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# Due Process

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the area of economic and social welfare, the courts will uphold the statute in the face of an equal protection claim so long as there is a rational basis for the classification. Allocation of scarce resources is a major concern for the state. "[For the] people [who] are the most needy in the country . . . it is appropriate for medical care costs to be met, first, for [those] people."[264]

## SUPREME COURT

## ALBANY COUNTY

### Augat v. Dowling[265]
(decided May 20, 1994)

Petitioner, Robert Augat, claimed the conduct of respondent, Commissioner of Social Services of the State of New York, violated his liberty interest in reputation and employment, as well as his constitutional right to due process under the New York[266] and Federal Constitution.[267] Specifically, petitioner claims that a report was issued citing allegations of physical abuse by the petitioner against a resident, and directing the revocation of his approval to act as administrator for the Laurel Manor Home for Adults.[268] Further, the petitioner was discharged from his employment, denied an opportunity to challenge the accusations against him, and was not permitted to be present at the home or

264. *Schweiker*, 457 U.S. at 590.

265. 161 Misc. 2d 225, 613 N.Y.S.2d 527 (Sup. Ct. Albany County 1994).

266. N.Y. CONST. art. I, § 6. Section 6 provides in pertinent part: "No person shall be deprived of life, liberty or property without due process of law." *Id.*

267. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." *Id.*; U.S. CONST. amend. XIV, § 1. Section 1 provides in pertinent part: "No State shall deprive any person of life, liberty, or property, without due process of law . . . ." *Id.*

268. *Augat*, 161 Misc. 2d at 226-27, 613 N.Y.S.2d at 528. Mrs. Agatha Augat also claimed respondent's conduct violated her constitutional rights. *Id.* at 226, 613 N.Y.S.2d at 528.

have any contact with the residents.[269] The respondent, in a verified answer, took a threefold approach.[270] First, respondent asserted that the petitioner lacked proper standing to challenge the inspection report issued by the Department;[271] second, respondent contended that the proceeding was premature; and finally that the petitioner did not have a constitutionally protected interest in retaining Department approval for his position as administrator of the residential facility.[272]

The Supreme Court of New York, Special Term, held that the two directives in the Department's report were to be annulled, as contrary to the protections afforded by the Due Process Clause, and remanded the proceeding with the direction that petitioner receive a hearing on the charge that he abused a facility resident.[273]

Having brought an article 78 proceeding,[274] petitioner challenged the decision of the Commissioner of Social Services who stated in his report that petitioner was "no longer approved to act as administrator . . . "[275] of the Laurel Manor Home for Adults.[276] The respondent had inspected the facility and issued a report containing its decision to essentially remove petitioner as administrator.[277] The report stated that petitioner had allegedly physically abused a resident, and expressed a disapproval of

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269. *Id.*

270. *Id.* at 227, 613 N.Y.S.2d at 528.

271. *Id.*

272. *Id.*

273. *Id.* at 231, 613 N.Y.S.2d at 531.

274. *Id.* at 226, 613 N.Y.S.2d at 528. "Petitioner Agatha Augat [at the time of this opinion] is licensed by the respondent to operate the Laurel Manor Home for Adults[,] . . . [t]he Augat Family has operated adult care facilities since 1920 . . . [and] Robert Augat became its administrator in 1982." *Id.* Robert Augat is the petitioner who is challenging the revocation of his license to act as administrator. *Id.*

275. *Id.*

276. *Id.* The Laurel Manor Home for Adults, as explained by the court, is "a residential facility for adults needing some assistance in performing the routine functions of daily living." *Id.*

277. *Id.* "Pursuant to 18 N.Y. COMP. CODE R. & REGS. tit. 18 § 487.9(c)(2) [sic] a person cannot be an administrator of an adult home 'without prior written approval of the department.'" *Id.*

petitioner as administrator of the facility.[278] Petitioner subsequently demanded a hearing on the charge of abuse which was denied when the Department stated that he had no right to an administrative hearing.[279] Petitioner asserted several causes of action. First, he asserted a violation of his due process rights[280] in that he was deprived of notice of the accusation, as well as an administrative hearing.[281] Second, he claimed a violation of his "constitutionally protected liberty interest in his reputation and employment by the [Commissioner's] conduct."[282]

