an advocate met resistance from the New York County Clerk's office when he attempted to file a combined Article 78/Declaratory Judgment action in New York County. The County Clerk's office showed him a then recently issued opinion, Brannon v. Goodman, which said the petitioner/plaintiff could not combine two forms of action, but must bring two separate cases and buy two index numbers, unless the declaratory relief sought was intertwined with the Article 78 relief sought.[40] The advocate had to convince the clerk's office that the declaratory relief he sought was intertwined with the Article 78 relief.

F. Class Actions [CPLR Article 9]

An Article 78 proceeding may be brought as a class action. *See e.g. Walker v. Buscaglia,* 71 A.D. 2d 315 (3rd Dep't 1979). However, exhaustion defenses may prevent class certification. *See, e.g. Daniel v. NYS Div. of Housing and Community Renewal,* 179 Misc. 2d 452, 459 (Sup. Ct. N.Y. County 1998).

G. Defeating Mootness Defenses

It is not uncommon for an administrative agency to provide the relief requested shortly after the filing of an Article 78 proceeding, thus mooting out the Article 78 claim. Although the petitioner may have obtained individual relief, s/he has not prevailed on the legal claim. If the petitioner does not agree to discontinue the Article 78 proceeding, the agency will

[38] Substantial evidence "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." *Gramatan Ave. Assoc. v. NYS Div. of Human Rights*, 45 N.Y.2d 176 (1978). "Courts may not weigh the evidence or reject [the agency's] choice where the evidence is conflicting and room for choice exists." *Mittl v. NYS Div. of Human Rights,* 100 N.Y. 2d 326, 331 (2003) (citations omitted).

[39] *See, e.g., Crown Communication New York, Inc., v. D.O.T.*, 4 N.Y.3d 159 (2005); *Schwartfigure v. Hartnett*, 83 N.Y.2d 296 (1994).

[40] *Brannon v. Goodman*, Index No. 115662/09, 2010 N.Y. Misc. LEXIS 2721 (Sup. Ct. N.Y. County Mar. 24, 2010).

likely move to dismiss it on grounds of mootness. Courts will normally not consider questions that have become moot due to passage of time or change in circumstances. *Hearst Corp. v. Clyne,* 50 N.Y.2d 707, 714-715 (1980). An exception to this rule exists "where issues are substantial or novel, likely to recur and capable of evading review." *Id.* The Court of Appeals has often invoked this exception. *See, e.g., City of New York v. Maul,* 14 N.Y.3d 499 (2010) (plaintiffs raised substantial and novel questions as to whether defendants were fulfilling statutory duties; issues likely to recur and evade review given temporary nature of foster care, aging out of potential plaintiffs and transitory nature of foster care placements); *Mental Hygiene Legal Services v. Ford,* 92 N.Y. 2d 500 (1998) (challenge to involuntarily committed patient's involuntary transfer without a hearing is type of case likely to recur, will typically evade review, is substantial and novel).

1. Use one or more of the exceptions as a basis to defeat a mootness defense.

2. Raise declaratory judgment or injunction or incidental damage claims in the petition.

3. Consider bringing the Article 78 proceeding as a class action.

4. Intervene additional petitioners.

H. Defeating Exhaustion Defenses

"The exhaustion rule is not … is not an inflexible one. It is subject to important qualifications. It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury." *Watergate II Apartments v. Buffalo Sewer Auth.,* 46 N.Y.2d 52, 57 (1978) (citations omitted). [41]

An example of an emergency or irreparable injury is a client facing imminent eviction.[42] The best practice might be to request an administrative hearing, but then bring the Article 78 proceeding immediately, without waiting for a hearing to be scheduled and held.

Futility is illustrated in the case of *Herberg v. Perales,* 180 A.D.2d 166 (1st Dep't 1992), where the result of a hearing was a remand to the local agency to make a new determination. When the local agency made the same determination, a second hearing decision again remanded the matter to the local agency, which made the same determination for the third time. To ask for a third administrative hearing in this circumstance would have been futile.

[41] *See also Coleman v. Daines*, 79 A.D.3d 554, 560 (1st Dep't 2010), for discussion of exceptions to exhaustion rule.
[42] *But see Frumoff v. Wing*, 239 A.D.2d 216 (1st Dep't 1997) (held that lower court should have granted respondent's motion to dismiss because petitioner did not ask for administrative hearing on denial of emergency rent arrears grant).

IX. Oral Argument [22 NYCRR § 202.8(d)]

Motion papers received by the clerk of the court on or before the return date shall be deemed submitted as of the return date. The assigned judge, in his or her discretion or at the request of a party, thereafter may determine that any motion be orally argued and may fix a time for oral argument. A party requesting oral argument shall set forth such request in its notice of motion or in its order to show cause or on the first page of the answering papers, as the case may be. Where all parties to a motion request oral argument, oral argument shall be granted unless the court shall determine it to be unnecessary. Where a motion is brought on by order to show cause, the court may set forth in the order that oral argument is required on the return date of the motion.

To request argument in an Article 78 proceeding, the attorney should print at the top right of the Notice of Petition, "Oral Argument Requested." But this does not ensure oral argument — the attorney should check the rules of the individual judge to whom the case is assigned and contact the court attorney or part clerk if needed to determine if oral argument will be held.

In the Appellate Divisions, for both appeals and transferred proceedings, the attorney must file a notice requesting argument. 22 NYCRR §§ 600.11(f), 670.20, 800.10, 1000.11. The attorney must contact the adversary to discuss and then notify the clerk in writing of the time desired for argument by each party. This must be filed timely. Consult the appropriate Appellate Division calendar for exact times.

It is highly recommended that the attorney take advantage of the opportunity for oral argument in the Article 78 proceeding (and at the Appellate Division if the proceeding is transferred). Judges' calendars are ever increasing, and they may not have enough time to understand or remember every fact in the case or every point made in the written submission. At oral argument the judge(s) can ask questions and the attorney can illuminate facts or legal arguments that may not have been clear in the written submissions. Many judges have said that oral argument is invaluable and in many cases has caused them to change their minds from their first inclinations.

X. Attorney's Fees

Under CPLR Article 86, New York's Equal Access to Justice Act, attorney's fees and costs are recoverable from the State or an agency of the State where the petitioner is a prevailing party and the position of the state was not "substantially justified."

Fees may also be available under 42 U.S.C. § 1988 for certain enumerated federal civil rights claims, and under CPLR § 909 for class actions.

A. Prevailing Party — A party has prevailed when s/he has succeeded in whole or in substantial part in gaining the relief sought in the petition. Whether a petitioner

seeking Article 86 fees is a "prevailing party" under the "catalyst theory" when the State voluntarily grants the relief sought in the petition without a court order or judgment is not definitively resolved. One First Department decision held that petitioner is not a prevailing party in the absence of an enforceable judgment or order. *Auguste v. Hammons,* 285 A.D. 2d 417 (1st Dep't 2001), *citing Buckhannon Board & Care Home v. West Va. Dep't of Health and Human Resources,* 532 U.S. 598 (2001). Subsequently, that same court overruled itself and held that the one could be a prevailing party under the catalyst theory and awarded Article 86 attorney's fees. *Solla v. Berlin,* 106 A.D. 3d 80 (1st Dep't 2013.) However, on appeal, the decision to award fees was reversed on other grounds. *Solla v. Berlin,* 24 N.Y. 3d 1192 (2015).

B. Position of the State — Whether the position of the State was substantially justified is a measure of the acts or failure to act from which judicial review is sought, and not the State's litigation position.

XI. Case Examples of "Far-Reaching" Results

Boyd v. Doar, Index No. 400706/2008 (Sup. Ct. N.Y. County, Oct. 2, 2008). Article 78 appeal of fair hearing decision upholding agency refusal to restore public assistance and food stamp benefits stolen from petitioner's electronic benefit transfer (EBT) system account. Court approved settlement restoring all stolen benefits to petitioner. City and state agencies implemented additional security measures to prevent similar thefts from EBT accounts.

Carbonell v. Doar, Index No. 401371/2011 (Sup. Ct. N.Y. County, April 27, 2012) Article 78 appeal filed on behalf of disabled public assistance recipient sanctioned for failure to comply with work rules. Court approved settlement lifting sanction and restoring lost benefits with HRA agreeing to revise its procedures so that recipient previously found disabled will not be subject to work-related sanction without new determination of employability.

Carver v. State of New York, 26 N.Y.3d 272 (2015). State withheld half of the petitioner's $10,000 lottery prize winnings as reimbursement for the public assistance benefits he received from 1997-2000. Appellate Division held that the petitioner established a prima facie case showing that any forfeiture of the petitioner's lottery winnings would result in a federal wage violation under 29 U.S.C. § 201, *et. seq.*, because he would have been paid less than the applicable federal minimum wage for the work he performed, granted the petition, and directed New York State to return the sum of $5,000 to him. Court of Appeals affirmed.

Coleman v Daines, 19 N.Y.3d 1087 (2012). Hybrid CPLR article 78 proceeding and 42 U.S.C. § 1983 action alleged that respondent Robert L. Doar, Commissioner of HRA, failed to make a timely decision regarding petitioner's initial Medicaid claim and that Doar and respondent Richard F. Daines, Commissioner of the New York State

Department of Health, violated Social Services Law § 133 and her constitutional right to due process by failing to give her notice of the availability of "temporary assistance" benefits at the time of application.

Jenevieve R. v. Doar, Index No. 400046/2011 (Sup. Ct. N.Y. County, Nov. 14, 2011). Appeal of fair hearing decision upholding agency discontinuance of entire family's benefits for alleged failure of head of household to comply with drug/alcohol assessment, contrary to state regulation. Court approved settlement restoring all lost benefits to petitioner with HRA agreeing to implement procedure to ensure that any substance abuse related sanction falls solely on individual affected and rest of family remains eligible for assistance, as required by state regulation.

Johnson v. Berlin, Index No. 402321/2010 (Sup. Ct. N.Y. County, Feb. 29, 2012). Appeal of fair hearing decision upholding agency sanction of parent of severely disabled child for failure to provide new documentation of child's disability and need for work exemption every three months. Court approved settlement lifting sanction and restoring all lost benefits to individual petitioner, with HRA agreeing to implement new policy for caretakers of disabled individuals, extending exemption period up to one year.

Johnson v. Berlin, Index No. 400081/2010 (Sup. Ct. N.Y. County, Sept. 19. 2012). Combined Article 78 and Declaratory Judgment action filed on behalf of appellant who had failed to appear at scheduled fair hearing to appeal HRA decision to impose durational sanction for failure to comply with work requirements. Challenged OTDA's failure to implement a policy permitting a person with a physical or mental disability to reopen a fair hearing more than 15 days after a default, raising Americans with Disabilities Act and due process claims. Settlement resulted in amendment of 18 NYCRR 358-5.5 to eliminate the 15-day time limit to reopen defaulted fair hearing.

Puerto v. Doar, 42 Misc. 3d 563 (Sup. Ct. N.Y County 2013). Filed on behalf of public assistance recipient sanctioned for failure to comply with work rules, although fully engaged in assigned educational program. Challenged individual sanction as well as agency's automatic sanction "autoposting" process which fails to comport with regulatory requirements of supervisory case record review prior to imposition of sanction; agency's equating a single missed appointment with failure to comply even where recipient is participating in work; and agency's failure to offer meaningful conciliation as required by state statute and regulation. Lower court's finding that failure of conciliation notice to advise PA recipient that sanction can be avoided by showing actual compliance violated regulation, reversed by *Puerto v. Doar*, 2016 N.Y. App. Div. LEXIS 4309 (1st Dep't June 9, 2016) (order of lower court modified and otherwise affirmed).

Smith v. Proud, Index No. 400903/2010 (Sup. Ct. N.Y. County, April 6, 2010). Filed originally as an Article 78 proceeding with declaratory judgment and federal civil rights claims, challenging an employment-related sanction based on the inadequacy of the

Conciliation Notice and Notice of Decision under the 2006 amendments to Social Services Law § 341(1). Subsequently, a motion to intervene another petitioner, amend the petition to a class action petition/complaint and for class certification was granted. As of this writing, the parties are in settlement negotiations.

Solla v. Berlin, 106 A.D.3d 80 (1st Dep't 2013). First Department held that petitioner was prevailing party under the catalyst theory and awarded Article 86 attorney's fees for Article 78 proceeding brought to compel compliance with fair hearing decision. On appeal, decision to award fees was reversed on other grounds, *see Solla v. Berlin,* 24 N.Y. 3d 1192 (2015).

Stewart v. Roberts, Index No. 5507/15 (Sup. Ct. Albany County) (pending). Hybrid Article 78 proceeding and declaratory judgment class action against the Commissioner of the New York State Office of Temporary and Disability Assistance, Samuel D. Roberts, and the Commissioner of the Onondaga County Department of Social Services, Sarah Merrick, for denying application for public assistance benefits because of a disqualifying resource. The petition/complaint seeks a Declaratory Judgment, pursuant to CPLR § 3001, that Social Services Law § 131-a (1) and 18 NYCRR § 352.3 (c) require that when a local social services district determines eligibility for public assistance, all non-exempt assets, including motor vehicles that are not exempt under Social Services Law § 131-n, should be valued using their equity value.

XII. Sample Forms and Documents

APPENDIX A

Helfman, Lester

From: Helfman, Lester
Sent: Tuesday, May 26, 2015 2:40 PM
To: 'Hearings, AdminRecords (OTDA)'
Cc: Singer, Anique
Subject: URGENT ! - FH#6918677Y
Attachments: Authorization-

Please provide a copy of the record of Fair Hearing No. 6918677Y including the audio file and copies of all documents in the record. Insofar as the statute of limitations is scheduled to run soon, please provide the record by May 28, 2015. Alternatively, if this cannot be done, I request that OTDA agree not to raise the statute of limitations as a defense so long as we file any Article 78 proceeding within 30 days of receipt of the record.

Thank you for your consideration.

Lester Helfman
The Legal Aid Society
111 Livingston Street – 7th Floor
Brooklyn, New York 11201
718-422-2732

APPENDIX B

THE LEGAL AID SOCIETY

Brooklyn Neighborhood Office
111 Livingston Street - 7th Fl.
Brooklyn, NY 11201
T (718) 722-3100
www.legal-aid.org

Blaine (Fin) V. Fogg
President

Seymour James
Attorney–in–Chief

Adriene L. Holder
Attorney–in–Charge
Civil Practice

October 27, 2014

Mark Lahey, Principal Administrative Law Judge
Office of Administrative Hearings
New York State Office of Temporary and Disability Assistance
P.O. Box 1930
Albany, New York 12201-1930

Re: Request for Corrected Fair Hearing Decision
Matter of the Appeal of
FH#: 6430488Q
Decision Date: 06/24/14

Dear Judge Lahey:

I now represent the appellant, , who was unrepresented at the above-referenced fair hearing contesting HRA's determinations that his failures to comply with employment requirements on June 25, 2013 and July 26, 2013 were willful and without good cause. I write to request a corrected decision pursuant to 18 N.Y.C.R.R § 358-6.6 on three grounds: (1) notwithstanding the Agency's failure to introduce evidence adequate to prove that it had mailed the appointment notices, conciliation notices and Notices of Decision, the ALJ determined that the Agency had introduced evidence that the notices were mailed in the normal course of business triggering a presumption of receipt of mail; (2) the ALJ failed in his duty to assist the *pro se* Appellant to develop the record; and (3) the ALJ refused an offer of evidence by the Appellant, even failing to accept the documents into the record for identification purposes.

