McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 2. Limitations of Time (Refs & Annos)

McKinney's CPLR § 217

§ 217. Proceeding against body or officer; actions complaining about conduct that would constitute a union's breach of its duty of fair representation; four months

Currentness

1. Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty; or with leave of the court where the petitioner or the person whom he represents, at the time such determination became final and binding upon him or at the time of such refusal, was under a disability specified in section 208, within two years after such time.

2. (a) Any action or proceeding against an employee organization subject to article fourteen of the civil service law or article twenty of the labor law which complains that such employee organization has breached its duty of fair representation regarding someone to whom such employee organization has a duty shall be commenced within four months of the date the employee or former employee knew or should have known that the breach has occurred, or within four months of the date the employee or former employee suffers actual harm, whichever is later.

(b) Any action or proceeding by an employee or former employee against an employer subject to article fourteen of the civil service law or article twenty of the labor law, an essential element of which is that an employee organization breached its duty of fair representation to the person making the complaint, shall be commenced within four months of the date the employee or former employee knew or should have known that the breach has occurred, or within four months of the date the employee or former employee suffers actual harm, whichever is later.

Credits

(L.1962, c. 308. Amended L.1990, c. 467, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

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C217:1 Four-Month Period for Article 78 Proceedings, In General.

A CPLR Article 78 proceeding "against a body or officer" is the mechanism for judicial review of the action or inaction of an administrative agency or officer. It also applies to a limited number of acts and determinations by private corporations, which possess a franchise from the state. See generally Practice Commentaries on CPLR 7802, at C7802:1 (e.g., corporate management vis-à-vis shareholder claiming right of access to corporate books and records, application of corporate entity's by-laws to members, university termination and discipline decisions vis-à-vis faculty and students). Other private parties and their activities are outside the scope of Article 78. See *De Petris v. Union Settlement Ass'n, Inc*., 1995, 86 N.Y.2d 406, 411 n.*, 633 N.Y.S.2d 274, 277, 657 N.E.2d 269, 272 ("article 78 is generally not a means for seeking private relief against private corporations"). To the extent Article 78 review is available, the four-month period of CPLR 217(1) applies. (The statute was subdivided in 1990 when provision was made in subdivision 2 for actions against public sector labor unions for breach of the duty of fair representation. Subdivision 1 contains the same language as the original CPLR 217.)

The four-month period for CPLR Article 78 proceedings is the shortest statute of limitations in Article 2 of the CPLR. "The reason for the short statute is the strong policy, vital to the conduct of certain kinds of governmental affairs, that the operation of government not be trammeled by stale litigation and stale determinations." *Solnick v. Whalen*, 1980, 49 N.Y.2d 224, 232, 425 N.Y.S.2d 68, 73, 401 N.E.2d 190, 195 (internal quotations and citation omitted). See also *Best Payphones, Inc. v. Dep't of Information Technology and Telecommunications,* 2005, 5 N.Y.3d 30, 34, 799 N.Y.S.2d 182, 184, 832 N.E.2d 38, 40.

The opening proviso--"unless a shorter time is provided"--should alert the practitioner that some agency activity may be subject to an even shorter period for review than four months. See, e.g., Town Law § 282 (Article 78 review of plat of town's planning board or change in zoning regulation must be brought within 30 days of filing of decision in office of town clerk); Executive Law § 818(1) (Article 78 review of order or act of Adirondack Park Agency must be brought within 60 days of effective date of order or when act occurred). Occasionally, a statute conferring judicial review of agency action may provide for a period longer than four months, and this, too, supersedes CPLR 217(1), by operation of CPLR 201. See, e.g., *Dandomar Company, LLC v. Town of Pleasant Valley Town Board*, 2011, 86 A.D.3d 83, 924 N.Y.S.2d 499 (2d Dep't) (one-year period for challenges to government abandonment of a highway (Highway Law § 205(2)).

Reference must be made to CPLR 7801, which sets forth the types of proceedings to which CPLR 217(1) applies. Article 78 prescribes uniform procedure for the ancient writs of mandamus, prohibition and certiorari, but the fundamental differences in the writs, and therefore the type of Article 78 proceeding at issue, still play a role in the workings of CPLR 217. See Practice Commentaries on CPLR 7801, at C7801:2 through C7801:4.

Briefly, an Article 78 proceeding in the nature of "mandamus to compel" seeks to compel an officer to perform a duty required by law to be performed--an act that involves no exercise of discretion or judgment. "Prohibition" serves to restrain judicial or quasi-judicial officers from acting without jurisdiction or in excess of their jurisdiction. "Certiorari" reviews the determination of an administrative tribunal that was made after a statutorily required trial-type hearing, where the standard of review asks whether the determination was supported by substantial evidence. Finally, "mandamus to review" provides judicial review of agency determinations made without the trappings of a trial-type hearing and virtually all other types of administrative decision-making not included in the other categories.

C217:2 Accrual Occurs When Challenged Action Is Final and Binding.

When review of a determination is sought, the proceeding must be commenced within four months of when the determination becomes "final and binding" upon the petitioner. If mandamus to compel is the desired relief, the four month period runs from the date of the respondent's refusal to perform the duty demanded by the petitioner. The last phrase creates a special rule for petitioners under a disability--infancy or insanity--at the time the determination or refusal to perform occurred. Unlike CPLR 208, application of such toll under CPLR 217(1) lies in the discretion of the court, and the maximum extension on account of the disability is two years from the time the claim accrued.

The point at which agency action becomes "final and binding upon the petitioner" within the meaning of CPLR 217(1) has ties to the finality doctrine that governs the seeking of judicial review under administrative law principles. See Practice Commentaries on CPLR 7801, at C7801:7. As a matter of administrative law, a party aggrieved by agency action cannot obtain Article 78 review until administrative remedies have been "exhausted" and the agency action is final. See CPLR 7801(1). When that moment occurs, CPLR 217(1) commands the party to move swiftly, i.e., within four months. See *Walton v. New York State Dep't of Correctional Services*, 2007, 8 N.Y.3d 186, 195, 831 N.Y.S.2d 749, 754, 863 N.E.2d 1001, 1006.

