

CHAPTER 22

HOW TO CHALLENGE ADMINISTRATIVE DECISIONS USING ARTICLE 78 OF THE NEW YORK CIVIL PRACTICE LAW AND RULES*

A. Introduction

This Chapter is about a New York State law that provides a procedure for you to challenge decisions that were made by a New York State official or administrative body. It is called Article 78 because it can be found starting at Section 7801 of the New York Civil Practice Law and Rules.¹ This Chapter explains when and how to bring an Article 78 proceeding. There are very strict rules and time limits when bringing an Article 78 proceeding, so please read the requirements carefully.

Part B of this Chapter explains what you can complain about in an Article 78 petition. Part C describes when you can obtain relief under Article 78. Part D explains the procedure for filing an Article 78 petition. Part E describes how to bring an Article 78 proceeding, and the Appendix has a sample Article 78 petition and supporting papers.

Article 78 is New York State law, and does not apply in other states. Some other states have similar laws to review decisions of officials and administrative agencies. But, if you are in another state, you will have to research what your state's law is and how it differs from New York's Article 78.

1. What is an Article 78 Proceeding?

In an Article 78 proceeding, you ask a state court to review a decision or action of a New York State official or administrative agency, such as a prison official or the Board of Parole, which you believe was unlawful. You can use Article 78, for example, to attack the state's calculation of your good time, a decision to place you in solitary confinement, or a decision to deny you parole. In addition to claiming a violation of a law or regulation in an Article 78 petition, you must also explain in what way the action or inaction you are challenging caused you injury. For example, if you have been denied parole, your injury would be that you are suffering a longer incarceration. If you were not given a fair disciplinary hearing, your injury would be the punishment you received and the record of your alleged violation. If you were wrongfully denied medication, your injury would be pain or sickness.

On the other hand, you cannot challenge your conviction and sentence in an Article 78 proceeding because those are judicial decisions (made by a judge or court), as opposed to administrative decisions.² For information on challenging convictions and sentences, see *JLM*, Chapter 9 ("Appealing Your Conviction or Sentence"); *JLM*, Chapter 20 ("Using Article 440 of the New York Criminal Procedure to Attack Your Unfair Conviction

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1. N.Y. C.P.L.R. § 7801 (McKinney 2008 & Supp. 2014). The standard way of citing this statute, which you may use when you are writing a legal paper and do not want to write "New York Civil Practice Law and Rules," is: N.Y. C.P.L.R. 7801 (the number indicates the section or Rule to which you are referring). Article 78 can be found in 7801 to 7806 of the N.Y. C.P.L.R. You should also look at § 401–411 of the N.Y. C.P.L.R., which describe some of the rules for "special proceedings," because Article 78 is a type of special proceeding.

2. N.Y. C.P.L.R. § 7801(2) (McKinney 2008 & Supp. 2014). Article 78 may also be used to prevent a judge from hearing a case, or a public prosecutor from certain actions, if it is beyond his or her authority to do so. *See Schumer v. Holtzman*, 60 N.Y.2d 46, 51, 454 N.E.2d 522, 524, 467 N.Y.S.2d 182, 184 (1983) (holding that a remedy of prohibition under Article 78 is only available to "prevent or control a body or officer acting in a judicial or quasi-judicial capacity from proceeding or threatening to proceed without or in excess of its jurisdiction [citations omitted] and then only when the clear legal right to relief appears and, in the court's discretion, the remedy is warranted [citations omitted].") In other words, it is not available to correct common procedural or substantive errors).

or Illegal Sentence”); *JLM*, Chapter 13 (“Federal Habeas Corpus”); and *JLM*, Chapter 21 (“State Habeas Corpus”).

You start an Article 78 proceeding by filing a petition. Therefore, throughout the proceeding you are referred to as the “petitioner.” Your petition will name the agency or official whose decision you are challenging as the “respondent” (you can name more than one respondent), and will state why you are complaining about the decision and what you would like the court to do about it. After the agency or official files its “answer” responding to the claims you make in your petition, you can file another document called the “reply.”³

2. Who Hears Article 78 Proceedings?

Article 78 petitions are heard by New York Supreme Courts,⁴ which are the trial courts in New York.⁵ Some Article 78 cases that begin in a supreme court will eventually be transferred by that court to the appellate division (the next highest court) if they involve a question of “substantial evidence.”⁶ Generally, a question of substantial evidence means that the original decision you are asking the court to review was not supported by enough evidence. This will be explained in greater detail in Part B(3).

After the judge reads the papers that you and the administrative agency have submitted, he will make a decision.⁷ Although Article 78 permits the judge to hold a hearing, this is extremely rare. As a result, prisoners who file Article 78 actions almost never actually appear in court. It is very likely that the judge will make his decision based upon the papers that you and the respondent (government agency or official) file with the judge.

You should note that the law gives agencies a great deal of discretion (freedom to use their own judgment). This means a judge needs a very good reason to overturn an administrative decision, and that you (as the person challenging the administrative action) will lose when it is unclear if you or the respondent has a better argument.

3. What Can You Ask the Court to Do in an Article 78 Proceeding?

When you prepare your Article 78 petition, you must ask the court to consider the following types of issues:

- (1) Whether the state official or agency failed to perform a duty that is required by law;
- (2) Whether the state official or agency acted beyond its authority or violated the law; or
- (3) Whether a decision made by the officer or agency was (a) obviously incorrect or unreasonable, (b) based upon an error of law, or (c) based upon insufficient evidence.⁸

If you are successful in your Article 78 challenge, the determination will be annulled (declared invalid) entirely or partially.⁹ The court may also order the respondent (the agency or official you are challenging) to act or refrain from engaging in certain conduct or action. The court will sometimes send an administrative decision back to the agency or officer for further review.¹⁰ You should be aware that in Article 78 proceedings, money damages are generally not awarded. The law states that money damages will only be awarded in Article 78 proceedings if they are “incidental” (secondary) to the main claim.¹¹ You should also be aware that courts

3. N.Y. C.P.L.R. § 7804(c) (McKinney 2008 & Supp. 2014).

4. N.Y. C.P.L.R. § 7804(b) (McKinney 2008 & Supp. 2014).

5. For a list of the addresses of the supreme courts in each county, see Appendix II at the end of the *JLM*.

6. N.Y. C.P.L.R. § 7804(g) (McKinney 2008 & Supp. 2014).

7. N.Y. C.P.L.R. § 7806 (McKinney 2008 & Supp. 2014).

8. N.Y. C.P.L.R. § 7803 (McKinney 2008 & Supp. 2014).

9. N.Y. C.P.L.R. § 7806 (McKinney 2008 & Supp. 2014).

10. *See* Police Benevolent Ass’n of the New York State Troopers, Inc. v. Vacco, 253 A.D.2d 920, 921, 677 N.Y.S.2d 808, 809 (3d Dept. 1998) (holding that the court retains the right to remit (send back) a decision for further proceedings if “such action is necessary to cure deficiencies in the record”).

11. N.Y. C.P.L.R. § 7806 (McKinney 2008 & Supp. 2014) (stating that “[a]ny restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner”). *See* Gross v. Perales, 72 N.Y.2d 231, 236, 527 N.E.2d 1205, 1207, 532 N.Y.S.2d 68, 70–71 (1988) (holding a claim for damages was incidental where damages were required under a statute once petitioner won his or her Article 78 claim: “[w]hether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim, is dependent upon the facts and issues presented in the particular case”); David D. Siegel, *New York Practice* 1014–15 (5th ed. 2011); N.Y. C.P.L.R. 7806, *Practice Commentaries* (McKinney 2008 & Supp. 2014).

normally do not delay proceedings. Courts will only “stay” (delay) the proceedings if the party shows three things: (1) they are likely to win, (2) they will suffer permanent harm if the court does not delay the proceedings, and (3) the harm the party will suffer is greater than the benefits of continuing with the proceedings.¹²

There are some kinds of relief you can ask the court to give you even before it hears your Article 78 petition. You may ask the court to stop the official or agency from taking further action until your Article 78 petition has been heard and decided by the court.¹³ For example, if you are challenging a decision that would result in you being placed in maximum security or being transferred to another institution, the court might order the official or agency to leave you where you are until the court has made its decision.

B. What You Can Complain About Under Article 78

In an Article 78 proceeding, you can raise only certain specific complaints about the state agency or official's action or failure to act. Possible complaints include the following:

- (1) that the agency or official has failed to do something the law requires;¹⁴
- (2) that the agency or official has done something, is doing something, or is about to do something that is beyond its lawful authority;¹⁵
- (3) that the agency or official made a decision that was unreasonable and irrational, did not follow the law, or violated lawful procedure;¹⁶ or
- (4) that the agency or official made a decision at a hearing not based on substantial evidence.¹⁷

You can choose to bring one claim or more than one claim at a time. If you make more than one claim in the same Article 78 proceeding, you may want to distinguish procedural claims (claims about the established or official way of doing something) from other types of claims. If you can show that an agency has failed to follow its own procedures, you may be successful in your Article 78 proceeding. You might challenge a parole decision or sentence calculation, or the action of a Work Assignment Committee or Time Allowance Committee. It may also be helpful to read N.Y. Civil Practice Law and Rules § 7803 (to see what the law says you can use Article 78 to challenge), and the annotated version of New York Civil Practice Law and Rules § 7803 in McKinney's,¹⁸ which lists the decisions of Article 78 cases, including prisoners' cases.¹⁹

In the documents you file with the court, you do not need to identify which type of claim or claims (also called “action” or “actions”) you are filing. You simply need to state that it is an Article 78 action.²⁰ Of course, the more detailed your petition is, the easier it will be for the court to understand the reasons you seek legal relief. The following Sections address the different types of claims that are allowed in Article 78 proceedings.

1. Compel Required Action (*Mandamus to Compel*)

The first type of action you can bring occurs when an official has failed to do something that is required by law. This action is called a “*mandamus to compel*.” When you bring this type of action, you are asking the court to order an official to do something that is his duty to do.²¹ In this type of action, the duty to be performed must be required by the law and may not be “discretionary” (meaning that it is left to the judgment or decision of the official).²² This type of Article 78 proceeding is very important because it can force officials to follow the

12. You have to show that you will suffer immediate and serious harm if the stay is not granted. The court will only grant a stay if it decides that the harm you face is greater than the cost of granting the stay. *See* N.Y. C.P.L.R. 7805, Practice Commentaries (McKinney 2008 & Supp. 2014).

13. N.Y. C.P.L.R. § 7805 (McKinney 2008 & Supp. 2014).

14. N.Y. C.P.L.R. § 7803(1) (McKinney 2008 & Supp. 2014).

15. N.Y. C.P.L.R. § 7803(2) (McKinney 2008 & Supp. 2014).

16. N.Y. C.P.L.R. § 7803(3) (McKinney 2008 & Supp. 2014).

17. N.Y. C.P.L.R. § 7803(4) (McKinney 2008 & Supp. 2014).

18. *See JLM*, Chapter 2, “Introduction to Legal Research,” for an explanation of McKinney's.

19. N.Y. C.P.L.R. § 7803 (McKinney 2012 & Supp. 2014).

20. David D. Siegel, *New York Practice* 986 (5th ed. 2011).

21. *See Gore v. Corwin*, 185 Misc. 2d 825, 826, 714 N.Y.S.2d 427, 428 (Sup. Ct. Ulster County 2000) (“*Mandamus* is a proceeding to compel a public body or officer to act in accordance with the law”).

22. *See Citywide Factors, Inc. v. N.Y. City Sch. Constr. Auth.*, 228 A.D.2d 499, 500, 644 N.Y.S.2d 62, 63 (2d Dept. 1996) (“*Mandamus* relief is appropriate only where the right to relief is clear, and the duty sought to be compelled is the performance of an act which is required by law and involves no exercise of discretion”).

regulations that protect your rights as a prisoner or parolee. For example, you can bring an Article 78 proceeding to challenge improper restrictions on your mail,²³ to correct inaccurate or unfair disciplinary records,²⁴ or to make the State Board of Parole act on your application for parole when the Board has ignored it but is required to act on it.²⁵ You can also bring an Article 78 proceeding to make the Board of Parole give you the reasons why your parole was denied.²⁶ Note that in this last type of proceeding, the remedy provided by the court would be to order the Board of Parole to decide your parole application,²⁷ or to make the Board give you the reasons for denying your parole.²⁸ Since the authority to grant parole is given to the Board of Parole, a court could not order a certain result or decision.²⁹ Another example of a proceeding to compel action would be claiming that you are entitled to credit against the length of your sentence for time you spent in custody.³⁰ In such a case you would be asking the court to order the agency (if you are in a New York State prison, this would be the Department of Correctional Services) to recalculate your sentence.³¹

23. See *Hicks v. Russi*, 219 A.D.2d 851, 851, 632 N.Y.S.2d 341, 342–43 (4th Dept. 1995) (reversing lower court’s dismissal of parolee’s Article 78 petition and holding that parole authorities could not prevent parolee from advertising or selling his book to prison inmates by mail and replying to mail orders or acting as a paralegal on criminal cases since these activities should not be interpreted as placing the parolee in the “company” of known criminals or constitute fraternization with criminals). *But see Raqiyb v. Goord*, 28 A.D.3d 892, 893, 813 N.Y.S.2d 251, 253 (3d Dept. 2006) (refusing prisoner’s claim that regulation of his mail with his incarcerated nephew and opening of prisoner’s outbound mail with insufficient postage was improper).

24. See *Hilton v. Dalsheim*, 81 A.D.2d 887, 887–88, 439 N.Y.S.2d 157, 157–59 (2d Dept. 1981) (granting prisoner’s Article 78 motion to compel the removal from his disciplinary record an alleged disciplinary violation, which was decided in a proceeding where he was not provided assistance in investigating the claim made against him and the hearing officer did not interview witnesses, both required by regulations, and because he was not given a written statement from the hearing officer outlining the evidence she relied upon and the reason for the actions she took, which violated the prisoner’s due process rights). For an example of mixed petition for mandamus to review and to compel, see *McDermott v. Coughlin*, 135 Misc. 2d 659, 661–62, 516 N.Y.S.2d 834, 836 (Sup. Ct. Chemung County 1987) (granting Article 78 to void a disciplinary hearing which decided that a prisoner had violated disciplinary rules when those rules were not yet filed with the New York Secretary of State at the time of the incident, giving back petitioner’s privileges and good behavior allowances, and removing the disciplinary action from his record).

25. See *Hines v. State Bd. of Parole*, 267 A.D. 99, 101, 44 N.Y.S.2d 655, 656–57 (3d Dept. 1943) (noting that an application for a *mandamus* to compel was the proper remedy to force the State Board of Parole to take action on prisoner’s application for parole); see also *Vulpis v. Dept. of Corr.*, 154 Misc. 2d 625, 625–29, 585 N.Y.S.2d 954, 954–56 (Sup. Ct. Kings County 1992) (granting prisoner’s *mandamus* to compel Department of Corrections to process his application for parole and ensure his release where Department did not follow applicable New York Correction Law); and *Utica Cheese v. Barber*, 49 N.Y.2d 1028, 1030, 406 N.E.2d 1342, 1343, 429 N.Y.S.2d 405, 406 (1980) (granting an Article 78 claim to force an agency to hold a hearing, as required by law, to decide petitioner’s application for a license).