Please note: **Since the statute of limitations is running on the appellant's time to file an Article 78 court proceeding, please confirm that if you do not grant this request to correct the decision, OTDA will consent to an additional 30 days for the filing of an Article 78 proceeding from the date of your letter advising us of your determination.**

1. Facts

Appellant requested a Fair Hearing on July 15, 2014 to challenge HRA's determination to discontinue his public assistance benefits pursuant to a Notice of Decision dated July 11, 2014 based on his alleged failure to comply with employment requirements. Appellant requested another Fair Hearing to challenge a second discontinuance of his public assistance benefits pursuant to a notice dated August 10, 2010 also based on an alleged failure to comply with employment requirements. The hearings requests were consolidated. At the hearing which was held on June 12, 2014, the Agency representative introduced a notice of a Mandatory Appointment for Evaluation of Work Activity, a Conciliation Notification and Notice of Decision relative to each of the two alleged infractions. Mr. testified that he did not receive any of the six notices because the address he used was a mailing address only, that there were problems with the mailbox having been broken into and that the person who lived at that address had been evicted prior to the alleged issuance of the first appointment notice. The ALJ asked Mr. for documentation regarding the mailing problems. When Mr. testified that he had doctor's appointments during the time of his first appointment (June 25, 2013), that he had verification of the appointments but not with him, but that HRA already had such verification, the ALJ indicated that it wasn't HRA's obligation as the Agency opposing him to present such evidence. At one point, the ALJ referred to Mr. 's testimony and asked "do you have any evidence ?" exhibiting a failure to understand that testimony is evidence.

Rather than follow its usual practice of introducing affidavits of Meyer Elbaz and Monica Johnson as purported proof that it had mailed the appointment and conciliation notices, HRA introduced only the affidavit of Monica Johnson dated September 12, 2014. HRA issued no evidence of mailing of either Notice of Decision. When the Agency representative offered the Johnson affidavit, he did not show it to the Appellant or explain what the import of the affidavit was as ALJs were instructed to do in the training that followed the settlement of the federal class-action *Meachem v. Wing*, 99 Civ. 4630 (SDNY). Moreover, without reading the affidavit, the ALJ finds a presumption of receipt. (See, Meachem Overview, pp. 10-14 attached hereto.)

Near the end of the hearing, the ALJ became hostile towards the Appellant in reaction to something Appellant said which the ALJ perceived to be disrespectful. The ALJ's palpable hostility toward the Appellant resulted in a response in kind from the Appellant and further response by the ALJ whose attitude was insulting towards the Appellant. The ALJ abruptly ended the hearing and directed Appellant to leave.

A Decision After Fair Hearing was issued on June 25, 2014 in which the ALJ, in the absence of substantial evidence, ruled that both appointment notices, both conciliation notices and both Notices of Decision were mailed in the normal course of business, and that the Agency's evidence of mailing, i.e., the one affidavit HRA introduced, created a presumption of receipt of mail. The ALJ found Mr. 's testimony in rebuttal of the presumption to be not credible because Mr. had more than one basis for the

rebuttal which the ALJ found to be inconsistent. In his decision, the ALJ placed the burden of proof on Appellant stating that "the Appellant did not establish good cause for the failure to comply with employment requirements."

HRA FAILED TO PROVE IT MAILED ANY OF THE SIX NOTICES

In order to prove that a notice was mailed to a Fair Hearing appellant, the Agency must prove: (a) an established office mailing procedure; and (b) that the procedure was followed in this particular case. See, Meachem Overview, pp. 10-14 attached hereto. HRA proved neither. In response to Mr. 's testimony that he did not receive the Mandatory Appointment for Evaluation of Work Activity notices of June 18, 2013 and July 19, 2014, the Conciliation Notifications dated June 27, 2013 and July 30, 2013 and the Notices of Decision dated July 11, 2013 and August 10, 2013, HRA offered only the affidavit of Monica Johnson dated September 12, 2012. Normally, HRA also introduces an affidavit from Meyer Elbaz which purports to describe the procedures used in producing the appointment and conciliation notices. In addition, HRA normally introduces an affidavit sworn to by Michael Taber as evidence that a Notice of Decision was mailed, however, HRA did not do so in this instance. The Johnson affidavit fails to prove a regular mailing procedure in place at the time of the mailings in question. Nor does it prove that the procedure described – such as it is – was in fact followed. Moreover, no evidence whatsoever was introduced regarding mailing of the Notices of Decision in that the Johnson affidavit refers only to the appointment notices and the Conciliation Notices.

The Johnson affidavit purports to describe the mailing procedure in place at the time the appointment notices and conciliation notices were purported to have been mailed. Yet, it is sworn to prior to the date of the alleged mailings. As such, if the affidavit is proof of any mailing procedure, it applies only to procedures in place prior to the notices since it cannot describe a procedure that will be in place in the future, i.e., after the date of the affidavit. Even if the affidavit were to be considered evidence of the mailing procedure in use at the time of the alleged mailings of the appointment and conciliation notices, the procedures described are inadequate to trigger the presumption of receipt because they fail to allege how the envelopes into which the notices purportedly mailed were addressed, to whom they were addressed, or for that matter, that they were addressed at all. Nor do the procedures described in the Johnson affidavit account for the possibility that the notice, if mailed, was returned undelivered. Specifically, in addition to the failure to state how and even if the envelopes are addressed, the affidavit fails to state whether there is a return address on the envelope and if so, which if any of the many HRA offices' addresses is placed on the envelope as a return address. Moreover, the procedures described in the mailing affidavit fail to state whether the mail was returned undelivered, or that any steps are generally taken or were taken specifically in this case, to determine whether the purportedly-mailed notices were returned undelivered to HRA by the United States Postal Service.

In addition, the Johnson affidavit fails to state any facts showing that the procedure described was in fact followed. For example, HRA offered no evidence showing that the procedures that purportedly insure that the equipment that folds the notices, inserts them in an envelope and stamps the envelope were followed. HRA did not offer copies of the reports that are alleged in Paragraphs 7 and 8 of the Johnson affidavit to insure that the number of notices in the work order for production is the same as the number produced. Nor is there anything in the Johnson affidavit alleging that the notices were actually picked up by the United States Postal Service or otherwise placed in the Postal Services' possession.

THE ALJ FAILED IN HIS DUTIES TO CONDUCT THE HEARING PROPERLY.

Rather than assist the *pro se* Appellant to develop the record, the ALJ refused to look at and even mark for identification purposes evidence the Appellant tried to submit. He insisted that documentary evidence was the only evidence that would be acceptable and refused to consider Appellant's testimony

When the Agency representative offered the Johnson affidavit into evidence, the ALJ accepted it as proof of the mailing of all six notices. The ALJ did not show the affidavit to the Appellant, nor did he explain adequately what the import of the affidavit was. Finally, he did not offer the Appellant an opportunity to cross-examine the Agency representative regarding the content of the affidavit or the mailing procedures in general.

When Mr. stated that he had evidence regarding his medical appointments but not with him, the ALJ should have offered an adjournment to give Mr. an opportunity to present the documentary evidence the ALJ was insisting on as the only thing that would be credible.

In sum, the ALJ failed to conduct the hearing in a fair and impartial manner, shifted the burden of proof from the Agency where it belonged (18 N.Y.C.R.R. § 358-5.9) to Appellant, and exhibited open hostility towards the Appellant.

CONCLUSION

In sum, the decision should be corrected because: 1) there is no evidence in the record that HRA mailed either of the Notices of Decision to Appellant; and 2) the Johnson affidavit is wholly inadequate to prove HRA's mailing procedures with regard to the appointment and conciliation notices, or that such procedures were followed so as to trigger the presumption of mailing; and 3) the ALJ failed in his duty to assist the *pro se* Appellant to develop the record and otherwise conduct the hearing in a fair and impartial manner.

Sincerely,

Lester Helfman
Staff Attorney

cc: , ESQ., NYC HRA Office of Legal Affairs

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No.

----------X

IN THE MATTER OF THE APPLICATION

ATTORNEY'S AFFIRMATION IN SUPPORT OF FORMA PAUPERIS

J. S. ,

TO SUE AS A POOR PERSON.

----------X

To: Clerk of the Court

1. I affirm that I am of Counsel to SEYMOUR JAMES, Esq., associated with The Legal Aid Society, a non-profit organization pursuant to the Section 495(7) of the Judiciary Law, which has as its primary purpose the furnishing of legal services to indigent persons.

2. The Legal Aid Society has determined that its client, J.S. is unable to pay the costs, fees and expenses necessary to prosecute this action.

3. It is respectfully requested pursuant to C.P.L.R. § 1101(e) that an Index Number be issued without fee, and that filing fees be waived so that Petitioner may prosecute this proceeding.

DATED: BROOKLYN, NEW YORK
April 2, 2016

LESTER HELFMAN
ATTORNEY-AT-LAW

LSNY[sm] **- Bronx** **Providing Free Civil Legal Services To Bronx Residents**

Legal Services for New York City

Steven B. Telzak
Project Director

Andrew Scherer
Executive Director and President

Fern Schair
Chairperson

ATTORNEY CERTIFICATION FOR POOR PERSON'S RELIEF

Re: H_____ B_____ v. Samuel Roberts, Commissioner, OTDA

H_____ B_____ is represented by Legal Services NYC–Bronx, a not-for-profit organization which provides free legal services to indigent persons.

Legal Services NYC-Bronx certifies that it has determined that H_____ B_____ is unable to pay the court costs, fees, and expenses necessary to prosecute this action.

Waiver of all fees and costs to prosecute this action, including the cost of an index number and RJI is hereby requested for H_____ B_____.

April 3, 2008

Maryanne Joyce, Esq.
Legal Services NYC – Bronx
(LSNY – Bronx)
579 Courtlandt Avenue
Bronx, NY 10451

APPENDIX D

_____ COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,	**Index No.** _____
Plaintiff(s),	(, **J.**)
against	_____
_____,	_____
Defendant(s).	

REDACTION COVER PAGE

☐ The document filed contains no confidential personal information, as defined in **22 NYCRR 202.5(e)**.

☐ *The document contains the following (CHECK ANY THAT APPLY)*:

- ☐ Social Security Number.
- ☐ Confidential Personal Information (CPI) that is **REDACTED** in accordance with **22 NYCRR 202.5(e).**
- ☐ Confidential Personal Information (CPI) that is **UN-REDACTED** and seeks a remedy in accordance with **22 NYCRR 202.5(e)(2) OR (3)**.
- ☐ Confidential Personal Information (CPI) that is **UN-REDACTED** as required or permitted by a specific rule or law;

  Specify the rule or law _____ .
- ☐ Confidential Personal Information (CPI) that is **UN-REDACTED** as directed by court order; and I hereby specify:

  DATE of such court order: _____ & DATE filed: _____.

  Other identifying information for such order: _____ .

Does the court order direct that this **UN-REDACTED** document be **visible to all participating parties?** ☐ **yes /** ☐ **no.**

A court order is being filed with the document: ☐ **yes /** ☐ **no.**

Signature of filer: _____

Print Name: _____

Counsel appearing for: _____ **(name of party)**

Filer is Unrepresented: ☐ **yes** ☐ **no**

Date: _____

Revised 01/2016

APPENDIX E

REQUEST FOR JUDICIAL INTERVENTION

UCS-840 (7/2012)

For Court Clerk Use Only:
IAS Entry Date
Judge Assigned
RJI Date

Supreme COURT, COUNTY OF

Index No: Date Index Issued:

CAPTION: Enter the complete case caption. Do not use et al or et ano. If more space is required, attach a caption rider sheet.

Plaintiff(s)/Petitioner(s)

-against-

Defendant(s)/Respondent(s)

NATURE OF ACTION OR PROCEEDING: Check ONE box only and specify where indicated.

MATRIMONIAL

- ○ Contested

NOTE: For all Matrimonial actions where the parties have children under the age of 18, complete and attach the **MATRIMONIAL RJI Addendum.** For Uncontested Matrimonial actions, use RJI form UD-13.

TORTS

- ○ Asbestos
- ○ Breast Implant
- ○ Environmental: _____ (specify)
- ○ Medical, Dental, or Podiatric Malpractice
- ○ Motor Vehicle
- ○ Products Liability: _____ (specify)
- ○ Other Negligence: _____ (specify)
- ○ Other Professional Malpractice: _____ (specify)
- ○ Other Tort: _____ (specify)

OTHER MATTERS

- ○ Certificate of Incorporation/Dissolution [see **NOTE** under Commercial]
- ○ Emergency Medical Treatment
- ○ Habeas Corpus
- ○ Local Court Appeal
- ○ Mechanic's Lien
- ○ Name Change
- ○ Pistol Permit Revocation Hearing
- ○ Sale or Finance of Religious/Not-for-Profit Property
- ○ Other: _____ (specify)

COMMERCIAL

- ○ Business Entity (including corporations, partnerships, LLCs, etc.)
- ○ Contract
- ○ Insurance (where insurer is a party, except arbitration)
- ○ UCC (including sales, negotiable instruments)
- ○ Other Commercial: _____ (specify)

NOTE: For Commercial Division assignment requests [22 NYCRR § 202.70(d)], complete and attach the **COMMERCIAL DIV RJI Addendum.**

REAL PROPERTY: How many properties does the application include? _____

- ○ Condemnation
- ○ Mortgage Foreclosure (specify): ○ Residential ○ Commercial

Property Address: _____ (Street Address, City, State, Zip)

NOTE: For Mortgage Foreclosure actions involving a one- to four-family, owner-occupied, residential property, or an owner-occupied condominium, complete and attach the **FORECLOSURE RJI Addendum.**

- ○ Tax Certiorari - Section: _____ Block: _____ Lot: _____
- ○ Tax Foreclosure
- ○ Other Real Property: _____ (specify)

SPECIAL PROCEEDINGS

- ○ CPLR Article 75 (Arbitration) [see **NOTE** under Commercial]
- ○ CPLR Article 78 (Body or Officer)
- ○ Election Law
- ○ MHL Article 9.60 (Kendra's Law)
- ○ MHL Article 10 (Sex Offender Confinement-Initial)
- ○ MHL Article 10 (Sex Offender Confinement-Review)
- ○ MHL Article 81 (Guardianship)
- ○ Other Mental Hygiene: _____ (specify)
- ○ Other Special Proceeding: _____ (specify)

STATUS OF ACTION OR PROCEEDING: Answer YES or NO for EVERY question AND enter additional information where indicated.

	YES	NO	
Has a summons and complaint or summons w/notice been filed?	○	○	If yes, date filed: _____
Has a summons and complaint or summons w/notice been served?	○	○	If yes, date served: _____
Is this action/proceeding being filed post-judgment?	○	○	If yes, judgment date: _____

NATURE OF JUDICIAL INTERVENTION:

Check ONE box only AND enter additional information where indicated.

- ○ Infant's Compromise
- ○ Note of Issue and/or Certificate of Readiness
- ○ Notice of Medical, Dental, or Podiatric Malpractice — Date Issue Joined: ______________
- ○ Notice of Motion — Relief Sought: ______________ Return Date: ______________
- ○ Notice of Petition — Relief Sought: ______________ Return Date: ______________
- ○ Order to Show Cause — Relief Sought: ______________ Return Date: ______________
- ○ Other Ex Parte Application — Relief Sought: ______________
- ○ Poor Person Application
- ○ Request for Preliminary Conference
- ○ Residential Mortgage Foreclosure Settlement Conference
- ○ Writ of Habeas Corpus
- ○ Other (specify): ______________

RELATED CASES:

List any related actions. For Matrimonial actions, include any related criminal and/or Family Court cases.
If additional space is required, complete and attach the **RJI Addendum**. If none, leave blank.

Case Title	Index/Case No.	Court	Judge (if assigned)	Relationship to Instant Case

PARTIES:

For parties without an attorney, check "Un-Rep" box AND enter party address, phone number and e-mail address in space provided.
If additional space is required, complete and attach the **RJI Addendum**.