The petitioner claims he was not given the chance to respond to the charge of physical abuse because he was not allowed to attend a meeting with the Social Services Regional Director.[283] His inability to respond to the charge was also based upon the ground that the Department was not specific in the charge or its origin.[284] The affidavit further alleged that the Director charged petitioner with being "burnt out" and that he had been drinking prior to the meeting.[285] Petitioner claimed the "Department's action ha[d] caused him to lose his employment[] and . . . resulted in physical ailments."[286] In opposition, the

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278. *Id.* Violations 24 and 55 of the report state the contentions at issue here. *Id.*

279. *Id.*

280. U.S. CONST. amends. V, XIV; N.Y. CONST. art. I, § 6.

281. *Augat*, 161 Misc. 2d at 226, 613 N.Y.S.2d at 528.

282. *Id.* As outlined by the court, petitioner had three other causes of action:

> The third cause of action asserts damage to a constitutionally protected interest of Mrs. Augat. The fourth cause of action asserts a violation of Mr. Augat's constitutional rights to freedom of speech, association, and equal protection of the laws because of the direction that he is being prohibited from engaging in any conversation or physical interaction with the residents of Laurel Manor. The fifth cause of action asserts that the respondent has overstepped its authority in attempting to restrict the civil rights of Mr. Augat and the adult home residents with regard to conduct taking place off the premises of the adult home.

*Id.* at 226-27, 613 N.Y.S.2d at 528.

283. *Id.* at 227, 613 N.Y.S.2d at 528.

284. *Id.* at 227, 613 N.Y.S.2d at 529.

285. *Id.*

286. *Id.*

respondent claimed that "a full and fair opportunity to respond to the charges[]" was provided.[287]

The court addressed respondent's first contention, that petitioner lacked standing to challenge the report in issue, with an application of what the court viewed as the correct rule of law. The court quoted *Salla v. County of Monroe*[288] which stated "an employee has standing to challenge the unconstitutional interference of third persons with the employer-employee relationship."[289] Petitioner was found to have made a prima facie showing of the requisite unconstitutional interference and thus had standing.[290]

The *Augat* court, after resolving the issue of standing, immediately turned to the respondent's major contention, that petitioner did not have a property or liberty interest in the Department's approval of him to act as administrator.[291] Stating that the Commissioner and the Department were subject to the State Administrative Procedure Act,[292] the court defined what a license was according to the Act.[293] Next, the *Augat* court looked to the New York Codes, Rules and Regulations which provides that a person cannot be an adult home administrator "without prior written approval of the Department."[294] As a result, the

287. *Id.*

288. 64 A.D.2d 437, 409 N.Y.S.2d 903 (4th Dep't 1978), *aff'd*, 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979), *cert. denied*, 446 U.S. 909 (1980).

289. *Augat*, 161 Misc. 2d at 228, 613 N.Y.S.2d at 529 (quoting *Salla*, 64 A.D.2d 437, 409 N.Y.S.2d 903).

290. *Id.*

291. *Id.*

292. N.Y. A.P.A. LAW § 102(4) (McKinney 1984).

293. *Augat*, 161 Misc. 2d at 228, 613 N.Y.S.2d at 529. Section 102(4) of the State Administrative Procedure Act defines license as follows: "'License' includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law." *Id.* (citing N.Y. A.P.A. LAW § 102(4)).