26. See *Van Luven v. Henderson*, 52 A.D.2d 1042, 1042, 384 N.Y.S.2d 898, 899 (4th Dept. 1976) (noting that an Article 78 proceeding is the proper remedy when the Board of Parole does not give prisoners notice of reasons for denial of parole); see also *People ex rel. Cender v. Henderson*, 51 A.D.2d 683, 683, 378 N.Y.S.2d 205, 206 (4th Dept. 1976) (holding that an Article 78 proceeding is the proper remedy to force the Board of Parole to provide a prisoner with the reasons why his parole was denied).

27. See *Vulpis v. Dept. of Corr.*, 154 Misc. 2d 625, 629, 585 N.Y.S.2d 954, 956 (Sup. Ct. Kings County 1992) (ordering Department of Correction to release prisoner who had been denied parole after approving his temporary release or to process his application with “all due speed” if additional approvals were needed for his release).

28. See *Van Luven v. Henderson*, 52 A.D.2d 1042, 1042, 384 N.Y.S.2d 898, 898–99 (4th Dept. 1976) (ordering Board to notify prisoner of reasons for denying him parole).

29. *Hines v. State Bd. of Parole*, 181 Misc. 280, 282, 46 N.Y.S.2d 569, 570–71 (Sup. Ct. Westchester County 1943) *aff’d*, 267 A.D. 881, 46 N.Y.S.2d 572 (2d Dept. 1944) (“[T]he authority to release on parole has been confided to the Board of Parole and not to the courts. Parole cannot be compelled by a mandatory order”).

30. See *People v. Pugh*, 51 A.D.2d 1047, 1048, 381 N.Y.S.2d 417, 419 (2d Dept. 1976) (noting that an Article 78 proceeding is the proper course by which a defendant can obtain credit against his sentence for time spent in custody prior to sentencing); see also *People v. Searor*, 163 A.D.2d 824, 824, 559 N.Y.S.2d 840, 840–41 (4th Dept. 1990) (noting that an Article 78 proceeding is the proper way to challenge the prison authorities’ calculation of jail time credit); *People v. Blake*, 39 A.D.2d 587, 587, 331 N.Y.S.2d 851, 852 (2d Dept. 1972) (noting that if the Department of Correctional Services miscalculated defendant’s jail term, his proper remedy would be an Article 78 proceeding); *People v. Person*, 256 A.D.2d 1232, 1233, 685 N.Y.S.2d 367, 368 (4th Dept. 1998) (noting that Article 78 proceeding is the proper way to review the prison authorities’ calculation of defendant’s jail time credit).

31. See, e.g., *Maccio v. Goord*, 194 Misc. 2d 805, 808, 756 N.Y.S.2d 412, 414–15 (Sup. Ct. Albany County 2003), *aff’d*, 4 A.D.3d 688, 772 N.Y.S.2d 745 (3d Dept. 2004) (granting in part prisoner’s Article 78 petition and directing the Department of Correctional Services to credit him with jail time served); *Grier v. Flood*, 84 Misc. 2d 4, 8, 375 N.Y.S.2d 506, 509 (Sup. Ct. Nassau County 1975) (granting prisoner’s Article 78 petition and directing the Department of Correctional

When you bring this type of proceeding, if possible, you should state in your petition the law, regulation, or case you believe states the official's duty. If you seek relief because the agency did not follow proper procedures, you should try to show that the mistakes led to or helped lead to the agency's decision(s). If you do not show this connection, the court might rule that the failure to follow appropriate procedures was only *harmless error* (meaning the agency decision would have been the same even if it had followed proper procedures).

2. Review of Discretionary Administrative Decision—"Arbitrary and Capricious" Standard (*Mandamus* to Review)

A second type of action under Article 78 is a claim that asks the court to review a discretionary administrative decision or action (as opposed to the failure of an official to do something required by law, explained above in Part B(1)). If you want the court to review a discretionary administrative action or decision, you will have to claim it was against the law because the action or decision was made without a sound reason. The law calls such decisions and actions "arbitrary and capricious."³² An arbitrary and capricious decision or action is one taken "without sound basis in reason and . . . without regard to the facts."³³

The arbitrary and capricious standard can be used to challenge decisions made by agency officials. It can be used, for example, to challenge a disciplinary decision that was made without following the procedures required by law.³⁴ If an agency harmed you by violating its own legally required procedures (the law or their own regulations) in making an administrative decision, you can argue that such an action is arbitrary and capricious.³⁵

Keep in mind that generally courts believe that administrative officials are in the best position to make decisions regarding prisoners. Thus, it is very difficult to prove that an agency or official acted arbitrarily or capriciously in making a decision that is left up to its, or his or her, judgment. The court will not substitute its own judgment for that of the official,³⁶ unless you can show that the decision was so unreasonable as to require that it be overturned.

Examples of decisions that could be challenged as arbitrary under this type of Article 78 proceeding would include most day-to-day prison decisions, such as decisions regarding furlough and temporary release,³⁷

Services to credit him with jail time served).

32. *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974) (discussing standards of judicial review of administrative agencies).

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

34. *See Proctor v. Goord*, 10 Misc. 3d 229, 232–33, 801 N.Y.S.2d 517, 519–20 (Sup. Ct. Albany County 2005) (holding that the Department of Corrections' action was "arbitrary and capricious" when it failed to remove from a prisoner's inmate record an "unusual incident report" for an alleged violation that the prisoner was later found not to have committed).

35. *See People ex rel. Furde v. N.Y. City Dept. of Corr.*, 9 Misc. 3d 268, 274, 796 N.Y.S.2d 891, 896 (Sup. Ct. Bronx County 2005) ("Where an agency promulgates rules and extends greater due process rights than may be required by the Federal Constitution, it is without question that state law mandates that the agency follow its own rules To do otherwise is to act arbitrarily and capriciously"); *see, e.g., Liner v. Miles*, 133 A.D.2d 962, 520 N.Y.S.2d 470 (3d Dept. 1987) (granting Article 78 petition and finding that Commissioner of Correctional Facilities determination that prisoner did not follow disciplinary rule was not supported by substantial evidence); *Nesbitt v. Goord*, 12 Misc. 3d 702, 705–06, 813 N.Y.S.2d 897, 900 (Sup. Ct. Albany County 2006) (granting Article 78 petition and requiring the Department of Correctional Services to follow its own rules in reviewing requests to award Temporary Work Release); *People ex rel. Furde v. N.Y. City Dept. of Corr.*, 9 Misc.3d 268, 273–74, 796 N.Y.S.2d 891, 895 (Sup. Ct. Bronx County 2005) (holding that the Department of Corrections acted arbitrarily and capriciously in confining a pretrial detainee to his cell for 23 hours a day, and ordering that detainee be released into general prison population); *Martinez v. Baker*, 180 Misc. 2d 334, 336, 688 N.Y.S.2d 877, 987 (Sup. Ct. Albany County 1999) (finding that the Department of Correctional Services acted arbitrarily and capriciously in denying Spanish-speaking prisoner participation in a family reunion program because he did not complete an alcohol and substance abuse program, even though prisoner did not have access to a bilingual program or a translator for the existing program).

36. *See Bd. of Visitors-Marcy Psychiatric Ctr. v. Coughlin*, 60 N.Y.2d 14, 20, 453 N.E.2d 1085, 1088, 466 N.Y.S.2d 668, 671 (1983) (noting that the standard of judicial review of a determination by Commissioner of Department of Correctional Services is not whether the court would come to the same determination itself but instead whether the determination was irrational, arbitrary, or capricious).

37. *See Lopez v. Coughlin*, 139 Misc. 2d 851, 853, 529 N.Y.S.2d 247, 249 (Sup. Ct. Albany County 1988) (holding that the Department of Correctional Services' decision to disapprove an application of prisoner with AIDS for participation in a temporary release program was not rationally related to the Department's interest in prisoner's health).

appearances at disciplinary proceedings,³⁸ access to evidence,³⁹ visitation rights, mail access, and transfers. But note that the opportunity to review transfers in particular is very limited because New York law gives the Commissioner of Corrections “almost unbridled authority to transfer inmates from one facility to another.”⁴⁰ “Unbridled authority” means having complete power to take an action without interference by others—for instance the courts. Challenges to transfers, however, have been upheld where: (1) a prisoner’s request for an appropriate transfer for medical reasons is unreasonably denied;⁴¹ (2) a prisoner requires rehabilitative treatment that has been completely withheld;⁴² and (3) a member of an inmate grievance committee, who represents other prisoners and abides by the rules of the institution, is transferred without a hearing or compelling emergency.⁴³

Challenges based on a claim that the administrative agency abused its discretion by giving too severe a punishment can also be made by filing an Article 78 petition because such punishments are usually the result of administrative hearings. These petitions, which claim an “abuse of discretion . . . as to the measure or mode of penalty or discipline imposed,” must meet a very high legal standard.⁴⁴ The court will only set aside an administrative agency’s punishment or disciplinary measures if they are “so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness.”⁴⁵ Thus, such actions are very rarely successful.

You should also remember that the “arbitrary and capricious” standard applies to the reasons that the agency or official gave at the time it made its decision. If the agency’s original reasons are arbitrary and capricious, the court may reject other new justifications later offered by the agency in the Article 78 proceeding.⁴⁶

38. *See* *Boodro v. Coughlin*, 142 A.D.2d 820, 822–23, 530 N.Y.S.2d 337, 339–40 (3d Dept. 1988) (holding that the Hearing Officer had acted arbitrarily and capriciously in excluding prisoner from his disciplinary hearing because the Hearing Officer’s reason for excluding prisoner due to misbehavior was not supported by the record). *But see* *Grant v. Senkowski*, 146 A.D.2d 948, 950, 537 N.Y.S.2d 323, 325 (3d Dept. 1989) (affirming the dismissal of an Article 78 petition because removing the prisoner from the disciplinary hearing was not arbitrary or capricious since the removal was due to prisoner’s misbehavior and occurred only after warnings).

39. *See* *Coleman v. Coombe*, 65 N.Y.2d 777, 780, 482 N.E.2d 562, 562, 492 N.Y.S.2d 944, 944 (1985) (holding that where prison regulations allowed prisoner to call witnesses on his behalf in disciplinary proceedings, and calling witness did not threaten safety or correction goals, prisoner had the right to call his brother as a witness to give testimony to try to reduce penalty to be imposed); *see also* *Wilson v. Coughlin*, 186 A.D.2d 1090, 1090–91, 590 N.Y.S.2d 798, 798 (4th Dept. 1992) (granting a prisoner’s request to cancel the effect of an official’s determination in a disciplinary hearing because the prisoner had not been allowed to offer evidence of mitigating circumstances, which is a factor considered in prison disciplinary hearings). “Mitigating circumstance” means a fact or event that does not excuse behavior but may lessen the degree of punishment.

40. *Johnson v. Ward*, 64 A.D.2d 186, 188, 409 N.Y.S.2d 670, 672 (3d Dept. 1978); *see also* N.Y. Correct. Law § 23 (McKinney 2003) (“The commissioner shall have the power to transfer inmates from one correctional facility to another.”). *But see* *Salahuddin v. Coughlin*, 202 A.D.2d 835, 836, 609 N.Y.S.2d 105, 106 (3d Dept. 1994) (noting that the broad authority to transfer does not permit transfers that are made to deny a prisoner a constitutional right or in response to the exercise of such a right).

41. *See* *Barnett v. Metz*, 55 A.D.2d 997, 998, 390 N.Y.S.2d 701, 701–02 (3d Dept. 1977) (holding that while decisions about transfers between institutions are generally left to the administration, where a prisoner could show that the prison arbitrarily abused this discretion by failing to consider medical evidence, the decision could be challenged through Article 78).

42. *See* *People ex rel. Ceschini v. Warden*, 30 A.D.2d 649, 649, 291 N.Y.S.2d 200, 201–02 (1st Dept. 1968) (holding that where a person sentenced to an institution for rehabilitation claims that he has not been given any rehabilitative treatment, the court should look into that claim).

43. *See* *Johnson v. Ward*, 64 A.D.2d 186, 189–90, 409 N.Y.S.2d 670, 673 (3d Dept. 1978) (holding that a prisoner-member of the Inmate Grievance Resolution Committee may not be transferred to another facility without a prior hearing unless the member’s presence or conduct creates an emergency and transfer is immediately necessary to protect the facility or its personnel, in which event, the hearing on his transfer shall be held as soon as practicable at the receiving facility).

44. *See, e.g.,* *Regan v. Coughlin*, 86 A.D.2d 913, 913, 448 N.Y.S.2d 258, 259 (3d Dept. 1982) (concluding that punishment of 60 days of keeplock, loss of commissary privileges and 30 days of good time, and 80 days of restricted visits was not disproportionate for prisoner who threw a handkerchief to a visitor in the visiting room, because the penalty was not so disproportionate as to be “shocking to [the court’s] sense of fairness”).

45. *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 233, 313 N.E.2d 321, 326, 356 N.Y.S.2d 833, 841 (1974) (quoting *Stolz v. Bd. of Regents*, 4 A.D.2d 361, 364, 165 N.Y.S.2d 179, 182 (3d Dept. 1957)).

46. *See* *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Serv.*, 77 N.Y.2d 753, 759, 573 N.E.2d 562, 565, 570 N.Y.S.2d 474, 479 (1991) (holding that the reasons the agency later offered for dismissal of employee could not be used

3. Review of Hearing Board Decision—“Substantial Evidence Test” (*Certiorari* to Review)

A third type of Article 78 proceeding is a claim stating that the court should review a decision made by a hearing board because the determination made at the hearing was not supported by substantial evidence. In these cases, you challenge decisions that were made in hearings or in other formal, court-like settings. If you believe the evidence produced at the hearing was inadequate to support the decision, you can use an Article 78 proceeding to ask a court to review the decision. A court can review the record (an official written report) from the hearing to see whether it supports the decision. You can challenge any sort of disciplinary hearing or parole board decision that is based on submission of evidence and a record if the evidence produced was inadequate to support the decision.⁴⁷ By bringing this type of claim, you are asking the court to review the record that the agency or official used for the decision.

The standard used by the court in reviewing Article 78 challenges to administrative decisions made after administrative hearings is the “substantial evidence test.” This means that the court will look to see if there was enough evidence in the record for the administrative official to decide as he did. It does not mean that the court will ask whether the official made the right decision. You cannot argue that the decision was wrong. Instead, you need to argue that the official did not have enough evidence to make that decision.

