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. The law 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.

This Chapter is divided into six parts. **Part A**—the Introduction you are reading now—will provide a brief overview of what an Article 78 proceeding is, where these proceedings happen, and what you can use an Article 78 petition to do. **Part B** explains what you can complain about in an Article 78 petition. **Part C** describes when you can get 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. **Part F** describes how you can appeal an Article 78 decision. The **Appendix** at the end of this Chapter has a sample Article 78 petition and supporting papers.

Article 78 is New York State law, and it does not apply in other states. Some states have similar laws to review the decisions of officials and administrative agencies. 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 that you believe was unlawful. An example of a New York state official is a prison official. An example of an administrative agency is the Board of Parole. 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 how you were injured by the action or inaction you are challenging. For example, if you were 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.[2] For information on challenging convictions and sentences, see *JLM*, Chapter 9, "Appealing Your

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[1] N.Y. C.P.L.R. § 7801 (McKinney 2008). 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 §§ 7801–7806 of the N.Y. C.P.L.R. You should also look at the sections and rules in Article 4 of the N.Y. C.P.L.R., which apply to "special proceedings" because Article 78 is a type of special proceeding.

[2] N.Y. C.P.L.R. § 7801(2) (McKinney 2008). Article 78 may also be used to prevent a judge from hearing a case, or prevent a public prosecutor from taking certain actions, if it is beyond his authority to do so. *See* Schumer v.

Conviction or Sentence,"); *JLM,* Chapter 20, "Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence," *JLM*, Chapter 13, "Federal Habeas Corpus Petitions, and *JLM,* Chapter 21, "State Habeas Corpus: Florida, New York, and Michigan."

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," and will state why you are complaining about the decision and what you would like the court to do about it. (Note that you can name more than one respondent in the same petition.) 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 the original decision you are asking the court to review was not supported by enough evidence.[7] This will be explained in greater detail in Part B(3).

After the judge reads the papers that you and the respondent (state agency or official) have submitted, he will make a decision.[8] Although Article 78 permits the judge to hold a hearing, this is extremely rare. As a result, incarcerated people who file Article 78 actions almost never actually appear in court. It is very likely that the judge will make his decision based on the papers that you and the respondent (state 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 a decision by a state agency or official. You (as the person challenging the decision) 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 can only 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.[9]

If you are successful in your Article 78 challenge, the original decision will be annulled (declared invalid) either entirely or partially. The court may also modify, or change, the original decision or order the respondent (the agency or official you are challenging) to act (or not act) in specific ways.[10] The

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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 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.

[3] N.Y. C.P.L.R. § 7804(c) (McKinney 2008).

[4] N.Y. C.P.L.R. § 7804(b) (McKinney 2008).

[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).

[7] N.Y. C.P.L.R. § 7803(4) (McKinney 2008).

[8] N.Y. C.P.L.R. § 7806 (McKinney 2008).

[9] N.Y. C.P.L.R. § 7803 (McKinney 2008).

[10] N.Y. C.P.L.R. § 7806 (McKinney 2008).

court will sometimes send an administrative decision back to the agency or officer for more review.[11] You should be aware that in Article 78 proceedings, monetary damages (money) 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 remedy (what you want the court to do).[12]

There are some kinds of relief (solutions) 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 on your Article 78 petition.

However, you should be aware that courts normally do not grant such delays in proceedings (further actions). Courts will only "stay" (delay) the proceedings if you can show three things: (1) you are likely to win, (2) you will suffer permanent harm if the court does not delay the proceedings, and (3) the harm you will suffer is greater than the benefits of continuing with the proceedings.[14]

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. Some possible complaints are that:

(1) The agency or official failed to do something the law requires;[15]
(2) The agency or official did something, is doing something, or is about to do something that is beyond its lawful authority;[16]
(3) The agency or official made a decision that was unreasonable and irrational, did not follow the law, or did not follow lawful procedure;[17] or
(4) The agency or official made a decision at a hearing that was not based on substantial evidence.[18]

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 New York Civil Practice Law and Rules § 7803 (to see what the law says you can challenge using Article 78), and the annotated

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[11] *See* Police Benevolent Ass'n of N.Y. 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 "further agency action is necessary to cure deficiencies in the record").

[12] N.Y. C.P.L.R. § 7806 (McKinney 2008) ("Any 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) (finding damages to be incidental because they were required by law to be awarded once petitioner won Article 78 claim, and holding that "[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 a particular case"); DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE 1093–1094 (6th ed. 2018); Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, N.Y. C.P.L.R. § 7806 (Supp. 2014).

[13] N.Y. C.P.L.R. § 7805 (McKinney 2008).

[14] 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* Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, N.Y. C.P.L.R. § 7805 (2008).

[15] N.Y. C.P.L.R. § 7803(1) (McKinney 2008).

[16] N.Y. C.P.L.R. § 7803(2) (McKinney 2008).

[17] N.Y. C.P.L.R. § 7803(3) (McKinney 2008).

[18] N.Y. C.P.L.R. § 7803(4) (McKinney 2008).

version of New York Civil Practice Law and Rules § 7803 in McKinney's,[19] which lists the decisions of Article 78 cases, including cases regarding incarcerated people.[20]

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. Historically, you simply need to state that it is an Article 78 action.[21] 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.[22] In this type of action, the duty to be performed must be required by the law and may not be "discretionary" (meaning that the official can decide whether to perform that duty).[23] This type of Article 78 proceeding is very important because it can force officials to follow the regulations that protect your rights as a person who is either incarcerated or on parole. For example, you can bring an Article 78 proceeding to challenge improper restrictions on your mail,[24] to correct inaccurate or unfair disciplinary records,[25] or to make the State Board of Parole act on your application for parole when the Board is required to act on it but has ignored it.[26] You can also bring an Article 78 proceeding to make the Board of Parole tell you the reasons why your parole was denied.[27] Note that in this last type of proceeding, the remedy,

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[19] See *JLM*, Chapter 2, "Introduction to Legal Research," for an explanation of McKinney's.

[20] N.Y. C.P.L.R. § 7803 (McKinney 2008).

[21] DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE 1066 (6th ed. 2018).

[22] *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.").

[23] *See* Citywide Factors, Inc. v. N.Y.C. 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.").

[24] *See* Hicks v. Russi, 219 A.D.2d 851, 851, 632 N.Y.S.2d 341, 342–343 (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 incarcerated people by mail, replying to mail orders, or acting as a paralegal on criminal cases since these activities did not place the parolee in the "company" of known criminals or constitute fraternization with criminals). *But see* Raqiyb v. Goord, 28 A.D.3d 892, 893–894, 813 N.Y.S.2d 251, 253 (3d Dept. 2006) (rejecting an incarcerated person's claim that regulation of his mail correspondence with his incarcerated nephew and opening of his outbound mail with insufficient postage was improper).

[25] *See* Hilton v. Dalsheim, 81 A.D.2d 887, 887–888, 439 N.Y.S.2d 157, 157–159 (2d Dept. 1981) (granting incarcerated person's Article 78 motion to remove from his institutional record all disciplinary violations resulting from a proceeding in which he was not provided adequate assistance in preparation for the proceeding, as required under state regulations; the hearing officer did not interview witnesses, as required under state regulations; and the hearing officer did not give him a written statement of the evidence relied upon and the reasons for the disciplinary action, which violated his due process rights). For an example of mixed petition for *mandamus* to review and to compel, see McDermott v. Coughlin, 135 Misc. 2d 659, 661–662, 516 N.Y.S.2d 834, 836–837 (Sup. Ct. Chemung County 1987) (granting an Article 78 motion to void a disciplinary hearing which found that an incarcerated person had violated disciplinary rules because those rules were not yet filed with the New York Secretary of State at the time of the incident, giving back the privileges and good behavior allowances to the incarcerated person, and removing the disciplinary action from his record).