294. *Id.* (citing N.Y. COMP. CODES R. & REGS. tit. 18, § 487.9(c)(2) (1990)).

court held that this approval, pursuant to the Act,[295] was clearly a license.[296]

The *Augat* court then proceeded to cite and explain several New York cases that dealt with the effects of a license revocation on a person's constitutional rights. The *Augat* court first cited to *Perpente v. Moss*.[297] In *Moss*, an applicant seeking a license to run an employment agency was denied the license due to the fact that he had been associated with an agency which had its license revoked prior to this incident.[298] The denial had been based on the applicant's character.[299] The applicant reapplied and again was denied.[300] The appellate division sustained the denial, holding that the Commissioner was within his rights to pass on the applicant's character.[301] The court of appeals stated, in language relied upon by the *Augat* court, that "a license may not be refused on the ground that the applicant 'is not a person of good character' unless the applicant has fair opportunity to meet a challenge to his good character and unless the court of review is apprised of [its] basis . . . ."[302] The *Moss* court subsequently dismissed the applicant's appeal.[303]

Next, the *Augat* court looked to *O'Brien v. O'Brien*.[304] In *O'Brien*, the court of appeals dealt with the equitable distribution of marital property resulting from a divorce. The marital property in question was the husband's license to practice medicine.[305]

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295. N.Y. A.P.A LAW § 102(4) (McKinney 1984).
296. *Augat*, 161 Misc. 2d at 228, 613 N.Y.S.2d at 529.
297. 293 N.Y. 325, 56 N.E.2d 726 (1944).
298. *Id.* at 327, 56 N.E.2d at 726.
299. *Id.*
300. *Id.*
301. *Perpente*, 267 A.D. 974, 48 N.Y.S.2d 548.
302. *Moss*, 293 N.Y. at 329, 56 N.E.2d at 727.
303. *Id.* at 330, 56 N.E.2d at 728.
304. 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).
305. *Id.* at 580, 489 N.E.2d at 713, 498 N.Y.S.2d at 744. The appellate division concluded that the license was not marital property subject to distribution. O'Brien v. O'Brien, 106 A.D.2d 223, 485 N.Y.S.2d 548 (2d Dep't 1985). *See* Conner v. Conner, 97 A.D.2d 88, 468 N.Y.S.2d 482 (2d Dep't 1983); Lesman v. Lesman, 88 A.D.2d 153, 452 N.Y.S.2d 935 (4th Dep't 1982).

The license had been acquired during the marriage and with the significant support of Dr. O'Brien's wife.[306] The court of appeals held that the license was subject to distribution as marital property[307] and, as a part of its reasoning, the court stated, "[a] professional license is a valuable property right . . . which may not be revoked without due process of law."[308]

*Saumell v. New York Racing Ass'n*,[309] was another case illustrative of the relationship between license revocation and constitutional rights. In *Saumell*, a jockey had been excluded from racing at tracks owned by the New York Racing Association [hereinafter NYRA], which was, in fact, a monopoly sanctioned by the State Legislature.[310] The jockey had contended that NYRA's action was, in effect, a revocation of his license without a hearing.[311] The New York Court of Appeals held, without referring to licenses specifically, that "it was a violation of petitioner's constitutional rights to exclude him from NYRA facilities without a prior hearing."[312]

The *Augat* court summarily discussed several other cases analogous to *Saumell*[313] before proceeding to the final major case

306. *O'Brien*, 66 N.Y.2d at 581, 489 N.E.2d at 714, 498 N.Y.S.2d at 745.

307. *Id.* at 588, 489 N.E.2d at 718, 498 N.Y.S.2d at 749.

308. *Id.* at 586, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.

309. 58 N.Y.2d 231, 447 N.E.2d 706, 460 N.Y.S.2d 763 (1983).

310. *Id.* at 235, 447 N.E.2d at 708, 460 N.Y.S.2d at 765. The complainant contended that the State Administrative Procedure Act applied to the NYRA and thus he was entitled to a hearing. *Id.* The court of appeals determined that the Act did not apply but did recognize state action as the State Legislature had granted the monopoly. *Id.*

311. *Id.*

312. *Id.* at 237, 447 N.E.2d at 709, 460 N.Y.S.2d at 766.