Once again, the court will not substitute its judgment for that of the agency. But if there were mistakes or errors in the evidence against you, the court may overturn the decision. “Substantial” means there must be enough evidence so that a reasonable person could make the same decision the agency made. It does not mean most of the evidence supports the decision made by the administrative agency.

For example, some prisoners have successfully challenged disciplinary decisions where a correctional officer’s misbehavior reports relied on at the prisoner’s hearing were based on “hearsay.”⁴⁸ Hearsay is a type of evidence that comes from someone who did not actually see the event or action that he is describing. For example, if the only evidence the hearing officer uses to support a disciplinary decision against you comes from reports by people who did not actually see the behavior or activity they describe, the court may say that this hearsay evidence is not enough to support the finding of misconduct.

Many prisoners also try to challenge disciplinary decisions that are based on reports by informants. Courts recognize the importance of protecting the confidentiality of informants, and will uphold determinations even where the prisoner has not been allowed to see or to cross-examine the informants. In a decision by the highest court of New York, a prisoner tried to challenge a disciplinary hearing decision by arguing that the hearing officer should be required to interview the informants personally in order to determine their credibility.⁴⁹ (Determining credibility means deciding how much to trust what an informant or witness says. If an informant is “credible,” that means they are likely to tell the truth and their statements can be trusted.)

The court held that although a hearing officer must determine the informants’ credibility, a face-to-face interview is not necessary to make this determination.⁵⁰ Recently, prisoners have successfully challenged hearing decisions by arguing that corrections officers’ reports of informants’ statements were not detailed and specific enough for the hearing officer to determine the credibility of the informants.⁵¹

because its original dismissal was arbitrary and capricious).

47. See *JLM*, Chapter 18 for an explanation of disciplinary proceedings, and *JLM*, Chapter 32 for an explanation of parole.

48. See *Rodriguez v. Coughlin*, 176 A.D.2d 1234, 1234, 577 N.Y.S.2d 190, 191 (4th Dept. 1991) (finding that misbehavior reports did not provide substantial evidence to support findings that prisoner was guilty because they did not show that correctional officers who signed them had personal knowledge of facts in the reports); see also *Deresky v. Scully*, 156 A.D.2d 362, 363, 548 N.Y.S.2d 318, 319 (2d Dept. 1989) (finding that the prison’s conclusion that the prisoner started the fire in the cell of another prisoner was not sufficiently supported by evidence where the only evidence of guilt was hearsay testimony of officer who was not present, and the prisoner offered credible testimony that contradicted such hearsay).

49. *Abdur-Raheem v. Mann*, 85 N.Y.2d 113, 118, 647 N.E.2d 1266, 1269, 623 N.Y.S.2d 758, 761 (1995).

50. *Abdur-Raheem v. Mann*, 85 N.Y.2d 113, 121, 647 N.E.2d 1266, 1271, 623 N.Y.S.2d 758, 763 (1995).

51. *Milland v. Goord*, 264 A.D.2d 846, 846–47, 698 N.Y.S.2d 245, 246 (2d Dept. 1999) (“[T]estimony of the correction officer who interviewed the confidential informants was not sufficiently detailed and specific to enable the Hearing Officer to independently assess the credibility and reliability of the informants”). See also *Agosto v. Goord*, 264 A.D.2d 840, 698 N.Y.S.2d 244 (2d Dept. 1999) (holding that a determination must be annulled because “testimony of the correction officer who interviewed the confidential informants was not sufficiently detailed and specific to enable the Hearing Officer to independently assess the credibility and the reliability of the informants”). But see *Medina v. Goord*, 253 A.D.2d 973, 973, 678 N.Y.S.2d 919, 919 (3d Dept. 1998) (upholding the hearing officer’s determination as supported “by sufficiently detailed

Prisoners have also used Article 78 to challenge hearing decisions related to drug violations.⁵² In some instances, prisoners have successfully challenged the reliability or accuracy of drug tests through Article 78 proceedings.⁵³

Also, in at least one case, a prisoner successfully challenged a determination that he had been in possession of a weapon by pointing out that the evidence on the record was insufficient to support the decision.⁵⁴ In that case, the court ruled that there was not enough evidence to show that a weapon found in a cell belonged to a prisoner who had just been transferred to that cell.⁵⁵

Courts treat substantial evidence claims differently than other Article 78 claims. If you bring a substantial evidence claim, the state Supreme Court will first check to see whether there are other reasons to end your proceeding.⁵⁶ For example, the court will check to see whether your claim is within the statute of limitations, which is the period of time between when the event occurred and when you must bring your claim. If you did not file your claim within that time limit, your claim will be dismissed.

If the court does not terminate your claim, it will transfer your case to the appellate court, which is called the Supreme Court, Appellate Division. This is unlike other Article 78 proceedings, which are heard in Supreme Court. This means that it will probably take longer for your case to be decided.

information from which [the hearing officer] could independently assess [the informants'] reliability"); *Valentin v. Goord*, 259 A.D.2d 911, 912, 687 N.Y.S.2d 208 (3d Dept. 1999) (same holding as *Medina*).

52. *See Venegas v. Irvin*, 249 A.D.2d 982, 982, 672 N.Y.S.2d 200, 201 (4th Dept. 1998) (holding there was substantial evidence for determining that prisoner possessed drugs, where the misbehavior report included correction officer's statement that he saw prisoner throw a marijuana cigarette on the floor and that the cigarette later tested positive for marijuana, despite questions around when the cigarette was tested); *see also Rollison v. Scully*, 181 A.D.2d 734, 735, 580 N.Y.S.2d 480, 480 (2d Dept. 1992) (holding that the Department of Corrections failed to produce substantial evidence that prisoner's wife had brought cocaine to the correctional facility because the Department had not introduced the required documents into evidence as required by regulations).

53. *See Wisniewski v. Smith*, 133 A.D.2d 541, 541, 519 N.Y.S.2d 908, 909 (4th Dept. 1987) (holding that correctional facility superintendent's determination that individual violated institutional rule by using marijuana was not supported by substantial evidence because the finding was based on tests that were not established as reliable on the record); *see also Kalish v. Keane*, 256 A.D.2d 343, 344, 681 N.Y.S.2d 336, 337 (2d Dept. 1998) (finding that there was no substantial evidence for drug violation by prisoner where prisoner produced evidence that he was on prescription medication that could produce false positive drug tests. Hearing officer consulted with a representative of manufacturer of a different urine test than the one used by the prison, and representative did not know whether the medication at issue could cause a false positive test result); *Kincaide v. Coughlin*, 86 A.D.2d 893, 893, 447 N.Y.S.2d 521, 522 (2d Dept. 1982) (finding that there was not substantial evidence to support superintendent's determination regarding prisoner's marijuana possession because correction officer's testimony that a test showed substance to be marijuana did not include description of nature or procedures used in test.); *Moss v. Scully*, 152 A.D.2d 577, 577-78 (2d Dept. 1989) (giving examples of how a test may be flawed, specifically, where there was no evidence introduced that (1) the breathalyzer and the ampoules used with it had been tested within a reasonable time in relation to the petitioner's test, and found to be properly calibrated and in working order when the test was administered to the petitioner; (2) that the chemicals used in conducting the test were of the proper kind and mixed in the proper portions; and (3) that the breathalyzer was operated properly during the test); *but see Holmes v. Coughlin*, 182 A.D.2d 1121, 1121-22, 583 N.Y.S.2d 703, 704 (4th Dept. 1992) (upholding superintendent's determination that the prisoner used illegal drugs as sufficiently supported by two positive Syva EMIT Drug Detection System Tests, and commenting on the tests' scientific reliability and validity).

54. *Varela v. Coughlin*, 203 A.D.2d 630, 631-32, 610 N.Y.S.2d 103, 104 (3d Dept. 1994) (holding that where a prisoner only had control of an area (his room) for a very brief time, and spent most of that time actually away from the space, the finding of a weapon hidden in his room would not give rise to a reasonable inference that the prisoner possessed the weapon). *But see Patterson v. Senkowski*, 204 A.D.2d 831, 832-33, 612 N.Y.S.2d 84, 85 (3d Dept. 1994) (finding that written misbehavior report by officer who searched prisoner's clothes was sufficient evidence to support finding by superintendent that the prisoner possessed a weapon, and that the prisoner's claim that the jacket was not his merely created issue of credibility for the hearing officer); *Swindell v. Coughlin*, 215 A.D.2d 855, 855, 626 N.Y.S.2d 329, 329 (3d Dept. 1995) (concluding that evidence of six ball bearings hidden in a dental floss container in prisoner's cell substantially supported determination that prisoner was guilty of possessing contraband classified as a weapon; prisoner's claim that he found the ball bearings during his work detail and was waiting to turn them over to his supervisor was not supported by the supervisor, and was not enough to raise a doubt as to the sufficiency of the evidence supporting the decision).

55. *Varela v. Coughlin*, 203 A.D.2d 630, 631, 610 N.Y.S.2d 103, 103-04 (3d Dept. 1994); *but see Torres v. Coughlin*, 213 A.D.2d 861, 861, 624 N.Y.S.2d 67, 68 (3d Dept. 1995) (distinguishing *Varela* and holding that there was sufficient evidence that a prisoner possessed a weapon when the prisoner had been in the facility for 20 days and had been in the living area where the weapon was found for eight days).

56. N.Y. C.P.L.R. 7804(g) (McKinney 2008 & Supp. 2012).

4. Challenge Legal Authority for State Action (Prohibition)

The fourth type of Article 78 proceeding arises when you challenge the state as having gone beyond its lawful authority. In this type of proceeding, you ask the court to stop an official from acting beyond his authority or jurisdiction. This type of case is difficult to prove and rarely successful in court. Nevertheless, if you feel that an official is going to act in a way that will injure you, and the official is not allowed by law to act in such a way, this type of Article 78 proceeding can be a way to prevent the action.⁵⁷

C. When You Can Obtain Relief Under Article 78

There are three important limitations on the use of Article 78 that you keep in mind, or your case may be dismissed. They are described below.

1. You May Only Challenge Administrative Decisions

Article 78 may only be used to challenge administrative determinations of a New York state officer or agency. It generally cannot be used to challenge the decisions of a judge or a court, such as criminal convictions or criminal sentences. However, Article 78 can be used to challenge other types of actions by judges. Article 78 may be used to challenge a punishment a court gives for contempt of court.⁵⁸ It can also be used where the judge made a decision that exceeded his authority (this is called “prohibition”—see Part B(4)), or to challenge a judge’s failure to act (called “*mandamus*”—see Part B(1)).

2. You Must Exhaust All Administrative Remedies

The administrative determination you challenge must be final.⁵⁹ This means that a decision-maker must have caused you an actual injury of some sort. There have been many cases dealing with the question of what kinds of decisions are considered final. If possible, you should read the Practice Commentary and Notes of Decisions of Section 217 of N.Y. C.P.L.R. to see how courts have decided the issue.

In addition to the decision being final, there must be no way for you to appeal the decision any further within the administrative agency.⁶⁰ If it is possible for you to appeal the decision to a higher state officer, you must do so before seeking Article 78 relief. In other words, you must go through every normally available step in the administrative process before seeking Article 78 relief. This is called “exhaustion of remedies.” If you have failed to follow the normal administrative procedure to the fullest extent possible, the court may refuse to hear your Article 78 petition.⁶¹ This means that it is important to be aware of the ways in which you can challenge or appeal the decisions of prison officials within the prison or corrections system.⁶²

There are specific time limits for bringing appeals at each level of the administrative appeals process. You should be aware that many administrative appeals require you to act quickly. For example, you must bring a

57. *See* *Schumer v. Holtzman*, 60 N.Y.2d 46, 51, 454 N.E.2d 522, 524, 467 N.Y.S.2d 182, 184 (1983) (holding that a request for prohibition under Article 78 is only appropriate if you are asking the court to prevent an official from acting beyond his or her authority).

58. *See* *Williams v. Cornelius*, 76 N.Y.2d 542, 546, 563 N.E.2d 15, 17, 561 N.Y.S.2d 701, 703 (1990) (holding that Article 78 petitions may be used to challenge a summary contempt order, where a summary contempt order is one in which there is “no right to an evidentiary hearing, the right to counsel, or the opportunity for adjournment to prepare a defense.” This challenge to a summary contempt order may only be issued when the actions giving rise to the contempt order take place in the “immediate view and presence” of the judge and the action disrupts the court proceeding. *See also* *Loeber v. Teresi*, 256 A.D.2d 747, 748–49, 681 N.Y.S.2d 416, 418 (3d Dept. 1998) (holding that an Article 78 petition can be used to challenge a judge’s summary contempt order).

59. N.Y. C.P.L.R. 7801(1) (McKinney 1994).

60. *See* *Essex County v. Zagata*, 91 N.Y.2d 447, 453, 695 N.E.2d 232, 235, 672 N.Y.S.2d 281, 284 (1998) (holding under New York Civil Practice Law and Rules 7801 that an agency determination is final when: (1) the agency’s position is definitive; (2) the position inflicts actual injury; and (3) no further agency action can remove or lessen the injury).

61. *See* *Alamin v. N.Y. State Dept. of Corr. Services*, 241 A.D.2d 586, 587, 660 N.Y.S.2d 746, 747 (3d Dept. 1997) (requiring petitioner to exhaust administrative remedies before initiating an Article 78 petition); *McCloud v. Coughlin*, 102 A.D.2d 854, 854, 476 N.Y.S.2d 630, 631 (2d Dept. 1984) (dismissing Article 78 petition because petitioner had not appealed superintendent’s disciplinary ruling to the Commissioner of the Department of Correctional Services).

62. *See* *Farinaro v. Leonardo*, 143 A.D.2d 492, 492–93, 532 N.Y.S.2d 601, 602 (3d Dept. 1988) (holding that a prisoner who was informed of the proper administrative procedure to challenge decision of prison officials to withhold martial arts catalog from him and did not follow such procedure had failed to exhaust administrative remedies, and could not obtain judicial relief).

grievance within 21 days of the event that gives rise to the grievance.⁶³ For more information on Inmate Grievance Procedures, see *JLM*, Chapter 15. If you are appealing the outcome of a disciplinary hearing, you must submit an appeal in writing to the superintendent within 72 hours of the decision.⁶⁴ The superintendent must then issue a decision within 15 days of receiving the appeal. If you are appealing a Superintendent's Hearing decision, you must appeal to the Commissioner within thirty days of the decision.⁶⁵ The Commissioner must issue a decision on your appeal within 60 days.