In *Best Payphones, Inc. v. Dep't of Information Technology and Telecommunications,* 2005, 5 N.Y.3d 30, 799 N.Y.S.2d 182, 832 N.E.2d 38, the Court of Appeals made the link between CPLR 217(1) and the finality doctrine explicit by drawing, in part, upon recent cases in the finality domain to formulate a two-part definition for the time when agency action is "final and binding" for statute of limitations purposes: "First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining

party." 5 N.Y.3d at 34, 799 N.Y.S.2d at 184, 832 N.E.2d at 40. The devil, as they say, is in the details of the particular agency action at issue. Because agencies exist in many different forms and are governed by disparate regulations and procedures, and their actions may affect parties in unique ways, counsel must be prepared to carefully analyze the action taken by the particular agency in order to evaluate the moment of finality. The facts of *Best Payphones* offer an example.

The petitioner applied to a New York City agency for a franchise allowing it to operate pay phones on City sidewalks. The franchise was approved by the agency in August 1999 subject to the petitioner's execution and delivery of a specified franchise agreement and other closing documents. As of January 13, 2000, the petitioner, despite its installation and operation of the phones, had not submitted the required paperwork, and on that date the agency notified the petitioner by letter that such failure had resulted in the agency's "determin[ation] not to approve a franchise for [petitioner]." The letter went on to say that petitioner could, within 60 days, sell its phones to any other franchised entity, remove the phones or submit the required paperwork for the franchise. If none of these steps were taken, the City would remove the phones based on petitioner's status as a non-holder of a franchise. Because petitioner did none of the above, the City began to remove the phones in early May. Petitioner then quickly submitted the paperwork but was notified in June that its maintenance of the phones was unlawful. Petitioner commenced an Article 78 proceeding in July.

The Court of Appeals unanimously held that the proceeding was time-barred because the agency action had become final and binding as a result of the agency's January 13 letter:

[The letter] left no doubt that the agency had reached a definitive position regarding petitioner's payphones that inflicted actual, concrete injury.... The 60-day grace period offered petitioner no opportunity to ameliorate the injury, or to avoid it, except by agreeing to the agency's demands. The January 13 letter held out no hope of further administrative action, or change in the agency's position, but left petitioner only with the choice of accepting [the agency's] position or initiating suit.

Id. at 34-35, 799 N.Y.S.2d at 184, 832 N.E.2d at 40.

The lesson of *Best Payphones*, indeed the lesson of all cases involving potential Article 78 review, is that a proceeding should be commenced at the earliest point at which a court reasonably could view the agency action as final. See, e.g., *In re City of New York*, 2006, 6 N.Y.3d 540, 814 N.Y.S.2d 592, 847 N.E.2d 1166 (city planning commission's determination, following public hearing, that certain property appropriately could be taken pursuant to condemnation was final determination to be reviewed, not Mayor's subsequent approval of the acquisition). Judge Susan Phillips Read wrote in a dissenting opinion in *Walton v. New York State Dep't of Correctional Services*, supra: "[W]e have consistently sought over the past several years to encourage parties who seek to challenge an agency determination to do so at the earliest possible date.... [L]itigants should risk suing prematurely rather than too late." 8 N.Y.3d at 202, 831 N.Y.S.2d at 759, 863 N.E.2d at 1011. In other words, despite CPLR 7801(1)'s exhaustion requirement, a dismissal for prematurity, which obviously must be without prejudice, is far preferable to a fatal dismissal under the statute of limitations.

Another Court of Appeals precedent to which attention must be paid, especially because it involves the pervasive environmental impact review required by SEQRA (the State Environmental Quality Review Act) in so many land- and water-use projects, is *Stop-the-Barge ex rel. Gilrain v. Cahill*, 2003, 1 N.Y.3d 218, 771 N.Y.S.2d 40, 803 N.E.2d 361. In connection with its installation of a power generator on a floating barge in Brooklyn, an energy company (NYCE) submitted an environmental assessment statement to the New York City Department of Environmental Protection (DEP), which thereby became the lead agency for environmental review of the project under SEQRA. On January 19, 2000, DEP issued a conditional negative declaration (CND), signifying that the

project would have no significant adverse impact on the environment and therefore required no environmental impact statement. The CND was subject to a 30-day period of public comment, which ended on February 18, 2000, at which point the CND became final, ending the SEQRA review of the project.

In the meantime, NYCE applied to the State Department of Environmental Conservation (DEC) for an air permit, an administrative inquiry governed by legislation separate from SEQRA. DEC tentatively approved the permit, but during the public notice period that began in August 2000, a citizens group, the petitioners, voiced opposition on the ground of inadequate SEQRA review. In December 2000, however, DEC issued the air permit.

Two months later--February 20, 2001--petitioners commenced an Article 78 proceeding challenging both the CND and the air permit as having been wrongfully issued. The Court, however, held that the proceeding, to the extent it attacked DEP's SEQRA determination, should have been commenced within four months of February 18, 2000. It was then that DEP's SEQRA process came to an end, and that agency's action relating to SEQRA became final and binding. That was the point at which actual injury occurred because the CND allowed NYCE to proceed with the project without the need to prepare an environmental impact statement.

The petitioners' challenge to SEQRA review did not come within the potential exception described in *Essex County v. Zagata*, 1998, 91 N.Y.2d 447, 672 N.Y.S.2d 281, 695 N.E.2d 232. There, the Court indicated that finality is lacking if "the injury purportedly inflicted by the agency may ... be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. If further agency proceedings might render the disputed issue moot or academic, then the agency position cannot be considered definitive or the injury actual or concrete." Id. at 453-54, 672 N.Y.S.2d at 284-85, 695 N.E.2d at 235-36 (internal quotation marks, citations and italics omitted). In the instant case, DEC's review of the air permit application had no bearing on DEP's SEQRA review. Compare *Walton v. New York State Dep't of Correctional Services*, supra (holding that agency 1's action was not final because it could have been altered due to agency 2's pending interrelated decision).