Un-Rep	**Parties:** List parties in caption order and indicate party role(s) (e.g. defendant; 3rd-party plaintiff).	**Attorneys and/or Unrepresented Litigants:** Provide attorney name, firm name, business address, phone number and e-mail address of all attorneys that have appeared in the case. For unrepresented litigants, provide address, phone number and e-mail address.	Issue Joined (Y/N):	Insurance Carrier(s):
☐	Last Name First Name Primary Role: Secondary Role (if any):	Last Name First Name Firm Name Street Address City State Zip Phone Fax e-mail	○YES ○NO	
☐	Last Name First Name Primary Role: Secondary Role (if any):	Last Name First Name Firm Name Street Address City State Zip Phone Fax e-mail	○YES ○NO	
☐	Last Name First Name Primary Role: Secondary Role (if any):	Last Name First Name Firm Name Street Address City State Zip Phone Fax e-mail	○YES ○NO	
☐	Last Name First Name Primary Role: Secondary Role (if any):	Last Name First Name Firm Name Street Address City State Zip Phone Fax e-mail	○YES ○NO	

I AFFIRM UNDER THE PENALTY OF PERJURY THAT, TO MY KNOWLEDGE, OTHER THAN AS NOTED ABOVE, THERE ARE AND HAVE BEEN NO RELATED ACTIONS OR PROCEEDINGS, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION PREVIOUSLY BEEN FILED IN THIS ACTION OR PROCEEDING.

Dated: ______________ ______________
SIGNATURE

______________ ______________
ATTORNEY REGISTRATION NUMBER **PRINT OR TYPE NAME**

APPENDIX F

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of I_____ D_____, Petitioner, For a Judgment Pursuant to Article 78 and for Declaratory Relief Pursuant to Section 3001 of the Civil Practice Law and Rules, -against- KRISTIN M. PROUD, as Commissioner of the New York State Office of Temporary and Disability Assistance, and STEVEN BANKS, as Commissioner/Administrator of the New York City Human Resources Administration, Respondents.	Index No. _____ **NOTICE OF PETITION**

PLEASE TAKE NOTICE, that upon the petition of I_____ D_____, verified on January ___, 2015, the exhibits annexed thereto, and all proceedings had herein,

An application will be made to this Court, in the Motion Support Courtroom, Room 130, at the Courthouse located at 60 Centre Street, New York, New York, at 9:30 a.m. on February ___, 2015, or as soon thereafter as counsel can be heard, for an order and judgment pursuant to Article 78 and Section 3001 of the Civil Practice Law and Rules:

1. Vacating and reversing respondent Proud's Decision After Fair Hearing # 6782839P, dated September 18, 2014, which upheld respondent Banks' determination by Notice Number N024BY5058, dated November 20, 2013, to discontinue petitioner's public assistance benefits because she missed an appointment on November 4, 2013;

2. Directing respondent Proud to direct City respondent's New York City Human Resources Administration to reopen petitioner's public assistance case and to restore all benefits lost as a result of the September 18, 2014 decision, and the November 20, 2013 determination; and directing respondent Banks to reopen the case and to issue such benefits;

3. Directing respondent Banks to withdraw the November 20, 2013 Notice of Decision, and to delete and expunge the record of the underlying infraction from petitioner's electronic case record;

4. Declaring that State respondent's failure to hold City respondent agency to its burden of proof, in particular where mailing issues are concerned, violates state law and regulation as well as the court-ordered stipulation in *Meachem v. Wing*, 99 Civ. 4630 (S.D.N.Y. Apr. 20, 2005), and State respondent's own policy guidelines for hearing officers; and directing the retraining of state hearing officers on mailing issues;

5. Awarding costs, disbursements, attorney's fees, and other expenses to petitioner pursuant to Article 86 of the Civil Practice Law and Rules (CPLR), and any other relevant attorney's fee provision; and

6. Granting such further relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR § 7804(c), answering affidavits, if any, are required to be served upon the undersigned at least five (5) days before the return date of this petition.

Dated: January ____, 2015
Bronx, New York

Respectfully submitted,

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APPENDIX G

At the IAS Term, Part ____ of the Supreme Court of the State of New York, held in and for the County of New York at the County Courthouse, 60 Centre Street, Room _____, New York, New York, on the _____ day of May, 2012.

P R E S E N T:

Hon. _____
JUSTICE OF THE SUPREME COURT

In the Matter of the Application of L.E., For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules, Petitioner, - against - ELIZABETH BERLIN, as Executive Deputy Commissioner Of the New York State Office of Temporary and Disability Assistance; - and - ROBERT DOAR, as Administrator of the New York City Human Resources Administration, - and - LINCOLN 54, LLC, Respondents.	**ORDER TO SHOW CAUSE** Index No.

Upon the annexed Verified Petition of L.E., duly verified on May 29, 2012 and the exhibits annexed thereto, and the Affirmation of Lester Helfman, Esq., dated May 30, 2012, and

sufficient cause appearing therefore,

LET Respondents show cause at an IAS Part _____ of the Supreme Court of the State of New York, held for the County of New York at the County Courthouse, 60 Centre Street, Room _____, New York, New York, on the _____ day of June, 2012 at 9:30 a.m. or as soon thereafter as counsel may be heard,

WHY a judgment should not be granted pursuant to C.P.L.R. §§ 7806, 3001 and 8601:

(1) Annulling so much of State Respondent's Decision After Fair Hearing dated April 25, 2012 in Petitioner's case that upheld the discontinuance of public assistance and denying her application for Food Stamps, pursuant to the notice dated December 3, 2011; and

(2) Ordering City and State Respondents to restore all public assistance benefits lost by Petitioner as a result of the discontinuance; and

(3) Ordering City Respondent to recertify Petitioner's Food Stamp eligibility retroactive to the date of the expiration of her last certification and issue all Food Stamp benefits retroactive to the date of the expiration of her last certification; and

(4) Declaring pursuant to C.P.L.R. § 3001 that City Respondent's discontinuance of Petitioner's public assistance and denial of her Food Stamp application without written notice was in violation of 18 N.Y.C.R.R. §§ 351.22(b), 358-2.2, 358-3.3, 358-2.23; 7 C.F.R. § 273.14; 18 N.Y.C.R.R § 387.17(f); and the Due Process Clause of the Fourteenth Amendment; and

(5) Declaring pursuant to C.P.L.R. § 3001 that State Respondent's DAFH affirming City respondent's determination to discontinue Petitioner's public assistance benefits and deny her Food Stamps, without notice was in violation of 18 N.Y.C.R.R. §§ 352.22(b), 358-2.2, 358-2.23, 358-3, 387.17(f); 7 C.F.R. § 273.14(b), and the Due Process Clause of the Fourteenth Amendment; and

(6) Declaring pursuant to C.P.L.R. § 3001 that State Respondent's determination in its DAFH that City Respondent's affidavits proved the predicate facts necessary to trigger a presumption of receipt of mail was arbitrary, capricious and a violation of the Due Process Clause in that the decision was contrary to her own stated policy and procedures and precedent established in prior DAFHs: and

(7) Enjoining State Respondent to re-train the hearing officer who conducted the hearing in this matter regarding due process notice rights of appellants and the evidentiary requirements for the triggering of a presumption of receipt of mail and monitoring the hearing officer's recommended decisions to insure that Fair Hearing appellants' Due Process rights are observed and that proper procedures are followed when the issue at a Fair Hearing involves receipt of mail.

(8) Staying Respondent Lincoln 54, LLC, from executing the warrant of eviction in the its Housing Court proceeding against Petitioner and her family; and

(9) Awarding Petitioner reasonable attorney's fees and costs against Respondent Berlin in an amount to be determined, as provided by the New York State Equal Access to Justice Act, C.P.L.R. §§ *8600 et. seq*; and

(10) Granting such other and further relief as the Court may deem just and proper.

IT BEING ALLEGED and SUFFICIENT CAUSE APPEARING THEREFOR that immediate and irreparable injury will result to Petitioner unless her eviction is stayed, it is ORDERED that, pending the hearing and determination of this proceeding, Respondent LINCOLN 54, LLC, and any agent thereof including but not limited to any City Marshal acting on behalf of LINCOLN 54, LLC, is stayed from executing the warrant of eviction obtained in the proceeding LINCOLN 54, LLC v. and , Index No. XXXXX/2012, Civil Court of the

City of New York, County of Kings, Housing Part, on the premises known as 50 Lincoln Road, Apartment #3E, Brooklyn, New York 11225.

SUFFICIENT CAUSE APPEARING THEREFOR LET personal service of this Order to Show Cause and the papers upon which it is based, upon State Respondent at her office at 14 Boerum Place, 16th Floor, Brooklyn, New York 11201, and upon the Attorney General of the State of New York at 120 Broadway, 24th Floor, New York, New York 10271; and upon City Respondent at his office at 180 Water Street, New York, New York 10038; and upon respondent LINCOLN 54, LLC , on Steve Sperva, the Registered Managing agent by certified mail at 2304 Nostrand Aveneu, #4547, Brooklyn, New York 11210, and on Novick, Edelstein, Lubell, Reisman, Wasserman, Leventhal, P.C. attorney for LINCOLN 54, LLC in the aforementioned Housing Court Proceeding, at 733 Yonkers Avenue, Suite 600, Yonkers, New York 10704, by personal delivery or by certified mail, be deemed good and sufficient notice.

E N T E R: _____

Justice of the Supreme Court

APPENDIX H

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of	:	
L.E.,	:	
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,	:	**VERIFIED PETITION**
Petitioner,	:	
- against -	:	Index No.
ELIZABETH BERLIN, as Executive Deputy Commissioner Of the New York State Office of Temporary and Disability Assistance;	:	
- and -	:	
ROBERT DOAR, as Administrator of the New York City Human Resources Administration,	:	
- and -	:	
LINCOLN 54, LLC,	:	
Respondents.	:	

Petitioner, by the undersigned attorneys, for her Verified Petition alleges as follows:

PRELIMINARY STATEMENT

1. By this proceeding brought pursuant to Article 78 and § 3001 of the Civil Practice Law and Rules, Petitioner seeks a judgment: (a) annulling the Decision After Fair Hearing ("DAFH") (a copy of which is annexed hereto as Exhibit A) issued by Respondent Berlin which upheld the determination of Respondent Doar to discontinue Petitioner's public assistance and Food Stamp benefits in violation of lawful procedure, due to Petitioner's alleged failure without

good cause to attend a face-to-face recertification interview, and (b) directing Respondents to issue to her all benefits lost as a result of the unlawful discontinuance.

2. Respondent Berlin's DAFH was arbitrary, capricious, contrary to law and not supported by substantial evidence because: (a) it permitted Respondent Doar to discontinue Petitioner's public assistance and Food Stamp benefits without prior and/or adequate notice in violation of applicable state and federal statutes, regulations and the Due Process Clause of the Fourteenth Amendment; and (b) it upheld Respondent Doar's determination to discontinue Petitioner's benefits even though Respondent Berlin made a finding that Respondent Doar did not prove that he ever mailed the legally required predicate Notice of Decision to Petitioner; and (c) it determined that Respondent Doar mailed a notice to Petitioner advising her of an appointment for a face-to-face recertification interview despite the fact that the Respondent Doar's "mailing affidavits" did not establish a procedure that would ensure that such notices were in fact mailed; and (d) it determined that the stated mailing procedure described in the "mailing affidavit" was followed creating a presumption that the notice scheduling a face-to-face recertification appointment was mailed in the normal course of business and that such mail was received, in the absence of any evidence that such procedures, if adequate, were in fact followed, and where the evidence of record shows that the stated procedures were not followed, and (e) it is contrary to OTDA's own procedures for evaluating evidence presented and is inconsistent with administrative *stare decisis;* and (f) it rests on the hearing officer's personal belief's rather than the evidence of record.

3. Petitioner further seeks a judgment pursuant to CPLR § 3001 declaring that (a) the discontinuance of Petitioner's public assistance without prior and adequate notice, and the

effective discontinuance of Food Stamps without adequate notice violated the New York Social Services Law, state and federal regulations and the Due Process Clause of the Fourteenth Amendment; and (b) the State Respondent's determination that the notice of Petitioner's face-to-face recertification appointment was mailed triggering a presumption of receipt thereof was arbitrary, capricious and made in violation of lawful procedure, the State Respondent's policies and procedures and own precedent setting decisions, and the Due Process Clause of the Fourteenth Amendment; and (c) the State Respondent's reliance on her hearing officer's personal beliefs in making the determination, rather than the evidence in the record violated 18 N.Y.C.R.R. § 358-6.1 and the Due Process Clause of the Fourteenth Amendment.

4. In view of the serious errors committed by State Respondent's hearing officer in conducting the hearing and rendering a recommended decision, including the manner in which he assessed the evidence and applied the evidentiary presumption of receipt of mail, ignored the due process requirement of prior notice of the proposed discontinuance of benefits, and permitted his own subjective beliefs to substitute for evidence of record, Petitioner also seeks injunctive relief requiring State Respondent to retrain the hearing officer who conducted the hearing, and going forward, to review the records and decisions of his hearings in order to ensure that Fair Hearing appellants' rights are not similarly violated and that the applicable law is properly applied.

5. Petitioner also seeks attorneys fees and costs pursuant to the New York State Equal Access to Justice Act, C.P.L.R. §§ 8600 *et seq.*

VENUE

6. Venue is properly placed in this court pursuant to C.P.L.R. §§ 506(b) and

7804(b).

PARTIES

7. Petitioner E.L. was a recipient of public assistance and Food Stamps for her child. She resides at Lincoln Road, # , Brooklyn, NY 11225.

8. Respondent Berlin is the Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance ("OTDA"), the executive agency of the State of New York responsible for: (a) supervising the operation and administration of all public assistance programs in New York State, including those operated or administered locally in New York City by the Human Resources Administration; (b) complying with federal and state law and regulations with respect to cash assistance and food stamps benefits; (c) promulgating regulations to ensure that the applicable state and city agencies, including HRA, comply with federal and state law and regulations; and (d) enforcing those laws and regulations. (Respondent Berlin is referred to herein as "State Respondent" or "OTDA.")

9. Respondent Doar is the Administrator of the New York City Human Resources Administration ("HRA"), the executive agency of the City of New York that has responsibility for: (a) the operation and administration of public assistance programs for New York City residents, including cash assistance and food stamps, and (b) compliance with federal and state law and regulations relating to those public assistance programs. (Respondent Doar is referred to herein as "City Respondent" or "HRA.")

10. On information and belief, Respondent Lincoln 54 LLC is the owner and landlord of the premises located at Lincoln Road, Brooklyn, New York where Petitioner resides. According to the Multiple Dwelling Registration statement filed by Lincoln 54 LLC with the

New York City Department of Housing Preservation and Development, the Registered Managing Agent of the premises is Steve Spera, whose address is listed as 2304 Nostrand Avenue, Apt. 4547, Brooklyn, New York 11210.

STATUTORY AND REGULATORY SCHEME

11. Eligibility requirements for cash public assistance and Food Stamps are set forth in federal and state statutes and regulations as are the due process Fair Hearing rights that exist to challenge benefit deprivations.

12. The New York State Constitution provides that it is the duty of the State and its social services districts to provide adequately for individuals and families who do not have sufficient funds to support themselves: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions." N.Y. Const., Art. XVII, § 1. New York State has enacted two cash public assistance programs in furtherance of its constitutional mandate - the Family Assistance program which provides benefits to eligible members of households that contain at least one child, N.Y. Social Services Law ("SSL") §§ 343 *et seq.*; 18 N.Y.C.R.R. Part 369, and the Safety Net Assistance program which provides benefits to eligible members of households without children or with children but who have received Family Assistance for more than five years, SSL § 159; 18 N.Y.C.R.R. Part 370. In addition, New York State provides Food Stamp benefits to members of eligible households. SSL § 95; 18 N.Y.C.R.R. Part 387.