If you fail to meet a deadline for an appeal, you may be prevented from bringing an Article 78 petition on the same claim. If you do not receive a response by the time limit, you can proceed to the next level of appeal.⁶⁶

There are a few exceptions to the general rule requiring exhaustion of administrative remedies, but keep in mind that these exceptions are rarely applied by the court and normally should not be relied upon. The first exception is in cases where an appeal would have no chance of success. In *Martin v. Ambach*,⁶⁷ the court observed that the finality requirement of N.Y. C.P.L.R. 7801(1) may be relaxed if the pursuit of an administrative remedy "reasonably appears to be futile."⁶⁸ Note that courts rarely find that an appeal "reasonably appears to be futile."⁶⁹

A second exception to the exhaustion requirement may arise when a non-final order will result in "irreparable harm" without court intervention.⁷⁰ A "Non-final order" is an order from the court that does not end or dispose of a case or legal issue, and is generally not appealable. "Irreparable harm" is harm that cannot be changed or reversed after it has been done. Thus, if harm will take place before you can appeal a decision, you can file a motion under Article 78 to ask the court to intervene to prevent the harm. Types of interventions could include a transfer out of your facility or a decision of a disciplinary hearing board, which might take effect before you have a chance to appeal. Additionally, in a case that was not brought by a prisoner, a court has ruled that exhaustion is not required if someone is seeking medical benefits to which he is entitled under state and federal law because it "creates an unnecessary hardship" on "poor, needy individuals."⁷¹

The third exception is in cases challenging an agency's action as beyond its powers. In *Dineen v. Borghard*,⁷² the court held that the exhaustion rule "need not be followed when an agency's action is alleged to be unconstitutional or wholly beyond its powers."⁷³ This means that if your Article 78 petition claims that a prison official acted unconstitutionally in depriving you of some protected right, it is possible that a court may find that you do not need to have first exhausted all of your administrative appeals. This exception is a limited one and, as one court has pointed out, "[t]he mere assertion that a constitutional right is involved will not excuse the failure to pursue established administrative remedies that can provide the requested relief."⁷⁴

63. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5.

64. N.Y. Comp. Codes R. & Regs. tit. 7, § 253.8 (2015).

65. N.Y. Comp. Codes R. & Regs. tit. 7, § 254.8.

66. See, e.g., N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.4(c) (if you appeal a parole decision and the appeal unit does not issue its findings within four months of receiving your appeal, you are considered to have exhausted your administrative remedies and may bring your appeal to the courts).

67. *Martin v. Ambach*, 85 A.D.2d 869, 446 N.Y.S.2d 468 (3d Dept. 1981), *aff'd*, 57 N.Y.2d 1001, 443, N.E.2d 953, 457 N.Y.S.2d 478 (1982).

68. *Martin v. Ambach*, 85 A.D.2d 869, 870, 446 N.Y.S.2d 468, 470 (3d Dept. 1981) (noting that the lower court had relied upon such reasoning).

69. See *Martin v. Ambach*, 85 A.D.2d 869, 871, 446 N.Y.S.2d 468, 470 (3d Dept. 1981) (stating that this should be the exception rather than the rule, occurring only when necessary to avoid irreparable harm). See also Practice Commentary to N.Y. C.P.L.R. 7801(7) (McKinney 1994) (stating that the three exceptions lie in the court's discretion and "are rarely invoked in the context of Article 78 review").

70. *Martin v. Ambach*, 85 A.D.2d 869, 871, 446 N.Y.S.2d 468, 470 (3d Dept. 1981).

71. See *Lutsky v. Shuart*, 74 Misc.2d 436, 438, 342 N.Y.S.2d 709, 712, n2 (Sup. Ct. Nassau County 1973), *aff'd*, 43 A.D.2d 1016, 351 N.Y.S.2d 946 (2d Dept. 1974) (holding that welfare recipient seeking medical benefits does not have to exhaust administrative remedies before bringing an Article 78 petition); see also *Valdes v. Kirby*, 92 Misc.2d 367, 371, 399 N.Y.S.2d 972, 974-75 (Sup. Ct. Suffolk County 1977) (holding exhaustion not required for petitioner seeking housing shelter allowance and facing possible eviction).

72. *Dineen v. Borghard*, 100 A.D.2d 547, 473 N.Y.S.2d 247 (2d Dept. 1984) (plaintiff was a public employee claiming that his work was unlawfully reassigned to others in order to pressure him to quit his job and because the agency's actions were beyond its powers, the administrative exhaustion rule did not apply).

73. *Dineen v. Borghard*, 100 A.D.2d 547, 548, 473 N.Y.S.2d 247, 249 (2d Dept. 1984) (holding plaintiff was not required to pursue an administrative remedy since he was alleging violations of his statutory and constitutional rights).

74. *Levine v. Bd. of Educ. of N.Y.*, 186 A.D.2d 743, 744, 589 N.Y.S.2d 181, 183 (2d Dept. 1992).

For example, in *Levine v. Board of Education*, a court rejected a teacher's claim that the exhaustion requirement did not apply due to constitutional violations. The court held that mere assertion of a constitutional violation will not excuse one from pursuing relief through the established administrative agency. The court also stated that the asserted constitutional violation exception did not apply when the claims were based on factual issues that the court could not review without the necessary factual record established by the administrative agency.⁷⁵

Therefore, it is possible that a court will allow your Article 78 motion to proceed without exhaustion of all the administrative remedies when you can demonstrate: (1) futility of the administrative remedy, (2) irreparable harm in absence of prompt judicial intervention, or (3) unconstitutional action. Remember that these exceptions rarely work, and it is safest to pursue all possible appeals within the agency or prison system before filing an Article 78 proceeding in court.

3. Your Article 78 Petition Must Be Filed Within Four Months After the Administrative Decision Becomes Final

Your Article 78 petition must be filed with the court within four months of the date that the administrative determination that you want to challenge becomes final.⁷⁶ This four-month period is called the "statute of limitations." As soon as you have exhausted your administrative appeals, you should get to work on writing and filing your petition. Remember, you must file the petition before the four-month time limit is up. If you wait longer than four months, the court will dismiss your petition. Part D(8) explains how you can file and serve your petition.

To find out the deadline for filing your papers, you must first determine when the decision you are challenging became final. The statute of limitations will usually run from the date when you receive notice of the determination that you are challenging. Keep in mind that you must exhaust your administrative remedies (as discussed above in Part C(2)). The statute of limitations will not begin to run until you receive final notice from the highest possible administrative authority. Sometimes the authority may not notify you; if the designated time has passed, you can assume your appeal has been denied.⁷⁷

If you apply for a rehearing (rather than another appeal) by the highest agency or prison board, the courts will not extend the statute of limitations period to cover this rehearing application period unless the law entitles you to a rehearing.⁷⁸ So, unless a rehearing is required by law, you should treat the notice of the final appeal decision as the time when the four-month statute of limitations period begins. The law on statutes of limitations is complicated. If you are confused about when you need to file your papers, it is a good idea to plan on filing them within four months of the date you receive the order or decision about which you are complaining.⁷⁹

Following "service" (delivery of the papers to the Attorney General and the respondents), be sure to send "proof of service" to the court clerk. Proof of service should include an affidavit of service, which states that the papers were served on the Attorney General, the Attorney General's Office, and the respondents.

75. *Levine v. Bd. of Educ. of N.Y.*, 186 A.D.2d 743, 744, 589 N.Y.S.2d 181, 183 (2d Dept. 1992); *see also* *Timber Ridge Homes at Brookhaven v. State of N.Y.*, 223 A.D.2d 635, 636, 637 N.Y.S.2d 179, 180 (2d Dept. 1996) (holding that constitutional challenge that depends on the facts cannot be brought until the factual record is developed by the agency).

76. N.Y. C.P.L.R. 217(1) (McKinney 1990 & Supp. 2013).

77. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 9, § 8006.4(c) (if an appeal of a parole decision does not result in the appeal unit issuing its findings within four months of receiving the appeal, administrative remedies are exhausted and an appeal may be brought to the courts).

78. *See De Milio v. Borghard*, 55 N.Y.2d 216, 220, 433 N.E.2d 506, 507-08, 448 N.Y.S.2d 441, 442-43 (1982) (holding that the four-month statute of limitations in an Article 78 action brought by a government employee to challenge his discharge (firing) from work begins to run on the termination date of his employment and not on the later date when his request for reconsideration of discharge was denied); *see also* *Loughlin v. Ross*, 208 A.D.2d 631, 631, 618 N.Y.S.2d 231, 232 (2d Dept. 1994) (finding that in an Article 78 proceeding to review Commissioner's determination following disciplinary hearing, the statute of limitations began to run when the determination sustaining the disciplinary charges against the prisoner was affirmed on administrative appeal; the attempt by the petitioner to secure a reconsideration of the determination did not extend the statute of limitations).

79. N.Y. C.P.L.R. 7801: 7 Practice Commentary (McKinney 1994).

D. Procedures for Filing an Article 78 Petition

In the past few years, New York State has changed its civil procedure law (the law that tells you when, where, and how to file claims). Even though the new rules are similar to the Federal Rules of Civil Procedure, there are still significant differences. Even if you are familiar with the Federal Rules, you should still review New York's rules carefully.⁸⁰

The Appendix of this Chapter contains examples of the legal papers that you must file with the court in order to use Article 78. This Chapter provides the essential information that you will need to use these legal papers. **Do not tear the papers out of the book.** Copy the printed language on your own paper, fill in the blanks, and replace any italicized words with the facts that apply to your case. The court might reject your papers if you tear them out of this book.

Under the current law, you need to send *an original and one copy* of each of the following (explained below) to the county supreme court clerk, the respondents, and the Attorney General of the state:

- (1) A Notice of Petition or an Order to Show Cause;
- (2) A Verified Petition;
- (3) All exhibits and supporting affidavits attached to the petition;
- (4) Either the full filing fee or a reduced fee with an affidavit that supports your claim that you are too poor to pay the full filing fee.⁸¹ The full filing fee is \$190.⁸² **Caution:** If you fail to enclose either the fee, or the poor person's motion and affidavit, you will **not** get an index number. Without the index number, you cannot proceed with your claim;
- (5) A "Request for Judicial Intervention" ("RJI");⁸³ and
- (6) A "Request for an Index Number."

If possible, you should try to keep a copy of all papers you file during the Article 78 proceeding.

1. Starting the Proceeding

You begin an Article 78 proceeding by filing either a Notice of Petition or an Order to Show Cause (described below). Whichever you choose, you will also need to file supporting affidavit(s), a Verified Petition, the filing fee, the Request for Judicial Intervention, and the Request for an Index Number.⁸⁴ The following sections will explain how to do each of these things.

"Filing" in an Article 78 proceeding means delivery of the Verified Petition to the court clerk with the required fee.⁸⁵

You should file your Article 78 petition in the supreme court for the county in which the administrative decision you are challenging was made, the county where the administrative appeal was decided, or the county in which the respondent has his main office (usually Albany County).⁸⁶ This rule applies even if you have been transferred or released. See Appendix II at the end of the *JLM* for a list of the addresses of the supreme courts for the various counties.

By filing, you begin the proceeding and automatically "interpose" the claim for statute of limitations purposes. This means that if you filed within the statute of limitations, the respondent cannot later get the action dismissed on the grounds that it took too long for you to file successfully. You must file within four months of the time the decision that you are challenging becomes final.

However, the real benefits of this initial filing are not great. Your case can still be dismissed unless service is completed and proof of service is filed within four months and fifteen days after you receive the challenged decision. Do not be lulled into a false sense of security because you have filed within the statute of limitations

80. If you are going to look through the procedure code yourself, remember the rules are applicable to special proceedings such as Article 78 proceedings through the definitional section of N.Y. C.P.L.R. 105(b), unless another section provides otherwise.

81. N.Y. C.P.L.R. 1101 (McKinney); N.Y. C.P.L.R. 8018 (McKinney 2010).

82. N.Y. C.P.L.R. 8018 (McKinney 2010).

83. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.6. See Appendix A of this Chapter for a sample of a Request for Judicial Intervention.

84. N.Y. C.P.L.R. 7804 (McKinney 2001 & Supp. 2012); N.Y. C.P.L.R. 304 (McKinney 2008 and Supp. 2014); N.Y. C.P.L.R. 8018 (McKinney 1981 and Supp. 2012).

85. N.Y. C.P.L.R. 304 (McKinney 2008 and Supp. 2014).

86. N.Y. C.P.L.R. 506(b) (McKinney 1992).

period. There are still strict time limits that require you to complete the entire process very quickly. However, filing your petition will get you an index number.

2. Order to Show Cause or Notice of Petition

A notice of petition is directed to the Respondent, and must clearly identify who he is. It also advises where and when the petition is to be submitted to a judge and identifies all papers upon which the Article 78 challenge is based.

An order to show Cause also gives notice to all parties, but in a different form. It is different from a Notice of Petition because it is presented to a judge and signed by him before it is served to other parties to the case. Courts are not required to grant an Order to Show Cause and may request you file a Notice of Petition.

Since you are in prison, unless you can get someone else (like a friend, relative, or a private service) to assist you with service, you should commence the proceedings with an Order to Show Cause. An Order to Show Cause is an order signed by the judge directing that a petition be heard immediately or sooner than the twenty days advance notice to the other party/respondent that is normally required before a hearing can occur. It is used instead of a Notice of Petition when you need an immediate hearing. Governmental agencies shall be served by personal delivery of the initiating papers to the County Attorney (County) or Corporation Counsel (City) or to any person designated to receive service in a writing, and filed in the County Clerk's Office. Frequently, an Order to Show Cause requires an expedited hearing and also stays (pauses) the threatened official action until the claim is heard.

In the Order to Show Cause, you should ask the court to allow you to serve the respondents and the Attorney General by mail. Be sure to specifically include a request to the judge to allow service by mail. In the affidavit attached to your Order to Show Cause, you should explain why you need an Order to Show Cause. The reason can be because you are in prison and cannot carry out "personal service," meaning that you cannot physically deliver your petition directly to the respondent. Another reason you could list for needing an Order to Show Cause is that the situation that your Article 78 petition is trying to prevent is likely to happen in the next twenty days. For example, if you are scheduled to be removed from a work release program in less than twenty days, you may want to use an Order to Show Cause to try to prevent this from happening. See the example of an "Order to Show Cause" in Appendix A of this Chapter.

Alternatively, you can file a Notice of Petition. The Notice of Petition includes the name of the respondents, the nature of your claim, and the date and place of the hearing where you want your petition heard. A Notice of Petition must be personally served on the respondents and the Attorney General's Office or the case may be dismissed. Unlike an Order to Show Cause, if you file a Notice of Petition, you must serve it at least twenty days before the date you name as the date of the hearing.⁸⁷ Note that if you are serving by mail, you must file an Order to Show Cause, not a Notice of Petition. See the example of a "Notice of Petition" in Appendix A to this Chapter.

You should attach a copy of your petition to the Order to Show Cause or Notice of Petition (as appropriate). The petition should contain a written statement explaining the facts and your reasons for requesting the relief you seek. For more information on writing your petition, see below.

(a) The Return Date

If you file an Order to Show Cause, the court will set the "return date." This is the date when the case will be heard by the court. The Court will sign the Order and mail it to you, and it will have the return date.

An Order to Show Cause can speed up the hearing date so that it may occur in less than the usual twenty days. You can pick a date for the hearing in the order that you send to the court. You should pick a date that will be a week or two from the date on which you think the court will receive your papers. If the court cannot schedule a hearing on that day, the court clerk will cross out the date that you selected and write another one on the order. The clerk will let you know if this has occurred.