Stop-the-Barge's holding that finality as to a SEQRA determination occurs upon completion of the SEQRA portion of a multistage endeavor is not always followed when zoning legislation is a subsequent step in the project at issue. The Court of Appeals made this point in *Eadie v. Town Board of North Greenbush*, 2006, 7 N.Y.3d 306, 316-18, 821 N.Y.S.2d 142, 146-47, 854 N.E.2d 464, 468-69, where a town board conducted SEQRA review as a preliminary step in its potential enactment of certain rezoning legislation. The Court held that an Article 78 challenge to the rezoning, based on violations of SEQRA, was timely when brought within four months of the rezoning, even though this was more than four months from the end of the SEQRA process. The Court found that no "concrete injury" befell the citizen-petitioners until the rezoning occurred. The Court distinguished *Stop-the-Barge*, where the agency at issue, DEP, after making its SEQRA determination, played no further role in the barge project at issue, and was in no position to make further changes to the SEQRA determination. In *Eadie*, in contrast, the entity that made the SEQRA decision, the town board, remained actively involved in the project--possible rezoning legislation--and could have made changes before the rezoning enactment took place. The petitioners' injury here was merely "contingent" upon the adoption of the rezoning, and such rezoning could have been protested and altered during the legislative process. On the other hand, the *Eadie* Court added a vague warning that in some legislation situations, it may be the SEQRA determination itself, not the zoning enactment, that causes actual, concrete injury to the petitioner. "In that hypothetical case," as the Court put it, the petitioner may not be required or permitted to await the enactment of the zoning legislation before commencing an Article 78 proceeding. 7 N.Y.3d at 317, 821 N.Y.S.2d at 147, 854 N.E.2d at 469.

C217:3. The Requirement of Notice.

Aside from finality, the statute of limitations does not begin to run on an Article 78 proceeding until the petitioning

party receives appropriate notice that the final determination at issue has been made. Many times, the notice requirement will be spelled out in the relevant legislation or regulations pursuant to which the agency made its determination. See, e.g., *Village of Westbury v. Dep't of Transp.*, 1989, 75 N.Y.2d 62, 72, 550 N.Y.S.2d 604, 609, 549 N.E.2d 1175, 1180 (where governing regulations required that notice be given to political subdivision where road widening project was located, notice to village where most of the impact of construction would occur was not satisfied by notice to county in which village was located). See also *Goldstein v. Niagara Falls Memorial Med. Center*, 1988, 143 A.D.2d 515, 533 N.Y.S.2d 40 (4th Dep't) (if party is entitled to written notice, the statute of limitations does not begin to run until notice in that form is received). But see *90-92 Wadsworth Avenue Tenants Ass'n v. City of New York Dep't of Housing Preservation and Development*, 1996, 227 A.D.2d 331, 331, 656 N.Y.S.2d 8, 9 ("In circumstances where a party would expect to receive notification of a determination, but has not, the Statute of Limitations begins to run when the party knows, or should have known, that it was aggrieved by the determination."). In the absence of rules or regulations to the contrary, oral notice may suffice. See, e.g., *Scott v. City of Albany*, 2003, 1 A.D.3d 738, 766 N.Y.S.2d 650 (3d Dep't) (city attorney informed petitioner in telephone conversation of finality of decision, which had adverse impact and caused injury at that time).

If an attorney has appeared on behalf of a party in an administrative proceeding in which notice to the party is required, such notice must be served on the attorney in order to trigger the running of the statute of limitations. *Bianca v. Frank*, 1977, 43 N.Y.2d 168, 173, 401 N.Y.S.2d 29, 31, 371 N.E.2d 792, 793. Even if the regulation at issue specifies service on the party herself, and the party is so served, the statute of limitations does not run until service is made on the party's attorney. See also *Munroe v. Ponte*, 2017, 148 A.D.3d 1025, 1026-27, 50 N.Y.S.3d 423, 425 (2d Dep't).

If the notice sent by an agency is ambiguous or uncertain as to whether a determination is final or still can be challenged by further administrative review, such ambiguity generally should be resolved against the agency. In *Mundy v. Nassau County Civil Service Comm'n*, 1978, 44 N.Y.2d 352, 405 N.Y.S.2d 660, 376 N.E.2d 1305, the Court was presented with a civil service eligibility list that was certified in January 1975; at that time, provisional employees not on the list normally would be considered aggrieved and obliged to commence an Article 78 proceeding, if any, within four months. The list here, however, was withdrawn by the agency shortly after it was issued, and the agency later recertified the list in July 1975. "Having created the ambiguity and impression of nonfinality, it was up to the defendant commission to either 'make it clear what was or what was not its [final] determination' ... or, failing that showing, to abide by reasonable delays which it alone had engendered." 44 N.Y.2d at 358, 405 N.Y.S.2d at 662, 376 N.E.2d at 1307. See also *Burch v. New York City Health & Hosp. Corp.*, 2014, 118 A.D.3d 454, 987 N.Y.S.2d 348 (1st Dep't) (at-will government employee's challenge to termination usually must be brought within four months of termination notice regardless of availability of optional administrative review proceeding, but here, the notice created ambiguity by including statement that employee could invoke such review proceeding and "the result of that review would be 'final and binding'"). But see *Carter v. State of New York, Executive Dep't, Division of Parole*, 2000, 95 N.Y.2d 267, 716 N.Y.S.2d 364, 739 N.E.2d 730 (no ambiguity as to finality of determination was created by notice from appeals unit of Division of Parole containing handwritten inscription that the matter would be "schedule[d] for full Parole Board review" because applicable regulations specified that no further review of an appeals unit determination was available to parolee; review by the Parole Board was nothing more than "internal audit," not a review remedy).

In the absence of explicit notice requirements in the governing regulations, the type of notice necessary to trigger the running of CPLR 217(1)'s four-month statute of limitations depends, generally, on whether the determination to be reviewed was "quasi-judicial" in nature or "quasi-legislative." This necessitates a brief summary of the meaning of these terms.