13. Unlike the cash assistance programs where recipients remain eligible until they are determined to be ineligible for some reason, including failure to attend a face-to-face recertification interview, Food Stamp eligibility expires at the end of the specific period for

which eligibility has been certified. 7 C.F.R. § 273.10(f); 18 N.Y.C.R.R § 387.17(a).

14. Adult recipients of cash assistance and Food Stamps in New York State are required to establish their continued eligibility for assistance at specified intervals through a process known as recertification. 18 N.Y.C.R.R. §§ 351.20, 350.21; 7 C.F.R. § 273.14. Included in the recertification process is a requirement that assistance recipients appear for a face-to-face recertification interview. 18 N.Y.C.R.R. § 351.22(a), 387.17(f); 7 C.F.R § 273.14.

15. Benefits recipients must be sent a written notice of the need to recertify their eligibility for the respective benefits and advising then of the consequences of a failure to do so. 7 C.F.R. § 273.14(b); 18 N.Y.C.R.R. §§ 387.17(a), 351.21

16. Failure of an assistance recipient to appear for her face-to-face recertification interview without good cause is a ground for termination of cash assistance and Food Stamps. 18 N.Y.C.R.R. § 351.22(b), 351.26, 387.17(f); 7 C.F.R. §273.14(a).

17. City Respondent's determination to discontinue cash assistance and/or Food Stamps for failure to keep an appointment for a face-to-face recertification interview is subject to certain due process protections afforded the recipient.

18. Specifically, prior to discontinuance of cash assistance benefits HRA must issue a notice to the recipient at least ten days prior to proposed discontinuance, advising the recipient of its intended action, the reason for such action, the recipient's right to challenge the proposed action in an administrative Fair Hearing, the time periods within which a hearing must be requested and the recipients other rights in the hearing process. 18 N.Y.C.R.R. §§ 351.22(b), 358-2.2, 358-2.23, 358-3.3(a); 7 C.F.R. § 273.15 and the Due Process Clause of the Fourteenth Amendment.

19. Prior to the expiration of a Food Stamp certification period, HRA must issue a Notice of Expiration advising the recipient that her Food Stamp certification will expire and the need and time within which a Food Stamp recertification application must be submitted to insure the continued receipt of Food Stamps. 7 C.F.R. § 273.14; 18 N.Y.C.R.R. §387.17(f).

20. A Fair Hearing must be requested within sixty days of a notice to discontinue cash assistance and within ninety days of a notice to discontinue Food Stamps. SSL § 22; 18 N.Y.C.R.R. § 358-3.5(b)(1) and (2); 7 C.F.R. § 273.15(g).

21. At all Fair Hearings in which the issue is reduction or discontinuance of benefits, the burden is on HRA to prove that its proposed action is correct. 18 N.Y.C.R.R. § 358-5.9(a).

22. Where a Fair Hearing issue involves whether or not a benefits recipient received a notice that HRA alleges to have mailed to the recipient, HRA has the burden of proving that the notice was in fact mailed, either through direct evidence of the mailing, or by proof of the existence of a reliable office mailing procedure and proof that such procedure was in fact followed. 18 N.Y.C.R.R § 358-5.9(a).

23. Where the receipt of a notice is denied by a Fair Hearing appellant, it is HRA's practice to submit standard form affidavits ("mailing affidavits") that purport to establish a regular mailing procedure and that such procedure in fact is followed.

24. Pursuant to a Stipulation and Order of Settlement in a federal class action (*Meachem v. Wing, et al., 99 Civ. 4630 (PKC)(April 20, 2005)*) State Respondent has directed its Administrative Law Judges ("ALJs") of the legal requirements for determining whether the mailing procedure described in the affidavits have been met. (Meachem Overview, p.11, annexed hereto as Exhibit "B".) As a result of a letter written by public assistance advocates to

the General Counsel of the New York State Office of Temporary and Disability Assistance expressing concern that OTDA hearing officers were not consistently observing those requirements in the conduct of hearings and issuance of decisions, State Respondent causes a memorandum to issue to all hearing officers reminding them of the procedures that must be followed. (Memorandum of Dan Bloodstein dated July 19, 2011 annexed hereto as Exhibit "C.")

25. For example, ALJs must determine if the procedures set forth in the affidavits were in place at the time of the alleged mailing and whether such procedure: (a) is adequate to prove a satisfactory mailing procedure; and (b) was in fact followed. Both prongs must be proven in order for the proponent to receive the benefit of the evidentiary presumption of receipt of mail. (See, Exhibit B.)

26. In similar cases and in accordance with its policy and procedures, where mailing affidavits or other evidence fail to show that the stated mailing procedures described in those affidavits were in fact followed, State Respondent has annulled local agency actions reinforcing OTDA policy as set forth in the Meachem Overview materials (Exhibit B.) As set forth below, some of these decisions were introduced and made part of the record of the Fair Hearing at issue in this case.

27. A Decision After Fair Hearing ("DAFH") must be based exclusively fair hearing record and may direct that specific action be taken. In addition, the decision may address the violation of any provision of the Fair Hearing regulations (18 N.Y.C.R.R. Part 358) including violations concerning notice. 18 N.Y.C.R.R. § 385-6.1(a).

28. In determining the credibility of an Appellant at a hearing, the ALJ must state in the decision as specifically as possible the basis for such determination. The lack of

documentary evidence is not a *per se* basis for finding an appellant's testimony incredible. Uncorroborated testimony may be found credible, particularly where it is uncontradicted and internally consistent. Policy Guideline of Deputy General Counsel Russell Hanks, December 11, 1996. (Exhibit "D" at p. 27.)

FACTUAL ALLEGATIONS

29. Petitioner L.E. and her child reside with her sister La.E. and her child, and their grandmother C.M. The household received public assistance on behalf of the respective children of Petitioner and her sister and Food Stamps on behalf of the children and the grandmother.

30. Until recently, the household also received a Family Eviction Prevention Subsidy ("FEPS") to assist them with payment of the rent. Rent for the apartment in which they all live is $850 per month and is frozen at that amount because Petitioner's grandmother, who is the prime tenant receives a Senior Citizen Rent Increase Exemption ("SCRIE") pursuant to New York Rent Stabilization Law § 26-509 (McKinney;s Unconsolidated), NYC Administrative Code, Title 26, Ch. 4.

31. On information and belief, by notice dated October 25, 2011, (a copy of which is annexed hereto as Exhibit "E") City Respondent scheduled an appointment for Petitioner for a face-to-face recertification on November 15, 2011. Petitioner never received this notice and consequently was not aware of the appointment or the need to recertify her eligibility at that time.

32. On information and belief, City Respondent issued a "NOTICE OF DECISION ON YOUR PUBLIC ASSISTANCE, FOOD STAMPS AND MEDICAL ASSISTANCE" dated December 3, 2011 (a copy of which is annexed hereto as Exhibit "F" and is referred to

hereinafter as the "Notice of Decision" or "NOD") to advise Petitioner that her cash assistance benefits would be discontinued on December 14, 2011 because she did not attend the November 15, 2011 face-to-face-recertification appointment and that her Food Stamps were also being discontinued pursuant to an unspecified prior notice. Petitioner never received this Notice of Decision.

33. City Respondent in fact terminated petitioner's cash assistance and Food Stamps on or about December 8, 2011.

34. Shortly thereafter, in January, 2012, Respondent Lincoln 54, LLC commenced a non-payment of rent summary eviction proceeding against Petitioner's grandmother and all occupants of their apartment, including Petitioner, in the Civil Court of the City of New York, Kings County under the caption Lincoln 54, LLC v. M, Index Number L&T XXXXX/2012.

35. On March 15, 2012, Petitioner's representative at The Legal Aid Society requested a Fair Hearing to challenge the discontinuance of her assistance.

36. On March 16, 2012, a judgment of possession in the eviction proceeding was entered against Petitioner and her grandmother C.M. A warrant of eviction was issued to City Marshal Locascio on March 29, 2012. (A copy of the judgment which includes a notation that a warrant of eviction was issued on April 13, 2012 is annexed hereto as Exhibit G.)

37. Pursuant to 18 N.Y.C.R.R § 358-3.7(b), Petitioner's representative requested copies of the documents that HRA planned on introducing at the hearing. Only when HRA provided those documents did Petitioner learn that her case was closed because (a) she did not redeem benefits issued to her, and (b) she did not attend the November 15, 2011 face-to-face recertification appointment.

38. On April 10, 2012, a Fair Hearing was held before Alan Chorney, one of OTDA's hearing officers.

39. On April 25, 2012, State Respondent issued a Decision After Fair Hearing directing City Respondent to take no further action on a determination to discontinue Petitioner's benefits due to her alleged failure to redeem benefits issued to her, but affirming the discontinuance of Petitioner's benefits for failure to attend the face-to-face recertification appointment pursuant to the notice dated December 3, 2011.

40. In large part, as a result of the discontinuance of her cash assistance benefits, Petitioner and her family are at imminent risk of eviction. Restoration of her benefits, including FEPS is an integral part of the source from which her rent arrears can be paid and the homelessness of her family prevented.

41. On May 4, 2012 Petitioner's grandmother moved by Order to Show Cause for a stay of the execution of the warrant of eviction in the Housing Court proceeding. That motion was adjourned to May 30, 2012.

42. If the relief requested in this Petition is not granted, Petitioner will be unable to satisfy the judgment in the eviction proceeding, and she and her family will be homeless and will suffer irreparable harm.

43. Likewise, if the stay of the execution of the warrant of eviction in the annexed Order to Show Cause is not signed, Petitioner and her family will become homeless and will suffer irreparable harm. Any relief that ultimately may be granted will be futile if the stay preventing the eviction pending the hearing and determination of this proceeding is not granted.

THE FAIR HEARING

44. The Fair Hearing in this matter was held before Administrative Law Judge Alan Chorney on April 10, 2012.

45. At the hearing, HRA's hearing representative introduced the NOD (Exhibit F) and argued that the request for the Fair Hearing was made beyond the statutory/regulatory period within which such request must be made, but offered no evidence that the NOD, i.e., the notice required by 18 N.Y.C.R.R. §§ 358-2.2, 358-3.3(a) and (b), and 358-2.23 and the Due Process Clause of the Fourteenth Amendment, advising Petitioner that her benefits were about to be terminated, the reason why, her right to request a hearing and the time within which she must do so, was ever sent to her.

46. Petitioner testified that she did not receive either the notice scheduling the face-to-face recertification appointment or the Notice of Decision to discontinue her benefits.

47. In the Decision After Fair Hearing, State Respondent's hearing officer, in accordance with the law and State respondent's policy and practice, correctly determined that the statute of limitations for requesting the hearing was tolled and that OTDA had jurisdiction to review HRA's actions because (a) the December 3, 2011 NOD did not advise Petitioner of the 90-day time limit for requesting a Fair Hearing with respect to the Food Stamp discontinuance, and (b) more importantly, "(t)here was no evidence presented at the hearing to establish that the December 3, 2011 notice was ever mailed to the Appellant." (Exhibit A, p. 4.)

48. HRA's failure to send a NOD to Petitioner should also have been dispositive of the merits of the hearing since issuance of a NOD is required by 18 N.Y.C.R.R. §§ 358-2.2, 358-3.3(a) and (b), and 358-2.23 and is a rudimentary requirement of due process under the Fourteenth Amendment and the United States Supreme Court's decision in *Goldberg v. Kelly*,

397 U.S. 254 (1970). Instead, the hearing officer proceeded to the issue of whether Petitioner received the notice scheduling the appointment for her face-to-face recertification, despite the fact HRA's failure to send to Petitioner the notice required by State and federal statute, regulations and the Due process Clause.

49. HRA's hearing representative introduced the "Notice of Recertification Appointment" (Exhibit E hereto) and claimed that it was mailed to Petitioner.

50. Petitioner testified that she did not receive the Notice of Recertification Appointment.

51. HRA's hearing representative then introduced the two standard form mailing affidavits that purported to establish the regular procedure utilized by HRA in producing and mailing notices such as the Notice of Recertification Appointment to assistance recipients. (Affidavits of Meyer Elbaz sworn to on August 11, 2011 and Monica Johnson sworn to September 22, 2011 copies of which are annexed hereto as Exhibit "H" and "I," respectively.)

52. HRA's "mailing affidavits" fail to prove a regular mailing procedure in place at the time of the alleged mailings. Moreover, no evidence was introduced to show that the purported mailing procedures described in the affidavits were in fact followed. On the contrary, the record demonstrates that the procedures, even if adequate, were not followed.

53. Both affidavits that purport to describe the mailing procedure in place at the time the notice was alleged to have been mailed are sworn to prior to the date of the notice purportedly mailed, and are not evidence of a mailing procedure in place subsequent to the date of the affidavits. The affidavits, sworn to on August 11, 2011 and September 22, 2011 respectively are not and cannot be evidence of a mailing procedure used on October 25, 2011 as

one cannot describe a procedure utilized to mail a notice before that notice has been mailed. Thus, no relevant and material evidence of a mailing procedure that existed at the time of the alleged mailing of the recertification appointment notice was introduced by City Respondent.

54. Even if the affidavits were to be considered evidence of the mailing procedure in use at the time of the alleged mailing of the recertification appointment notice, the procedures described are inadequate to trigger the presumption of receipt because they fail to allege how the envelopes into which the notices purportedly mailed were addressed, or for that matter, that they were addressed at all.

55. Nor do the procedures described in the Elbaz and Johnson affidavits account for the possibility that the notice, if mailed, was returned undelivered. Specifically, in addition to the failure to state how and even if the envelopes are addressed, the affidavits fail to state whether there is a return address on the envelope and if so, which if any of the many HRA offices' addresses is placed on the envelope as a return address.

56. Moreover, the procedures described in the mailing affidavits fail to state whether the mail was returned undelivered, or that any steps are generally taken or were taken specifically in this case, to determine whether the purportedly-mailed notice was returned undelivered to HRA by the United States Postal Service

57. In addition, the mailing affidavits fail to allege any facts that show that the procedures described therein were in fact followed, an essential element that must be proved to trigger the presumption of receipt of mail.

58. Paragraphs 4 and 5 of the Johnson affidavit (Exhibit "I" hereto) explain a procedure whereby the number of notices in the work order, the number of notices produced, and

the number of notices placed in envelopes for mailing are compared so as to insure that there are no missing notices. Paragraph 6 of the Johnson affidavit states that the notices are placed into equipment that folds the notices, places them into envelopes and seals the envelopes. Paragraph 6 of the Johnson affidavit further explains that the mailing equipment prints out reports detailing the number of notices prepared for mailing, and compares that number with the number indicated in the work order. The affidavits fail to allege that the reports were compared and that the numbers matched. Nor were the reports themselves introduced so as to demonstrate that the numbers matched. No other evidence was offered to demonstrate that the mailing procedures alleged were in fact followed.

59. The evidence demonstrates that the procedures were not followed. Paragraph 7 of the Elbaz affidavit (Exhibit "H") states that the appointment notices are generated approximately two weeks before the appointment date. However, the appointment notice in this case is dated October 25, 2011, fully 21 days before the November 15, 2011 appointment – a substantial diversion from the time-line described in the affidavit.

60. After the submission of the mailing affidavits by HRA, Petitioner again testified that she did not receive the appointment notice in the mail and that sometimes she and her neighbors receive each other's mail. She introduced a list (a copy of which is annexed hereto as Exhibit J) signed by four other tenants in her building who have received Petitioner's or her grandmother's mail in their own mailboxes.

61. Petitioner, through her representative, introduced Decisions After Fair Hearing in three other cases in which OTDA held that the mailing of a notice had not been proved because of a lack of proof that the purported mailing procedures described in mailing affidavits were

actually followed in each specific case (FH# 4972591P dated March 7, 2008, FH#5314979R dated August 7, 2009, FH#4358685Z dated November 25, 2005, annexed hereto collectively as Exhibit K) and a copy of the decision in the Appellate Division, Second Department *In the Matter of Kassler v. Wing,* 238 A.D.2d 583 (annexed hereto as Exhibit L) with an identical holding.