In your Order to Show Cause, you must indicate the date by which you will mail or deliver (serve) copies of the papers to the respondent and to the appropriate Attorney General's office. You should give the respondent two to three weeks between the date on which he receives the papers and the date that you set for

87. N.Y. C.P.L.R. 7804(c) (McKinney 2008 & Supp. 2012). You should send your papers to the Attorney General by sending it to the address of the assistant attorney general in the county in which the court sits. Your prison library should have the address; otherwise, you should write to the Court Clerk.

the court appearance. You should take into account the time that it will take for the papers to go through the mail after you send them out.

If you file a Notice of Petition, you must specify the return date (the date when the case will be heard by the court). The return date must normally be at least twenty days after the date on which the respondent has been served.⁸⁸ Therefore, you should choose a date that is more than twenty days from the date by which you will have served the respondents. If the court wants to hear your Article 78 action on another day, it can change the date. The court should notify you if it changes the return date. Your Notice of Petition can be dismissed if you do not provide a return date.⁸⁹ Remember, an Order to Show Cause can speed up the hearing date so that your case can be heard in less than 20 days.

(b) The Respondents

You should name as the respondent the official or agency whose action or inaction you are challenging. If you name the official, you should also include his or her formal title. If you do not, you will need to substitute the name of the new official if someone new takes that job.⁹⁰ If your case involves prison records, you may want to name the Commissioner of the Department of Correctional Services (“DOCS”) as a respondent.

Bear in mind that you will have to serve documents on all of the parties you list as respondents. The more parties you list as respondents, the more parties you have to serve with documents. Thus, it is generally wise only to list the officials involved and the Commissioner of the Department of Correctional Services. For example, in disciplinary cases, it is usually enough to name the Commissioner of the Department of Correctional Services, the superintendent of the facility where the hearing was held, or the state director of disciplinary programs (the person responsible for reviewing administrative appeals).

(c) Stay

If you request and the judge grants a stay against the respondent, the official or agency’s decision that you are challenging cannot be enforced until after your petition has been heard.⁹¹ For example, if you are challenging a decision to place you in solitary confinement, you might ask the judge for an order that you not be placed there while you are waiting for a decision on your petition. Without a stay, your time in solitary might be up before the judge decides your petition, and the only thing you could then accomplish would be to have the decision “expunged” (removed) from your records. If you want a stay, you must ask for it in the Order to Show Cause that you send to the court, like the sample order at the end of this Chapter.

3. Article 78 Petition

The core of your Article 78 papers is the petition. The petition identifies the parties, explains the basis for “venue” (place where the lawsuit is filed or heard) in a particular county, and states the facts of your case, your legal claims, and the relief you are asking the court to give you. Relief simply means what you are asking the judge to do. You should submit an affidavit (a sworn statement by you or another person) to support the facts in the petition. You can also attach copies of documents relating to your case.

Be sure that you think carefully in advance and make the strongest arguments possible when you draft your petition. For example, if the Board of Parole has treated you differently from other prisoners, emphasize that it is unfair for the Board to treat you differently. Also, if there are standard procedures or regulations that you know were not followed in your case, you should point this out. If you claim that the agency did not follow its procedures, you should also claim that the decision it reached may be wrong because of this.

88. N.Y. C.P.L.R. 7804(c) (McKinney 2008 & Supp. 2012).

89. *See Vetrone v. Mackin*, 216 A.D.2d 839, 840–41, 628 N.Y.S.2d 866, 867 (3d Dept. 1995) (holding that the Notice of Petition is null and void if it does not specify a return date at the time of filing and at the time of service on the respondent); *Grover v. Wing*, 246 A.D.2d 813, 814, 667 N.Y.S.2d 785, 786 (3d Dept. 1998) (determining that a petition was an Article 78 claim, and that failure to serve defendants with a Notice of Petition or order to show cause without a proper return date made dismissal appropriate).

90. N.Y. C.P.L.R. 1019 (McKinney 1997 & Supp. 2012).

91. N.Y. C.P.L.R. 7805 (McKinney 2008 & Supp. 2012). Section 7805 states: “On the motion of any party or on its own initiative, the court may stay further proceedings, or the enforcement of any determination under review”

4. Verification of Petition

Your petition must also include a “verification”—a short statement in which you swear to the truth of the statements in your petition. It must include the statement that what is alleged in your petition “is true . . . except as to those matters alleged on information and belief and that as to those matters [insert your name] believes them to be true.”⁹² You should use this exact language and sign your petition in front of a notary. You can find a sample verification in the Appendix at the end of this Chapter.

5. Discovery: Use of the “Notice to Admit”

An Article 78 proceeding usually does not involve discovery (the part of a lawsuit where the parties exchange facts). Formal discovery tools, such as “depositions” (official interviews of people) and “interrogatories” (written questions submitted to people who may have relevant information), can only be used if the court gives you permission. If the court finds there are issues of fact that need to be resolved, it may grant you permission to carry out discovery. An example of an issue of fact is a dispute over whether someone was present at the administrative hearing. See *JLM*, Chapter 8, “Obtaining Information to Prepare Your Case: The Process of Discovery,” for more information on discovery.

The one form of discovery that you can use without first seeking permission from the court is the “Notice to Admit.” It can be used only if the respondent is an individual, not the state. You can use a Notice to Admit to ask the respondent to admit:

- (1) The genuineness of any paper or document,
- (2) The correctness or accuracy of a photograph, or
- (3) The truth of any matters of fact about which you believe there can be no dispute and which are within the knowledge of the respondent or can easily be found by him on reasonable inquiry.⁹³

The Notice to Admit is particularly useful in cases where you are making factual allegations or where no transcript of the administrative proceedings exists. The Notice to Admit should be a separate document. This document should be a list of questions. Each question should be divided into short parts answerable with yes or no. Do not write long questions with many parts because then the respondent could say false to all of them, even though most or part of a question was true. Also, be sure to list and number your questions. You should send these questions to the respondent, the Attorney General’s Office, and the court with your petition.

6. Filing Fees

Before December 1999, prisoners could file for poor person status (“*in forma pauperis*”) in New York state courts and, if eligible, did not have to pay filing fees for claims made in state court. In 1999, the State Legislature made changes to the New York Civil Practice Law and Rules, requiring that prisoners pay filing fees whenever they bring claims in state courts.⁹⁴ So, even if you or someone you know has previously filed an Article 78 proceeding without paying a filing fee, or if you have looked at a prior edition of the *JLM* that reflects the old law, *you now will most likely be required to pay a filing fee in order to begin your Article 78 proceeding and receive your index number.*⁹⁵ The only exception is for prisoners bringing Article 78 petitions in relation to jail time credit. If you are filing this kind of Article 78 petition, you do not have to pay a filing fee.⁹⁶

92. N.Y. C.P.L.R. 3020(a) (McKinney 2010 & Supp. 2012).

93. N.Y. C.P.L.R. 3123(a) (McKinney 2005) (stating that the Notice to Admit may be served at any time after service of the answer, but not later than 20 days before trial).

94. The new fee requirements can be found in N.Y. C.P.L.R. 1101(d) (McKinney 2011).

95. *Gomez v. Evangelista*, 290 A.D.2d 351, 352, 736 N.Y.S.2d 365, 366 (1st Dept. 2002) (holding that the requirement that prisoners pay a non-waivable fee of at least \$15, while other non-prisoners can get their fees completely waived, does not violate the Equal Protection Clause of the 14th Amendment, and is therefore constitutional). *See also* *Berrian v. Selsky*, 306 A.D.2d 771, 772, 763 N.Y.S.2d 111, 113 (3d Dept. 2003) (holding that the fee requirement for an Article 78 challenge “is rationally related to the legitimate governmental interest of deterring frivolous prisoner litigation”); *Bonez v. McGinnis*, 305 A.D.2d 814, 815, 758 N.Y.S.2d 543, 544 (3d Dept. 2003) (same holding as *Berrian*). N.Y. C.P.L.R. 1101(d) (effective Sept. 1, 2015, a plaintiff may seek to commence action without payment of the fee required by filing the form affidavit, attesting that he is unable to pay the costs, fees and expenses necessary for the action, and if the court denies the application and does not grant a fee waiver, the case will be dismissed if the fee is not paid within 120 days of the date of the order).

96. N.Y. C.P.L.R. 1101(f)(5) (McKinney 2011).

Prisoners are eligible for a reduced filing fee, which may be between fifteen and fifty dollars⁹⁷ (the full filing fee is \$190).⁹⁸ In order to get the reduced filing fee, you must submit an affidavit to the court stating why you cannot afford the full filing fee and asking for a reduced filing fee.⁹⁹ If you are unable to pay the full filing fee, you should include in your reduced filing fee affidavit as much detailed information as possible about your financial situation. For example, you should tell the court in your affidavit if you cannot work because you are medically or mentally ill, because you are in protective custody due to danger, or because no jobs are available to you. Also, explain any outstanding obligations you have, especially court-ordered obligations such as child support or restitution. See Appendix A for a sample affidavit to request a reduced filing fee. If the court denies your request for the reduced filing fee, it will notify you. You will then have 120 days to pay the full fee (\$190) or your case will be dismissed.¹⁰⁰ If you win your case, the court will refund any filing fee that you have paid.

In the affidavit, you must provide the name and mailing address of the facility where you are currently confined as well as all other facilities you have been confined in during the last six months.¹⁰¹ The court will then get a copy of your inmate trust fund account statement for the six months before you filed the affidavit.¹⁰² If the court decides that you cannot afford to pay the full filing fee, it may allow you to pay a reduced filing fee that is no less than fifteen and no more than fifty dollars.¹⁰³ The court will then require you to pay an initial part of the reduced filing fee that you can reasonably afford.¹⁰⁴ Only in exceptional circumstances may the court decide that you do not have to pay this initial filing fee.¹⁰⁵ The rest of the reduced filing fee (the difference between the total amount of the reduced filing fee and the amount paid as the initial part of the filing fee) will be collected by your facility.¹⁰⁶ This means that if you are a state prisoner, DOCS will collect a portion of your weekly wages and outside receipts until the reduced filing fee is fully paid.

7. The Index Number and Filing Date

The court will tell you your index number after you file the documents listed in Part E(2) below. Once the court tells you the index number, you must write it on the line next to where it says “Index No., on all the documents that you serve to the respondent or submit to the court.¹⁰⁷ If you serve your Notice of Petition or Order to Show Cause and Verified Petition without an index number or filing date (for example, because filing has not occurred), the paper has no legal weight. The court will act as if you never did anything. However, the court might allow you to amend your petition if you made a mistake in the filing process (for example, if you purchased the index number but forgot to put it on your other documents).¹⁰⁸ On the other hand, if you make a mistake in the filing process, the court might dismiss the entire proceeding. You could still refile, but only

97. N.Y. C.P.L.R. 1101(f)(2) (McKinney 2011).

98. N.Y. C.P.L.R. 8018(a) (McKinney 2010). In addition, \$125 may be charged if a trial or inquest (hearing) is scheduled. The charge is called a “Request for Judicial Intervention” fee. N.Y. C.P.L.R. 8020(a) (McKinney 2003).

99. N.Y. C.P.L.R. 1101(d) (McKinney 2011), 1999 N.Y. Sess. Laws 412 Pt. D. § 1 (McKinney 2000).

100. N.Y. C.P.L.R. 1101(d) (McKinney 2011), 1999 N.Y. Sess. Laws 412 Pt. D. § 1 (McKinney 2000).

101. N.Y. C.P.L.R. 1101(f)(1) (McKinney 2011).

102. If you have been incarcerated in the same facility for six months before you filed the affidavit, the court will get a copy of your inmate trust fund account from the prison superintendent of your facility. If you have been confined for less than six months at that facility at the time you file your affidavit, the court will either: (1) get an inmate trust fund account statement for the last six months from the Central Office of DOCS in Albany if you are a state prisoner who was transferred from another state correctional facility; or (2) get an inmate trust fund statement from a federal or local correctional facility if you were transferred from such a facility. N.Y. C.P.L.R. 1101(f)(1) (McKinney 2011).

103. N.Y. C.P.L.R. 1101(f)(2) (McKinney 2011).

104. N.Y. C.P.L.R. 1101(f)(2) (McKinney 2011).

105. However, please note that the statute states that “in no event shall an inmate be prohibited from proceeding for the reason that the inmate has no assets and no means by which to pay the initial partial filing fee.” N.Y. C.P.L.R. 1101(f)(2)(ii) (McKinney 2011).

106. N.Y. C.P.L.R. 1101(f)(2) (McKinney 1997 & Supp. 2012).

107. N.Y. C.P.L.R. 2101(c) (McKinney 1997 & Supp. 2012).

108. N.Y. C.P.L.R. 2001 (McKinney 2010); N.Y. C.P.L.R. 305(c) (McKinney 2010) (“At any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.”). In other words, if fixing a mistake would not be unfair to the other party’s ability to present their argument against you, then you will most likely be able to amend the mistake.

after obtaining a new index number. You can do this either by filing a new motion for poor person status or paying the fee again. If you must refile, you should be aware of statute of limitations concerns. See Part C(3) above for a discussion of statute of limitations.

8. Serving the Respondents and the Attorney General

“Serving” means giving the respondents and the Attorney General’s Office a copy of every document and exhibit that you sent to the court clerk. Remember that for Article 78 proceedings, you must serve both the official (person or people) or agency you have named AND the correct office of the New York State Attorney General. Unless the court directs otherwise, the Attorney General must be served by personal service and the official or agency by personal service or certified mail, return receipt requested, with “URGENT LEGAL MAIL” written on the front of the envelope in capital letters.

You may not serve the respondents until you receive an index number from the court. You must write the index number and the court’s designated date of filing (which you can find in the information that the clerk sends you) on the first page of every item that you send to the respondents. You must also tell the Attorney General the name of the judge and the date of the hearing if available. You should include the date of the hearing and the name of the judge on every paper that you send to the respondent if the court clerk sends you this information.

You must be careful to serve your petition on the official or agency you have named as respondent and to the New York State Attorney General.¹⁰⁹ (The Attorney General will represent the state in the proceeding.)

To recap, if you are using an Order to Show Cause, the respondents must receive these items before the time specified by the court in the Order to Show Cause when the judge signs and mails it back to you. If you are using a Notice of Petition, the respondents must receive these items at least twenty days before the court date.¹¹⁰ A Verified Petition, supporting affidavits, and either an Order to Show Cause or a Notice of Petition must be served within four months and fifteen days after you receive the decision.¹¹¹ It is important to serve papers far enough ahead so that there is time to complete the proof of service requirement, which also must be completed in four months and fifteen days.¹¹² You must serve the Attorney General by personal service unless you get special permission to do otherwise.¹¹³ You can get this special permission by making a request for it in your Order to Show Cause. If you are serving a state agency, you can serve either the chief executive officer or a person assigned by him to receive service. You have two options for serving the state officer: personal delivery or certified mail, return receipt requested. If you choose certified mail, you must write “URGENT LEGAL MAIL” on the front of the envelope in capital letters.¹¹⁴ Service is not complete until the certified mail is received by the agency to which it is sent.