Quasi-judicial has been defined in various ways, depending on the context. For example, on the issue whether res judicata or collateral estoppel can apply to an agency determination, a quasi-judicial proceeding is one which was "rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals

employing procedures substantially similar to those used in a court of law." *Ryan v. New York Telephone Co.*, 1984, 62 N.Y.2d 494, 499, 478 N.Y.S.2d 823, 825-26, 467 N.E.2d 487, 489-90. In the context of certiorari (CPLR 7803(4)), a quasi-judicial proceeding is one that involves adjudication of a party's rights after a "trial-type" hearing pursuant to legal mandate where the essential elements of a "fair trial" were employed, such as notice, cross-examination of witnesses, and a determination based solely on the record. See Practice Commentaries on CPLR 7801, at C7801:2, pp.31-32. The State Administrative Procedure Act defines an "adjudicatory proceeding" as "any activity which is not a rule making proceeding ... in which a determination of the legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a hearing." N.Y.State Admin.Proc.Act § 102(3). See also *Owners Comm. on Electric Rates, Inc. v. Public Service Comm'n*, 1989, 150 A.D.2d 45, 53, 545 N.Y.S.2d 416, 421 (3d Dep't) (dissenting opinion) (typical quasi-judicial proceeding is one "in which the petitioner was an adversarial party in an administrative proceeding specifically involving the adjudication of his rights"), reversed for the reasons stated in the dissenting opinion below, 1990, 76 N.Y.2d 779, 559 N.Y.S.2d 957, 559 N.E.2d 651. Examples that come to mind under any of these definitions of quasi-judicial are determinations involving license revocations and discharges of tenured government employees.

In contrast, an agency's "quasi-legislative" activities are in the nature of general rule-making, promulgating a rate schedule, or issuing a policy directive, all of which have an impact on a relatively wide group of people. See Practice Commentaries on CPLR 7801, at C7801:5, p.42.

When he was a Justice of the Appellate Division, Third Department, Howard A. Levine (later Associate Judge of the Court of Appeals) developed an analytical framework by which the distinction between quasi-judicial and quasi-legislative action serves as the determinant for the running of the four-month statute of limitations. The Court of Appeals adopted his framework in *Owners Comm. on Electric Rates, Inc. v. Public Service Comm'n*, 1990, 76 N.Y.2d 779, 559 N.Y.S.2d 957, 559 N.E.2d 651, reversing on basis of dissenting opinion below 150 A.D.2d 45, 51-54, 545 N.Y.S.2d 416, 420-22 (3d Dep't).

Owners Committee involved an agency's promulgation of electric utility rates, a quasi-legislative activity. All members of the Appellate Division court agreed that the statute of limitations for review of such a determination begins to run when the petitioner receives some type of notice of the determination--only then can the agency action be "final and binding on the petitioner"--but what kind of notice will suffice? The majority of the Appellate Division held that regardless of the nature of the agency's proceeding, whether quasi-judicial or quasi-legislative, the petitioner must receive actual notice of the outcome before the statute of limitations begins to run. Judge Levine's dissent, which was adopted by the Court of Appeals, said that accrual for judicial challenge of a quasi-legislative decision occurs as soon as the agency's determination is "readily ascertainable." In the case at hand, this happened upon the date of issuance of the decision, which was also the date of performance of all the procedural formalities that made the agency's determination effective, including its filing with the Secretary of State.

The "readily ascertainable" accrual rule for review of quasi-legislative determinations, which makes constructive notice the key to accrual, is largely policy-driven. In quasi-legislative matters, the class of persons who may be aggrieved could be quite large. To use the date of an aggrieved citizen's receipt of actual notice could therefore expose the government agency to Article 78 review far beyond the time that the short limitations period of CPLR 217 contemplates. Judge Levine wrote,

Apart from the obvious problems of proof of actual notice, it is readily apparent, where a legislative-type administrative determination is involved, having an impact far beyond the immediate parties at the administrative stage, that keying the commencement of the CPLR article 78 Statute of Limitations to the date of receipt of [actual] notice by the challenger will effectively destroy the statutory policy behind the short [statute of] limitations period that governmental operations should not be held hostage to stale claims.

150 A.D.2d at 53, 545 N.Y.S.2d at 421. Accrual based on actual notice, said Judge Levine, should be reserved for the "typical quasi-judicial administrative determination in which the petitioner was an adversarial party in an administrative proceeding specifically involving the adjudication of his rights." Id.

The "readily ascertainable" component of Judge Levine's test was explored in *School Administrators Ass'n v. New York State Dep't of Civil Service*, 2015, 124 A.D.3d 1174, 3 N.Y.S.3d 150 (3d Dep't), leave to appeal denied, 26 N.Y.3d 904, 17 N.Y.S.3d 85, 38 N.E.3d 831. The court in that case was confronted with an Article 78 challenge to a civil service policy memorandum that limited the ability of state employees to opt out of a health insurance program and take a money payment instead. The memorandum clearly constituted a quasi-legislative determination, so actual notice to the affected employees was not required in order to trigger the running of the statute of limitations. Constructive notice sufficed. The court listed the various dissemination procedures by which the civil service commission made the contents of the memorandum "readily ascertainable" more than four months before commencement of the Article 78 proceeding, including mailings to officials of participating agencies and individuals who had requested to be on a "courtesy list," a website posting, and regional information meetings. See also *Knavel v. West Seneca Central School District*, 2017, 149 A.D.3d 1614, 53 N.Y.S.3d 731 (4th Dep't), leave to appeal dismissed, 29 N.Y.3d 1116, 61 N.Y.S.3d 519, 83 N.E.3d 849 (although court made no definitive holding as to whether certain administrative action was quasi-legislative, three out of five justices agreed that even if it were, agency's mere dropping of letters in mail to affected persons would not have made agency's action readily ascertainable). There may be occasions when the adverse nature of quasi-legislative action may not be readily ascertainable until actual notice is received by the aggrieved party. See *New York State Ass'n of Counties v. Axelrod*, 1991, 78 N.Y.2d 158, 165-66, 573 N.Y.S.2d 25, 29, 577 N.E.2d 16, 20.