[26] *See* Hines v. State Bd. of Parole, 267 A.D. 99, 101, 44 N.Y.S.2d 655, 656–657 (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 incarcerated person's application for parole); *see also* 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).

[27] *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 the incarcerated person the 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 an incarcerated person with the reasons why his parole was denied).

or solution, provided by the court would be to order the Board of Parole to decide your parole application,[28] or to make the Board give you the reasons for denying your parole.[29] Since the authority to grant parole is given to the Board of Parole, a court cannot order a certain result or decision.[30] Another example of a proceeding to compel action would be claiming that you are entitled to credit towards your sentence for time you spent in custody.[31] In this 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 Corrections and Community Supervision) to recalculate your sentence.[32]

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's 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, which is explained above in Section 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 (good) reason. The law calls such decisions and actions "arbitrary and capricious."[33] An arbitrary and capricious decision or action is one taken "without sound basis in reason and . . . without regard to the facts."[34]

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.[35] If an agency harmed you by violating its own legally required procedures

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[28] *See* Vulpis v. Dept. of Corr., 154 Misc. 2d 625, 629, 585 N.Y.S.2d 954, 956 (Sup. Ct. Kings County 1992) (ordering the Department of Corrections to release an incarcerated person who was denied parole after approving his temporary release or to process his application with "all due speed" if additional approvals were needed for his release).

[29] *See* Van Luven v. Henderson, 52 A.D.2d 1042, 1042, 384 N.Y.S.2d 898, 898–899 (4th Dept. 1976) (ordering the Board of Parole to notify an incarcerated person of the reasons his parole was denied).

[30] Hines v. State Bd. of Parole, 181 Misc. 280, 282, 46 N.Y.S.2d 569, 570–571 (Sup. Ct. Westchester County 1943) ("The 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."), *aff'd*, 267 A.D. 881, 46 N.Y.S.2d 572 (2d Dept. 1944).

[31] *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, 840–841 (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. Person, 256 A.D.2d 1232, 1233, 685 N.Y.S.2d 367, 368 (4th Dept. 1998) (noting that an Article 78 proceeding is the proper way to review the prison authorities' calculation of defendant's jail time credit); People v. Blake, 39 A.D.2d 587, 587, 331 N.Y.S.2d 851, 852 (2d Dept. 1972) ("If the Department of Correctional Services has miscalculated defendant's jail term, his proper remedy would be an article 78 proceeding . . . .").

[32] *See, e.g.*, Maccio v. Goord, 194 Misc. 2d 805, 808, 756 N.Y.S.2d 412, 414–415 (Sup. Ct. Albany County 2003) (granting an incarcerated person's Article 78 petition in part and directing the Department of Correctional Services to credit him with jail time served), *aff'd*, 4 A.D.3d 688, 772 N.Y.S.2d 745 (3d Dept. 2004); Grier v. Flood, 84 Misc. 2d 4, 8, 375 N.Y.S.2d 506, 509 (Sup. Ct. Nassau County 1975) (granting an incarcerated person's Article 78 petition and directing the Department of Correctional Services to credit him with jail time served).

[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) (discussing standards of judicial review of administrative agencies).

[34] 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).

[35] *See* Proctor v. Goord, 10 Misc. 3d 229, 232–233, 801 N.Y.S.2d 517, 519–520 (Sup. Ct. Albany County 2005) (holding that the Department of Corrections' action was "arbitrary and capricious" when it failed to remove from an incarcerated person's prison record an "unusual incident report" for an alleged violation that he was later found not to have committed).

(the law or its own regulations) in making an administrative decision, you can argue that such an action is arbitrary and capricious.[36]

Keep in mind that, generally, courts believe that administrative officials are in the best position to make decisions regarding incarcerated people. 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, unless you can show that the decision was so unreasonable as to require that it be overturned.[37]

You can challenge as arbitrary and capricious most day-to-day prison decisions, such as decisions regarding furlough and temporary release,[38] appearances at disciplinary proceedings,[39] access to evidence,[40] visitation rights, mail access, and transfers. However, your chance of successfully challenging a transfer is very small because New York law gives the Commissioner of Corrections "almost unbridled authority to transfer inmates from one facility to another."[41] "Unbridled authority" means the complete power to take an action without interference by others (so, this means the courts cannot get involved). Challenges to transfers, however, were successful where: (1) an incarcerated

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[36] *See* People *ex rel.* Furde v. N.Y.C. 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, 962, 520 N.Y.S.2d 470, 470 (3d Dept. 1987) (granting Article 78 petition and finding that the determination of the Commissioner of Correctional Facilities that the incarcerated individual did not follow a disciplinary rule was not supported by substantial evidence); Nesbitt v. Goord, 12 Misc. 3d 702, 705–706, 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); Martinez v. Baker, 180 Misc. 2d 334, 336, 688 N.Y.S.2d 877, 879 (Sup. Ct. Albany County 1999) (finding that the Department of Correctional Services acted arbitrarily and capriciously in denying an incarcerated Spanish-speaking person participation in a family reunion program because he did not complete an alcohol and substance abuse program, even though he did not have access to a bilingual program or a translator for the existing program).

[37] *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).

[38] *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 an incarcerated person with AIDS for participation in a temporary release program was not rationally related to the Department's interest in the health of incarcerated people).

[39] *See* Boodro v. Coughlin, 142 A.D.2d 820, 822–823, 530 N.Y.S.2d 337, 339–340 (3d Dept. 1988) (holding that the Hearing Officer acted arbitrarily and capriciously in removing the incarcerated person from his disciplinary hearing because the Hearing Officer's reasons for excluding him due to misbehavior were 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 incarcerated person from the disciplinary hearing was not arbitrary or capricious because the removal was due to individual's misbehavior and occurred only after warnings).

[40] *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 an incarcerated person to call witnesses on his behalf in disciplinary proceedings, and calling witness did not threaten safety or correction goals, the incarcerated person had the right to call his brother as a witness to give testimony to try to reduce the penalty to be imposed); *see also* Wilson v. Coughlin, 186 A.D.2d 1090, 1090–1091, 590 N.Y.S.2d 798, 798 (4th Dept. 1992) (granting an incarcerated person's request to cancel the effect of an official's determination in a disciplinary hearing because he had not been allowed to offer evidence of mitigating circumstances, which is a factor considered in prison disciplinary hearings). A "mitigating circumstance" is a fact or event that does not excuse behavior but may decrease the degree of punishment.