As a prisoner, you may have a great deal of trouble accomplishing service. The two most common means of service are personal service and mail.¹¹⁵ Each can pose problems for prisoners.

(a) Personal Service

Personal service is when someone (the “server”) actually approaches, identifies, and personally hands a person the paperwork. The server then describes and swears in an affidavit to exactly what she did, and this affidavit is turned over to the court to demonstrate proof of service. A prisoner could serve the agency

109. N.Y. C.P.L.R. 7804(c) (McKinney 2008).

110. N.Y. C.P.L.R. 7804(c) (McKinney 2008).

111. N.Y. C.P.L.R. 306-b (McKinney 2010) (effectively sets time limit for service); N.Y. C.P.L.R. 7804(c) (McKinney 2008) (stating that Notice of Petition, petition, and supporting affidavits all need to be served); see *Long Island Citizens Campaign, Inc. v. Cnty. of Nassau*, 165 A.D.2d 52, 55, 565 N.Y.S.2d 852, 855 (2d Dept. 1991) (holding that the petition must be served along with the Notice of Petition or Order to Show Cause).

112. N.Y. C.P.L.R. 306-b (McKinney 2010).

113. N.Y. C.P.L.R. 307(1) (McKinney 2010); see *Lowrance v. Coughlin*, 190 A.D.2d 915, 915, 593 N.Y.S.2d 597, 598 (3d Dept. 1993) (holding that without a court order, personal jurisdiction may not be obtained over an Attorney General by serving him or her via mail).

114. N.Y. C.P.L.R. 307(2) (McKinney 2010 & Supp. 2014).

115. Electronic means and overnight delivery service have also become possibilities in some circumstances. See N.Y. C.P.L.R. 2103(b)(6)-(7) (McKinney 2012 & Supp. 2014).

personally either by asking anyone on the outside who is not a party and is over eighteen years of age to hand over the paperwork, or by hiring a professional service agency (which can be expensive).¹¹⁶

(b) Service by Mail

Service by mail is allowed in many situations, but not when suing the government. For example, you are required to personally serve the Attorney general. If you are not able to personally serve the Attorney General, you should include an Order to Show Cause requesting authorization to serve on the Attorney General by mail the material that you originally send the court.¹¹⁷ If you cannot serve the state agency by certified mail, you should also include an Order to Show Cause asking to serve the state agency in an alternative manner. In the Order to Show Cause, you should specifically explain the process you must go through at your institution to mail the documents so that the court will authorize that particular process. If there are any other difficulties in serving process that make it very difficult or impossible to accomplish in time, tell the court right away and ask for additional time.¹¹⁸ In the past, courts have allowed prisoners to use whatever mail services are available to them. In fact, courts sometimes give prisoners special permission to use mail to serve the Attorney General, who normally must be served by personal service.¹¹⁹ It is very important that you ask the court clerk about serving process and describe the procedure for mailing at your institution. Write a note asking the clerk to provide specific instructions on exactly what you have to do to serve.

(c) Service by Filing

A final possibility is to ask if you can serve by filing pursuant to New York Civil Practice Law and Rules 2103(d).¹²⁰ This rule is basically a catchall provision that says if no other means are available, service can be fulfilled by filing the documents you need to serve by mailing them to the court clerk. Just being in prison is not enough to trigger this provision. You would have to state a compelling reason why you could not serve in any other manner.

9. Proof of Service

Proof of Service is evidence for the court that you have notified respondents that you are suing them. It is a form that you send the court stating that you served process. If someone else has served personally for you, that person must provide you with an “affidavit of service,” which is an affidavit explaining the time, date, and circumstances surrounding the event. Some professional servers may have a certificate that they send to you. If you serve by mail, you may have to sign an affidavit saying that you mailed it, or you may have to include a copy of the receipt from certified mail. If you are allowed to use regular mail, another possibility is to send the court a receipt signed by the respondent indicating that the respondent received the package. This is called an acknowledgment. Whatever proof of service you have, you should submit it to the court.

116. N.Y. C.P.L.R. 2103(a) (McKinney 2012 & Supp. 2014)

117. *Onorato v. Scully*, 170 A.D.2d 803, 805, 566 N.Y.S.2d 408, 409 (3d Dept. 1991) (noting that “service by mail, absent issuance of an order to show cause authorizing service by mail in lieu of personal service, is jurisdictionally defective” (quoting *Matter of Dello v. Selsky*, 135 A.D.2d 994, 995, 522 N.Y.S.2d 716, 717 (3d Dept. 1987))). See Appendix A at the end of this Chapter for a general example of an Order to Show Cause. Model your request on the example.

118. The main problem is that “mailing” has a specific legal definition under New York’s Civil Practice Law and Rules:

“Mailing” means the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person’s last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state

N.Y. C.P.L.R. 2103(f)(1) (McKinney 2012 & Supp. 2014) (emphasis added). A prisoner generally does not have access to a depository under the exclusive care of the United States Postal Service and, therefore, cannot “mail” within the meaning of the statute. However, as noted above, courts commonly allow prisoners to serve by mail.

119. See *Onorato v. Scully*, 170 A.D.2d 803, 805, 566 N.Y.S.2d 408, 409 (3d Dept. 1991) (finding, in certain circumstances, a court may treat a prisoner’s letter as an application to permit alternative service even where there is no order to show cause authorizing service by mail); *Matter of Hanson v. Coughlin*, 103 A.D.2d 949, 949, 479 N.Y.S.2d 767, 768 (3d Dept. 1984) (interpreting prisoner’s attempt to mail petition as an application for an order permitting alternative service, and remitting the case to the trial court such that the prisoner could submit an order to show cause).

120. N.Y. C.P.L.R. 2103(d) (McKinney 2012 & Supp. 2014).

10. The “Answer” by the Government and Your “Reply”

The document that the administrative official or agency files with the court in opposition to your petition is called the answer. The answer is a document that replies to each point in your petition by admitting, denying, or claiming lack of knowledge about it. With the answer, the respondent can also submit any affidavits or other documents to the court. The respondent is required to serve you with a copy of his answer as well as all attached documentary evidence no later than five days before the hearing date.¹²¹

When you receive the answer, you should read it carefully to see what arguments the government is making in response to your claim. Usually, the Attorney General’s Office, rather than the respondent(s), writes the answer. If the respondent fails to file an answer within the allowed time, you can ask the court to rule in your favor.

You might want to submit an additional document, called a reply, once you read the government’s answer. If you think the transcript or other documents submitted by the respondent were inaccurate, you will want to say that in a reply. If the respondent has added allegations about you that were not included in your petition, you will need to address those in the reply by either denying them or saying you do not know if they are true or not. If you do not, the court can view those facts as if you have admitted that they are true.¹²² And, if the respondent has made a claim against you (a counterclaim) you will want to address this claim against you in a reply. You must serve the respondent with your reply at least one day before the hearing.¹²³

If you are seeking review of a discretionary decision made by an official or agency after a hearing, the respondent is required to submit a copy of the transcript of the hearing to the court with its answer. While the respondent is not required to serve you with a copy of the transcript, several courts have ruled against respondents who failed to provide the courts with administrative hearings transcripts.¹²⁴

E. How to Bring an Article 78 Proceeding

To bring an Article 78 proceeding, you must complete the following steps before the deadlines:

- (1) File the items listed below with the clerk of the court where you are bringing the proceeding;
- (2) Serve the respondent and the Attorney General’s Office; and
- (3) File proof of service with the court during the appropriate time period.

1. Deadlines

Four-month deadline for filing in court (Step (1) above): You must file with the court within the statute of limitations period. If you do not, you will automatically lose your case. Remember, you cannot serve the respondent (step 2) until you receive an index number. The court sends you an index number after you have completed step 1. Plan your time accordingly.

Deadline for service and filing proof of service (Steps (2) and (3) above): You must serve both the respondent(s) and the Attorney General and file “proof of service” with the appropriate court within four months and fifteen days after you receive the decision you are challenging. It will take some time to file proof of service, so remember to leave enough time after service to get this accomplished.

Example: If you receive a decision on December 1, 2015, you must file your appeal with the appropriate court before April 1, 2016. You must serve the respondents and the Attorney General’s Office and file proof of service with the court before April 15, 2016.

121. N.Y. C.P.L.R. 7804(c), (e) (McKinney 2008).

122. N.Y. C.P.L.R. 3018(a) (McKinney 2010).

123. N.Y. C.P.L.R. 7804(c) (McKinney 2008 & Supp. 2014)

124. See *Matter of Gittens v. Sullivan*, 151 A.D.2d 481, 481, 542 N.Y.S.2d 272, 273 (2d Dept. 1989) (ordering respondent to produce transcript of disciplinary hearing, and if no transcript existed, agency’s determination had to be voided and a new administrative hearing conducted); *Matter of Arnot-Ogden Memorial Hosp. v. Axelrod*, 95 A.D.2d 947, 948, 463 N.Y.S.2d 927, 930 (3d Dept. 1983) (holding that default judgment was proper, as respondent had repeatedly failed to produce transcript as ordered by the court).

2. Procedure

(a) Filing with the Court

As mentioned above, you need to send to the county Supreme Court clerk one original and one copy of each of the following:

- (1) A Notice of Petition or an Order to Show Cause;
- (2) A Verified Petition;
- (3) All exhibits and supporting affidavits attached to the petition;
- (4) Either the full filing fee or an affidavit that supports your claim that you cannot afford to pay the full filing fee. See discussion in Part D(6) above. If the court approves your request, it will charge you between fifteen and fifty dollars;
 - (1) Caution: If you fail to enclose either the full fee, or the reduced fee and the poor person's motion and affidavit, you will not get an index number. Without the index number, you cannot proceed with your claim.
- (5) A "Request for Judicial Intervention" ("RJI"). Different courts apply different rules on these, so check with your court clerk to make sure you have complied with the RJI rules for your court;¹²⁵ and
- (6) A "Request for an Index Number."

Mail these items to the correct court clerk and wait for an index number. After you receive the number, serve the respondents and Attorney General with the proper paperwork. You can make the copies by hand.

(b) Serving the Respondents and the Attorney General's Office

If you are using an Order to Show Cause, the respondents must receive these items before the time specified in the Order. If you are using a Notice of Petition, the respondents must receive the items at least twenty days before the court date. NOTE: If you are permitted to serve papers by mail, you must add five days to the deadline. So, you would mail your papers at least twenty-five days before the court date.¹²⁶

(c) Proof of Service

It is important that you file proof of service on each respondent and the Attorney General on time. Without a timely filing, the court will dismiss your case.

(d) Refiling Your Petition

If your case is dismissed because you did not file proof of service on time, you have fifteen days from the date of dismissal to refile your petition and serve the respondents and the Attorney General. Note that, not only will you have to pay the filing fee again, but you will also have to repeat the entire process.

3. How to Get Help from a Lawyer

Courts have the power, under Section 1102(a) of the New York Civil Practice Law and Rules, to appoint a lawyer for you, but they do not have to.¹²⁷ If you would like a lawyer, include a request for a court-appointed attorney in your request for a fee reduction or waiver. You can also contact the agencies in JLM, Appendix IV, to see if they know a lawyer who will represent you for free. You should also read JLM, Chapter 4, "How to Find a Lawyer."

4. The Judgment

The court's decision about your Article 78 petition is called a judgment. The court has the power to render any judgment that it feels is appropriate. It can modify the decision of the administrative body, cancel it, make an entirely different decision, or send the case back to the administrative agency for a new hearing or decision (this is called a remand to the administrative agency).¹²⁸

125. N.Y. Comp. Codes R. & Regs. tit. 22, § 202.6 (2013 & Supp. 2014).

126. N.Y. C.P.L.R. 2103 (b)(2) (McKinney 2012 & Supp. 2014).

127. N.Y. C.P.L.R. 1102(a) (McKinney 2012 & Supp. 2014).

128. N.Y. C.P.L.R. 7806 (McKinney 2008 & Supp. 2014).

F. How to Appeal Your Article 78 Decision

If you lose your Article 78 proceeding and wish to appeal to the Appellate Division of the New York Supreme Court, professional legal help is important.¹²⁹ You can request that the Appellate Division assign you an attorney. Appealing an Article 78 decision is much more complicated than filing a petition in the New York Supreme Court.¹³⁰ If you are thinking of appealing, you must serve a “Notice of Appeal” upon the New York State Attorney General and file the Notice with the court within thirty days of the entry of judgment denying your Article 78 petition.¹³¹ Note that you must file the Notice of Appeal with the Supreme Court that decided your case, not with the Appellate Division. You should serve the Notice of Appeal first, and then file the Notice with proof of service. If you do not serve and file the notice of appeal within thirty days of the denial of your petition, the denial will be final and you will not be allowed to appeal it with or without a lawyer.

If you win in Supreme Court on your own, and the respondent files an appeal to the Appellate Division, you should petition the Appellate Division as soon as possible to appoint a lawyer for you on appeal. See the sample requests at the end of this Chapter. The respondent can get an automatic stay of the decision pending the outcome of the appeal.¹³² This means the Supreme Court decision in your favor will not go into effect until the appeal has been decided. You can then move to have the court vacate (dismiss) the stay.

1. Where to Appeal

The Appellate Division of the New York Supreme Court has four departments. Each of these departments covers a different portion of New York State. Your appeal will take place in the department of the Appellate Division that contains the county where your Article 78 petition was decided against you.¹³³ Each of the four departments can have specific rules about the time limits and process of filing and proceeding on an Article 78 appeal, so you must be sure to find out what, if any, specific documents or actions are required by your department for each step of your appeals process.¹³⁴

2. Filing a Notice of Appeal (“Taking the Appeal”)

Your first step in appealing an Article 78 decision is serving a Notice of Appeal on the Attorney General and filing the Notice of Appeal with the Clerk of the county where your judgment was decided, with proof of service upon the Attorney General.

In your notice, you must explain five important things:

- (1) The decision that you are appealing;
- (2) Which judge made the decision;
- (3) The date on which the decision was made;
- (4) What date the judgment was filed with the County Clerk; and
- (5) What parts of the decision you want to appeal (you can appeal part of or the whole decision).

129. See JLM, Chapter 4 and Appendix IV of the JLM for information on finding help from a lawyer.

130. See, e.g., N.Y. C.P.L.R. 5513, 5515, 5516, 5519, 5525, 5528 and 5701(b) & (c) (McKinney 1995 & Supp. 2012). Note, however, that many of these provisions are subject to change. With the exception of 5516, 5525, and 5528, all sections have had legislation proposed that would modify the provision in some way.