C217:4. Effect of Request to Agency for Reconsideration.

The Court of Appeals has held on repeated occasions that a request or application to an agency for reconsideration of its determination, which is otherwise final and binding, does not toll or extend the statute of limitations for an Article 78 proceeding seeking judicial review of that determination. *De Milio v. Borghard*, 1982, 55 N.Y.2d 216, 220, 448 N.Y.S.2d 441, 443, 433 N.E.2d 506, 508; *Kahn v. New York City Dep't of Education*, 2012, 18 N.Y.3d 457, 472, 940 N.Y.S.2d 540, 549, 963 N.E.2d 1241, 1250. See also *Davis v. Kingsbury*, 1970, 27 N.Y.2d 567, 313 N.Y.S.2d 390, 261 N.E.2d 393, affirming for reasons in opinion below, 1968, 30 A.D.2d 944, 945, 293 N.Y.S.2d 997, 998 (1st Dep't). The reason for the nonextension rule is that "[a] motion to reconsider generally seeks the same relief, and advances factual and legal issues that were previously litigated at the administrative level." *Yarbough v. Franco*, 2000, 95 N.Y.2d 342, 347, 717 N.Y.S.2d 79, 81-82, 740 N.E.2d 224, 226-27. See *Gilmore v. Planning Board of Town of Ogden*, 2005, 16 A.D.3d 1074, 1075, 791 N.Y.S.2d 804, 805 (4th Dep't) (board's refusal to reconsider its decision "did not render its initial decision nonfinal and thus did not restart the running of the statute of limitations").

The Appellate Divisions have recognized a possible exception to the rule on agency reconsideration when the agency actually reconsiders the matter. Unfortunately, however, the cases are "in disarray" as to the circumstances under which reconsideration serves to extend the statute of limitations. See *Davis v. Kingsbury*, 1970, 27 N.Y.2d 567, 569, 313 N.Y.S.2d 390, 391, 261 N.E.2d 393, 394 (Breitel, J., dissenting opinion). In order for the statute of limitations to run again, must the reconsideration be based on the addition of new facts and new evidence or will a simple reexamination of the original facts suffice?

The First Department has said, without qualification, that the statute of limitations is renewed if reconsideration by the agency is "mandated" by its governing rules. *Todd v. New York City Housing Auth*., 1999, 262 A.D.2d 202, 692 N.Y.S.2d 327 (1st Dep't). The case cited for this proposition, however, is *Feller v. Wagner*, 1958, 7 A.D.2d 126,

128, 180 N.Y.S.2d 748, 751 (1st Dep't), where the mandatory reconsideration consisted of a "fresh evaluation" of the existing record together with "new" expert "opinion and factual evidence." Another early decision of the First Department treated an agency's reconsideration as restarting the statute of limitations where the agency "conduct[ed] a new investigation with the receipt and consideration by it of additional testimony and other new data.... Its determination upon such a reconsideration, when made, amounted to a final determination which was reviewable by an Article 78 proceeding instituted within four months thereafter." *Camperlengo v. State Liquor Auth.,* 1962, 16 A.D.2d 342, 344, 228 N.Y.S.2d 115, 117 (1st Dep't). But in *Davis v. Kingsbury*, 1968, 30 A.D.2d 944, 293 N.Y.S.2d 997 (1st Dep't), the First Department, holding that a discretionary reconsideration did not revive the statute of limitations where the second application was based solely on the same evidence, said in dicta, "It is of course different where the second hearing is mandated ... *or* where a different factual presentation is invited by the authority ... or entertained by it." (Emphasis added). The *Davis* dictum seems to be in accord with *Todd*'s unequivocal statement that the fact of "mandatory" reconsideration, by itself, can serve as a revival. The First Department decision in *Davis* was affirmed by the Court of Appeals "for the reasons stated in the opinion at the Appellate Division. As that court concluded, 'the essential similarity of the proof offered on both hearings made the second a mere request for a rehearing.'" 27 N.Y.2d 567, 313 N.Y.S.2d 390, 261 N.E.2d 393. Did the Court of Appeals intend to adopt what the First Department said in dicta about "mandatory" reconsideration?

The Second Department has not discussed the effects of a mandatory reconsideration, but has held that if, on a "discretionary reconsideration[,] ... the agency conducts a fresh and complete examination of the matter based on newly presented evidence, an aggrieved party may seek review in a CPLR article 78 proceeding commenced within four months of the new determination." *Riverso v. New York State Dep't of Environ. Conservation*, 2015, 125 A.D.3d 974, 977, 3 N.Y.S.3d 414, 417 (2d Dep't). In *Riverso*, a new investigation of an environmental condition conducted ten years later with new scientific data and new analyses in an investigatory report resulted in a "new determination," albeit reaching the same outcome, thereby permitting Article 78 review within four months thereafter.

The Third Department, without regard to whether reconsideration lies in the agency's discretion or is mandatory upon request, has held that "the four-month Statute of Limitations within which a challenge must be commenced will run from the initial determination unless the agency conducts a fresh and complete examination of the matter based on newly presented evidence." *Quantum Health Resources v. DeBuono*, 2000, 273 A.D.2d 730, 732, 710 N.Y.S.2d 422, 424 (3d Dep't), leave to appeal dismissed, 95 N.Y.2d 927, 721 N.Y.S.2d 603, 744 N.E.2d 138. An earlier decision had confined this rule to situations in which reconsideration is granted "as a matter of grace" by the agency, implying that a mandatory reconsideration might be treated differently. *Corbisiero v. New York State Tax Comm'n*, 1981, 82 A.D.2d 990, 990, 440 N.Y.S.2d 396, 397, affirmed, 1982, 56 N.Y.2d 680, 451 N.Y.S.2d 716, 436 N.E.2d 1318. The discretionary/mandatory distinction did not reappear in the *Quantum* case.