[41] 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(1) (McKinney 2017) ("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 an incarcerated person a constitutional right or in response to the exercise of such a right).

person's request for an appropriate transfer for medical reasons is unreasonably denied;[42] (2) an incarcerated person requires rehabilitative treatment that has been completely withheld;[43] and (3) a member of an incarcerated grievance committee, who represents other incarcerated people and abides by the rules of the institution, is transferred without a hearing or compelling emergency.[44]

You can also file an Article 78 petition to claim that an agency abused its discretion by giving you a punishment that is too severe (because such punishments are usually the result of administrative hearings). These petitions claim an "abuse of discretion ... as to the measure or mode of penalty or discipline imposed."[45] The court will only rule in your favor (and reject the agency's punishment) if it is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness."[46] As a result, these Article 78 petitions are very hard to win.[47]

The examples mentioned above challenge an agency's or official's decision. You can also file a petition claiming that the agency or official gave "arbitrary and capricious" reasons when it originally made the decision. If the official's original reasons are arbitrary and capricious, the court reviewing your Article 78 petition may rule in your favor (and reject the official's decision) even though the official offers different reasons later on in the proceedings.[48]

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

A third type of Article 78 action allows you to claim that a hearing board made a decision that was not supported by substantial evidence ("substantial evidence" is explained in more detail in the paragraphs below). 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 not enough to support the decision, you can use an Article 78 petition 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 use a substantial evidence argument to challenge any sort of disciplinary hearing or parole board decision that is based on evidence and a record.[49] By bringing this type of claim, you are asking the court to review the record that the agency or official used for the decision.

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[42] *See* Barnett v. Metz, 55 A.D.2d 997, 998, 390 N.Y.S.2d 701, 701–702 (3d Dept. 1977) (holding that while decisions about transfers are generally left to the agency's discretion, where an incarcerated person could show that the prison arbitrarily abused this discretion by failing to consider medical evidence, the decision could be challenged through Article 78).

[43] *See* People *ex rel.* Ceschini v. Warden, 30 A.D.2d 649, 649, 291 N.Y.S.2d 200, 201–202 (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).

[44] *See* Johnson v. Ward, 64 A.D.2d 186, 189–190, 409 N.Y.S.2d 670, 673 (3d Dept. 1978) (holding that an incarcerated person serving as a member of the then-called 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).

[45] N.Y. C.P.L.R. § 7803(3) (McKinney 2008).

[46] 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)).

[47] *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 and loss of commissary privileges, loss of 30 days of good time, and 80 days of restricted visits was not disproportionate for an incarcerated person who threw a handkerchief to a visitor in the visiting room because there was substantial evidence that the individual violated the rules and the penalty was not so disproportionate as to be "shocking to [the court's] sense of fairness").

[48] *See* Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Serv., 77 N.Y.2d 753, 759, 573 N.E.2d 562, 567, 570 N.Y.S.2d 474, 479 (1991) (holding that the reasons an agency later offered for dismissing an employee could not be used because its original dismissal was based on arbitrary and capricious reasons); *see also* Tamulinas v. Bd. of Educ. of Jericho, 279 A.D.2d 527, 529, 719 N.Y.S. 2d 660, 662 (2d Dept. 2001) (holding that reliance on the forms was arbitrary and capricious, and refusing to consider the additional reasons given because "determination is limited to the ground invoked by the administrative body at the time of the decision.")

[49] See Chapter 18 of the *JLM* for an explanation of disciplinary proceedings and Chapter 32 of the *JLM* for an explanation of parole.

When the court reviews an Article 78 challenge to agency decisions made after administrative hearings, they use a standard called the "substantial evidence test." "Substantial" means there must be enough evidence that a reasonable person could make the same decision the agency made. This means that the court will look to see if there was enough evidence in the record for the agency official to decide as he did. It does not mean that most of the evidence supports the decision made by the agency. It also does not mean that the court will determine whether the official made the right decision. You cannot argue that the decision was wrong, because the court will not substitute its judgment for the agency's judgment. Instead, you need to argue that the official did not have enough evidence to make its decision. If there were mistakes or errors in the evidence against you, the court may overturn the decision.

For example, some incarcerated people have successfully challenged disciplinary decisions where, during the hearing, a corrections officer used misbehavior reports that were based on "hearsay."[50] 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 incarcerated people also challenge disciplinary decisions that use reports by informants. In general, courts recognize that it is important to protect informants' confidentiality and will agree with decisions based on information from informants even where the incarcerated person has not been allowed to see or cross-examine the informants. In a decision by the highest court of New York, an incarcerated person challenged a disciplinary hearing decision by arguing that the hearing officer should be required to interview the informants personally in order to determine their credibility.[51] (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 rejected the individual's challenge and said that even though a hearing officer must determine the informants' credibility, a face-to-face interview is not required.[52] Incarcerated people 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.[53]

Incarcerated people have also used Article 78 to challenge hearing decisions related to drug violations.[54] Some incarcerated people have successfully challenged drug-related decisions by showing

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[50] *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 an incarcerated person was guilty because reports did not show that correction 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 incarcerated person started a fire in the cell of another individual was not sufficiently supported by evidence where the only evidence of guilt was hearsay testimony of an officer who was not present, and the incarcerated person offered credible testimony that contradicted such hearsay).

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

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

[53] Milland v. Goord, 264 A.D.2d 846, 846–47, 698 N.Y.S.2d 245, 246 (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 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 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, 208 (3d Dept. 1999) (upholding the hearing officer's determination as supported by "sufficiently detailed information from which [the hearing officer] could properly assess [the informants'] reliability").

[54] *See* Venegas v. Irvin, 249 A.D.2d 982, 982, 672 N.Y.S.2d 200, 201 (4th Dept. 1998) (holding there was

that a drug test was not reliable or accurate enough to support the hearing decision, or the drug test was not conducted properly.[55]

Also, in at least one case, an incarcerated person successfully challenged a determination that he had been in possession of a weapon because he showed that the evidence on the record was insufficient to support the decision.[56] In that case, the court ruled that there was not enough evidence to show that a weapon found in a cell belonged to an individual who had just been transferred to that cell.[57]

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 court proceeding.[58] 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 do not file your claim within that time limit, your claim will be dismissed. If the court does not dismiss 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,

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substantial evidence for determining that an incarcerated person possessed drugs, where the misbehavior report included correction officer's statement that he saw the individual throw a marijuana cigarette on the floor and that the cigarette later tested positive for marijuana, despite questions around when the cigarette was tested and when the report was filed); *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 the wife of an incarcerated person had brought cocaine to the correctional facility because the Department had not introduced the required documents into evidence as required by regulations).

[55] *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 an incarcerated person where the person 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 an incarcerated person's marijuana possession because correction officer's testimony that a test showed substance to be marijuana did not include description of nature of the test or the procedures used); Moss v. Scully, 152 A.D.2d 577, 577–578, 543 N.Y.S.2d 161, 162 (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 incarcerated person's test and found to be properly calibrated and in working order when the test was administered; (2) the chemicals used in conducting the test were of the proper kind and mixed in the proper portions; and (3) the breathalyzer was operated properly during the test). *But see* Holmes v. Coughlin, 182 A.D.2d 1121, 1121–1122, 583 N.Y.S.2d 703, 704 (4th Dept. 1992) (upholding superintendent's determination that the incarcerated person used illegal drugs as sufficiently supported by two positive Syva EMIT Drug Detection System Tests, and commenting on the tests' scientific reliability and validity).

[56] Varela v. Coughlin, 203 A.D.2d 630, 631–632, 610 N.Y.S.2d 103, 104 (3d Dept. 1994) (holding that there was insufficient evidence to determine that a weapon hidden in an incarcerated person's cell was under the control of that person where he had been recently transferred to the facility, spent no more than six days in his cell (and some of that in keeplock), and there was no evidence his cell had been searched prior to his arrival or he had an opportunity to acquire the weapon). *But see* Patterson v. Senkowski, 204 A.D.2d 831, 832–833, 612 N.Y.S.2d 84, 85 (3d Dept. 1994) (finding that written misbehavior report by officer who searched an incarcerated person's jacket in a communal area was sufficient evidence to support finding by superintendent that the incarcerated person possessed a weapon, and that his claim that the jacket was not his merely created issue of credibility for the hearing officer to determine); 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 an incarcerated person's cell substantially supported determination that he was guilty of possessing contraband classified as a weapon; the incarcerated person'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).