131. N.Y. C.P.L.R. 5513, 5515 (McKinney 1995 & Supp. 2012). The notice of appeal is a simple form that is easy to prepare yourself. You can adapt the sample criminal notice of appeal found in JLM, Chapter 9. Simply include your own case caption, your name and the respondent’s name, the proper party titles (for example, “petitioner” and “respondent”), and state that the notice of appeal is filed pursuant to N.Y. C.P.L.R. 5513 (McKinney 1995 & Supp. 2012).

132. N.Y. C.P.L.R. 5519(a)(1) (McKinney 1995 & Supp. 2012).

133. The four departments are as follows: 1st Department—Bronx, New York (Manhattan); 2nd Department—Brooklyn, Dutchess, Kings (Brooklyn), Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Westchester; 3rd Department—Albany, Broome, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Madison, Montgomery, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington; 4th Department—Allegany, Cattaraugus, Cayuga, Chautauqua, Erie, Genesee, Herkimer, Jefferson, Lewis, Livingston, Monroe, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Seneca, Steuben, Wayne, Wyoming, Yates.

134. You can find this information by looking up your court and department rules in McKinney’s New York Rules of Court (2012). The relevant parts of the rules are as follows: N.Y. Ct. Rules Part 600 (1st Dep’t); Part 670 (2nd Dep’t); Part 800 (3rd Dep’t); Part 1000 (4th Dep’t).

A filing fee of \$315 may be required to file your notice, but you can request a reduced fee if you are unable to pay in full.¹³⁵ (You may serve your Notice of Appeal to the court and the Attorney General by mail; see Part D(8) above for information on serving documents.) Remember, you must serve and file the notice of appeal within thirty days of your petition's denial, or the decision will be final and you cannot appeal.¹³⁶

3. Putting Together Your Record

In order for your appeal to go forward, you will need a record of your case so far. The record will include all of the information that has been filed in your case, except for any briefs that were filed. A record will likely have your original Article 78 petition, the answer from the Attorney General, your reply, if any, the exhibits for both parties, and all decisions and judgments made by the court that heard your case. It may also contain the transcript of the proceedings.

You will also need to add a statement including the following information:

- (1) The index number of your case;
- (2) The full names of the original parties and any change in parties;
- (3) The court and county in which the proceeding began;
- (4) The date the proceeding started and the dates when you served your pleadings;
- (5) A brief description of what you are trying to do (appeal the decision in your case) and why;
- (6) Whether the appeal is from a judgment, an order, or both, the dates of whatever judgments or orders you are appealing from, and the name of the judge who made the decision; and
- (7) A statement about which method of appeal you are using, either a full-record appeal or an original record appeal (which means you will not have to put together the record for your case yourself).¹³⁷

Each of the four departments has different rules about what needs to be in the record for an appeal.¹³⁸ Generally, you should follow these two steps. First, assemble all documents listed above. Then, request the Appellate Court to subpoena your record from the lower court. (Though not all appellate courts are willing to obtain original records from the lower court, a court will usually do this for a pro se prisoner with poor person status.) Otherwise, you can read and follow the court rules for the specific department you are in.

4. Writing Your Brief

To proceed with your appeal you will also have to write a brief, a document including all the legal reasons the court should not have decided against you in your Article 78 petition. You must be as specific as possible about your reasons and should cite the statutes, regulations, and cases supporting your decision. You must also be specific about why the judge made the wrong decision in your case. Your brief will likely need to contain a cover page with information about your case (such as the case name, docket number, lower court, and appellate court), as well as your name and address.¹³⁹ You will need to send the same number of copies of this brief to the court and the Attorney General as you are required to send of the record.

5. "Perfecting the Appeal": Submitting All Necessary Documents

To proceed in your appeal, you must do what is called "perfecting the appeal," which means submitting every document required by the court in which you are appealing, including the record, brief, and any other

135. N.Y. C.P.L.R. 8022(b) (McKinney 1981 & Supp. 2007). See N.Y. C.P.L.R. 1101(f) (McKinney 1997 & Supp. 2012) and Part D(6) of this chapter for more information about requesting a reduced filing fee. The rules are different for each department. For example, the 4th Department has an entire section on Poor Persons. See N.Y. Ct. Rules § 1000.14 (McKinney 2012).

136. N.Y. C.P.L.R. 5513, 5515 (McKinney 1995 & Supp. 2012).

137. N.Y. C.P.L.R. 5531 (McKinney 1995 & Supp. 2012).

138. See McKinney's New York Rules of Court for each department's particular rules: N.Y. Ct. Rules § 600.10 (McKinney 2012) (1st Department rules on the required form and content of your record), N.Y. Ct. Rules §§ 670.9, 670.10.1 (McKinney 2012) (2nd Department rules on records), N.Y. Ct. Rules § 800.5 (McKinney 2012) (3rd Department rules on records), and N.Y. Ct. Rules § 1000.4 (McKinney 2012) (4th Department rules on records).

139. For information and requirements for your brief, see McKinney's New York Rules of Court for each department: N.Y. Ct. Rules § 600.10(d) (McKinney 2012) (1st Dept.); N.Y. Ct. Rules §§ 670.10.1, 670.10.3(g) (McKinney 2012) (2d Dept.); N.Y. Ct. Rules § 800.8(a) (McKinney 2012) (3d Dept.); N.Y. Ct. Rules § 1000.4(f) (McKinney 2012) (4th Dept.).

document your department requires. Each department has a time limit within which to complete perfecting the appeal.¹⁴⁰

6. The Reply to Your Appeal

Once your brief is filed, the court will tell you when your case will be heard. When the court requires the Attorney General to file a brief on your case, you may file a reply brief, usually within a few days of receiving the Attorney General's brief.¹⁴¹ You only need to file a reply brief if there are any issues raised by the Attorney General's brief that your first brief did not cover, or to show why the arguments and cases used by the Attorney General are weaker than your own. You do not need to restate the points you raised in your original brief. Some weeks after you have filed your reply brief, the court will inform you of its decision.

G. Conclusion

Article 78 is available to appeal decisions by state officials or agencies but not courts. You may use it only when you have exhausted other remedies. Since Article 78 petitions are your last chance to challenge administrative decisions, pay attention to Part A's requirements and Part D's procedures for filing or appealing a petition. Remember, you can only challenge decisions or actions you think are illegal, not just unfair. If you are unsure what type of petition is available, read Part B's possible complaints and actions, and Part C's limits on what you can challenge. Appendix A's sample forms and instructions will help you prepare a petition.

APPENDIX A

SAMPLE ARTICLE 78 PETITIONS AND SUPPORTING PAPERS

This Appendix A contains the following documents:

- A-1: Order to Show Cause
- A-2: Affidavit in Support of Order to Show Cause
- A-3: Notice of Petition
- A-4: Article 78 Petition
- A-5: Verification of Petition
- A-6: Request for Judicial Intervention
- A-7: Application for an Index Number
- A-8: Affidavit in Support of Request for Reduction/Waiver of Fees

These documents are intended to guide you when you file your own petition. **DO NOT TEAR THESE FORMS FROM THE JLM.** Copy them on your own paper and fill them out according to the facts of the administrative decision you are challenging.

140. For example, in the 1st Department, you must have all documents filed within nine months of the date of your notice of appeal. N.Y. Ct. Rules § 600.11(a)(3) (McKinney 2012). In the 2nd Department, the time limit is six months. N.Y. Ct. Rules § 670.8(e) (McKinney 2012). Both the 3rd and 4th Departments have a 60-day time limit. N.Y. Ct. Rules §§ 800.14(b), 1000.12(a) (McKinney 2012).

141. In the 1st Department, you have nine days to reply from the day you are served with the Attorney General's brief. N.Y. Ct. Rules § 600.11(c) (McKinney 2012). In the 2nd, 3rd, and 4th Departments, you have 10 days from when the Attorney General serves the brief to reply. N.Y. Ct. Rules §§ 670.8(c)(3), 800.9(c), 1000.2(e) (McKinney 2012).

A-1. ORDER TO SHOW CAUSE

At a Term of the Supreme Court of the State of New York, held in and for the County of _____ on the _____th day of _____, 20____.¹⁴²¹⁴³

Present: Hon. _____, Justice¹⁴⁴

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____ X

In the Matter of the Application of _____ :

:

:

Petitioner, _____ :

: ORDER TO SHOW CAUSE

- against - _____ :

: Index No. _____

:

Respondent, _____ :

:

For a Judgment Pursuant to Article 78 _____ :

of the Civil Practice Law and Rules _____ :

_____ X

Upon the annexed affidavit in support of an Order to Show Cause of _____,¹⁴⁵ verified on the _____the day of _____, 20____,¹⁴⁶ the Verified Petition,¹⁴⁷ and _____¹⁴⁸ sworn to on the _____the day of _____, 20____,¹⁴⁹ it is

142. Name of the county in which the case will be filed, in all capital letters. When filling in county names, note that each borough of New York City is a county of New York State, but some of them have different names: Manhattan is New York County; Brooklyn is Kings County; and Staten Island is Richmond County. See N.Y. C.P.L.R. 506(b) (McKinney 1994 & Supp. 1999). The court clerk will fill in the date.

¹⁴³ All roman numerals (small letters in superscript) throughout this Section refer to instructions for filling out documents. These instructions are provided after matching roman numerals presented at the end of this Chapter.

144. The clerk or judge will fill this in. You should leave this blank.

145. Your name.

146. Here, you should give the date the petition was approved/verified. See Appendix A-4 for a sample petition and Appendix A-5 for a sample verification.

147. A sample petition is contained in Appendix A-4.

148. Insert any other papers you are submitting with this Order.

149. The date you signed and notarized your documents.

ORDERED that respondent _____¹⁵⁰ show cause at a Term of this Court, to be held in the County of _____¹⁵¹ on the ____ the day of _____, 20____,¹⁵² or as soon thereafter as counsel may be heard, why a judgment should not be made and entered in this matter pursuant to Article 78 of the Civil Practice Law and Rules:

VACATING and setting aside Respondent's determination of [mm/dd/yyyy] [assigning petitioner to 120 days confinement in the Special Housing Unit (solitary confinement, "SHU")] because [the underlying Superintendent's Hearing is null and void];¹⁵³

DIRECTING Respondent to [expunge all entries of said Superintendent's Hearing and the resulting disposition thereof from all of petitioner's records and restore petitioner in all respects to the status he enjoyed prior to the commencement of said Superintendent's Hearing];¹⁵⁴

GRANTING such other and further relief as the Court may deem just and proper. It is further

ORDERED that pending the hearing of this special proceeding and pursuant to section 7805 of the N.Y. Civil Practice Law and Rules, Respondent and all other officers, employees, agents, attorneys and persons working in active concert or participation with Respondent are stayed and prohibited from taking action related to or enforcing Respondent's determination of _____, 20____.¹⁵⁵ It is further

ORDERED that service of a copy of this order, together with the papers upon which it is granted, upon both the Respondent _____¹⁵⁶ and the Attorney General, by mail, on or before _____, 20____,¹⁵⁷ shall be deemed sufficient.

ENTER:

_____¹⁵⁸

JUSTICE OF THE SUPREME COURT

150. Print or type in all capital letters the name of the respondent.

151. County in which you are filing the petition.

152. Leave this blank. The judge will fill in the information about the date.

153. Do not copy the bracketed material. You should briefly explain in your own words exactly what the respondent did to you and why you think it was incorrect.

154. Do not copy the bracketed language. Explain in your own words what you want the court to do for you.

155. This paragraph is the "stay" described in Part D. The "stay" will be in effect until the hearing date. The date you insert here is the date of the administrative decision you disagree with and want the court to reverse. Until the court decides your case, this order will prevent the respondent from enforcing the administrative decision you are challenging.

156. Respondent's name.

157. Leave this blank. The judge will fill in the date.

158. Leave this blank. The judge will sign on the line.

A-2. AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____ X

In the Matter of the Application of :

:

_____, :

Petitioner, :

AFFIDAVIT IN
SUPPORT OF ORDER
TO SHOW CAUSE

- against - :

Index No. _____

_____, :

Respondent, :

:

For a Judgment Pursuant to Article 78 :

of the Civil Practice Law and Rules :

_____ X

STATE OF NEW YORK)
COUNTY OF _____¹⁵⁹ ss:)

I, _____,¹⁶⁰ being duly sworn, depose and say:

1. I am the petitioner in the above-entitled proceeding.

2. I make this affidavit in support of my annexed application for an Order to Show Cause to prosecute the attached petition pursuant to Article 78 of the Civil Practice Law and Rules which challenges _____¹⁶¹

3. _____¹⁶²

4. Petitioner seeks to proceed by Order to Show Cause rather than by Notice of Petition because _____¹⁶³

159. Name of the county in which you are making this affidavit.

160. Your name.

161. Write in the decision you are complaining about and the date of the decision.

162. This paragraph should state the relevant facts and why the decision you disagree with is wrong. It should explain the statement of the claims you made in the Order to Show Cause. If there are many issues, organize your statements and arguments into several paragraphs, each dealing with a separate issue. Remember: this is a sworn statement, and it is a crime to include anything you know is a lie. If you want to include a statement you think is true, but you are not completely sure about it, you can say that you are making the statement "upon information and belief."

163. This paragraph should state why you are using an Order to Show Cause instead of a Notice of Petition. (See Part D(2) on the difference between an Order to Show Cause and Notice of Petition and the requirements for proceeding

5. Petitioner, being incarcerated, also cannot effect personal service of the within papers and respectfully requests that timely service by mail be deemed sufficient.

6. Petitioner designates _____¹⁶⁴ County as the place of venue.

7. No previous application for the relief requested herein has been made.¹⁶⁵

8. I have moved by the annexed affidavit for a reduction/waiver of the filing fees.¹⁶⁶

WHEREFORE, petitioner respectfully requests that this Court enter an order directing Respondent to show cause why a judgment should not be made and entered pursuant to Article 78 of the Civil Practice Law and Rules _____¹⁶⁷ and granting such other and further relief as the Court may deem just and proper.

_____¹⁶⁸

_____¹⁶⁹

Sworn to before me this

__the day of _____, 20__

_____¹⁷⁰

NOTARY PUBLIC

by Order to Show Cause.) You should be sure to explain: (1) why a hearing is needed as soon as possible, but within 20 days (for example, you may be worried about being placed in solitary confinement before 20 days are up); and (2) why a stay is needed (for example, you do not want to wrongfully be placed in solitary confinement before you have a chance for the court to review your case).

The reasons for these requests may be similar (as they are in the examples above), but you should explain them both. It is a good practice to argue that you will be “irreparably injured” if the court does not grant a stay and a speedy hearing—this means that you will be hurt in a way that the court will not be able to fix later if the officer’s or agency’s decision takes effect before you have had a chance to contest it in the hearing.

164. Name of the county in which you are filing.

165. Make sure you include this statement only if this is the first time you have asked for a review of the decision. If you have applied for similar relief, explain why it was inadequate or why changed circumstances have caused you to bring this action.