What emerges from the Appellate Division caselaw is that reconsideration of an agency determination based on new evidence, even if the same result is reached, produces a revival of the statute of limitations running from the new determination. This appears to be so regardless of whether the reconsideration was mandatory or at the discretion of the agency. What remains unresolved is whether reconsideration that is mandatory under the agency's rules, standing alone, should revive the statute of limitations even if no new evidence is presented upon the reconsideration. Some of the cases imply that a mandatory reconsideration, indeed, produces this result. But it is difficult to articulate a persuasive reason as to why this should be so. Is it fair to give a petitioner a new bite at the apple if he or she produces no new or different facts in support of a mandatory reconsideration? Two of the policies underlying the statute of limitations--deterrence of dilatoriness and stale claims--are thwarted if a petitioner who missed the first four-month deadline gets a reset of the period based on nothing more than a mandatory reconsideration that treads the exact same ground as before. Only if the agency's re-opening of a matter is accompanied by different facts can it truly be said that the agency's determination is new (regardless of whether the same result is reached).

In any event, the careful practitioner should do everything possible to avoid having to make an argument for revival of the four-month period and instead commence an Article 78 proceeding within four months of the original determination. The following advice was offered by Judge Susan Phillips Read of the Court of Appeals: "[W]e have consistently sought over the past several years to encourage parties who seek to challenge an agency determination to do so at the earliest possible date." *Walton v. New York State Dep't of Correctional Services,* 2007, 8 N.Y.3d 186, 202, 831 N.Y.S.2d 749, 759, 863 N.E.2d 1001, 1011 (dissenting opinion). Hopefully, the client will facilitate the process by coming to counsel "at the earliest possible date."

C217:5 Four-Month Period Applicable in Some Declaratory Judgment Actions.

Declaratory judgment actions (CPLR 3001) are often used to challenge acts of the government. For example, an attack on the validity or constitutionality of a state statute or city ordinance typically takes the form of an action for a declaratory judgment. The declaratory relief in such action not only seems appropriate, but this form of action has the added advantage of a potentially long statute of limitations--the six-year "residual" period of CPLR 213(1). Declaratory judgment actions, in general, get the six-year period of CPLR 213(1) because no other period is specified for such actions. See Practice Commentaries on CPLR 213, at C213:1.

Naturally, litigants who might otherwise be time-barred by CPLR 217(1) from contesting government action by means of an Article 78 proceeding will be inclined to seek declaratory relief instead (or in addition) in an effort to overcome the statute-of-limitations defense. The ability to do so, however, was severely curtailed by the Court of Appeals in *Solnick v. Whalen*, 1980, 49 N.Y.2d 224, 425 N.Y.S.2d 68, 401 N.E.2d 190. There, the Court held that if an action for declaratory judgment could have been litigated in a different type of proceeding with a specified statute of limitations shorter than that of CPLR 213(1), then that shorter period will also apply to the claim seeking declaratory relief. 49 N.Y.2d at 229-30, 425 N.Y.S.2d at 71, 401 N.E.2d at 192. Thus, a dilatory litigant cannot avoid the time-bar of CPLR 217(1) simply by recasting an Article 78 claim as one for declaratory judgment. 49 N.Y.2d at 230, 425 N.Y.S.2d at 71-72, 401 N.E.2d at 194. Labels are not controlling. To determine whether the declaratory judgment action could have been prosecuted in another form, the court must "examine the substance of [the] action to identify the relationship out of which the claim arises and the relief sought." Id. at 229, 425 N.Y.S.2d at 71, 401 N.E.2d at 193. Only "[i]f no other form of proceeding exists for the resolution of the claims tendered in the declaratory judgment action [will] the six-year limitation of CPLR 213 (subd.1) ... be applicable." 49 N.Y.2d at 230, 425 N.Y.S.2d at 72, 401 N.E.2d at 194.

It remains the rule that an action for a declaration of the invalidity of legislation, such as a statute or ordinance, based on its substantive content, gets the six-year statute of limitations of CPLR 213(1), rather than the four-month period of CPLR 217(1), because such relief is not available in an Article 78 proceeding. *Council of City of New York v. Bloomberg*, 2006, 6 N.Y.3d 380, 388, 397-98, 813 N.Y.S.2d 3, 6, 13-14, 846 N.E.2d 433, 436, 443-44 (majority & dissent); *Save the Pine Bush, Inc. v. City of Albany*, 1987, 70 N.Y.2d 193, 202, 518 N.Y.S.2d 943, 946, 512 N.E.2d 526, 529. The courts have ruled inconsistently, however, as to accrual in cases seeking a declaration of the invalidity of legislation. See *South Liberty Partners, L.P. v. Town of Haverstraw*, 2011, 82 A.D.3d 956, 958, 918 N.Y.S.2d 563, 565 (2d Dep't) (accrual occurs when plaintiff suffers harm as result of unconstitutional legislation); *Westhampton Beach Associates, LLC v. Incorporated Village of Westhampton Beach*, 2017, 151 A.D.3d 793, 796, 56 N.Y.S.3d 518, 521 (2d Dep't) (same), leave to appeal dismissed, 2018, 31 N.Y.3d 929, 72 N.Y.S.3d 26, 95 N.E.3d 328; *New York Insurance Ass'n, Inc. v. State*, 2016, 145 A.D.3d 80, 88-89, 41 N.Y.S.3d 149, 155 (3d Dep't), leave to appeal denied, 2017, 29 N.Y.3d 910, 57 N.Y.S.3d 714, 80 N.E.3d 407 (six-year period begins to run upon enactment of legislation); *Amerada Hess Corp. v. Acampora*, 1985, 109 A.D.2d 719, 722, 486 N.Y.S.2d 38, 41 (2d Dep't) (invalid statute causes continuing harm, meaning that statute of limitations for declaratory judgment continues to run indefinitely); *Nelson v. Lippman*, 2000, 271 A.D.2d 902, 905, 709 N.Y.S.2d 210, 213-14 (3d Dep't) (same), reversed on other grounds, 95 N.Y.2d 952, 722 N.Y.S.2d 467, 745 N.E.2d 386.

