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Due Process

78 proceeding, the court has authority to remand and order an agency to conduct a proper hearing if the record before it "demonstrates a[n] [arbitrary or capricious] lack of appropriate procedure" by the defendant agency.[386]

Citing *Liotta v. Rent Guidelines Board*[387] the court noted that:

> Plaintiffs cannot manufacture a [section] 1983 claim by pointing to the allegedly defective meeting while ignoring that part of the regulatory process that serves to redress administrative error. Rather, in considering whether defendants have failed to afford plaintiffs due process . . . the Court evaluates the entire procedure, including the adequacy and availability of remedies under state law.[388]

In conclusion, the federal and New York State courts uniformly hold that the availability of article 78 proceedings sufficiently protect the property interests of individuals claiming pension plan survivor's benefits, satisfying procedural due process requirements under the Fourteenth Amendment of the United States Constitution, and article I, section 6 of the New York State Constitution. Following the above reasoning, the court granted the defendant's motion for summary judgment.

New Amber Auto Service v. New York City Environmental Control Board[389]
(decided November 9, 1994)

Plaintiffs, New Amber Auto Service and Spin Holdings Inc., claimed that both an administrative code provision[390] and an environmental control regulation,[391] which they were charged

386. *Id.*

387. 547 F. Supp. 800, 802 (S.D.N.Y. 1982). In *Liotta*, tenants sued the defendant city's rent guidelines board to enjoin a rent increase that had been decided during a meeting, described as so "unruly" as to deprive them of property without due process. The court granted defendant's motion for summary judgment holding that the availability of Article 78 proceedings was an appropriate remedy, which plaintiffs had failed to utilize timely. *Id.* at 803-04.

388. *Campo II*, 843 F.2d at 102.

with violating, were unconstitutionally vague.[392] In addition, plaintiffs challenged the environmental control regulation as violative of their due process rights under the Federal[393] Constitution.[394] The court rejected plaintiffs' arguments and found both the administrative code provision, section 24-141, and the environmental control regulation, section 31-53(a), to be constitutional.[395] Likewise, plaintiffs' due process claim was also dismissed.[396]

New Amber, a Queens auto body shop, was charged with violating section 24-141 of the City's Administrative Code, when an inspector from the New York City Department of Environmental Protection [hereinafter DEP] witnessed a New Amber employee spray painting a car and emitting paint fumes into the air.[397] The DEP inspector issued a notice of violation and hearing to New Amber for emission of an "odorous air contaminant" pursuant to section 24-141.[398] Similarly, Spin Holdings, owner and operator of a cafe in Battery Park City, was issued a notice of violation and hearing by a DEP inspector.[399]

389. 619 N.Y.S.2d 496 (Sup. Ct. New York County 1994).

390. NEW YORK CITY, N.Y., ADMIN. CODE & CHARTER § 24-141 (1994). The code provision provides in pertinent part: "No person shall cause or permit the emission of air contaminant, including odorous air contaminant, or water vapor if the air contaminant or water vapor causes or may cause detriment to the health, safety, welfare or comfort of any person . . . ." *Id.*

391. N.Y. COMP. CODES R. & REGS. tit. 15, § 31-53(a) (1991). The regulation provides in pertinent part: "The complainant shall have the burden of proof in establishing that the respondent has committed or caused the violation charged in the notice of violation . . . ." *Id.*

392. *New Amber*, 619 N.Y.S.2d at 498-99.

393. U.S. CONST. amend. XIV, § 1. The section provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." *Id.*

394. *New Amber*, 619 N.Y.S.2d at 499.

395. *Id.* at 500-01.

396. *Id.* at 500.

397. *Id.* at 498.