[57] Varela v. Coughlin, 203 A.D.2d 630, 631, 610 N.Y.S.2d 103, 103–104 (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 an incarcerated person possessed a weapon when he had been in the facility for 20 days and had been in the living area where the weapon was found for eight days).

[58] N.Y. C.P.L.R. § 7804(g) (McKinney 2008).

which are heard in the Supreme Court. This means that your substantial evidence claims will probably take longer to be decided than other Article 78 claims.

4. Challenge Legal Authority for State Action (Prohibition)

The fourth type of Article 78 proceeding arises when you challenge the state as acting 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 hurt or 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.[59]

C. When You Can Obtain Relief Under Article 78

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

1. You May Only Challenge Administrative Decisions

You can only use Article 78 to challenge administrative determinations of a New York state officer or agency. You generally cannot use it to challenge the decisions of a judge or a court, such as criminal convictions or criminal sentences. However, you can use Article 78 to challenge some types of actions by a judge, such as a punishment given by a judge for contempt of court.[60] You can also use Article 78 if the judge made a decision that exceeded his authority (this is called "prohibition"—see Part B(4) above), or the judge failed to act in some way that was legally required (called "*mandamus*"—see Part B(1) above).

2. You Must Exhaust All Administrative Remedies

The administrative determination that you challenge must be final.[61] This means that a decision-maker must have caused you an actual injury of some sort.[62] 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.[63] If it is possible for you to appeal the decision to a higher state officer in the prison system, you must do so before using Article 78. In other words, you must go through every normally available step in the administrative process before using Article 78. This is

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[59] *See* Schumer v. Holtzman, 60 N.Y.2d 46, 51, 454 N.E.2d 522, 524, 467 N.Y.S.2d 182, 184 (1983) (noting 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).

[60] *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, 748–749, 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).

[61] N.Y. C.P.L.R. § 7801(1) (McKinney 2008).

[62] *See, e.g.* Adirondack Wild: Friends of The Forest Preserve v. N.Y. State Adirondack Park Agency, 161 A.D.3d. 169, 75 N.Y.S.3d. 681 (3d Dept. 2018) (referring to an Article 78 proceeding and stating that "[w]e have previously held that an administrative action is final and ripe for review only when a pragmatic evaluation reveals that the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" (citing Adirondack Council, Inc. v Adirondack Park Agency, 92 AD3d 188, 190, 936 NYS2d 766 (2012))).

[63] *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 that, under N.Y. C.P.L.R. § 7801, 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).

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.[64] This means that it is important to be aware of the ways you can challenge or appeal the decisions of prison officials within the prison or corrections system.[65]

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 grievance within twenty-one days of the event that gives rise to the grievance.[66] For more information on grievances, see *JLM*, Chapter 15, "Incarcerated Grievance Procedures." If you are appealing the outcome of a disciplinary hearing, you must submit an appeal in writing to the superintendent within seventy-two hours of the decision. The superintendent must then issue a decision within fifteen days of receiving the appeal.[67] If you are appealing a superintendent's hearing decision, you must appeal to the Commissioner within thirty days of the decision, and the Commissioner must issue a decision on your appeal within sixty days.[68]

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.[69]

There are a couple of exceptions to the general rule that you must exhaust all administrative remedies before you bring an Article 78 petition. Because the courts rarely grant these exceptions, you should not rely on them. Instead, you should assume that you must first exhaust all administrative remedies.

The first possible exception is when your appeal for an administrative remedy would have no chance of succeeding. In one New York state case, the court said that the finality requirement of N.Y. C.P.L.R. § 7801(1) may be relaxed if trying to obtain an administrative remedy "reasonably appears to be futile."[70] But you should be aware that it is not common for courts to find that an appeal "reasonably appears to be futile," or unlikely to succeed.

The second possible exception is when an order is made that could harm you without the court stepping in to protect you. This is when a "non-final order" will result in "irreparable harm" without court intervention (without the court taking some kind of action).[71] "Irreparable harm" is harm that cannot be changed or reversed after it happens. A "non-final order" is a court order that does not end or get rid of a case or issue. If irreparable harm from a non-final order is going to happen before you can try to appeal, you can ask the court to step in under Article 78. For example, if a decision by the disciplinary board was going to take place before you could appeal it, the court could intervene by taking you out of your facility. Or if you were not receiving medical benefits that should be provided

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[64] *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) (dismissing Article 78 petition because petitioner had not exhausted administrative remedies available under Public Health Law); 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).

[65] *See* Farinaro v. Leonardo, 143 A.D.2d 492, 492–493, 532 N.Y.S.2d 601, 602 (3d Dept. 1988) (holding that an incarcerated person who was informed of the proper administrative procedure to challenge the decision of prison officials to withhold a martial arts catalog from him, and who did not follow that procedure, had failed to exhaust administrative remedies and could not obtain judicial relief).

[66] N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(a)(1) (2024).

[67] N.Y. COMP. CODES R. & REGS. tit. 7, § 253.8 (2024).

[68] N.Y. COMP. CODES R. & REGS. tit. 7, § 254.8 (2024).

[69] *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.4(c) (2024) (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 through an Article 78 petition).

[70] 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).

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

under state or federal law, the court could intervene before the appeal by providing those benefits to you (to avoid "unnecessary hardship" on "poor, needy individuals" in the words of one court).[72]

The third possible exception is when an agency does something that is unconstitutional or does something it does not have the power to do.[73] 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] This means that you cannot simply claim that something is unconstitutional to try to get around the requirement of exhausting the remedies available from the administrative agency. It also could be a problem to bring a constitutional claim that would require the court to review facts made on the record by the administrative agency. In one case the court declined the exception for this reason.[75]

So, it is possible that a court might allow you to proceed with an Article 78 motion even if you have not exhausted all of the administrative remedies if you can demonstrate: (1) your appeal for an administrative remedy has no chance of succeeding, (2) you would suffer irreparable harm without some judicial (court) intervention, or (3) an unconstitutional action or action beyond an agency's powers is taken against you. 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 no later than four months after 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. If you wait longer than four months to do this, the court will dismiss your petition. Section D(8) of this Chapter explains how you can file and serve your petition.

To find out the deadline for filing your papers, you must first figure out when the decision you want to challenge became final. The statute of limitations will usually run from the date when you receive notice of the determination you are challenging. It 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 authority has not notified you, and the time when you were supposed to be notified has passed, you can assume your appeal has been denied.[77]

If you apply for a rehearing (instead of another appeal) by the highest agency or prison board, the courts will not extend the statute of limitations period to cover the rehearing application period (unless

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72 *See* Lutsky v. Shuart, 74 Misc. 2d 436, 438, 342 N.Y.S.2d 709, 712 (Sup. Ct. Nassau County 1973), *aff'd*, 43 A.D.2d 1016, 351 N.Y.S.2d 946 (2d Dept. 1974) (holding that a 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, 974–975 (Sup. Ct. Suffolk County 1977) (holding that exhaustion of administrative proceedings is not required for a petitioner seeking a housing shelter allowance and facing possible eviction before the proceedings).