So-called "quasi-legislative" acts of administrative agencies, such as the promulgation of regulations or rate

schedules, often can be challenged on grounds specified in CPLR 7803(3) (violation of lawful procedure, error of law, arbitrary and capricious, or abuse of discretion), and therefore the bringing of a declaratory judgment action in such cases is subject to the four-month statute of limitations. *New York City Health & Hosp. Corp. v. McBarnette*, 1994, 84 N.Y.2d 194, 616 N.Y.S.2d 1, 639 N.E.2d 740; *Thrun v. Cuomo*, 2013, 112 A.D.3d 1038, 976 N.Y.S.2d 320 (3d Dep't), leave to appeal denied, 2014, 22 N.Y.3d 865, 986 N.Y.S.2d 20, 9 N.E.3d 370. Moreover, cases are legion in which claims for declaratory relief are dismissed because a now time-barred Article 78 proceeding would have been available to challenge "administrative action," which often takes the form of a particularized determination as to the applicability of a statute or regulation to a specific party.

Gress v. Brown, 2012, 20 N.Y.3d 957, 958 N.Y.S.2d 675, 982 N.E.2d 595, is but one of dozens of illustrations of the application of the *Solnick* rule. Certain at-will, seasonal employees of the City of Buffalo brought an action in 2008 against the Buffalo Fiscal Stability Authority (BFSA), seeking a declaration that BFSA's 2004 adoption of a resolution freezing wages for all Buffalo employees was invalid as applied to plaintiffs because of an alleged exemption contained in the legislation creating BFSA. The Court held, pursuant to *Solnick*, that the declaratory relief at issue was, in substance, a challenge by the plaintiffs to BFSA's administrative action in applying the wage freeze to them. Thus, the plaintiffs could have contested the BFSA's action in an Article 78 proceeding within four months of BFSA's adoption of the resolution in 2004. Their failure to do so rendered the declaratory action time-barred.

If a party's complaint contains multiple claims for declaratory relief, the court, on a motion to dismiss for untimeliness, must examine all of the claims to determine whether each claim legitimately qualifies for the six-year period or whether it is one that could have been brought pursuant to Article 78 and the four-month period has expired. See, e.g., *Schiener v. Town of Sardinia*, 2008, 48 A.D.3d 1253, 852 N.Y.S.2d 538 (4th Dep't) (portion of declaratory judgment action that sought invalidation of zoning ordinance due to procedural irregularities in its adoption (CPLR 7803(3)) was time-barred because commenced beyond Article 78's four-month statute of limitations, but plaintiff's challenge to substance of ordinance was still within six-year period for declaratory relief). See also *Village of Islandia v. County of Suffolk*, 2018, 162 A.D.3d 715, 716-17, 79 N.Y.S.3d 188, 192-93 (2d Dep't); *New York Insurance Ass'n, Inc. v. State*, supra. A similar analysis is required if the aggrieved party brings a so-called "hybrid action/proceeding," in which the petitioner explicitly alleges one or more claims under Article 78 together with one or more claims for declaratory relief. See generally Practice Commentaries on CPLR 7804, at C7804:5. In hybrid actions, separate statutes of limitations apply to the separate claims--CPLR 217(1) to the Article 78 component and CPLR 213(1) to the claim for declaratory relief. See, e.g., *Jones v. Amicone*, 2006, 27 A.D.3d 465, 812 N.Y.S.2d 111 (2d Dep't).

As noted above in Commentary C217:1, very few forms of decision-making by private parties are subject to Article 78 review. Thus, in a joint action for declaratory relief against a government defendant and a private party, even if the government defendant may be entitled to dismissal based on the Article 78 time bar of CPLR 217, the action usually may continue against the private party, who is subject only to the six-year period of CPLR 213(1). For example, the plaintiff in *Grocholski Cady Road, LLC v. Smith*, 2019, 171 A.D.3d 102, 96 N.Y.S.3d 409 (4th Dep't), brought a declaratory action against its neighboring landowner (a natural person) and the local town alleging that the town had improperly discontinued a portion of a road and had declined to compel the neighbor to remove certain obstacles he had erected on the road. The neighbor urged dismissal as against him on the ground that the plaintiff's action fell within the scope of Article 78, and the four-month period had expired. "We disagree completely," said the court. The private defendant was not a "body or officer" within the scope of CPLR 7802, and the claim against the neighbor involved only the respective rights of private parties to use the road, which was not subject to Article 78 review (see CPLR 7803). Thus, CPLR 213(1), not CPLR 217, applied to the declaratory claim against the neighbor.

C217:6. Mandamus to Compel.

When an aggrieved party files a mandamus proceeding to compel a government official to perform a duty required by law (CPLR 7803(1)), the four-month period of CPLR 217(1) is measured from the official's refusal to act following the aggrieved party's demand. *Waterside Associates v. New York State Dep't of Environmental Conservation*, 1988, 72 N.Y.2d 1009, 1010, 534 N.Y.S.2d 915, 916, 531 N.E.2d 636, 637. The party seeking government action, however, should not unreasonably delay making its demand because the doctrine of laches may be invoked to bar the claim. As the court put it in *Barresi v. County of Suffolk*, 2010, 72 A.D.3d 1076, 1076, 900 N.Y.S.2d 343, 345 (2d Dep't), leave to appeal denied, 15 N.Y.3d 705, 908 N.Y.S.2d 158, 934 N.E.2d 892: "The petitioner must make his or her demand within a reasonable time after the right to make it occurs, or after the petitioner knows or should know of the facts which give him or her a clear right to relief, or else, the petitioner's claim can be barred by the doctrine of laches." Furthermore, in the context of an Article 78 proceeding, laches may be based solely on unreasonable delay without regard to whether the respondent was prejudiced by the delay. *Sheerin v. New York Fire Dep't Articles 1 and 1B Pension Funds*, 1979, 46 N.Y.2d 488, 495-96, 414 N.Y.S.2d 506, 510, 387 N.E.2d 217, 221. The application of laches involves an exercise of discretion. See, e.g., *Chevron U.S.A., Inc. v. Commissioner of Environmental Conservation*, 2011, 86 A.D.3d 838, 927 N.Y.S.2d 452 (3d Dep't) (delay in making demand excused) (3-2 decision); *Speis v. Penfield Central Schools*, 2014, 114 A.D.3d 1181, 980 N.Y.S.2d 642 (filing of petition itself deemed to be demand, and this occurred within four months of when petitioner became aware of alleged entitlement).