398. *Id.* A hearing regarding the violation was held by the New York City Environmental Control Board, where the residing Administrative Law Judge found against New Amber. *Id.* After a subsequent appeal was denied, New Amber instituted the instant action. *Id.*

399. *Id.*

Spin Holding's violation of section 24-141 arose as a result of its emission of noxious cooking odors and fumes into the open air.[400]

Plaintiffs challenged the administrative code provision, section 24-141, as both unconstitutionally vague on its face and as applied.[401] In support of their claim, plaintiffs contended that the statute was facially vague because "[t]here [was] no definition of what constitutes a 'detriment to the health, safety, welfare, or comfort of any person.'"[402] Further, plaintiffs argued that the statute provided no objective standard to use in order to determine whether a particular activity complied with, or violated, the law.[403] Likewise, plaintiffs challenged the environmental control regulation, section 31-53(a), as unconstitutionally vague on the ground that, although the regulation provided that the complainant had the burden of proof at the environmental control board hearing, it failed to provide the particular standard of proof required.[404]

As an initial matter, the court explained that a party challenging a legislative enactment must overcome the heavy burden that the enactment is presumptively valid.[405] The court also pointed out

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400. *Id.* The Administrative Law Judge, residing for the New York City Environmental Control Board, found Spin Holdings' activities to be a violation of the cited air pollution code provision. *Id.* An appeal was pending at the time of the instant action. *Id.*

401. *Id.*

402. *Id.* (citing NEW YORK CITY, N.Y., ADMIN. CODE & CHARTER § 24-141 (1994)).

403. *Id.* at 498-99. Plaintiffs cite, as an example of this vagueness, the fact that "a reasonable person may not be bothered by the spray painting, where a sensitive person might." The argument is that such vagueness leads to arbitrary and discriminatory application. *Id.* at 499.

404. *Id.* at 501. Thus, the plaintiffs argued, a judge is free to choose whether to apply a preponderance, clear and convincing, or beyond a reasonable doubt standard of proof. *Id.*

405. *See* People v. Bright, 71 N.Y.2d 376, 520 N.E.2d 1355, 526 N.Y.S.2d 66 (1988) (holding N.Y. Penal Law § 240.35, prohibiting loitering in Pennsylvania Station and the Port Authority Bus Terminal, to be unconstitutionally vague because legislative guidelines providing a standard for determining the type of activity that constituted suspicious loitering in places of publicly unrestricted access were absent).

the necessity of drafting legislative enactments in general terms, capable of "flexible and reasonable application."[406] In addition, similar legislative enactments prohibiting emission of air pollution, which do not provide a precise definition of what constitutes prohibited emissions, have been found constitutional.[407]

A legislative enactment, such as a statute or regulation, may be challenged as unconstitutionally vague in two ways. An enactment will be found to be facially vague to the extent it "specifies no comprehensible standard or guide capable of interpretation"[408] or "when it cannot validly be applied to any conduct."[409] In addition to facial vagueness, an enactment can be unconstitutionally vague as applied.[410] The United States Supreme Court has fashioned a two-part test to determine whether a statute is unconstitutionally vague as applied.[411] First,

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406. *Id.* at 499. The court cites Nicholas v. Kahn, 47 N.Y.2d 24, 31, 389 N.E.2d 1086, 1090, 416 N.Y.S.2d 565, 569 (1979):

> [I]t is not necessary that the Legislature supply administrative officials with rigid formulas in fields where flexibility in the adaptation of the legislative policy to infinitely variable conditions constitute the very essence of the programs. Rather, the standards prescribed by the Legislature are to be read in light of the conditions in which they are to be applied.

New Amber, 619 N.Y.S.2d at 499.

407. *See, e.g.*, Liberty Lines Express, Inc. v. New York City Envtl. Control Bd., 160 A.D.2d 295, 296, 553 N.Y.S.2d 389, 390 (1st Dep't 1990) (upholding the constitutionality of pollution control codes challenged by a bus company charged with violating such codes by emitting visible air contaminants from their buses into the air).

408. Coates v. City of Cincinnati, 402 U.S. 611 (1971) (holding a city ordinance that restricted the right to public assembly to be unconstitutionally vague on its face).