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

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

75 *See* Levine v. Bd. of Educ., 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, 223 A.D.2d. 635, 636, 637 N.Y.S.2d 179, 180 (2d Dept. 1996) (holding that a 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 2019).

77 *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 9, § 8006.4(c) (2024) (stating that 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 deemed to have been exhausted, and an appeal may be brought before the courts).

the law gives you the right 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 the statute 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.[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).

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 at the end 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 copy and one extra 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 copies of all the papers you file during the Article 78 proceeding for your own record.

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[78] *See* De Milio v. Borghard, 55 N.Y.2d 216, 220, 433 N.E.2d 506, 507–508, 448 N.Y.S.2d 441, 442–443 (1982) (holding that the 4-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 or effective 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 a Commissioner's determination after a disciplinary hearing, the statute of limitations began to run when the determination sustaining the disciplinary charges against the incarcerated person was affirmed on administrative appeal; the petitioner's attempt to get a reconsideration of the determination did not extend the statute of limitations).

[79] Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, N.Y. C.P.L.R. § 7801:7 (Supp. 2023).

[80] If you are going to look through the procedure code yourself, remember that 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) (McKinney 2003), unless another section provides otherwise.

[81] N.Y. C.P.L.R. § 1101 (McKinney 2012); N.Y. C.P.L.R. § 8018 (McKinney 1981).

[82] N.Y. C.P.L.R. § 8018(a) (McKinney 1981).

[83] N.Y. COMP. CODES R. & REGS. tit. 22, § 202.6 (2024). See Appendix A of this Chapter for a sample of a Request for Judicial Intervention.

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 steps.

"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 where either: the administrative decision you are challenging was made, the administrative appeal was decided, the material events took place, or the respondent has his main office (this is 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 all of the counties.

By filing, you begin the proceeding and automatically "interpose" the claim. This means that if you file before the statute of limitations runs out, the respondent cannot later argue that it took you too long to file successfully. You must file within four months of a final decision.

There are still some drawbacks at this stage, even if you file within the statute of limitations. 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.

Filing your petition will get you an index number.

2. Notice of Petition or Order to Show Cause

(a) Notice of Petition

A Notice of Petition gives notice to all parties. It includes the name of the respondents (the opposite parties), the nature of your claim (the type of claim you are bringing forward), and the date and place of the hearing where you want your petition heard. It should be directed (addressed) to the respondent and clearly identify them. The Notice of Petition should state when and where it is to be submitted to a judge. It should also identify any documents you are basing the Article 78 challenge on.

A Notice of Petition must be served (delivered) in person to 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 put down 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 the Appendix to this Chapter for more information.

(b) Order to Show Cause

An Order to Show Cause also gives notice to all parties, but differs slightly. It is different from a Notice of Petition because it is presented to a judge and signed by him before it is served (delivered or mailed) to other parties to the case. You might use it because you need an immediate hearing or because you cannot physically serve a Notice of Petition. (Since you are in prison, you would need someone like a friend, relative, or a private service to help you serve a Notice of Petition in person.) Note that an Order to Show Cause pauses an official threatened action until your claim is heard.

An Order to Show Cause is an order signed by the judge directing that a petition be heard. Normally, a period of twenty days (advance notice) is given to the respondent before a hearing can

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[84] N.Y. C.P.L.R. § 7804 (McKinney 2008); N.Y. C.P.L.R. § 304 (McKinney 2010); N.Y. C.P.L.R. § 8018 (McKinney 1981).

[85] N.Y. C.P.L.R. § 304 (McKinney 2010).

[86] N.Y. C.P.L.R. § 506(b) (McKinney 2006).

[87] N.Y. C.P.L.R. § 7804(c) (McKinney 2008). You should send your papers to the Attorney General by sending them 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.

happen. With an Order to Show Cause, the judge can speed up the hearing date so that it happens in less than the usual twenty days—it can even happen immediately.

In your 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 include this request.

You should also explain why you need an Order to Show Cause in the affidavit (sworn written statement) attached to your Order to Show Cause. One reason could be that you are incarcerated and cannot carry out "personal service," meaning that you cannot deliver your petition directly to the respondent in person. Another reason you could list 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 stop this from happening. See the example of an "Order to Show Cause" in Appendix A of this Chapter for more information.

To give notice to government agencies, papers should be served to either: the county attorney (County), the corporation counsel (City), or any person designated to receive service in writing. The papers should also be filed in the County Clerk's Office.

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.

(c) 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.

You can pick a date for the hearing when you send the Order 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 happened.

In your Order to Show Cause, you must indicate the date by which you will serve (deliver or mail) 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 the court appearance. You should consider 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. If you forget to provide a return date on your Notice of Petition, the court should give you a chance to correct the mistake or disregard it if neither party is hurt by the mistake.[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.

(d) 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 formal title. You will need to

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[88] N.Y. C.P.L.R. § 7804(c) (McKinney 2008).

[89] N.Y. C.P.L.R. § 2001 (McKinney 2012); *see also* Oneida Pub. Libr. Dist. v. Town Bd., 153 A.D.3d 127, 129–130, 59 N.Y.S.3d 524, 526 (3d Dept. 2017) (holding that the latest version of N.Y. C.P.L.R. § 2001 was specifically changed so that courts would no longer dismiss petitions for mistakes like forgetting to put a return date on the Notice of Petition). Your petition may still be dismissed for larger mistakes like not serving a Notice of Petition at all. *See* 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).

substitute the name of a 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 to list only the officials involved and the Commissioner of the Department of Correctional Services. For example, in cases challenging disciplinary actions, 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).

(e) Stay

If you request a stay against the respondent (a pause in the proceedings) and the judge grants it, then your petition has to be heard before the decision you are challenging can be enforced.[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. 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" in a particular county (the place where the lawsuit is filed or heard), 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 incarcerated people, 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 that out. If you claim that the agency did not follow its procedures, you should also claim that the decision the agency reached may be wrong because of this.

4. Verification of Petition

Your petition must also include a "verification." A verification is a short statement in which you swear to the truth of the statements in your petition. It must include the statement that what is written in your petition "is true . . . except as to matters alleged on information and belief, and that as to those matters [insert your name] believes it 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—like "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

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[90] N.Y. C.P.L.R. § 1019 (McKinney 2012).

[91] N.Y. C.P.L.R. § 7805 (McKinney 2008) (stating that "[o]n the motion of any party or on its own initiative, the court may stay further proceedings, or the enforcement of any determination under review").

[92] N.Y. C.P.L.R. § 3020(a) (McKinney 2010).

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 getting 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 that can be answered 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, incarcerated people could file for poor person status ("*in forma pauperis*") in New York State courts, which meant they 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. Now incarcerated people must pay filing fees whenever they bring claims in state courts.[94] So, even if you or someone you know once 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 incarcerated people 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]

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[93] N.Y. C.P.L.R. § 3123(a) (McKinney 2018) (stating that the Notice to Admit may be served at any time after the answer is served, but not later than 20 days before trial).