C217:7. Prohibition.

An Article 78 proceeding in the nature of prohibition, which seeks to stop a judicial or quasi-judicial body or officer from acting without or in excess of jurisdiction, must be brought within four months from the time the offending decision to act becomes final and binding. Of course, the petitioner must have adequate notice of the decision before the statute of limitations begins to run. *Pinney v. Van Houten*, 2019, 168 A.D.3d 1293, 1294-95, 92 N.Y.S.3d 468, 471 (3d Dep't); *Working Families Party v. Fisher*, 2013, 109 A.D.3d 478, 479, 970 N.Y.S.2d 563, 566 (2d Dep't), affirmed on other grounds, 2014, 23 N.Y.3d 539, 992 N.Y.S.2d 172, 15 N.E.3d 1181.

When a prohibition proceeding challenges a retrial in a criminal case on the ground of double jeopardy--a common circumstance in which prohibition is sought--the four-month statute of limitations begins to run when "the People definitively demonstrate their intent to re-prosecute and the court beg[ins] to calendar the case for eventual trial." *Smith v. Brown*, 2014, 24 N.Y.3d 981, 996 N.Y.S.2d 207, 20 N.E.3d 987. Significantly, the Court rejected the "continuing wrong" approach adopted in *Johnson v. Carro*, 2005, 24 A.D.3d 140, 806 N.Y.S.2d 15 (1st Dep't), leave to appeal denied, 2006, 7 N.Y.3d 704, 819 N.Y.S.2d 871, 853 N.E.2d 242, which would toll the statute of limitations throughout the entire period of a body or officer's improper exercise of jurisdiction.

C217:8. Breach of Union's Duty of Fair Representation.

CPLR 217(2) was enacted in 1990 to overrule the 1987 decision of the Court of Appeals in *Baker v. Board of Education*, 1987, 70 N.Y.2d 314, 520 N.Y.S.2d 538, 514 N.E.2d 1109, which applied CPLR 213(1)'s six-year statute of limitations to claims by members of public sector labor unions for breach of the duty of fair representation, such as the union's failure to pursue a grievance proceeding on a member's behalf. New York's Taylor Law (Civil Service Law § 200 et seq.), which governs the rights and obligations of public sector unions and their members, contains no statute of limitations. This left the Court no alternative but to apply CPLR 213(1), which prescribes a six-year period for "an action for which no limitation is specifically prescribed by law." Recognizing that union-member grievances against their unions deserve prompt resolution, the Court invited the Legislature to "address the issue and fix a more suitable Statute of Limitations." 70 N.Y.2d at 322, 520 N.Y.S.2d at 542, 514 N.E.2d at 1113. This the Legislature did by adding subdivision 2 to CPLR 217, thereby imposing a four-month statute of limitations. (Under federal labor law in the private sector, a six-month period applies. 70

N.Y.2d at 319, 520 N.Y.S.2d at 540, 514 N.E.2d at 1111.)

Subdivision (a) governs claims directly against the union, and subdivision (b) governs interrelated claims against the public employer. See, e.g., *Baker v. Thompson*, 2002, 194 Misc.2d 116, 121-24, 750 N.Y.S.2d 486, 490-92 (Sup.Ct. Rensselaer Co.). In both situations, accrual occurs when the employee or former employee "knew or should have known" of the breach or when the employee or former employee "suffer[ed] actual harm, whichever is later." See, e.g., *Leblanc v. Security Services Unit Employees of the New York State Law Enforcement Officers Union,* 2000, 278 A.D.2d 732, 733, 718 N.Y.S.2d 116, 118 (3d Dep't).

Mercone v. Monroe County Deputy Sheriffs' Ass'n, Inc., 2011, 90 A.D.3d 1698, 936 N.Y.S.2d 826 (4th Dep't), held that a claim for breach of the union's duty of fair representation was not a case of "professional malpractice" and therefore was not eligible for application of the continuous representation doctrine. See Practice Commentaries on CPLR 214, at C214:6. The breach of duty at issue consisted of the union's failure to timely file a grievance arising from the member's discharge. The court held that the four-month statute of limitations expired four months from the untimely failure to file (CPLR 217(2)(a)) (date of harm). The employee also was aware of the breach of duty more than four months prior to commencement of the action. The period was not tolled by the union's subsequent and continuing, but ultimately unsuccessful, efforts to file the discharge and to invoke arbitration. The reason for inapplicability of the continuous representation toll was the absence of the necessary indicia of professional status of the union representatives. Even assuming union representatives provide counseling and advice in a relationship of trust and confidence, none of the other earmarks of professional training and regulation apply to their work.

LEGISLATIVE STUDIES AND REPORTS

This section is based on § 1286 of the civil practice act. The Second Report to the Legislature states that in the original proposal, the words "express or implied" were inserted preceding "refusal" with a view to codifying decisional law and for clarification of the then existing law. These words were subsequently deleted upon the suggestion of the New York State Bar Association Committee on Administrative Law and the Joint Committee on the Civil Practice Act. For statute of limitation purposes, comments the Fifth Report, a petitioner should not have to bear the risk of guessing correctly as to when a court would find an implied refusal had occurred.

Specifications of the disabilities on the basis of which the court is permitted to extend the time for the commencement of the proceeding is omitted, and in their place, reference is made to the disabilities specified in § 208. This section is more restrictive than § 208, states the Second Report. It governs any proceeding under article 78 in which petitioner claims a disability.

Official Reports to Legislature for this section:

2nd Report Leg.Doc. (1958) No. 13, p. 79.

5th Report Leg.Doc. (1961) No. 15, p. 63.

6th Report Leg.Doc. (1962) No. 8, p. 99.

Notes of Decisions (1387)

McKinney's CPLR § 217, NY CPLR § 217
Current through L.2019, chapter 256. Some statute sections may be more current, see credits for details.

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