409. Brache v. County of Westchester, 658 F.2d 47, 54 (2d Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982) (holding a county drug paraphernalia ordinance prohibiting the sale of items used exclusively for drug use not to be unconstitutionally vague on its face or as applied).

410. *New Amber*, 619 N.Y.S.2d at 499.

411. Grayned v. City of Rockford, 408 U.S. 104 (1972) (holding a city anti-noise ordinance prohibiting a person while on the grounds adjacent to an in-session school building from willfully making a noise or diversion that disturbs the peace or good order not to be unconstitutionally vague or

the court must determine whether the statute gives "the person of ordinary intelligence a reasonable opportunity to know what is prohibited."[412] Then, the court must consider whether the law provides "explicit standards for those who apply [it] . . . ."[413]

In contrast, the New York Court of Appeals has held that "'due process requires only a reasonable degree of certainty so that individuals of ordinary intelligence are not forced to guess at the meaning of the statutory terms.'"[414]

Thus, in applying the New York vagueness standard to the instant case, the court found both legislative enactments to be constitutionally sound.[415] With respect to section 24-141, all parties stipulated to the fact that the statute had to be read in the context of the entire air pollution regulatory scheme.[416] Therefore, when read as part of the statutory scheme, the statute possessed a "core meaning that [could] reasonably be understood."[417] In applying the United States Supreme Court's two-part vagueness test, the court concluded that "the person of

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overbroad). *See* United States v. Schneiderman, 968 F.2d 1564, 1568 (2d Cir. 1992) (holding the Mail Order Drug Paraphernalia Control Act to be neither unconstitutional on its face nor as applied).

412. *Grayned*, 408 U.S. at 108.

413. *Id.*

414. Kew Gardens Assocs. v. Tyburski, 70 N.Y.2d 325, 336, 514 N.E.2d 1114, 1120, 520 N.Y.S.2d 544, 550 (1987) (quoting Foss v. City of Rochester, 65 N.Y.2d 247, 480 N.E.2d 717, 491 N.Y.S.2d 128 (1985) (holding a New York City statute requiring owners of income-producing property to furnish income and expense statements to the Commissioner of Finance in preparation for real property assessment, to be constitutional on its face). *But see* Hejira Corp. v. MacFarlane, 660 F.2d 1356 (10th Cir. 1981) ("[T]he fact that different minds may reach different results when seeking to determine whether a given [situation] falls within the statutory definition . . . does not render the statute void for vagueness.").

415. *New Amber*, 619 N.Y.S.2d at 500-01.

416. *Id.* at 500.

417. *Id.* (quoting Brache v. County of Westchester, 658 F.2d 47, 51 (2d Cir. 1981)). Further, the court explained, such terms in section 24-141 as "air contaminant" and "odorous air contaminant," the emission of which causes detriment to the health, safety, welfare or comfort of any person, are defined in administrative code provision, section 24-104. *Id.*; *New Amber*, 619 N.Y.S.2d at 500. Also, the term "detriment" is readily understood by its dictionary meaning of "something that causes damage, harm or loss." *Id.*

ordinary intelligence [was] not left to make arbitrary guesses as to the meaning of the commonly understood and well-defined terms" found in the statute.[418] This finding would also obviously satisfy the similar standard proffered by the New York Court of Appeals.[419] As for explicit standards of application, section 24-141 set forth a list of examples of sources of prohibited odorous air contaminants, including paint, aircraft and diesel engines, compost heaps, and fish processing.[420]

As for section 31-53(a), the court held, as it has in the vast majority of civil proceedings, that the "general principle of administrative law," requiring proof by a preponderance of the evidence, is the proper standard in administrative hearings.[421] The court recognized that a limited number of civil cases required a clear and convincing standard of proof,[422] as the proof beyond a reasonable doubt standard was indisputably reserved for criminal trials.[423] Thus, based on these settled standards and the fact that plaintiffs would have been advised of the applicable

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418. *New Amber*, 619 N.Y.S.2d at 500. The court also finds section 24-141 to be rationally related to the legitimate legislative goal of protecting the well-being of human, plant and animal life. *Id.*

419. *Kew Gardens Assocs.*, 70 N.Y.2d at 336, 514 N.E.2d at 1120, 520 N.Y.S.2d at 550.