313. *See* Wrona v. Donovan, 88 A.D.2d 998, 451 N.Y.S.2d 834 (2d Dep't 1982) (holding that where employee must carry a gun to perform his job, due process requires a hearing on whether permit should be revoked); Caputo v. Barber, 76 A.D.2d 1029, 429 N.Y.S.2d 76 (3d Dep't 1980) (holding that baker received due process under Fourteenth Amendment when hearing was granted on his food processing license and he was allowed to appear with counsel); Rossetti v. O'Connell, 10 Misc. 2d 453, 172 N.Y.S.2d 716 (Sup. Ct. New York County 1958) (holding that where a garbage collector's license was revoked without notice or hearing, a property right was taken without due process of law).

used in support of its reasoning, *Sedutto v. City of New York*.[314] In *Sedutto*, a high pressure boiler engineer was denied a license.[315] The City of New York argued, as respondents in *Augat* did, that the engineer had a full and fair opportunity to submit proof of his qualifications. Further, the City argued that the administrative code did not require a hearing prior to the denial of a license.[316] The crux of the City's argument was that the question of the availability of a hearing, in a situation similar to the one before the *Augat* court, was whether the license was considered a privilege or a right.[317] The *Sedutto* court acknowledged that the distinction between rights and privileges had been rejected by the United States Supreme Court[318] and pulled the linchpin from the City's argument. Subsequently, the *Sedutto* court stated that "[i]n view . . . of . . . [actions] taken by the department without benefit of the right of confrontation to the petitioner . . . the court concludes that the determination [to deny the license] was arbitrary and capricious . . . and a due process hearing is required."[319]

The *Augat* court concluded with a list of occupations which, under New York law, have a constitutionally protected liberty interest in their licenses.[320] Finding that the people in the occupations listed would be entitled to notice and a hearing before a revocation, the *Augat* court could not find any reason, as contended by respondent, why the petitioner would not be deserving of the same constitutional protection.[321] Finally, the court stated that the respondent's conduct was exactly what the "due process clause of the Constitution" aims to prevent, and

314. 106 Misc. 2d 304, 431 N.Y.S.2d 654 (Sup. Ct. New York County 1980).

315. *Id.* at 304, 431 N.Y.S.2d at 656.

316. *Id.* at 308, 431 N.Y.S.2d at 658.

317. *Id.*

318. *See* Board of Regents of State College v. Roth, 408 U.S. 564 (1972); Graham v. Richardson, 403 U.S. 365 (1971).

319. *Sedutto*, 106 Misc. 2d at 309-10, 431 N.Y.S.2d at 659.

320. *Augat*, 161 Misc. 2d at 230, 613 N.Y.S.2d at 531. The list included: "a doctor, a jockey, a baker, a payroll guard, a tow truck driver, . . . a garbage man, and a boiler engineer . . . ." *Id.*

321. *Id.* at 231, 613 N.Y.S.2d at 531.

held that under the circumstances, petitioner was entitled to an adversarial hearing on the charge of physically abusing a resident at the facility.[322]

The constitutional rights, with regard to licenses, acknowledged by *Augat*, *Saumell*, *Sedutto*, *O'Brien*, and *Moss*, have also been recognized by the Supreme Court of the United States. In cases such as *Barry v. Barchi*[323] and *O'Bannon v. Town Court Nursing Center*, [324] the Supreme Court of the United States illustrated the complexities involved when it has decided on the constitutional rights involved with license revocations.

In *Barchi*, the New York State Racing and Wagering Board [hereinafter NYSRWB][325] set certain standards which essentially suspended a trainer's license when a post-race drug test of a horse revealed drugs. These standards were enacted against a horse trainer and resulted in the suspension of his license.[326] The trainer claimed his license was protected by the Due Process Clause of the Fourteenth Amendment and, therefore, the New York statute, which authorized the standards, was void due to the unavailability of a preliminary hearing to determine his culpability.[327] NYSRWB maintained throughout that the trainer was entitled to the process as provided by the statute.[328] The Court held that the State had an "important interest in assuring the integrity of the racing carried on under its auspices and thus, an interim suspension was necessary to determine issues involved in a case regarding such a State interest."[329] In words more relative to *Augat*, the Court stated "it is clear that Barchi had a property interest in his license sufficient to invoke the protection