62. Rather than applying the appropriate legal standard for determining whether HRA had met its evidentiary burden so as to trigger a rebuttable presumption of receipt of mail, and assessing the credibility of Petitioner's denial of receipt of the notice based on the content of her testimony and her demeanor, the hearing officer demonstrated his lack of understanding: (a) of where the burden of proof lies on the issue of proof of mailing; (b) of the nature of the evidence required to trigger the presumption of receipt of mail; (c) that the presumption is rebuttable; and (d) that credibility determinations cannot properly be made based on matters outside the record such as testimony he hears in other hearings and his subjective beliefs.

63. Such misunderstanding is demonstrated in the following statement made on the record by the hearing officer during the course of the hearing:

> I hear this over and over and over again. Either the five boroughs has the worst mailmen in the world or somebody is not paying attention to their mail. If it's the first one, I would recommend you get a P.O. box or something. Because if you're not getting mail delivered on a regular – on a reliable basis, then it's not the Agency's problem. If they send it out and it's not delivered correctly – the only way they are going to contact you is by mail and I would strongly recommend – I realize there is an expense involved – but as long as you're going to be on public assistance, get a P.O. box and give them a change of address. Give the Agency a change of address, because there is nothing I can do about this. People keep saying – every day I hear this like at least ten times. These are the people just not

paying attention to the mail or like I said, the five boroughs just has the worst mailmen that ever existed on the face of the earth.

64. Thus the hearing officer distorted the legal standard for triggering the presumption of receipt of mail, and even if that standard had been met, created an impossible burden for rebutting the presumption, thus converting a rebuttable presumption into an irrebuttable presumption.

65. State Respondent issued a DAFH on April 25, 2012 affirming City Respondent's discontinuance of Petitioner's benefits for not attending the face-to-face recertification appointment despite the fact that HRA failed to present any evidence that it mailed Petitioner the December 3, 2011 Notice of Decision discontinuing her public assistance and denying her Food Stamp benefits, which notice is required under State and federal law.

66. State Respondent's DAFH also held that HRA's mailing affidavits established that the October 25, 2011 appointment notice was mailed in the regular course of business creating a presumption of receipt of mail, and that Petitioner's contention of non-receipt of the appointment notice was not credible.

67. No prior request for the relief sought herein has been made.

STATEMENT OF CLAIMS

FIRST CAUSE OF ACTION: THE DISCONTINUANCE OF PUBLIC ASSISTANCE AND THE DENIAL OF FOOD STAMPS WITHOUT NOTICE

67. Petitioner repeats the allegations in paragraphs 1 through 67 as if fully set forth herein.

68. City Respondent's discontinuance of Petitioner's public assistance and denial of Food Stamps without notice, and State Respondent's affirmance of that discontinuance, is

arbitrary, capricious, contrary to lawful procedure and in violation of SSL § 22; 18 N.Y.C.R.R. §§ 351.22(b), 358.2.2, 358-2.23, 358-3.3(a); 7 C.F.R. § 273.15, and the Due Process Clause of the Fourteenth Amendment.

SECOND CAUSE OF ACTION: PROCEDURE FOR MAILING APPOINTMENT NOTICE NOT ESTABLISHED BY "MAILING AFFIDAVITS"

69. Petitioner repeats the allegations in paragraphs 1 through 67 as if fully set forth herein.

70. State Respondent's Decision After Fair Hearing affirming City Respondent's determination to discontinue Petitioner's public assistance and deny her Food Stamps, holding that City Respondent's affidavits established a regular mailing procedure and that the mailing procedure was followed thus triggering a presumption that Petitioner received the notice scheduling her face-to-face recertification appointment, was arbitrary and capricious, in violation of lawful procedure and the Due Process Clause of the Fourteenth Amendment, and not supported by substantial evidence in the record, in that the record lacks evidence: (a) of a mailing procedure in place at the time the notice scheduling Petitioner's face-to-face recertification appointment was purportedly mailed to her; (b) that the envelope in which the face-to-face recertification appointment notice was purportedly sent was properly addressed; (c) that a return address was placed on the envelope, and if so, what the return address was; and (d) that the mail was not returned undelivered by the United States Postal Service.

THIRD CAUSE OF ACTION: LACK OF EVIDENCE TO PROVE PROCEDURE FOR MAILING APPOINTMENT NOTICE WAS FOLLOWED

71. Petitioner repeats the allegations in paragraphs 1 through 67 as if fully set forth herein.

72. The State Respondent's Decision After Fair Hearing affirming City Respondent's determination to discontinue Petitioner's benefits was arbitrary and capricious and in violation of lawful procedure, and not supported by substantial evidence in the record of the hearing and is in violation of the Due Process Clause of the Fourteenth Amendment in that the "mailing affidavits" fail to allege any facts to show that the City Respondent followed its purported mailing procedure.

FOURTH CAUSE OF ACTION: PROCEDURE FOR MAILING APPOINTMENT NOTICES NOT FOLLOWED

73. Petitioner repeats the allegations in paragraphs 1 through 67 as if fully set forth herein.

74. The State Respondent's Decision After Fair Hearing affirming City Respondent's determination to discontinue Petitioner's benefits was arbitrary and capricious and in violation of lawful procedure, and not supported by substantial evidence in the record of the hearing and is in violation of the Due Process Clause of the Fourteenth Amendment in that the evidence in the record demonstrates that HRA failed to follow the procedures described in it "mailing affidavits" in that the notice of the appointment for Petitioner's face-to-face recertification appointment was not alleged to have been mailed within the time period for such mailing in the procedures described in the "mailing affidavits."

FIFTH CAUSE OF ACTION: DAFH VIOLATES PRINCIPLE OF STARE DECISIS

75. Petitioner repeats the allegations in paragraphs 1 through 67 as if fully set forth herein.

76. State Respondent's Decision After Fair Hearing is arbitrary, capricious, contrary to lawful procedure and violates the Due Process Clause of the Fourteenth Amendment in that it

is contrary to its stated policies and decisions and the principle of *stare decisis.*

REQUESTS FOR RELIEF

WHEREFORE, Petitioner requests that this Court enter a judgment:

(1) Annulling so much of State Respondent's Decision After Fair Hearing dated April 25, 2012 in Petitioner's case that upheld the discontinuance of public assistance and denying her application for Food Stamps, pursuant to the notice dated December 3, 2011; and

(2) Ordering City and State Respondents to restore all public assistance benefits lost by Petitioner as a result of the discontinuance; and

(3) Ordering City Respondent to recertify Petitioner's Food Stamp eligibility retroactive to the date of the expiration of her last certification and issuing all Food Stamp benefits retroactive to the date of the expiration of her last certification; and

(4) Declaring pursuant to C.P.L.R. § 3001 that City Respondent's discontinuance of Petitioner's public assistance and denial of her Food Stamp application without written notice was in violation of SSL 18 N.Y.C.R.R. §§ 351.22(b), 358-2.2, 358-3.3, 358-2.23; 7 C.F.R. § 273.14; 18 N.Y.C.R.R § 387.17(f); and the Due Process Clause of the Fourteenth Amendment; and

(5) Declaring pursuant to C.P.L.R. § 3001 that State Respondent's DAFH affirming City respondent's determination to discontinue Petitioner's public assistance benefits and deny her Food Stamps, without notice was in violation of SSL § 22; 18 N.Y.C.R.R. §§ 352.22(b), 358-2.2, 358-2.23, 358-3, 387.17(f); 7 C.F.R. § 273.14(b), and the Due Process Clause of the Fourteenth Amendment; and

(6) Declaring pursuant to C.P.L.R. § 3001 that State Respondent's determination in

its DAFH that City Respondent's affidavits proved the predicate facts necessary to trigger a presumption of receipt of mail was arbitrary, capricious and a violation of the Due Process Clause in that the decision was contrary to her own stated policy and procedures and precedent established in prior DAFHs: and

(7) Enjoining State Respondent to re-train the hearing officer who conducted the hearing in this matter regarding due process notice rights of appellants and the evidentiary requirements for the triggering of a presumption of receipt of mail and monitoring the hearing officer's recommended decisions to insure that Fair Hearing appellants' Due Process rights are observed and that proper procedures are followed when the issue at a Fair Hearing involves receipt of mail.

(8) Staying Respondent Lincoln 54, LLC, from executing the warrant of eviction in the its Housing Court proceeding against Petitioner and her family; and

(9) Awarding Petitioner reasonable attorney's fee and costs in an amount to be determined, as provided by the New York State Equal Access to Justice Act, C.P.L.R. §§ *8600 et. seq*; and

(10) Granting such other and further relief as the Court may deem just and proper.

Dated: Brooklyn, New York
May 29, 2012

Respectfully submitted,
STEVEN BANKS, ESQ.
THE LEGAL AID SOCIETY
Lester Helfman, of Counsel
111 Livingston Street – 7th floor
Brooklyn, New York 11201
Telephone No. 718-422-2732

VERIFICATION

L.E., being duly sworn deposes and says I am the Petitioner in this proceeding. I have read the foregoing Petition and I know its contents. The same is true to my knowledge except as to those matters stated to be alleged upon information and belief, and as to such matters, I believe them to be true.

_____

Sworn to before me this 29th
day of May, 2012.

_____
Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of I_____ D_____, Petitioner, For a Judgment Pursuant to Article 78 and for Declaratory Relief Pursuant to Section 3001 of the Civil Practice Law and Rules, -against- KRISTIN M. PROUD, as Commissioner of the New York State Office of Temporary and Disability Assistance, and STEVEN BANKS, as Commissioner/Administrator of the New York City Human Resources Administration, Respondents.	Index No. _____ **VERIFIED PETITION**

Petitioner, by the undersigned attorneys, hereby petitions and alleges as follows:

PRELIMINARY STATEMENT

1. Petitioner I_____ D_____ is sixty years old and lives alone. She receives a rental subsidy in the form of a voucher through the Section 8 program of the New York City Housing Authority (NYCHA).

2. Ms. D_____ receives Supplemental Nutrition Assistance Program (SNAP) benefits through City respondent agency, the Human Resources Administration (HRA), but has received no public assistance benefits since December 2013 when those benefits were discontinued as a result of the determination at issue in this case. Because no public assistance

shelter payments on her behalf have been made by City respondent since December 2013, Ms. D_____ is in danger of eviction from the apartment where she has lived for almost nine years.

3. Ms. D_____ brings this proceeding to annul a decision by the New York State Office of Temporary and Disability Assistance (OTDA), which upheld a determination by the New York City Human Resources Administration (HRA) to discontinue her public assistance benefits as of December 1, 2013, and to deprive her of those benefits for at least ninety days. *See* Decision After Fair Hearing (DAFH) # 6782839P, attached as Exhibit A.[1] While she has reapplied for public assistance benefits, she has not yet been accepted.

4. On or about October 26, 2013, City respondent agency scheduled an appointment for Ms. D_____ to report to its Dyckman Center on November 4, 2013 "to review your work activity." *See* Mandatory Appointment for Evaluation of Work Activity, dated October 26, 2013, attached as Exhibit B.

5. Because she was scheduled to work as a poll worker for the NYC Board of Elections for the November 5, 2013 election, Ms. D_____ telephoned the number provided on the appointment notice to advise the Center that she had to go for training at the Board of Elections office at 200 Varick Street, New York, N.Y., on November 4th, and could not attend the scheduled appointment. She left several messages but was unable to reach anyone in person, so was unable to reschedule her appointment at the Center.

6. On or about November 7, 2013, City respondent allegedly sent a Conciliation Notification addressed to "I_____ D_____" requesting that she attend an interview with a

[1] While the Decision After Fair Hearing under review as well as documents submitted at the hearing by the New York City Human Resources Administration spell her surname as "D_____," the correct spelling of petitioner's name is "D_____." State and city documents, including notices allegedly mailed to petitioner, misspell her surname by omitting the "l."

Conciliation Worker at 109 East 16th Street to discuss "why on 11/4/13, [she] failed to report to ...the Work Experience Program (WEP) Intake Section." *See* Conciliation Notification attached hereto as Exhibit C. Ms. D_____ did not receive the Conciliation Notification.

7. On or about November 20, 2013, City respondent allegedly sent a Notice of Decision (NOD) to "D_____ I_____" advising her that her public assistance benefits would be discontinued beginning December 1, 2013 because she "did not keep an employment or work activity appointment...on November 4, 2013." *See* Notice of Decision on Your Public Assistance, Supplemental Nutrition Assistance and Medical Assistance (NOD), attached as Exhibit D. Ms. D_____ did not receive the Notice of Decision.

8. On or about July 14, 2014, Ms. D_____ requested a fair hearing to contest the discontinuance of her benefits. A hearing was held on September 9, 2014 and Decision After Fair Hearing # 6782839P was issued by State respondent on September 18, 2014, upholding City respondent's determination to discontinue Ms. D_____'s public assistance benefits.

9. Since her benefits were discontinued, Ms. D_____ has been unable to pay her rent and is now at risk of an eviction proceeding.

10. By this proceeding brought pursuant to Article 78 of the Civil Practice Law and Rules (CPLR), petitioner seeks a judgment vacating and reversing the Decision After Fair Hearing issued by State respondent which upheld the determination of City respondent to discontinue her public assistance benefits for a period of at least ninety days, in violation of lawful procedure, as a "sanction" for petitioner's alleged failure willfully and without good cause, to attend an employment or work activity appointment on November 4, 2013.

11. Petitioner further seeks a judgment directing respondents to delete the sanction

from her case record, to reopen her public assistance case, and to issue to her all benefits lost as a result of the unlawful sanction.

12. Petitioner also seeks a declaration that State respondent's failure to hold City respondent agency to its burden of proof and to properly review the record before it at the administrative hearing, in particular where mailing issues are concerned, violates state law and regulation as well as the court-ordered stipulation in *Meachem v. Wing*, 99 Civ. 4630 (S.D.N.Y. Apr. 20, 2005), and State respondent's own policy guidelines for hearing officers; and seeks an order directing the retraining of state hearing officers on mailing issues.

13. Petitioner also seeks attorney's fees and costs pursuant to Article 86 of the CPLR and any other relevant attorney's fee provision.

PARTIES AND VENUE

14. Petitioner I_____ D_____ resides at 125 West 125th Street, New York, New York, 10030. At the time of the underlying events, her public assistance and Supplemental Nutrition Assistance Program (SNAP) benefits (formerly "Food Stamps") were administered by HRA's Dyckman Job Center #35, located at 4055 Tenth Avenue, New York, New York, 10034.

15. Respondent KRISTIN M. PROUD is the Commissioner of the New York State Office of Temporary and Disability Assistance (OTDA). As OTDA Commissioner, she is responsible for: (a) supervising the operation and administration of all public assistance programs in New York State, including those operated or administered locally in New York City by the Human Resources Administration; (b) complying with federal and state law and regulations with respect to public assistance and SNAP benefits; (c) promulgating regulations to ensure that the applicable state and city agencies, including HRA, comply with federal and state

law and regulations; and (d) enforcing those laws and regulations. State respondent is also responsible for: (a) holding hearings requested by public assistance recipients after adverse determinations by local social services agencies, including HRA; (b) making recommendations on final decisions for such hearings; and (c) issuing final decisions in compliance with federal and state law. Respondent Proud maintains a principal place of business at 14 Boerum Place, Brooklyn, New York, 11201.

16. Respondent STEVEN BANKS is the Commissioner/Administrator of the New York City Human Resources Administration (HRA). As HRA Commissioner, he is responsible for: (a) supervising the operation and administration of public assistance programs for New York City residents, including public assistance and SNAP benefits, and (b) complying with federal and state law and regulations relating to those public assistance programs. He maintains a principal place of business at 180 Water Street, New York, New York, 10038.