420. *New Amber*, 619 N.Y.S.2d at 500. Thus, despite some degree of latitude on the part of the administrative judge, the statute does provide sufficient notice as to what types of emissions are proscribed. *Id.*

421. *Id.* at 501. *See, e.g.*, Property Clerk of N.Y.C. Police Dep't v. Ferris, 77 N.Y.2d 428, 570 N.E.2d 225, 568 N.Y.S.2d 577 (1991); Property Clerk of N.Y.C. Police Dep't v. McDermott, 185 A.D.2d 134, 585 N.Y.S.2d 746 (1st Dep't 1992); Silverstein v. Appeals Bd. of the Parking Violations Bureau, 100 A.D.2d 778, 474 N.Y.S.2d 60 (1st Dep't 1984).

422. *See* Savastano v. Nurnberg, 152 A.D.2d 290, 548 N.Y.S.2d 555 (2d Dep't 1989), *aff'd*, 77 N.Y.2d 300, 569 N.E.2d 421, 567 N.Y.S.2d 618 (1990) (Mental Hygiene Law); *see also* Ortenberg v. Commissioner of Motor Vehicles, 191 A.D.2d 898, 595 N.Y.S.2d 127 (3d Dep't 1993) (Department of Motor Vehicles); Williams v. Perales, 156 A.D.2d 697, 549 N.Y.S.2d 167 (2d Dep't 1989) (Food Stamp Program); Flanagan v. New York State Tax Comm'n, 154 A.D.2d 758, 546 N.Y.S.2d 205 (3d Dep't 1989) (Tax Law); Margrander v. Fox, 272 A.D. 788, 70 N.Y.S.2d 207 (4th Dep't 1947) (fraud).

423. Kurz v. Doerr, 180 N.Y. 88, 72 N.E. 926 (1904).

standard at the administrative hearing had they inquired, the court refused to find section 31-53(a) unpermissibly vague.[424]

Finally, the court addressed plaintiffs' due process challenge to section 31-53(a). The court stated that due process protection afforded by the Fourteenth Amendment provides a party in an administrative proceeding "the opportunity to be heard with timely and adequate notice advising as to the reasons for the [proceeding], the opportunity to cross-examine witnesses and to call witnesses on its behalf, and the opportunity to present arguments and evidence."[425] Due to the fact that plaintiffs did not claim they failed to receive notice of the proceeding, or were deprived of an opportunity to present their case and challenge the DEP's case, the court found no basis to support a due process challenge.[426]

People v. C.M.[427]
(decided April 29, 1994)

In *People v. C.M.*,[428] the Supreme Court, New York County addressed what it found to be an issue of first impression in New York;[429] whether a defendant may waive his federal constitutional[430] or state statutory[431] right to a public trial,

424. *New Amber*, 619 N.Y.S.2d at 501.

425. *Id.* at 500 (citing Goldberg v. Kelly, 397 U.S. 254, 267 (1970)).

426. *New Amber*, 619 N.Y.S.2d at 500.

427. 161 Misc. 2d 574, 614 N.Y.S.2d 491 (Sup. Ct. New York County 1994).

428. *Id.*

429. *Id.* at 575, 614 N.Y.S.2d at 492.

430. *Id.* U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . ." *Id.*

431. N.Y. CIV. RIGHTS LAW § 12 (McKinney 1992). This section provides in pertinent part: "In all criminal prosecutions, the accused has a right to a . . . public trial . . . ." *Id.* The right is also protected under New York Judiciary Law § 4 (McKinney 1992). This section provides in pertinent part:

> The sittings of every court within this state shall be public, and every citizen may freely attend . . . except that in . . . cases for divorce, seduction, abortion, rape, assault with intent to commit rape,