[94] The requirements that all incarcerated people pay at least a small filing fee can be found in N.Y. C.P.L.R. § 1101(d)–(f) (McKinney 2012). The fees for each piece of the application can be found on the New York State courts website. *See The Courts: Filing Fees*, N.Y. STATE UNIFIED CT. SYS. (Apr. 1, 2021), *available at* https://www.nycourts.gov/forms/filingfees.shtml (last visited Mar. 27, 2024). As explained above in Part D, to file an Article 78 motion, you need to file a Request for Judicial Intervention (RJI) and a Request for an Index Number. Both of these documents come with a fee. If you make an application to file as a poor person (poor person relief) and your application is granted, the fee for the RJI will be waived, meaning you do not have to pay it. The fee to get an index number will not be fully waived, but it may be reduced. Based on the evidence of your inability to pay that you give to the court in your application for poor person relief, the court will decide how much you have to pay to file and get an index number. This amount will be between $15–50. There is no fee associated with the request to proceed as a poor person (referred to above, and in general, as fee waiver application, application to proceed as a poor person, poor person relief, or motion to proceed *in forma pauperis*. All of these phrases mean the same thing.).

[95] *See* Gomez v. Evangelista, 290 A.D.2d 351, 352, 736 N.Y.S.2d 365, 366 (1st Dept. 2002) (holding that the requirement that incarcerated people pay a non-waivable fee of at least $15, while other non-incarcerated people 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) (holding the same as *Berrian*). *But see* N.Y. C.P.L.R. § 1101(d) (McKinney 2012) (stating that a plaintiff may seek to start an action without paying the required fee by filing the form affidavit, attesting that he is unable to pay the costs and fees necessary for the action; if the court denies the application and does not grant a fee waiver, the case will be dismissed unless the fee is paid within 120 days of the date of the order).

[96] N.Y. C.P.L.R. § 1101(f)(5) (McKinney 2012) (expiring Sept. 1, 2025).

Incarcerated people are eligible for a reduced filing fee, which may be between $15–50[97] (the full filing fee is $190).[98] In order to get the reduced filing fee, you must submit an affidavit (sworn statement) to the court stating why you cannot afford the full filing fee and asking for a reduced filing fee.[99] If you are not able to pay the full filing fee, you should include as much detailed information as possible about your financial situation in your affidavit. For example, you should tell the court 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 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 trust fund account statement for the six months before you filed the affidavit. 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 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 a trust fund account statement for the last six months from the Central Office of DOCCS in Albany, if you are a person incarcerated by the state who was transferred from another state correctional facility; or (2) get a trust fund statement from a federal or local correctional facility, if you were transferred from such a facility.[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 person incarcerated by the state, DOCCS 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 fix your petition if you made a mistake

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97 N.Y. C.P.L.R. § 1101(f)(2) (McKinney 2012) (expiring Sept. 1, 2025).

98 N.Y. C.P.L.R. § 8018(a) (McKinney 1981). 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 1981).

99 N.Y. C.P.L.R. § 1101(d) (McKinney 2012).

100 N.Y. C.P.L.R. § 1101(d) (McKinney 2012).

101 N.Y. C.P.L.R. § 1101(f)(1) (McKinney 2012) (expiring Sept. 1, 2025).

102 N.Y. C.P.L.R. § 1101(f)(1) (McKinney 2012) (expiring Sept. 1, 2025).

103 N.Y. C.P.L.R. § 1101(f)(2) (McKinney 2012) (expiring Sept. 1, 2025).

104 N.Y. C.P.L.R. § 1101(f)(2) (McKinney 2012) (expiring Sept. 1, 2025).

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 2012) (expiring Sept. 1, 2025).

106 N.Y. C.P.L.R. § 1101(f)(2) (McKinney 2012) (expiring Sept. 1, 2025).

107 N.Y. C.P.L.R. Rule 2101(c) (McKinney 2012).

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 after obtaining a new index number. You can do this either by filing a new motion for *in forma pauperis* ("poor person" status) or paying the fee again. If you must refile, you should be aware of issues that might come up with the statute of limitations. See Section C(3) above for a discussion of the 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 both to 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" in capital letters on the front of the envelope.[114] Service is not complete until the certified mail is received by the agency to which it is sent.

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[108] N.Y. C.P.L.R. § 2001 (McKinney 2012); N.Y. C.P.L.R. Rule 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.

[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 a 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 also* Long Island Citizens Campaign, Inc. v. County 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 also* 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).

While incarcerated, you may have a great deal of trouble accomplishing service. You will probably use one of two methods, personal service or mail. Both types of service are described below, and both can cause problems for incarcerated people.

(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 exactly what she did, and this affidavit is turned over to the court to demonstrate proof of service. An incarcerated person could serve the agency 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).[115]

(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.[116] If you are not able to personally serve the Attorney General, you should include an Order to Show Cause requesting authorization to serve the material that you originally sent the court to the Attorney General by mail.[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 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 incarcerated people to use whatever mail services are available to them. In fact, courts sometimes give incarcerated people 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

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[115] N.Y. C.P.L.R. Rule 2103(a) (McKinney 2012).

[116] In general, service is accomplished by personal service to the state agency official and the Attorney General. N.Y. C.P.L.R. § 307(2) (McKinney 2010); N.Y. C.P.L.R. § 7804(c) (McKinney 2008). Therefore, without an order to show cause authorizing an alternative means of service, or when there has not been strict compliance with the provisions of N.Y. C.P.L.R. § 312-a (McKinney 2010) (authorizing service by mail under narrowly prescribed circumstances) or N.Y. C.P.L.R. § 307(2) (McKinney 2010) (authorizing service by certified mail upon the agency along with personal service upon the Attorney General), service by ordinary mail is generally insufficient in an Article 78 proceeding. *See* Rosenberg v. N.Y. State Bd. of Regents, 2 A.D.3d 1003, 1004, 768 N.Y.S.2d 404, 404 (3d Dept. 2003).

[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))); *cf.* Bottom v. Murray, 278 A.D.2d 817, 817, 718 N.Y.S.2d 535, 535–536 (4th Dept. 2000) (dismissing incarcerated person's Article 78 proceeding because he failed to personally serve the petition upon respondent and Attorney General and failed to seek an order to show cause to authorize service by mail as an alternative to personal service, despite his argument that he should be held to less stringent standards because he was proceeding *pro se* and had received inaccurate information from a notice provided to incarcerated people). 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 United States . . . ." N.Y. C.P.L.R. Rule 2103(f)(1) (McKinney 2012) (emphasis added). A person who is currently incarcerated 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 incarcerated people 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, that a court may treat an incarcerated person's letter as an application to permit alternative service even where there is no order to show cause authorizing service by mail); Hanson v. Coughlin, 103 A.D.2d 949, 949, 479 N.Y.S.2d 767, 768 (3d Dept. 1984) (interpreting an incarcerated person's attempt to mail a petition as an application for an order permitting alternative service, and remitting the case to the trial court so that the incarcerated person could submit an order to show cause).

court clerk about the 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.

(i) *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 to 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 a sworn statement 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.

9. 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 a lack of knowledge about each point. 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 and all attached documentary evidence no later than five days before the hearing date.[120]

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 government were inaccurate, you will want to say that in a reply. If the government 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 whether they are true. If you do not, the court can view those facts as if you have admitted that they are true.[121] And, if the government has made a claim against you (a counterclaim) you will want to address this claim against you in a reply. You must serve the government with your reply at least one day before the hearing.[122]

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 hearing transcripts.[123]

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.

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[120] N.Y. C.P.L.R. § 7804(c), (e) (McKinney 2008).

[121] N.Y. C.P.L.R. § 3018(a) (McKinney 2010).

[122] N.Y. C.P.L.R. § 7804(c) (McKinney 2008).