17. Based on the foregoing, pursuant to §§ 7804(b) and 506(b) of the CPLR, venue is properly placed in the Supreme Court of the State of New York, New York County, in that the underlying events took place in New York County, and City respondent maintains a principal office in New York County.

APPLICABLE STATUTES, REGULATIONS, AND POLICY

18. The U.S. and New York State Constitutions provide that no person shall be deprived of property without due process of law. U.S. Const. amend. XIV, § 1; N.Y. Const. art. I, § 6.

19. The New York State Constitution provides that it is the duty of social services districts to provide adequately for individuals and families who do not have sufficient funds to

support themselves: "The aid, care and support of the needy are public concerns and shall be provided by the state." N.Y. Const., art. XVII, § 1.

20. New York has established public assistance programs to comply with this duty. Family Assistance (FA) is available to families with children. Safety Net Assistance (SNA) is available to individuals without children, and to those who have timed out of Family Assistance. Social Services Law §§ 158, 349.

21. Public assistance programs in New York State are administered by the Office of Temporary and Disability Assistance (OTDA). The Commissioner of OTDA supervises local social services districts such as New York City in the administration of these programs. Social Services Law §§ 17, 20.

22. It is well established that public assistance recipients are entitled to the due process protections of the Constitution. *Goldberg v. Kelly*, 397 U.S. 254 (1970). Recipients are entitled to fair treatment and due process from the local agency administering public assistance benefits, as well as in the administrative hearing process.

Public Assistance Employment and Job Search Requirements

23. Section 336-d of the N.Y. Social Services Law requires that an applicant or recipient of public assistance be "engaged in an active and continuing effort to achieve self-sufficiency."

24. Under 18 NYCRR § 385.9(e), an applicant or recipient must "demonstrate that he or she is engaged in an active and continuing effort to achieve self-sufficiency....Such effort shall include...an active and continuing search for employment...[and] [e]ach such applicant or recipient shall have an affirmative duty to accept any offer of lawful employment in which he or

she may engage." Similarly, 18 NYCRR § 385.12(a)(3) requires an applicant or recipient of public assistance to accept any offer of employment, with certain exceptions for health and safety and other specified reasons.

25. In addition to the requirement for continuous job search and acceptance of any offers of employment, a social services district may require an applicant/recipient to participate in assessment and other required employment-related activities. 18 NYCRR §§ 385.2, 385.7, 385.9.

26. An applicant or recipient who is under 16 years of age, under 19 and a full-time student, or 60 years of age or older, is exempt from public assistance work requirements. 18 NYCRR § 385.2(b).

27. An individual will be found ineligible to receive public assistance if he or she fails to comply, without good cause, with public assistance employment requirements. Failure to participate in required employment-related activities will result in reduction or discontinuance of benefits, also known as "sanction." Social Services Law § 342(1); 18 NYCRR §§ 385.2, 385.12.

28. In determining whether or not good cause for failure to comply with employment requirements exists:

> [T]he social services official must consider the facts and circumstances, including information submitted by the individual subject to such requirements. Good cause includes circumstances beyond the individual's control, such as, but not limited to, illness of the individual, illness of another household member requiring the presence of the individual, … a household emergency, or the lack of adequate child care.

18 NYCRR § 385.12(c)(1).

29. Before imposing an employment-related sanction the local district must determine that any failure to comply with employment requirements was both willful and without good cause. Social Services Law § 341(1)(b); 18 NYCRR § 385.11(a)(4)(i) and (ii).

30. If the district determines that the failure to comply was both willful and without good cause, the recipient's pro rata share of the household's public assistance benefits will be discontinued. For the first such failure to comply, the benefits of an individual without dependent children will be discontinued for 90 days or until compliance, whichever period of time is longer, for the second failure to comply, benefits will be discontinued for at least 150 days, and for the third and subsequent failures, benefits will be discontinued for at least 180 days. Social Services Law § 342(3); 18 NYCRR § 385.12(d)(2).

31. City respondent HRA's Employment Process Manual lists "examples of typical good cause reasons for infraction" while noting that the list is "not all-inclusive." Among those are being "employed or at [a] job interview," as well as "conflicting appointments with other HRA or City agencies." *See* Employment Process Manual, relevant pages attached hereto as Exhibit E, at 14.9–14.10.

32. Temporary employment by the Board of Elections constitutes good cause for missing an employment-related appointment. *See* In the Matter of _____, DAFH # 5923319N (Dec. 19, 2011); In the Matter of _____, DAFH # 6093039Y (July 13, 2012), attached hereto as Exhibits F and G. Likewise, attendance at classes or vocational training constitutes good cause, *see, e.g.*, In the Matter of _____, DAFH # 6048005Y (June 25, 2012); In the Matter of _____, DAFH # 6884046L (Dec. 12, 2014), attached as Exhibits H and I.

Notice Requirements

33. If a social services district determines that a public assistance recipient has failed or refused to comply with an employment program requirement, the district "shall issue a notice in plain language indicating that such failure or refusal has taken place and of the right of such

participant to conciliation to resolve the reasons for such failure or refusal to avoid a pro-rata reduction in public assistance benefits." Social Services Law § 341(1)(a); 18 NYCRR § 385.11(a).

34. If the recipient does not respond to the conciliation notice or if the conciliation is unsuccessful, and the district determines that the failure or refusal was willful or without good cause:

> the district shall notify such participant in writing, in plain language and in a manner distinct from any previous notice, by issuing ten days notice of its intent to discontinue or reduce assistance. Such notice shall include the reasons for such determination, the specific instance or instances of willful refusal or failure to comply without good cause with the requirements of this title, the necessary actions that must be taken to avoid a pro-rata reduction in public assistance benefits, and the right to a fair hearing relating to such discontinuance or reduction.

Social Services Law § 341(1)(b).

35. Before taking an action to discontinue public assistance benefits, the local district:

> must review or cause to be reviewed [the action] to determine whether the action is correct based upon available evidence included in the applicant's or recipient's case record....Where it is determined that the intended action is correct after review, the social services agency must send to the applicant/recipient a notice which meets the requirements [of 18 NYCRR § 358-3.3].

18 NYCRR § 358-4.1.

36. A notice of intent to discontinue assistance must meet the "timely and adequate" requirements set forth in 18 NYCRR §§ 358-2.2, 358-2.23, and 358-3.3; and the Due Process Clause of the Fourteenth Amendment.

37. City respondent's Work, Accountability, and You (NYC WAY) computer system tracks public assistance recipients' compliance with employment rules and uses a mechanism called "autoposting" to record certain information in the system and to automatically initiate

certain actions. *See Puerto v. Doar*, 42 Misc. 3d 563, 569–571 (Sup. Ct. N.Y. County 2013).

38. If a recipient does not report to an employment-related appointment, the missed appointment is "autoposted" in City respondent agency's NYC WAY computer system, which then automatically sends out a Conciliation Notification. If the recipient does not report to Conciliation, a Notice of Decision is automatically sent out. According to City respondent's Employment Process Manual: "If...the participant does not report for Conciliation and no other information is received to establish good cause, the case will move to NOI status automatically after the expiration date of the Conciliation Notice." HRA Employment Process Manual, Exhibit E, at 14.11.

Conduct of Administrative Hearing

39. Public assistance applicants and recipients appeal adverse determinations by the local social services agency by means of administrative fair hearings. Social Services Law § 22; 18 NYCRR § 358-3.1.

40. OTDA regulations governing the fair hearing process and establishing the rights and obligations of applicants and recipients of public assistance are found in Part 358 of Title 18 of New York Codes, Rules, and Regulations.

41. The request for a fair hearing concerning public assistance benefits must be made within 60 days after the social services agency's determination. 18 NYCRR § 358-3.5(b)(1).

42. The 60-day time limit begins to run upon receipt of the notice. The time limit is waived if the notice is inadequate or defective. *See* Russell J. Hanks, Department of Social Services,[2] Policy Clarifications (May 1, 1991), attached as Exhibit J, at 2.

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[2] In 1997, the New York State Department of Social Services was reorganized and renamed the Department of Family Assistance (DFA). Its functions were distributed among three State agencies: the

43. An agency representative must appear at the hearing along with the case record and a written summary of the case. 18 NYCRR § 358-4.3(b). *See also Rodriguez v. Blum*, 79 Civ. 4518 (S.D.N.Y. Feb. 25, 1983) (stipulation and judgment).

44. "[I]n fair hearings concerning the discontinuance, reduction or suspension of public assistance, medical assistance, food stamp benefits or services, the social services agency must establish that its actions were correct." 18 NYCRR § 358-5.9(a).

45. In fair hearings concerning the discontinuance or reduction of public assistance or food stamp benefits due to sanction imposed for failure to comply with public assistance and food stamp employment rules, the social services agency must establish that the failure to comply was willful and without good cause. Social Services Law § 341(1)(b); 18 NYCRR § 385.11(a)(4)(i) and (ii).

46. A fair hearing shall be conducted by an impartial hearing officer, who, in order to ensure a complete record at the fair hearing, must:

> elicit documents and testimony, including questioning the parties and witnesses, if necessary, particularly where the appellant demonstrates difficulty or inability to question a witness; ...
>
> review and evaluate the evidence, rule on the admissibility of evidence, determine the credibility of witnesses, [and] make findings of fact relevant to the issues of the hearing[.]

18 NYCRR § 358-5.6.

47. A 1991 Department of Social Services Memorandum elaborates on hearing officers' responsibilities to ensure the adequacy of notices sent to appellants pursuant to 18 NYCRR § 358-3.3, and discusses the basis for tolling the time limit to request a fair hearing.

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existing Department of Health, and the newly created Office of Children and Family Services and Office of Temporary and Disability Assistance (autonomous offices within DFA), see L. 1997, ch. 436, pt. B, sec. 122.

> In every hearing involving a notice of intent, the sufficiency of the notice is a threshold issue. Raising the issue is not an affirmative responsibility of the appellant.... [T]he hearing officer must review the sufficiency of the notice to assess whether it complies with regulatory requirements and whether any deficiencies in the notice impinge on the appellant's due process rights....
>
> In evaluating the adequacy of a notice, the hearing officer should consider if the appropriate notice was sent and if the explanation of the district's intended action is understandable by the particular appellant....
>
> Where a hearing involves a notice of intent, any defect in the notice tolls the statute of limitations....When the statute of limitations is tolled, the underlying merits of the case must be addressed unless it is determined that the defects in the notice are so serious that the notice is void.

Russell J. Hanks, Department of Social Services, Policy Clarifications (May 1, 1991), Exhibit J, at 1-2 (emphasis in original).

48. Where the issue at a fair hearing involves whether or not a public assistance recipient received a notice that the district alleges to have mailed to the recipient, the district has the burden of proving that the notice was mailed to the recipient, either through direct evidence of the mailing, or by proof of the existence of a reliable office mailing procedure and proof that such procedure was in fact followed.

> In cases where affidavits are offered to establish the local agency's procedures with respect to mailing a document, the hearing officer should evaluate whether the affidavit is appropriate for the type of document mailed, and determine whether the presumption of mailing the document was established in the appellant's case...If the appellant alleges non-receipt of a mailed document, the hearing officer should explain to both parties that the agency will first be asked to provide evidence that establishes the document was properly mailed and, if mailing is established, the appellant will have a full and fair opportunity to explain why the document at issue was not received. The hearing officer may find an appellant's uncorroborated testimony as sufficient to rebut the agency's claim that the appellant was mailed a notice.

Russell J. Hanks, OTDA, Fair Hearing Training (Apr. 13, 2005), attached hereto as Exhibit K, at 2. *See also Meachem v. Wing*, 99 Civ. 4630 (S.D.N.Y. Apr. 20, 2005) (stipulation and order of

settlement); Meachem Overview, The impact of the Meachem litigation on fair hearings involving mailing issues (2005), relevant sections attached as Exhibit L, 10-12; Dan Bloodstein, OTDA, Meachem Reminder (July 19, 2011), attached as Exhibit M.

49. State respondent has advised hearing officers that the presumption of receipt of mail relies upon two evidentiary presumptions: (1) the presumption of mailing, and (2) the presumption of receipt. The first requires a showing that regular office mailing procedures were followed, to establish that the document was mailed; the second relies upon the regularity of mail delivery by the U.S. Postal Service, to establish that the document was received. Meachem Overview, 10-12, attached as Exhibit L; Meachem Reminder, Exhibit M.

50. To successfully establish the presumption of mailing:

> [T]he agency must show there is: an established office mailing procedure, and that the procedure was followed in this particular case[.] The agency will attempt to do this with a mailing affidavit or through direct testimony....The mailing affidavit must describe a regular office mailing procedure that is relevant to the document in question. The affidavit must also establish a basis, or nexus, for asserting that the document in this case followed that procedure....If the presumption is not established, the evidence must fail.

Meachem Overview, Exhibit L, at 11; Meachem Reminder, Exhibit M, at 11 (emphasis in original).

51. To establish the presumption of mailing, it is City respondent HRA's practice to submit standard form mailing affidavits that purport to establish a regular mailing procedure.

52. Notices of Decision (NODs) such as the one under review are generated by OTDA's Client Notice System (CNS) and are mailed by OTDA on behalf of HRA. "If CNS notices are the subject of a claim of non-receipt, the [local] agency MUST present affidavits from OTDA's Division of Information Technology [at the fair hearing]." Meachem Overview at

12; Meachem Reminder, Exhibit M, at 12 (emphasis in original).

53. For notices alleged to have been produced and mailed by City respondent, it is City respondent's practice to present form affidavits from City respondent HRA's Office of Management Information Systems.

54. The hearing officer must determine if the process described in the mailing affidavit was in place at the time of the alleged mailing, whether such process is adequate to prove a satisfactory mailing procedure, and if the described process was followed in the particular case.

55. The hearing officer must "examine the affidavit to confirm that it establishes … the regular office mailing procedure for the type of mailing at issue" and must note if there is a deficiency in the agency's affidavit, as for example, if "the affidavit refers to a nexus that has not been established by the agency's representative." Meachem Reminder, Exhibit M, at 11.

56. "If the presumption [of mailing] is not established, the evidence must fail." *Id.*

57. In determining the credibility of an Appellant at the hearing, the ALJ must state in the decision as specifically as possible the basis for such determination. "[T]he lack of documentary evidence is not a *per se* basis for finding an appellant's testimony incredible." Uncorroborated testimony may be found credible, particularly where it is "uncontradicted or internally consistent." Russell J. Hanks, Department of Social Services, Policy Guidelines (Dec. 11, 1996), in Meachem Overview, attached as Exhibit L, at 27.

58. The fair hearing decision must be based on the fair hearing record, must be in writing and must set forth the fair hearing issues, the relevant facts, and the applicable law, regulations, and approved policy upon which the decision is based. The decision must make

findings of fact, determine the issues, and state reasons for the determinations, and when appropriate, direct specific action to be taken by the social services agency. In addition, the decision may address the violation of any provision of the fair hearing regulations including violations of regulations concerning notice. 18 NYCRR § 358-6.1(a).

STATEMENT OF FACTS

59. Petitioner I_____ D_____ is sixty years old and lives alone.[3] She receives rental assistance through the Section 8 program of the New York City Housing Authority (NYCHA). Ms. D_____ receives Supplemental Nutrition Assistance Program (SNAP) benefits through City respondent agency, the Human Resources Administration (HRA), but has received no public assistance benefits since December 2013 when those benefits were discontinued as a result of the determination at issue in this case. Because public assistance shelter payments on her behalf have not been made by City respondent since December 2013, Ms. D_____ is in danger of eviction from the apartment where she has lived for almost nine years. *See* Certification of Basis for Eviction Proceeding Against Tenant Participating in the Section 8 Housing Choice Voucher Program, attached hereto as Exhibit N.

