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## Rules & Regulations

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## RULES & REGULATIONS

*N.Y. CONST. art. IV, § 8:*

*No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state. The legislature shall provide for speedy publication of such rules and regulations by appropriate laws.*

### SUPREME COURT, APPELLATE DIVISION

#### THIRD DEPARTMENT

Trustees Of Masonic Hall & Asylum Fund v. Axelrod<sup>1421</sup>  
(decided January 23, 1992)

Petitioner Masonic Hall, a residential health care provider and participant in the Medicaid program, brought an Article 78 proceeding<sup>1422</sup> claiming, *inter alia*, that its rights under article IV, section 8 of the state constitution<sup>1423</sup> were violated when the Commissioner of Health used a fixed, unpublished general guideline to deny the facility it operates a reimbursement rate increase.<sup>1424</sup>

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1421. 174 A.D.2d 199, 578 N.Y.S.2d 690 (3d Dep't 1992).

1422. N.Y. CIV. PRAC. L. & R. 7801-7806 (McKinney 1981 & Supp. 1992). Article 78 of the CPLR is the "major vehicle for judicial review of the actions (or inactions) of and decisions by government officials and bodies . . . ." 8 JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE, ¶7801.02 (1992).

1423. N.Y. CONST. art. IV, § 8 (providing in pertinent part that "[n]o rule or regulation made by any state department . . . shall be effective until it is filed in the office of the department of state").

1424. *Masonic Hall*, 174 A.D.2d at 204, 578 N.Y.S.2d at 693.

The court unanimously held that the guidelines used by the Commissioner to determine petitioner's reimbursement rate incorporated "both fixed and variable factors unique to [the] facility."<sup>1425</sup> As such, these guidelines were not "rules or regulations required to be filed with the Department of State."<sup>1426</sup>

Petitioner is the operator of a facility that provides skilled nursing and health related care and, as a participant in the Medicaid program, receives reimbursements based on an annual rate.<sup>1427</sup> When petitioner received its 1983 Medicaid reimbursement rate, the cost of additional nursing and dietary staff hired in 1982 was not included.<sup>1428</sup> Petitioner filed a timely appeal, but was denied a rate increase by respondent Commissioner. Petitioner then filed a second appeal and was again denied the rate increase. Following the second appeal, petitioner instituted an Article 78 proceeding challenging the Commissioner's denial of its 1983 reimbursement rate increase.<sup>1429</sup>

The supreme court remitted the proceeding to an administrative law judge for resolution of two specific factual issues, neither of which were related to petitioner's instant constitutional claim.<sup>1430</sup> That proceeding resulted in findings, which the Commissioner adopted, to again deny petitioner's request for a rate increase.<sup>1431</sup> Petitioner then commenced this proceeding, disputing the Commissioner's determination, which the supreme court

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1425. *Id.*

1426. *Id.* at 204-05, 578 N.Y.S.2d at 693.

1427. *Id.* at 200, 578 N.Y.S.2d at 691.

1428. *Id.* In 1981, Masonic Hall made substantial reductions in its nursing and dietary staff, based upon the recommendation of its accountant. In January, 1982, because of numerous complaints lodged against the Masonic Hall, the Department of Health conducted an investigation. This investigation revealed concerns that the patients at Masonic Hall were receiving substandard care as a result of the staff reductions. In February, 1982, the Department of Health held a meeting with Masonic Hall and disclosed its findings. It also delivered a letter which directed Masonic Hall to take corrective action within 30 days or it would be subjected to fines and termination of its operating license. As a result of that meeting, Masonic Hall hired more staff. *Id.* at 202, 578 N.Y.S.2d at 692.

1429. *Id.* at 201, 578 N.Y.S.2d at 691.

1430. *Id.*

1431. *Id.*

transferred to the appellate division pursuant to CPLR 7804(g).<sup>1432</sup>

Central to the court's decision that the guidelines used by the Commissioner<sup>1433</sup> did not have to be filed with the Department of State was the manner in which these guidelines were used and whether they were applied on a case-by-case basis.<sup>1434</sup> Petitioner's claim hinged on whether the Commissioner used fixed guidelines, without regard to the particular facts of petitioner's case.<sup>1435</sup> Where a guideline is applied on a case-by-case basis it is generally not required to be filed with the Department of State and published as a rule or regulation.<sup>1436</sup> Conversely, when the guideline is a "fixed, general principle to be applied by the Commissioner without regard to other facts and circumstances relevant to the regulatory scheme of the statute being administered, it constitutes a rule and regulation required to be filed with the Department of State."<sup>1437</sup>

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1432. *Id.* N. Y. CIV. PRAC. L. & R. 7804(g) (McKinney Supp. 1992) (provides for transfer of proceeding from court where proceeding was commenced to appellate division when "substantial evidence" issue is raised and lower court has not disposed of case without reaching substantial evidence issue) .

1433. In determining whether to deny an increase in the reimbursement rate, the Commissioner used "management assessment guidelines" which contain formulas that take into account such things as total hours paid employees, hours of patient care needed, and the number of beds in certain sections of the facility. *Masonic Hall*, 174 A.D.2d at 203-04, 578 N.Y.S.2d at 693.

1434. *Id.* at 204, 578 N.Y.S.2d at 693.

1435. *Id.*

1436. *Id.* See also *Dry Harbor Nursing Home & Health Related Facility v. Axelrod*, 137 A.D.2d 962, 525 N.Y.S.2d 371 (3d Dep't 1988) (guidelines that consider facts and circumstances of particular case need not be published as a rule or regulation), *appeal denied*, 73 N.Y.2d 701, 532 N.E.2d 101, 535 N.Y.S.2d 595 (1988)).

1437. *Masonic Hall*, 174 A.D.2d at 204, 578 N.Y.S.2d at 693. See also *Roman Catholic Diocese v. New York Dep't of Health*, 66 N.Y.2d 948, 951, 489 N.E.2d 749, 750, 498 N.Y.S.2d 780, 781 (1985) ("[O]nly a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances . . . constitutes a rule or regulation required by NY Constitution, article IV, § 8 to be filed in the office of the Department of State.").

In this case, the court held that formulas, guidelines, and criteria used by the Commissioner, in determining whether a rate increase was justified, did take into account facts and circumstances unique to petitioner's facility.<sup>1438</sup> Consequently, there was no requirement that they be filed and published.<sup>1439</sup> It appears from the court's decision that, as long as the variables and numbers plugged into a formula, equation, or guideline that are specific to the entity to which it is being applied, the rule or regulation which contains the formula does not have to be filed with the Department of State.

While the state requirement that certain rules and regulations be published is constitutional, there is no counterpart in the Federal Constitution. In contrast, the federal requirement for notice and publication of proposed rules and regulations is statutory.<sup>1440</sup> Accordingly, a federal agency's failure to comply with proper notice and publication of a rule or regulation may be challenged as a violation of federal law, whereas the failure of a state agency to do the same may be challenged as violative of the New York State Constitution.

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1438. *Masonic Hall*, 174 A.D.2d at 204-05, 578 N.Y.S.2d at 693. The Commissioner used data from reports specific to the petitioner's facility, such as the number of beds in the skilled nursing section and the number of hours paid petitioner's employees, in order to make his determination. *Id.* at 203-04, 578 N.Y.S.2d at 693.

1439. *Id.* at 205, 578 N.Y.S.2d at 693.

1440. 5 U.S.C. § 553 (1988) (providing in pertinent part that "[g]eneral notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law").