[123] *See* Gittens v. Sullivan, 151 A.D.2d 481, 481, 542 N.Y.S.2d 272, 273 (2d Dept. 1989) (ordering a respondent to provide a transcript of disciplinary hearing, and if no transcript existed, the agency's determination had to be voided and a new administrative hearing had to be started); Arnot-Ogden Memorial Hosp. v. Axelrod, 95 A.D.2d 947, 948–949, 463 N.Y.S.2d 927, 929–930 (3d Dept. 1983) (holding that a default judgment was proper because a respondent had repeatedly failed to produce a transcript that the court ordered).

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, 2018, you must file your appeal with the appropriate court before April 1, 2019. You must serve the respondent(s) and the Attorney General's Office and file proof of service with the court before April 16, 2019.

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) the full filing fee of $190 or an affidavit that supports your claim that you cannot afford to pay the full filing fee. See the discussion in Part D(6) above. Starting on September 1, 2019, if the court approves your request, it will not charge you anything;

Caution: If you fail to enclose either the full 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"). 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;[124] 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 the 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 respondent(s) must receive these items before the time specified in the Order. If you are using a Notice of Petition, the respondent(s) 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.[125]

(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

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[124] *See, e.g.,* N.Y. CT. RULES § 202.6(c) (McKinney 2024) (describing procedures for judicial intervention in counties in New York City). For the general procedure on Requests for Judicial Intervention in New York, see N.Y. COMP. CODES R. & REGS. tit. 22, § 202.6 (2024).

[125] N.Y. C.P.L.R. Rule 2103(b)(2) (McKinney 2012).

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 you will not only have to pay the filing fee again but 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.[126] 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).[127]

F. How to Appeal Your Article 78 Decision

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 covers the county where your Article 78 petition was decided against you.[128] 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 specific documents or actions, if any, are required by your department for each step of your appeals process.[129]

1. 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. You must file 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).[130]

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[126] N.Y. C.P.L.R. § 1102(a) (McKinney 2012).

[127] N.Y. C.P.L.R. § 7806 (McKinney 2008).

[128] The four departments are as follows: 1st Department—Bronx, New York (Manhattan); 2nd Department—Dutchess, Kings (Brooklyn), Nassau, Orange, Putnam, Queens, Richmond (Staten Island), 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. *Appellate Courts: Appellate Divisions*, N.Y. STATE UNIFIED CT. SYS. (Aug. 3, 2023), *available at* https://www.nycourts.gov/courts/appellatedivisions.shtml (last visited Mar. 27, 2024).

[129] You can find this information by looking up your court and department rules in McKinney's New York Rules of Court (2024). The relevant parts of the rules are as follows: N.Y. CT. RULES Part 600 [1st Dept.]; Part 670 [2d Dept.]; Part 850 [3d Dept.]; Part 1000 [4th Dept.'. You should also consult N.Y. CT. RULES Part 1250 for general rules.

[130] N.Y. C.P.L.R. § 5515 (McKinney 2014).

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.[131] (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 generally must serve and file the notice of appeal within thirty days of your petition's denial, or the decision will be final and you will not be able to appeal.[132]

2. 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 evidence 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). [133]

While each of the four departments has adopted a uniform, statewide set of rules to handle appeals, you should also check their additional supplements to ensure that you have what is needed to be in the record for an appeal.[134] 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 incarcerated person with poor person status.) Otherwise, you can read and follow the court rules for the specific department you are in.

3. Writing Your Brief

To proceed with your appeal, you will also have to write a brief, which is 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

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[131] N.Y. C.P.L.R. § 8022(b) (McKinney 1981). For more information about requesting a reduced filing fee, see Part F(6) of this Chapter ("Filing Fees") and N.Y. C.P.L.R. § 1101(f) (McKinney 2012) (expiring Sept. 1, 2025). The rules are different for each department.

[132] N.Y. C.P.L.R. §§ 5513, 5515 (McKinney 2014) (explaining the rules about the time in which you need to file your notice of appeal and the procedure for how to file a notice of appeal, respectively.

[133] N.Y. C.P.L.R. Rule 5531 (McKinney 2014).

[134] *See* McKinney's New York Rules of Court for general filing requirements (N.Y. CT. RULES § 1250.3 (McKinney 2024) and the particular rules for each department (N.Y. CT. RULES Parts 600, 670, 850, 1000 (McKinney 2024)).

address.[135] You are required to send the same number of copies of your brief and the record to the court and Attorney General.

4. "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 document your department requires. Each department has a time limit to complete perfecting the appeal. [136]

5. 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.[137] 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.

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[135] For information on and requirements for your brief, see McKinney's New York Rules of Court. N.Y. CT. RULES § 1250.8 (McKinney 2024) (form and content of briefs).

[136] N.Y. CT. RULES § 1250.9 (McKinney 2024) (time, number, and manner of filing of records, appendices and briefs).

[137] N.Y. CT. RULES § 1250.9(d) (McKinney 2024). You have ten days to file your reply unless you are within the First Judicial Department. If you are within the First Judicial Department, you should check the court's published term calendar.

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.

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 __day of _____________, 20____.[138]
Present: Hon. ___________, Justice[139]

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 ___________,[140] verified on the ____ day of _, 20____,[141] the Verified Petition,[142] and ___________________[143] sworn to on the ____ day of __, 20___,[144] it is

ORDERED that respondent ___________________[145] show cause at a Term of this Court, to be held in the County of _______________[146] on the _____ day of _______, 20____,[147] 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;

---

[138] 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 2006). The court clerk will fill in the date. All roman numerals (small letters in superscript) in this Section point to instructions for filling out documents. These instructions are provided after the matching roman numerals at the end of this Chapter.

[139] The clerk or judge will fill this in. You should leave this blank.

[140] Your name.

[141] 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.

[142] A sample petition is contained in Appendix A-4.

[143] Insert any other papers you are submitting with this Order.

[144] The date you signed your documents in front of a notary.

[145] Print or type the name of the respondent in all capital letters.

[146] County in which you are filing the petition.

[147] Leave this blank. The judge will fill in the information about the date.

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];[148]

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];[149]

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____.[150] 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 __________________[151] and the Attorney General, by mail, on or before ___ _______________, 20____,[152] shall be deemed sufficient.

ENTER:

____[153]

JUSTICE OF THE SUPREME COURT

---

148 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. You should also replace mm/dd/yyyy with the date of the determination you are challenging.

149 Do not copy the bracketed language. Explain in your own words what you want the court to do for you or what you want the court to make the respondent do.

150 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.

151 Respondent's name.

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

153 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 MOTION 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 _______________[154] ss:)

I, ______________________________,[155] 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 _________________________________.[156]
3. _[157]
4. Petitioner seeks to proceed by Order to Show Cause rather than by Notice of Petition because _______.[158]

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[154] Name of the county in which you are making this affidavit. This can be different than the county in which you are filing your appeal. Write in the county where you physically are while you are writing the affidavit.

[155] Your name.

[156] Write in the decision you are complaining about and the date of the decision.

[157] 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."

[158] 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 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.

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 ________________[159] County as the place of venue.

7. No previous application for the relief requested herein has been made.[160]

8. I have moved by the annexed affidavit for a reduction/waiver of the filing fees.[161]

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 _____[162] and granting such other and further relief as the Court may deem just and proper.

______________________[163]

______________________[164]

Sworn to before me this
__the day of _____________, 20__

______________________[165]

NOTARY PUBLIC

---

[159] Name of the county in which you are filing.

[160] 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.

[161] 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.

[162] 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.