60. Before her benefits were discontinued, petitioner received public assistance in the amount of $265.50 monthly, of which $112.50 ($56.25 semi-monthly) was sent directly to her landlord for rent. *See* All Benefits Issued printout, attached hereto as Exhibit O. Petitioner's public assistance and SNAP benefits were administered through City respondent HRA's Dyckman Job Center #35, located at 4055 Tenth Avenue, New York, New York, 10034.

61. On or about October 26, 2013, City respondent agency scheduled an appointment

[3] Having turned 60 in August of 2014, Ms. D_____ is no longer subject to public assistance employment requirements.

for Ms. D_____ to report to its Dyckman Center on November 4, 2013 "to review your work activity." *See* Mandatory Appointment for Evaluation of Work Activity, dated Oct. 26, 2013, attached as Exhibit B. *See also* NYCWAY Activity History Print, entry dated 10/23/13, indicating "Call in – Empl Intvw" with a FUT(ure) DATE of 11/04/13, attached as Exhibit P.

62. Because she was scheduled to work as a poll worker for the NYC Board of Elections for the November 5, 2013 elections, Ms. D_____ telephoned the number provided on the appointment notice, to advise the Center that she had to go for training at the Board of Elections office at 200 Varick Street, New York, N.Y. on November 4th, and could not attend the scheduled appointment. She left several messages but was unable to reach anyone in person, so was unable to reschedule her appointment at the Center.

63. On or about November 7, 2013, City respondent's Dyckman Center scheduled an appointment for petitioner to come to the Center, on November 16, 2013, to discuss why, on November 4, 2013, she "failed to report to or cooperate with the Work Experience Program (WEP) Intake Section." *See* Conciliation Notification, dated November 7, 2013, attached as Exhibit C. Ms. D_____ did not receive the Conciliation Notification.

64. When petitioner did not respond to the Conciliation Notification, on or about November 20, 2013, City respondent allegedly sent a Notice of Decision (NOD) informing Ms. D_____ that her public assistance benefits would be discontinued beginning December 1, 2013 because she "did not keep an employment or work activity appointment...on November 4, 2013." *See* Notice of Decision on Your Public Assistance, Supplemental Nutrition Assistance and Medical Assistance (NOD), N024BY5058, dated November 20, 2013, attached as Exhibit D. Ms. D_____ did not receive this Notice of Decision.

65. This Notice of Decision (NOD) was addressed to "D_____ I_____."

66. Petitioner did not receive either the Conciliation Notification or the NOD.

67. On July 14, 2014, petitioner requested a fair hearing in order to challenge the discontinuance of her benefits. The hearing was held on September 9, 2014.

68. At the hearing, as can be heard on the recording sent to petitioner's attorneys by State respondent, after the hearing officer's introductory remarks, City respondent's representative submitted the Notice of Decision, noting that it was dated November 20, 2013, and stated "the Agency cites the SOL on that notice." The hearing officer marked the NOD as Agency 1, and ascertained that the appellant had received a copy in preparation for the hearing. The agency representative then presented a "copy of the Appointment for November 4th, 2013," the "Notice of Conciliation," the "NYCWAY Activity Screen," the "Household Composition," "All Change Actions," and "All Benefits Issuance Screen," which the hearing officer accepted and marked into evidence as Agency Exhibits 2 through 7.

69. As can be heard on the recording, petitioner's attorney stated "on the SOL, Ms. D_____ never received the notice."

70. The hearing officer then asked "did she receive Agency 2 and 3," referring to the Mandatory Appointment notice and the Conciliation Notification.

71. On the recording, Ms. D_____ can be heard to testify that she received the appointment notice but was unable to go to the appointment because she went for training at the Board of Elections on the 4th in order to be prepared to work as a poll worker on the following day, which was Election Day, November 5th. She testified that she called the number listed on the appointment notice to advise the Center that she could not keep the appointment, that she left

messages that she could not attend and needed to reschedule, but that no one responded to her messages.

72. The hearing officer then asked Ms. D_____ about the Conciliation notice. In response to questions from her attorney, Ms. D_____ testified that she did not receive the Conciliation notice.

73. City respondent's representative asked the hearing officer if she could submit mailing affidavits and proceeded to submit the "Michael Taber affidavit," attached hereto as Exhibit Q, and the "Meyer Elbaz and Monica Johnson affidavits," attached as Exhibits R and S.

74. The hearing officer marked the mailing affidavits into evidence, but did not, on the record, "evaluate whether the affidavit [was] appropriate for the type of document mailed, and determine whether the presumption of mailing the document was established in the appellant's case." Hanks, Fair Hearing Training, Exhibit K, at 2. Although petitioner here claimed non-receipt of a mailed document, the hearing officer did not explain the concept of presumption of receipt of mail or "explain to both parties that the agency will first be asked to provide evidence that establishes the document was properly mailed and, if mailing is established, [that] the appellant will have a full and fair opportunity to explain why the document at issue was not received." *Id.* The hearing officer did not, on the record, "examine [each] affidavit to confirm that it establishes…the regular office mailing procedure for the type of mailing at issue" and did not note the deficiency in the agency's affidavit of mailing of the CNS-generated NOD—the Taber affidavit—namely, that "the affidavit refers to a nexus that has not been established by the agency's representative." Meachem Reminder, Exhibit M, at 11. Nor did the hearing officer note the inversion of Ms. D_____'s name on the NOD or the misspelling of

Ms. D_____'s surname on both the NOD and the Appointment and Conciliation notices.

75. After marking the affidavits into evidence, the hearing officer asked Ms. D_____ "Why do you think you didn't receive the Notification or the Conciliation?" In response, Ms. D_____ described significant problems with mail delivery in her building and a history of attempts to resolve the issue by buying her own lock for her mailbox and of numerous complaints both to the post office and to her building management.

76. While the hearing officer was discussing with petitioner the reasons for the delay in requesting the hearing, City respondent's representative broke in to say that despite Ms. D_____'s testimony that after receiving the appointment letter, she called the agency to let them know she couldn't attend because of training at the Board of Elections, the appointment "should have been a priority as far as I'm concerned."

77. In response, petitioner's attorney's pointed out that "on the notice itself it states that if you cannot make the appointment...to call the number that's listed. And [petitioner] followed that instruction...but no one responded to the call."[4]

78. Petitioner's attorney concluded by addressing "the Taber affidavit," attached hereto as Exhibit Q, which purports to establish mailing of the Notice of Decision. Paragraph 12 of the Taber affidavit states that "[a]ny notice generated by CNS can be accessed electronically through the OTDA computer systems," that "the mailing date that appears in the system or one business day after that date is the date on which a particular notice was delivered into the custody and control of the U.S. Postal Service," that the "appearance of such mailing date in the system

[4] The Mandatory Appointment for Evaluation of Work Activity notice states: "If you have any questions or are unable to keep this appointment, please call the telephone number above. You must contact us prior to your reporting time to arrange a new appointment." *See* Exhibit B.

confirms that the above-described procedure was followed," and that "[t]he 'Date' that appears on the top half of the first page of the CNS notice is the same date as the 'mailing date' referenced above." Taber Affidavit, Exhibit Q, ¶ 12.

79. Petitioner's attorney stated that contrary to paragraph 12 of the Taber affidavit, the NYCWAY printout has "no note entry for November 20th," the date on which the CNS-generated NOD was allegedly mailed to petitioner, and that while the NYC WAY Activity History Print indicates that an "NOI"[5] was sent November 18, 2013, two days prior to the date on the Notice, there is no CNS notice number provided. *See* NOD, attached hereto as Exhibit D; NYC WAY Activity History Print, attached hereto as Exhibit P, entry dated 11/18/13.

80. Petitioner's attorney concluded that therefore "the agency failed to prove that it followed its own procedures." The hearing officer acknowledged this objection, stating: "Your argument is that the Taber affidavit conflicts with the NYC WAY chronology of events." As noted above, however, the hearing officer did not note the deficiency in the agency's affidavit of mailing of the CNS notice, namely, that "the affidavit refers to a nexus that [was not] established by the agency's representative." Meachem Reminder, Exhibit M, at 11. The only mailing date which appeared "in the system" was the mailing date on the NYC WAY printout, November 18th, which did not match the mailing date on the CNS-generated NOD, November 20, 2013.

81. The hearing officer then concluded the hearing, without examining the sufficiency of the mailing affidavits, and without assessing whether petitioner's training and work activity constituted good cause for missing the November 4th appointment, saying "I think I have everything I need."

82. On September 18, 2014, State respondent, by her designee, issued Decision After

[5]The term "NOI" or "Notice of Intent" is used by City respondent agency to refer to a Notice of Decision.

Fair Hearing # 6782839P, holding that "[t]he Agency's determination of November 20, 2013, to discontinue the Appellant's Public Assistance benefits because the Appellant willfully and without good cause failed or refused to comply with employment requirements is correct." DAFH # 6782839P, Exhibit A at 6.

83. In her decision, State respondent correctly tolled the 60-day time limit for requesting a fair hearing stating, that the "the appellant's testimony [that she did not receive the Notice of Decision] was found credible because it was forthright and compelling." Exhibit A at 5.

84. State respondent neglects, however, to address the failure of City respondent to establish the presumption of mailing of the Notice of Decision. The decision states the "hearing evidence...established that the Agency's notice, dated November 20, 2013, was mailed in the ordinary course of business." DAFH # 6782839P, Exhibit A, at 5. As described above, the evidence in the record does not support a finding that the procedure described in the Taber affidavit was actually followed. The agency did not meet the presumption of mailing of the Notice of Decision. City respondent's representative presented no evidence to comport with paragraph 12 of the Taber affidavit, to demonstrate "the appearance of a mailing date in the system" which matched the date which appears on the CNS-generated Notice of Decision. The Taber affidavit submitted thus "refers to a nexus that [was not] established by the agency's representative." Meachem Reminder, Exhibit M, at 11. Furthermore, petitioner's surname was misspelled on the Notice of Decision and her first and last names were reversed so that the Notice was addressed to "D_____ I_____." The evidence in the record does not support a conclusion that the agency met its burden to prove mailing of the Notice of Decision. Where the

city does not meet the burden to prove mailing of the Notice of Decision, the agency's case fails and state respondent should direct the Notice to be withdrawn.

85. In the Decision After Fair Hearing under review, State respondent finds that despite petitioner's calling ahead of time to reschedule the appointment, and despite her attendance at training in order to be prepared for work for the Board of Elections the following day, petitioner did not have good cause to miss the appointment on November 4, 2013. Instead, State respondent appears to adopt the language of City respondent's representative at the hearing, stating that it was petitioner's "responsibility to keep all of her appointments and to make them a priority," DAFH, Exhibit A, at 5, ignoring the good cause provisions in state law and regulation and her own prior decisions after fair hearing, which find good cause when an appellant misses an appointment for work, including specifically for the Board of Elections, or for classes or training. *See* In the Matter of _____, DAFH # 5923319N (Dec. 19, 2011); In the Matter of _____, DAFH #6093039Y (July 13, 2012); In the Matter of _____, DAFH # 6048005Y (June 25, 2012); In the Matter of _____, DAFH # 6884046L (Dec. 12, 2014), attached hereto as Exhibits F through I.

FIRST CAUSE OF ACTION: STATE AND CITY RESPONDENTS DEPRIVED PETITIONER OF DUE PROCESS BY FAILING TO PROVIDE REQUIRED NOTICE OF INTENDED ACTION

86. City and State respondents violated the requirements of due process, law, and regulation, by failing to ensure that petitioner received notice of respondents' intentions to sanction petitioner and discontinue her benefits.

SECOND CAUSE OF ACTION: STATE RESPONDENT FAILED TO HOLD AGENCY TO ITS BURDEN OF PROOF ON MAILING ISSUES AT THE ADMINISTRATIVE HEARING

87. State respondent's Decision After Fair Hearing, affirming City respondent's determination to discontinue petitioner's public assistance benefits, was arbitrary and capricious, and contrary to law, in that State respondent's hearing officer failed to closely examine the mailing affidavit which purported to establish mailing of the Notice of Decision discontinuing petitioner's benefits, and thus failed to recognize that the affidavit presented to prove mailing referred to a nexus that was not established by City respondent agency's representative. The evidence in the record shows that City respondent failed to establish the predicate facts required to trigger an evidentiary presumption of mailing of the Notice of Decision to petitioner.

THIRD CAUSE OF ACTION: STATE RESPONDENT FAILED TO FOLLOW STATE LAW, REGULATION AND POLICY AND FAILED TO ADHERE TO THE PRINCIPLES OF ADMINISTRATIVE STARE DECISIS IN FAILING TO FIND GOOD CAUSE FOR MISSED APPOINTMENT

88. State respondent's Decision After Fair Hearing, affirming City respondent's determination to discontinue petitioner's public assistance benefits, was arbitrary, capricious, and contrary to law, and violated the principles of administrative stare decisis and due process, in that State respondent failed to find that petitioner's training and employment activities as a poll worker for the New York City Board of Elections, along with her good faith attempts to reschedule the appointment, as instructed on the appointment notice, constituted good cause for missing the November 4, 2013 appointment.

PRAYER FOR RELIEF

WHEREFORE, petitioner respectfully requests that this Court make and enter an order

and judgment:

1. Vacating and reversing State respondent's Decision After Fair Hearing # 6782839P, dated September 18, 2014, which upheld City respondent's decision by Notice Number N024BY5058, dated November 20, 2013, to discontinue petitioner's public assistance benefits, because she missed an appointment on November 4, 2013;

2. Directing State respondent to direct City respondent New York City Human Resources Administration to reopen petitioner's public assistance case and to restore all benefits lost as a result of the November 20, 2013 determination; and directing City respondent to reopen the case and to issue such benefits;

3. Directing City respondent to withdraw the November 20, 2013 Notice of Decision, and to delete and expunge the record of the underlying infraction from petitioner's electronic case record;

4. Declaring that State respondent's failure to hold City respondent agency to its burden of proof and to properly review the record before it at the administrative hearing, in particular where mailing issues are concerned, violates state law and regulation as well as the stipulation in *Meachem v. Wing*, 99 Civ. 4630 (S.D.N.Y. Apr. 20, 2005), is contrary to State respondent's own policy guidelines for hearing officers, and deprives appellants of due process of law; and directing retraining of state hearing officers on mailing issues;

5. Awarding petitioner reasonable costs and expenses incurred in this proceeding, including but not limited to reasonable attorney's fees pursuant to Article 86 of the CPLR, and any other relevant attorney's fee provision; and

6. Granting such further relief as this Court may deem just and proper.

Dated: January ___, 2015
Bronx, New York

Respectfully submitted,

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VERIFICATION

STATE OF NEW YORK)
COUNTY OF BRONX) ss.

I_____ D_____, being duly sworn, deposes and says:

I am the petitioner in this proceeding; I have read the foregoing petition and know its contents, which are true to my own knowledge except as to the matters stated to be alleged on information and belief and, as to those matters, I believe the allegations to be true.

_____
I_____ D_____

Sworn to before me this ___th
day of January 2015.

_____
NOTARY PUBLIC

Using Article 78 Proceedings to Get Results

PowerPoint

USING ARTICLE 78 PROCEEDINGS TO GET FAR-REACHING RESULTS

Presented by Les Helfman and Maryanne Joyce
NYSBA Partnership Conference

September 16, 2016

Article 78 of New York's Civil Practice Law and Rules

- Provides an expeditious procedure for judicial review of administrative agency decisions.
- Replaced the common law writs of certiorari, mandamus, and prohibition.
- May be brought against the New York State Office of Temporary and Disability Assistance (OTDA), Office of Children and Family Services (OCFS), or the Department of Health (DOH), to appeal a decision after fair hearing.
- May be used to compel local Department of Social Services (DSS) to comply with a decision after fair hearing.
- In emergency or where hearing would be futile, may be brought without prior hearing.