166. Include this statement if you are attaching an application to request for a reduction or waiver of fees. See Appendix A-8, Affidavit in Support of Request for Reduction/Waiver of Fees.

167. This paragraph basically states what you would like the court to do for you. You should copy the language of the paragraphs numbered 1 and 2 of the Order to Show Cause. See Appendix A-1. You can write them out as part of this sentence without separating them into paragraphs.

168. Sign your name here in the presence of a notary public.

169. Print or type your name and address.

170. This is where the notary public notarizes the affidavit by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another prisoner witness your signature. (Use this technique only as a last resort.) If another prisoner is your witness, you should add at the bottom of the affidavit:

I declare that I have not been able to have this [affidavit] notarized according to law because [explain here your efforts to get the affidavit notarized]. I therefore declare under penalty of perjury that all of the statements made in this [affidavit] are true to my own knowledge, and I pray leave of the Court to allow this [affidavit] to be filed without notarization.

[Your signature]

A-3. NOTICE OF PETITION

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____ X

In the Matter of the Application of :

:

_____, :

Petitioner, :

: NOTICE OF PETITION

- against - :

: Index No. _____

_____, :

Respondent, :

:

For a Judgment Pursuant to Article 78 :

of the Civil Practice Law and Rules :

_____ X

To _____;¹⁷¹

PLEASE TAKE NOTICE that upon the annexed petition of _____,¹⁷² verified the [th day of Month], [year]¹⁷³ and the annexed affidavit of [NAME],¹⁷⁴ sworn to on the [th day of Month], [year],¹⁷⁵ petitioner will apply to this Court on the [th day of [Month], [year]],¹⁷⁶ or as soon thereafter as counsel may be heard, for a judgment granting the relief requested in the annexed Petition.

171. Respondent's name in capital letters.

172. Your name.

173. Give the date you sign your petition.

174. List each affidavit (sworn statement) included in your papers. You can, for example, ask witnesses to the facts of your case to make affidavits to strengthen your petition.

175. This is the date on which the witness signed the affidavit.

176. Set a court date far enough ahead so that the respondent will have 20 days notice by the time he or she receives the Notice of Petition and petition.

PLEASE TAKE FURTHER NOTICE that you must serve a verified answer, any supporting affidavits and documents, and a certified transcript of the record of the proceeding at least five days before this application is made.¹⁷⁷

Petitioner designates _____ County as the place of trial. The basis of venue is _____

¹⁷⁸

¹⁷⁹

[Sign your name]

[Print your name]

Dated:____, 20____

177. The respondent is required to submit a certified transcript (written record) of any administrative hearing that was held. If you are seeking review of an official's or agency's failure to act or perform an administrative duty, then there will be no transcript, so do not include the demand for one.

178. Here you should write in the name of the county that the court is in. You should also briefly explain why you chose this court. Generally all you need to say is you are filing in this county because the decision you are challenging was made in this county. "Venue" simply refers to the location of the court. *See* N.Y. C.P.L.R. 506(b) (McKinney 2003).

179. Sign here and print your name clearly underneath.

A-4. ARTICLE 78 PETITION

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____ X

In the Matter of the Application of _____ :

:

_____, :

Petitioner, :

: PETITION

- against - :

: Index No. _____

_____, :

Respondent, :

:

For a Judgment Pursuant to Article 78 :

of the Civil Practice Law and Rules :

_____ X

To THE SUPREME COURT OF THE STATE OF NEW YORK FOR
_____ COUNTY:

The petition of _____,¹⁸⁰ complaining of the Respondent _____,¹⁸¹ respectfully alleges:

1. Petitioner _____¹⁸² is an inmate at _____,¹⁸³ _____,¹⁸⁴ New York.

2. Respondent [Ronald R. Roe, Superintendent of Ossining Correctional Facility, is petitioner's legal custodian and is charged with the overall supervision and administration of Ossining].¹⁸⁵

180. Your name in capital letters.

181. Respondent's name(s) in capital letters.

182. Your name.

183. Name of prison in which you are incarcerated.

184. Address of prison.

185. Do not copy the bracketed words. Write the respondent's name and state his or her, or its duties that resulted in the decision or action you are challenging. If the respondent is the Board of Parole, for example, you could state that the New York State Board of Parole is responsible for deciding whether or not to parole a prisoner.

3. This petition challenges [disciplinary action taken on June 15, 2000], when respondent, [pursuant to a Superintendent's Hearing,] had determined to [place him in the Special Housing Unit ("SHU," solitary confinement) for a period of 120 days].¹⁸⁶

4. The within proceeding is brought pursuant to C.P.L.R. Article 78 to challenge the final determination of _____, dated _____.¹⁸⁷

5. [On June 9, 2000, while confined to a private room/cell in the infirmary at Ossining Correctional Facility, petitioner began to feel claustrophobic and believed he was suffering from an asthmatic episode.]¹⁸⁸

6. [Corrections Officers Smith and Brown were called to the infirmary to restrain petitioner so that he could be given an injection to subdue him.]

7. [Petitioner was in an agitated state because he believed that he was going to be given a dose of anti-psychotic medication.]

8. [Once the officers arrived, they ordered petitioner to stand to the side of the room. He did not comply with this order.]

9. [Once the officers were in petitioner's room, he raised his hands and spoke to the officers to indicate that he did not want to receive medication. The officers reported, however, that when petitioner raised his hands, his fists were clenched.]

10. [The officers then grabbed petitioner and held him while the nurse administered an injection. Then they escorted petitioner to the Mental Health Unit where he was placed in a special observation cell ("dry cell").]

11. [On June 10, 2000, while in the observation cell, petitioner was served with a misbehavior report, charging him with violation of the following inmate rules: 100.11 (attempted assault) and 106.10 (refusing a direct order). A copy of the misbehavior report is attached as Exhibit 1.]

12. [The Superintendent's Hearing was commenced on June 15, 2000, while petitioner was still confined in the Mental Health Unit. Petitioner pleaded not guilty to the charges.]

13. [The hearing officer read into the record reports written by Correction Officers Smith and Brown. Neither report alleged that petitioner had attempted to assault either of the officers. (Copies of these reports are attached as Exhibits 2 and 3.)]

14. [The hearing officer then found petitioner guilty of both charges and imposed a penalty of 120 days confinement in the SHU, finding that the mere raising of hands with fists clenched constituted an attempt to assault.]

15. [Petitioner did not attempt to strike either officer, however. Neither officer's report indicated otherwise. The reports stated in a conclusory fashion that petitioner "raised his fists in an attempt to strike" the officers. Without further clarification, this statement is insufficient to conclude that petitioner attempted to assault either officer. Petitioner was not given an opportunity to present witnesses on his behalf.]

16. [Furthermore, the hearing officer made no inquiry into petitioner's mental state at the time of the incident or at the time of the hearing, even though the incident arose because the staff had decided petitioner was out of control and would have to be medicated by force, and even though petitioner was housed in the Mental Health Unit at the time of the hearing. Petitioner's mental state affected his responsibility for his actions and his ability to proceed at the hearing.]

17. Respondent's determination was [arbitrary, capricious, and an abuse of discretion] because [the hearing was held at a time when petitioner was incompetent to proceed on his own behalf, petitioner had no opportunity to present witnesses on his behalf, and respondent failed to determine petitioner's mental state.

186. Again, do not copy the bracketed words. You should give the date when you were told about the decision that you are complaining of and briefly describe the decision. If you are requesting that the court order the respondent to do something required by law, you should explain that the respondent has not performed its duty.

187. In this paragraph, you should state how your administrative remedies have been exhausted.

188. Again, do not copy the bracketed words. State what happened in your own words, and be sure to include all of the facts the court might think are important. Then state why you think the decision was incorrectly made. If you know of a specific law that applies, you should include it in your statement. This section will usually run for several paragraphs: separate each issue or argument into different paragraphs to make your petition more understandable.

The sample facts and argument in this and following paragraphs have been shortened for reasons of space and clarity. You will want to go into more detail than is given here.

Because petitioner had suffered a claustrophobic attack and sudden involuntary medication, he cannot be held responsible for refusing the direct order.]¹⁸⁹

18. [No previous application has been made for the requested relief.]¹⁹⁰

WHEREFORE, petitioner respectfully requests that judgment be entered pursuant to Article 78 of the Civil Practice Law and Rules:

1. VACATING and setting aside Respondent's determination of June 15, 2000, assigning petitioner to 120 days confinement in the Special Housing Unit (solitary confinement, "SHU") because the underlying Superintendent's Hearing is null and void;

2. DIRECTING Respondent to expunge all entries of said Superintendent's Hearing and the resulting disposition thereof from all of petitioner's records and restore petitioner in all respects to the status he enjoyed prior to the commencement of said Superintendent's Hearing;

3. GRANTING such other and further relief as the Court may deem just and proper.]¹⁹¹

_____ ¹⁹²

[your name]

Petitioner, pro se.¹⁹³

Dated: _____ ¹⁹⁴

189. Here you should state the particular legal mistake that the respondent made in making the determination that you are challenging. Refer to Part B of this Chapter for a description of the basic legal reasons why decisions may be challenged in an Article 78 proceeding. They are:

- (1) That the respondent failed or refused to perform a duty required by law (this would include constitutional violations and violations of Department of Correctional Services regulations);
- (2) That the respondent exceeded his or her legal authority;
- (3) That the respondent's determination was arbitrary, capricious, or an abuse of discretion; or
- (4) That the respondent's determination was not supported by substantial evidence.

You can change these words to fit your case's facts, as long as your complaint falls within one of the Part B categories.

190. In this line, you should state whether you have or have not filed a previous challenge to the administrative determination that you want the court to review.

191. Here you should state what you want the court to do to correct the respondent's mistake. Be sure to request the court to declare the determination that you are challenging void (without legal force). You should also specifically request what needs to be done to set the situation right and undo the mistake, or prevent it from taking effect. For example, you could request that the court issue an order "DIRECTING respondent to restore petitioner's good-time credit," "ENJOINING (prohibiting) respondent from transferring petitioner to any other facility" (if your transfer has not yet taken place), etc.

192. Sign your name here and print your name underneath.

193. "Pro se" means that you are appearing by yourself, without a lawyer.

194. Write the date when you are signing the papers, followed by your complete mailing address. You must also include a verification, a sample of which follows.

I affirm under 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 proceeding.

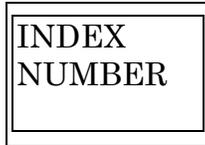
Dated: _____²¹⁶

(Signature)

(Print Name)

216. Write the date.

A-7. APPLICATION FOR AN INDEX NUMBER



Application for INDEX NUMBER

Pursuant to section 8018, New York Civil Practice Law & Rules

Title of Action: ARTICLE 78²¹⁷

[David Smith

v.

William Jones, Commissioner of the Department of Correctional Services]

Name and address of Attorney for Plaintiff or Petitioner Telephone No.²¹⁸ (PRO SE)

Name and address of Attorney for Defendant or Respondent Telephone No.²¹⁹

A. Nature of Special Proceeding Article 78 Proceeding

B. Application for Index Number filed by: Plaintiff Defendant

C. Was a previous Third Party Action filed? Yes No

COMPLETE

Do Not Detach THIS STUB

Supreme Court, _____²²⁰ County

_____²²¹

v.

_____²²² INDEX NUMBER:²²³

217. Write the name of your action.

218. Write your name and address.

219. Write the name and address of the respondent.

220. Write the name of the county in which you are bringing the action.

221. Write your name as the petitioner.

222. Write the name and official title of the respondent or respondents.

223. Leave this blank. Do not write a number.

A-8. AFFIDAVIT IN SUPPORT OF REQUEST FOR REDUCTION/WAIVER OF FEES

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____ X

In the Matter of the Application of _____ :

: Affidavit in Support of

_____, :

: Application for Fee

Petitioner, :

: Reduction/Waiver Pursuant to

: N.Y. C.P.L.R. 1101(f)

- against - :

: Index No. _____

_____, :

Respondent, :

:

For a Judgment Pursuant to Article 78 :

of the Civil Practice Law and Rules :

_____ X

I, _____,²²⁴ being duly sworn, hereby declare as follows:

1. I am the petitioner in the above-entitled proceeding, I am an inmate in a state correctional facility [place of incarceration: _____]²²⁵, and I submit this affidavit in support of my application for a reduction of the filing fees pursuant to N.Y. C.P.L.R. 1101(f) (and that an attorney be assigned to represent me).²²⁶

2. I currently receive income from the following sources, exclusive of correctional facility wages: _____

3. I own the following valuable property (other than miscellaneous personal property):

[List property:]

[Value:]

224. Your name.

225. Name and address of your correctional facility.

226. Include this part of the sentence if you would like to request that a lawyer represent you.

- 4. I have no savings, property, assets, or income other than as set forth herein.
- 5. I am unable to pay the filing fee necessary to prosecute this proceeding.
- 6. No other person who is able to pay the filing fee has a beneficial interest in the result of this proceeding.
- 7. The facts of my case are described in my claim and other papers filed with the court.
- 8. I have made no prior request for this relief in this case.

(signature)

Sworn to before me
this ___ day of _____, 20____.

227

NOTARY PUBLIC AUTHORIZATION

I, _____, ²²⁸ inmate number _____, ²²⁹ request and authorize the agency holding me in custody to send to the Clerk of the Court certified copies of the correctional facility trust fund account statement (or the institutional equivalent) for the past six months.

I further request and authorize the agency holding me in custody to deduct the filing fee from my correctional facility trust fund account (or the institutional equivalent) and to disburse those amounts as instructed by the Court. This authorization is furnished in connection with the above entitled case and shall apply to any agency into whose custody I may be transferred.

I UNDERSTAND THAT I MAY HAVE TO PAY THE ENTIRE FEE IF THE COURT DENIES MY REQUEST FOR A FEE REDUCTION. MOREOVER, I UNDERSTAND THAT THE FEE DETERMINED BY THE COURT WILL BE PAID IN INSTALLMENTS BY AUTOMATIC DEDUCTIONS FROM MY CORRECTIONAL FACILITY TRUST FUND ACCOUNT EVEN IF MY CASE IS DISMISSED.

230

(signature)

227. This is where the notary public notarizes the affidavit by signing it and fixing his or her official seal to it. If you have difficulty obtaining the services of a notary public, you should have another prisoner witness your signature. (Use this technique only as a last resort.) If another prisoner is your witness, you should add at the bottom of the affidavit:

I declare that I have not been able to have this [affidavit] notarized according to law because [explain here your efforts to get the affidavit notarized]. I therefore declare under penalty of perjury that all of the statements made in this [affidavit] are true to my own knowledge, and I pray leave of the Court to allow this [affidavit] to be filed without notarization.

[Your signature].

228. Your name.

229. Your inmate number.

230. Your signature. By signing this section, you give permission for your facility to send the Court copies of your trust fund account statement. You also authorize the facility to withdraw the filing fee from your account and to send it to the Court. The entire filing fee will be withdrawn automatically from your account even if your case is dismissed.