[163] Sign your name here in the presence of a notary public.

[164] Print or type your name and address.

[165] 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 incarcerated person witness your signature. (Use this technique only as a last resort.) If another incarcerated person 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 ______________________:[166]

PLEASE TAKE NOTICE that upon the annexed petition of ___________________________,[167] verified the [th day of [Month], [year]][168] and the annexed affidavit of [NAME],[169] sworn to on the [the day of Month], [year],[170] petitioner will apply to this Court on the [the day of [Month], [year]],[171] or as soon thereafter as counsel may be heard, for a judgment granting the relief requested in the annexed 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.[172]

Petitioner designates ___________________County as the place of trial. The basis of venue is _____ ___________________________________ [173]

---

[166] Respondent's name(s) in capital letters.

[167] Your name in capital letters.

[168] Give the date you sign your petition.

[169] 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.

[170] This is the date on which the witness signed the affidavit.

[171] Set a court date far enough ahead so that the respondent will have 20 days' notice by the time they receive the Notice of Petition and petition.

[172] 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.

[173] 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 2006).

______________________________[174]
[Sign your name]

[Print your name]
Dated:_____, 20____

[174] 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 __________________,[175] complaining of the Respondent __________________,[176] respectfully alleges:

1. Petitioner ___________[177] is an inmate at __________________,[178] __________________,[179] 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].[180]

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].[181]

4. The within proceeding is brought pursuant to C.P.L.R. Article 78 to challenge the final determination of ______, dated ________.[182]

---

[175] Your name in capital letters.

[176] Respondent's name(s) in capital letters.

[177] Your name.

[178] Name of prison in which you are incarcerated.

[179] Address of prison.

[180] 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 an incarcerated person.

[181] 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.

[182] In this paragraph, you should state how your administrative remedies have been exhausted.

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.][183]

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 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 said anything different. The reports only concluded that petitioner "raised his fists in an attempt to strike" the officers. Without further clarification or follow-up, 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 did not ask about 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. Because petitioner had suffered a claustrophobic attack and sudden involuntary medication, he cannot be held responsible for refusing the direct order.][184]

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[183] 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.

[184] 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:

18. [No previous application has been made for the requested relief.][185]

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.][186]

____________________[187]

[your name]
Petitioner, pro se.[188]
Dated:_____[189]

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(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.

[185] 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.

[186] 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.

[187] Sign your name here and print your name underneath.

[188] "Pro se" means that you are appearing by yourself, without a lawyer.

[189] 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.

A-5. VERIFICATION OF PETITION

VERIFICATION[190]
STATE OF NEW YORK)
COUNTY OF ________________[191] ss.:)

__________,[192] being duly sworn, deposes and says that deponent is the petitioner in the above-encaptioned proceeding, that [he] has read the foregoing petition and knows the contents thereof, that the same is true to deponent's own knowledge, except as to matters therein stated upon information and belief, which matters deponent believes to be true.

____________[193]

Sworn to before me this

__the day of _____, 20__

____
NOTARY PUBLIC [194]

[190] A verification is a brief affidavit in which you swear to the truth of the statements you make in a legal paper, such as an Article 78 petition. Your petition will not be accepted without a verification.

[191] Name of the county in which the affidavit is signed, in capital letters.

[192] Your name.

[193] Sign your name here in the presence of a notary public.

[194] 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 incarcerated person witness your signature. (Use this technique only as a last resort.) If another incarcerated person is your witness, you should add at the bottom of the affidavit:

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

A-6. REQUEST FOR JUDICIAL INTERVENTION (RJI)

REQUEST FOR JUDICIAL INTERVENTION
Index No.__[195]
Supreme Court ___[196] County
Date Purchased___

___
PLAINTIFF(S):[197]
IAS entry date:___[198]
Judge Assigned:___[199]

___
DEFENDANTS(S):[200]
RJI Date:___[201]
———————————————————————————————————————-
NATURE OF JUDICIAL INTERVENTION:
[][202] Order to Show Cause
(Clerk enter return date____________________)[203]
[][204] Notice of Petition (return __________________)[205]
NATURE OF ACTION OR PROCEEDING
SPECIAL PROCEEDINGS
[] Art. 78
Is this proceeding against a:
[Yes/No] Municipality: _________________[206][Yes/No] Public Authority: _________[207]
[Yes/No] Does this proceeding seek equitable relief?[208]
[Yes/No] Does this proceeding seek recovery for personal injury?[209]
[Yes/No] Does this proceeding seek recovery for property damage?[210]
Estimated time period for case to be ready for trial: 0-12 months
Attorney for Plaintiff(s):
Name[211] Address Phone

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195 The court will fill in this blank.

196 Write the name of the county where you are bringing the action.

197 Write your name.

198 "IAS" is the Individual Assignment System, where a single judge is randomly assigned to supervise each part of the case. The court will fill in this blank.

199 The court will fill in this blank.

200 Write the name of the respondents (the people/institutions you are suing).

201 "RJI" stands for Request for Judicial Intervention. This is the date that you submit the request. The court will fill in this blank.

202 If you are filing an Order to Show Cause, check this box.

203 If you are filing an Order to Show Cause, write the date you suggest the case be heard.

204 If you are filing a Notice of Petition, check this box.

205 If you are filing a Notice of Petition, write the date you suggest the case be heard.

206 Write "no" unless you are suing a city.

207 Write "yes" if you are suing any public officials or government agencies.

208 Write "yes" if you are seeking to prevent an agency or official from acting in a way which is harmful to you.

209 Write "yes" if you want to recover for injuries suffered by you.

210 Write "yes" if you want to recover for property damage. If not, write "no."

211 Write your name and address.

Attorney for Defendant(s):

Name[212]	Address	Phone

RELATED CASES:

Title[213]	Index Number	Court	Nature of Relationship

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: ____________________[214]

____
(Signature)

____
(Print Name)

[212] Write the name and address of the respondents.

[213] If you have previously brought an Article 78 proceeding that is related to the Article 78 proceeding you are currently bringing, write the title, index number, court and nature of relationship of that proceeding.

[214] Write the date.

A-7. APPLICATION FOR AN INDEX NUMBER

INDEX NUMBER

Application for INDEX NUMBER
Pursuant to section 8018, New York Civil Practice Law & Rules
Title of Action: ARTICLE 78[215]
[David Smith
v.
William Jones, Commissioner of the Department of Correctional Services]
Name and address of Attorney for Plaintiff or Petitioner Telephone No.[216] (PRO SE)
Name and address of Attorney for Defendant or Respondent Telephone No.[217]

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, __________[218] County
__________________________[219]
v.
__________________________[220] INDEX NUMBER:[221]

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[215] Write the name of your action.
[216] Write your name and address.
[217] Write the name and address of the respondent (the person/institution you are suing).
[218] Write the name of the county in which you are bringing the action.
[219] Write your name as the petitioner.
[220] Write the name and official title of the respondent or respondents.
[221] 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, _______________________,[222] 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: ______________][223], 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).[224]

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:]
________________________________	______________________
________________________________	______________________

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.

---

[222] Your name.

[223] Name and address of your correctional facility.

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

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____.

____[225]

NOTARY PUBLIC AUTHORIZATION

I, ______________________,[226] inmate number _________________, [227] 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.

____[228]

(signature)

[225] 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 incarcerated person witness your signature. (Use this technique only as a last resort.) If another incarcerated person 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].

[226] Your name.

[227] Your inmate number.

[228] 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.