322. *Id.*
323. 443 U.S. 55 (1979).
324. 447 U.S. 773 (1980).
325. *Barchi*, 443 U.S. at 57 n.1.
326. *Id.* at 59.
327. *Id.* at 61. Also stated as a basis was that "a summary suspension could not be stayed pending the administrative review provided by the statute." *Id.*
328. *Id.* at 60.
329. *Id.* at 64.

of the Due Process Clause . . . [and] [u]nquestionably, the magnitude of [his] interest . . . is substantial."[330]

Similarly, in *O'Bannon*, the United States Supreme Court analyzed the implications of license revocation. In *O'Bannon*, the Department of Health, Education, and Welfare [hereinafter HEW] and the Pennsylvania Department of Public Welfare [hereinafter DPW] revoked the Town Court Nursing Center's authority to provide nursing care to elderly residents, at government expense, in the form of reimbursements from HEW and DPW.[331] These reimbursements were available to the Nursing Center because it qualified as a "skilled nursing facility."[332] Subsequently, the Nursing Center was essentially decertified and HEW and DPW discontinued their reimbursements.[333] Residents of the Nursing Center brought suit requesting a pre-termination hearing.[334] The United States Court of Appeals for the Third Circuit[335] held, aside from other issues, that the residents had a constitutionally protected interest in continuing residence[336] at the facility which gave rise to their right to a pre-termination hearing.[337] In reversing, the Supreme Court stated, "while a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified."[338]

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330. *Id.*

331. *O'Bannon*, 447 U.S. at 775-76. The "government expense" consisted of reimbursements under "provider agreements" with HEW and DPW. Reimbursements were paid to the Nursing Center for people who qualified for Medicare and Medicaid under the Social Security Act. *Id.* at 775.

332. *Id.* at 775.

333. *Id.* at 775-76.

334. *Id.* at 777.

335. Town Court Nursing Ctr., Inc. v. Beal, 586 F.2d 280 (3d Cir. 1978), *rev'd*, 447 U.S. 773 (1980).

336. *O'Bannon*, 447 U.S. at 779. The argument was that the discontinuance of Medicare and Medicaid reimbursements would amount to the residents being transferred to another facility that was qualified to receive such reimbursements. *Id.* at 780.

337. *Id.* at 779.

338. *Id.* at 786.

With that sentence the Court indicated that the patients were enjoying an indirect benefit and thus their "constitutionally protected interest in life, liberty, or property" was not directly affected.[339]

In comparing federal decisions such as *Barchi* and *O'Bannon* to state decisions like *Augat*, *Saumell*, and *Sedutto*, there is agreement, whether outright or implicit, on the issue of constitutional rights and how those rights are treated under cases where license revocation is involved. The United States Supreme Court and the New York courts are consistent in that both require that one must have an interest, such as petitioner's job, at stake. Once it is determined that an interest is at stake, the safeguards of due process protect against the deprivation of that interest. Situations exist where a state interest may supersede certain procedural rights, as in *Barchi*. Furthermore, although rights may appear to exist in certain situations, these rights may not exist, as in *O'Bannon*, because they are misinterpreted. The *Augat* court, perhaps fortunately, did not encounter such complexities. If it had, surely Supreme Court precedents would have been applied.

Finally, the recognition of due process rights and one's liberty interest in holding a license appears to be applied consistently, in federal courts dealing with Medicare and gambling issues and in New York courts when dealing with jockeys, boiler engineers, and administrators. Of course, the general rules applied in *Augat* are subject to exceptions based upon the specific language of the statutory licensing provisions.

## NEW YORK COUNTY

### Campo v. New York City Employees' Retirement System[340] (printed April 26, 1994)

The plaintiff, Mrs. Campo, brought her due process claim into New York State court[341] following the dismissal[342] and

339. *Id.* at 790.

340. N.Y. L.J., Apr. 27, 1994, at 22 (Sup. Ct. New York County 1994).