Applicable Statutes, Regulations, and Court Rules

- CPLR—Selected Provisions
  - § 103 Form of Civil Judicial Proceeding
  - § 217 Limitations of Time/Proceeding against Body or Officer
  - Article 3—Jurisdiction and Service, Appearance and Choice of Court
  - Article 4—Special Proceedings
  - § 506 Venue/Where Special Proceeding Commenced
  - Article 9—Class Actions
  - Article 11—Poor Persons
  - § 3001 Declaratory Judgment
  - Article 55—Appeals Generally
  - Article 57—Appeals to the Appellate Division
  - Article 78—Proceeding Against Body or Officer
- State Social Services Law
  - § 22 Appeals and Fair Hearings; Judicial Review
- State Department of Family Assistance Regulations
  - 18 NYCRR Part 358—Fair Hearings
  - 18 NYCRR Part 359—Disqualification for Intentional Program Violation
- Uniform Civil Rules for the Supreme Court and the County Court
  - 22 NYCRR Part 202
- Rules of the Appellate Divisions
  - 22 NYCRR Part 600—First Department
  - 22 NYCRR Part 670—Second Department
  - 22 NYCRR Part 800—Third Department
  - 22 NYCRR Part 1000—Fourth Department

After the Fair Hearing
Alternatives to the Article 78 Proceeding

- Decision must be issued and complied with within 90 days of FH request.
- If decision favorable but DSS does not comply, make compliance complaint to OTDA.
- If decision unfavorable, request Reopening/Correction under 18 NYCRR 358-6.6.
  - Request hearing exhibits, recording, ALJ recommendations.
  - Letter to OTDA Deputy General Counsel.
  - Include request for waiver of 4 month SOL.
  - Local DSS will have opportunity to respond.

Article 78 Proceeding — Statute of Limitations

- Proceeding must be commenced within four months after determination to be reviewed becomes final and binding upon petitioner, or after respondent's refusal, upon demand of petitioner, to perform its duty, unless shorter time provided in statute governing particular agency or type of appeal. CPLR § 217.
- SOL met/Proceeding commenced, by filing petition with County Clerk. CPLR §§ 304, 2102.
- *4 months means 4 months, not 120 days!!!*

§ 7801 Nature of Proceeding

- Special proceeding to obtain judicial review of administrative agency action or inaction.
- Replaced common law writs of certiorari, mandamus, and prohibition.
- Judicial review confined to record, evidence "dehors the record" usually not considered.
- Administrative determination under review must be final.
- Exhaustion of administrative remedies required, except in cases of futility or emergency.

§ 7802 Parties

- Administrative agency body or officer
  - Commissioner of OTDA, OCFS, DOH
  - Commissioner of local DSS
- Petitioner/Respondent
- No joinder, interpleader or third party practice without leave of the court.
- In proceeding other than prohibition, joinder of necessary parties governed by CPLR § 1001.
  - Those who ought to be joined for complete relief to be accorded or who might be inequitably affected.

§ 7803 Questions Raised/Relief Available

- Whether body or officer failed to perform a duty enjoined upon it by law (mandamus to compel). § 7803(1).
- Whether body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction (prohibition). § 7803(2).
- Whether determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to penalty or discipline imposed (mixed mandamus/certiorari). § 7803(3).
- Whether determination made as a result of a hearing held, and at which evidence was taken, is, on the entire record, supported by substantial evidence (certiorari). § 7803(4). Requires transfer to Appellate Division.

§7804 Procedure

- Procedure governed by CPLR Article 78, and by CPLR Article 4 on Special Proceedings.
  - See also court and individual judge's rules.
- Statute of Limitations
  - 4 months (not 120 days!) from determination being appealed, unless shorter time provided in statute governing particular agency or type of appeal. CPLR § 217.
  - If statute expired, and federal claim, consider § 1983 action.
- Jurisdiction and Venue
  - Subject matter jurisdiction in Supreme Court. CPLR § 7804(b).
  - Venue in any county within judicial district where administrative action, refusal to act, or material events took place, or where principal office of respondent is located. CPLR § 506(b).

- Petitioner's papers — § 7804(c), (d)
  - Notice of Petition or Order to Show Cause
  - Verified Petition and accompanying affidavits and exhibits
  - Memorandum of Law
  - Reply to counterclaim or any new matter in answer
- Respondent's papers — § 7804(d)-(f)
  - Verified answer, affidavits or other written proof
  - Transcript of underlying proceeding to be filed with answer
  - Motion to dismiss may be filed instead of answer. If denied, court will grant time to answer.
- Time for Service — § 7804(c)
  - Unless brought by OSC, petition to be served at least 20 days before noticed to be heard. Answer to be served at least 5 days before return date. Reply to be served at least 1 day before return date.
  - If proceeding against state body or officer, such as OTDA, service must also be made on the attorney general.

- Transfer to Appellate Division — § 7804(g)
  - Where no substantial evidence question raised, Supreme Court shall dispose of the issues in the proceeding.
  - Where substantial evidence question raised, court shall first dispose of such other objections as could terminate the proceeding, without reaching the substantial evidence issue.
  - If determination of the other objections does not terminate the proceeding, court must transfer the proceeding to the Appellate Division.

- Discovery—CPLR § 408
  - No disclosure permitted without leave of court, except for notice to admit under § 3123.
- Trial—CPLR § 7804(h)
  - If triable issue, trial shall be held forthwith.
  - If proceeding transferred to the Appellate Division, tried by referee or by justice of the Supreme Court.

- Stays—CPLR § 7805
  - Court empowered to stay further proceedings or enforcement of any determination under review.
- Judgment—CPLR § 7806
  - May grant or dismiss petition; annul, confirm, or modify determination; may direct or prohibit action by respondent(s).
  - Restitution or damages must be incidental to relief sought.

Poor Person's Relief—CPLR § 1101

- Upon motion, court may grant permission to proceed as a poor person. CPLR §1101(a).
- Petitioner may seek to commence action without payment by filing form affidavit, available in the clerk's office, along with petition. Case given index number and application submitted to court. If court approves application, petitioner given notice that fees waived. If court denies application, petitioner given notice that case will be dismissed if fee not paid within 120 days of date of order. CPLR § 1101(d).
- Where party represented by a legal aid society, legal services, or other non profit organization, or by private counsel working under auspices of such organization, fees and costs waived without necessity of a motion. Attorney to file certification with clerk of court along with petition. CPLR § 1101(e).

Filing, Service, and Scheduling

- Necessary Forms/Papers to Commence Proceeding – CPLR § 304; 22 NYCRR § 202.5
  - Application for Poor Person's Relief/Attorney Certification
  - Redaction Cover Page (22 NYCRR 202.5(e)--mandatory as of March 2015)
  - Notice of Petition or Order to Show Cause
  - Verified Petition and supporting papers—original(s) for filing and copies for service
  - Request for Judicial Intervention (RJI) 22 NYCRR § 202.6
  - Memorandum of Law to be served with Petition if at all possible
- Proceeding by Notice of Petition and Service on Respondents – CPLR §§ 306-b, 307, 311; 22 NYCRR § 202.5-202.9
  - Procedures vary between courts. Check local court rules through www.nycourts.gov. Article 78 proceeding treated like a motion—contact Court Clerks' offices with questions.
  - Commence proceeding: Obtain Index Number, File Petition with County Clerk.
  - Serve copies of RJI, Notice of Petition/Petition/Memo of Law on Respondents. Service to be made within 120 days of commencement, but not later than 15 days after date SOL expires.
  - Service on municipal respondent by personal delivery to designated officer.
  - Service on State respondent by personal delivery or by certified mail marked "URGENT LEGAL MAIL." Must also serve NYS Attorney General.
  - Once served, bring original papers with proof of service to Court Clerk for review and approval of RJI purchase. Purchase RJI. File RJI, Notice of Petition, Verified Petition, proof of service, with Clerk's office.

- Proceeding by Order to Show Cause
  - In emergency, may choose to proceed by order to show cause.
  - No ex parte TRO allowed against public officer or municipal corporation. Advance notice must be given to municipal counsel and to Attorney General. NY CPLR § 6313(a).
  - If requesting interim relief, contact Respondent's attorney(s) to give opportunity to appear in opposition, or provide affirmation demonstrating prejudice by giving of notice. If no prejudice, must affirm good faith attempt at notification. 22 NYCRR § 202.7(f).
  - Obtain Index Number/File Petition with County Clerk.
  - Bring RJI, Proposed OSC and Petition to Ex Parte clerk's office for approval. If approved, buy RJI and return to Ex Parte clerk who will advise when and whether to return to appear before assigned judge.
  - Inform adversary of date, time, place to appear.
  - Once OSC signed, conform copies and serve as directed by judge.
  - Proceeding returnable at time and place indicated on signed Order to Show Cause. Appear in courtroom at date and time indicated.

- Scheduling
  - Unless brought by OSC, Petitioner chooses Return Date at which time all papers (Respondent's Answer/Motion to Dismiss, Petitioner's Reply, Memos of Law) are submitted.
  - Adjournments: Parties may stipulate to adjourn. No more than three adjournments for a total of 60 days may be submitted without prior permission of the court. 22 NYCRR 202.8(e). (Also check local rules.)
  - On Return Date, papers may be marked submitted, the case scheduled for oral argument, or counsel advised that judge will determine if oral argument needed.
  - Check for scheduling of oral argument, or any update or decision made in the case, in the New York Law Journal, the court's website, or sign up for email notifications at *iapps.courts.state.ny.us/webcivil/etrackLogin.*

Transferring the Article 78 Proceeding to the Appellate Division

- If proceeding transferred to Appellate Division pursuant to 7804(g), treated much like appeal. See CPLR Articles 55, 57; Title 22 of NYCRR, Parts 600, 670, 800, and 1000; and court websites for individual Appellate Division rules.
- Perfect by any method set forth in CPLR §§ 5525–5528, i.e. reproduced full record, appendix method, agreed upon statement in lieu of record, or on the original papers. See, e.g. 22 NYCRR § 600.5. Reproduced full record recommended.
- See individual Appellate Division rules for filing and service requirements, and requirements for form and content of record, transcript, other necessary documents, and briefs.
- Oral argument. Check Appellate Division rules and calendar for scheduling of oral argument. Appear promptly for oral argument.

Strategic Considerations

- Decision under review must be a "final" decision
  - Remand for new DSS determination not final
- Exhaustion of administrative remedies required prior to commencement of proceeding
- Choosing Respondents
  - State agency that made final decision must be named
  - If local DSS not necessary for complete relief and has no interest inequitably affected, need not be a party. Strategic reasons to include/exclude.
- Crafting claims for relief/causes of action
  - Track language of 7803—mandamus, prohibition, arbitrary and capricious and contrary to law
  - May also have due process or other claims, e.g. under Americans with Disabilities Act.
- Declaratory Judgment
  - Where Article 78 proceeding challenges policy or practice of agency, consider combined Article 78/Declaratory Judgment action. Declaratory relief requested must be "intertwined" with Article 78 relief sought
- Class Actions
  - Article 78 proceeding may be brought as a class action
- Defeating Mootness Defenses
  - Exception where issues are substantial or novel, likely to recur and capable of evading review
  - Consider Declaratory Judgment claim or class action; add additional petitioners
- Defeating Exhaustion Defenses -- Exhaustion rule not absolute. Need not be followed where:
  - Agency action unconstitutional or beyond its power
  - Resort to administrative remedy futile
  - Pursuit of administrative remedy would cause irreparable injury

Oral Argument—22 NYCRR § 202.8(d)

- Request oral argument!
- Set forth request on Notice of Motion or OSC.
- Shall be be granted unless court determines unnecessary. Check court and individual judge's rules.
- If transfer to Appellate Division, must file notice requesting argument.

Attorney's Fees

- Under CPLR Article 86, attorney's fees and costs are recoverable from the State or an agency of the State where the petitioner is a prevailing party and the position of the state was not "substantially justified."
- Fees may also be available under 42 U.S.C. § 1988 for certain federal civil rights claims, and under CPLR § 909 for class actions.

Case Examples of "Far-Reaching" Results

- **Boyd v. Doar**, Index No. 400706/2008 (Sup. Ct. N.Y. County, Oct. 2, 2008) (agency failure to replace PA/food stamps stolen from EBT account).
- **Carbonell v. Doar**, Index No. 401371/2011 (Sup. Ct. N.Y. County, April 27, 2012) (work-related sanction of disabled PA recipient).
- **Carver v. State of New York**, 26 N.Y.3d 272 (2015) (State intercept of lottery winnings).
- **Coleman v. Daines**, 19 N.Y.3d 1087 (2012) (availability of emergency Medicaid).
- **Jenevieve R. v. Doar**, Index No. 400046/2011 (Sup. Ct. N.Y. County, Nov. 14, 2011)(discontinuance of entire family's benefits for household head failure to comply with drug/alcohol rules).
- **Johnson v. Berlin**, Index No. 402321/2010 (Sup. Ct. N.Y. County, Feb. 29, 2012) (proof of disability of severely disabled family member for caretaker exemption).
- **Johnson v. Berlin**, Index No. 400081/2010 (Sup. Ct. N.Y. County, Sept. 19. 2012) (time limit for reopening defaulted fair hearing).
- **Puerto v. Doar**, Index No. 402224/2011 (Sup. Ct. N.Y. County, March 27, 2013) (compliance with work rules, concilation, and autoposting).
- **Smith v. Proud**, Index No. 400903/2010 (Sup. Ct. N.Y. County, April 6, 2010)(adequacy of conciliation notices and Notices of Decision).
- **Solla v. Berlin**, 106 A.D. 3d 80 (1st Dep't 2013) (attorney's fees available under catalyst theory).
- **Stewart v. Roberts**, Index No. 5507/15 (Sup. Ct. Albany County) (automobile with no equity value as resource).

Using Article 78 Proceedings to Get Results

Biographies

Speaker Biographies

Lester Helfman

Lester Helfman is a Senior Staff Attorney in the Brooklyn Neighborhood Office of The Legal Aid's Society's Civil Practice where he represents clients in administrative proceedings, Article 78 proceedings and affirmative litigation in both state and federal courts, including state and federal class actions. During his thirty-year career with The Legal Aid Society, Les has also specialized in housing law, health law and the rights of the elderly, and represented parolees in parole revocation proceedings and writs of habeas corpus. From 1993–1997, he was Director of Litigation at Queens Legal Services Corp. Les trains extensively on public benefits issues and administrative and judicial appeal rights. He co-chairs a work group composed of legal service advocates and NYC Human Resources Administration program and legal staff, working to ensure the integrity of the Fair Hearing system and to establish alternative resolution modalities. Les is a graduate of Herbert H. Lehman College and New York Law School.

Maryanne Joyce

A longtime legal services attorney, Maryanne recently started up a low-bono law practice, assisting low-income clients with public benefits issues, and focusing on Article 78 appeals. She also works with Part of the Solution in the Bronx, assisting with POTS' weekly legal clinic. Before starting her own firm, Maryanne worked at Legal Services of the Hudson Valley where she supervised the benefits practice. Prior to that, Maryanne worked as a staff attorney at Legal Services NYC-Bronx from 1999 to 2012, where she focused on public assistance, food stamps/SNAP, and Medicaid issues, and represented clients at administrative hearings and in New York State Supreme Court. At LSNYC-Bronx, Maryanne litigated several Article 78 proceedings that resulted in state and city policy changes benefitting public assistance applicants and recipients. Maryanne has trained on public benefits issues including basic welfare budgeting, welfare fair hearings, welfare fraud/administrative disqualification hearings, and article 78s in public benefits practice. Maryanne received her undergraduate degree from Yale University, and has an M.A. in Counseling from N.Y.U. She received her J.D. from Columbia Law School.