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gress intended Section 341 to preempt the available avenues of attack upon the collapsible corporation, it is submitted that it would have inserted statutory language to that effect, similar to that inserted in Section 671 of the Clifford Trust provisions of the 1954 Code.

Irwin E. Ginsberg

USE OF MANDAMUS TO REVIEW ADMINISTRATIVE ACTIONS IN NEW YORK

INTRODUCTION

The growth in number and in influence of administrative bodies in the past few decades has resulted in an ever increasing body of litigation in which those who believe themselves wronged by governmental agencies seek redress in the courts. The extraordinary remedy of mandamus has proved to be a convenient device for obtaining judicial review in many cases.

Although the common law writ of mandamus has been abolished in New York the relief formerly obtainable under that writ is available under the statutory substitute.¹ While the statute has achieved the salutary effect of eliminating the danger of an incorrect selection among the extraordinary remedies it has been recognized by the courts that the relief available under Article 78 of the Civil Practice Act is coextensive with that which existed before the reformed procedure.² For this reason no distinction will be made between cases of mandamus and the present cases in the nature of mandamus. The procedural consolidation has quite understandably resulted in a diminishing use of the old label by the courts.³ For purposes of convenience, however, the term "mandamus" will be used indiscriminately herein to characterize actions of this nature both before and after the passage of Article 78.

THE MANDATORY-DISCRETIONARY DISTINCTION

A consideration of the factors employed by the courts in deciding whether mandamus should be granted in a particular case must necessarily include a mention of the most common criterion used in deciding cases under the old writ. The old theory was that mandamus could be had only to compel performance of

1. C. P. A. §1283.

2. *Newbrand v. City of Yonkers*, 285 N. Y. 164, 33 N. E. 2d 75 (1941); see THIRD ANNUAL REPORT N. Y. JUDICIAL COUNCIL 132 (1937).

3. See *Fiore v. O'Connell*, 297 N. Y. 260, 78 N. E. 2d 602 (1948); *New York State Soc. of Prof. Eng. v. Education Dep't*, 262 App. Div. 602, 31 N. Y. S. 2d (3d Dep't 1941).

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ministerial duties and not actions described as judicial in nature⁴ or discretionary.⁵ The limiting effect of this traditional view was reduced when it later came to be acknowledged that mandamus would lie when an officer or agency had abused its discretion in refusing to act.⁶ Section 1284 of the Civil Practice Act recognizes that mandamus has been available to "compel performance of a duty specifically enjoined by law;"⁷ and "to review a determination of an administrative body."⁸

The distinction between duties found to be mandatory and those found to be discretionary is not always clear and the courts often do not specify into which classification a particular case falls.⁹ One court has stated: "Ultimately the question as to whether the words of a . . . statute are mandatory or discretionary is a matter of legislative intention to be gathered in the light of all the circumstances, having regard to the purposes sought to be accomplished by the . . . legislation."¹⁰ Clearly the fact that the ordinary meaning of the language of the statute indicates that an act is ministerial is not always controlling.¹¹

The distinction is perhaps no longer of great importance in view of the fact that the courts can act in both situations and often do not distinguish between the types.¹² Cases involving clearly mandatory acts present no great difficulty. It is when an exercise of administrative discretion is challenged in the courts that problems arise.

ABSOLUTE DISCRETION

Although the old mandatory-discretionary distinction has been virtually abandoned for practical purposes, there remains some

4. *People ex rel. Francis v. Common Council of Troy*, 78 N.Y. 33 (1879).

5. *People ex rel. Schwab v. Grant*, 126 N.Y. 473, 27 N.E. 964 (1891); *People ex rel. Harris v. Commissioner*, 149 N.Y. 26, 43 N.E. 418 (1896).

6. *Baird v. Board of Supervisors*, 138 N.Y. 195, 33 N.E. 827 (1893); *People ex rel. Empire City Trotting Club v. State Racing Comm.*, 190 N.Y. 31, 82 N.E. 723 (1907).

7. C. P. A. § 1284 (3).

8. C. P. A. § 1284 (2).

9. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 351 (1942).

10. *Rudhlan Amusement Co. v. Geraghty*, 146 Misc. 308, 315, 262 N.Y. Supp. 269, 278 (Sup. Ct. 1932); see *Rushford v. LaGuardia*, 280 N.Y. 217, 20 N.E. 2d 547 (1939); *Divisich v. Marshall*, 257 App. Div. 294, 13 N.Y.S. 2d 935 (1st Dep't 1939).

11. See *Dr. Bloom Dentist v. Cruise*, 259 N.Y. 358, 182 N.E. 16, appeal dismissed 288 U.S. 588 (1932); *Matter of Lindgren*, 232 N.Y. 59, 133 N.E. 353 (1921).

12. Although the mandatory-discretionary distinction probably does not have much effect in influencing the actual result in an individual case, the courts continue to use it as a justification for their denial of mandamus in cases where other factors would undoubtedly cause a denial of the remedy. *E. g. Gimprich v. Board of Education*, 306 N.Y. 401, 118 N.E. 2d 578 (1954). For an earlier discussion of the distinction see Patterson, *Ministerial and Discretionary Official Acts*, 20 MICH. L. REV. 848 (1922).

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question as to whether a new distinction has not been drawn between reviewable and absolute discretion. Benjamin, in his comprehensive study of administrative law in New York asserts that there are "some instances in which administrative discretion is held to be absolute and unreviewable . . ."¹³

In *Sheridan v. McElligott*,¹⁴ the court, faced with a New York City ordinance stating that the Fire Commissioner "shall have the power" to award a pension under specified circumstances, held the language to be a grant of discretion not reviewable by the court. However, words which seemingly impart unlimited discretion are not always so construed by the courts. In another case the court held the administrative action to be reviewable where the authorizing statute provided: ". . . the Regents shall have . . . power to indorse a license . . . issued in any other state or country. . . ."¹⁵

It would seem that many of the "instances" of absolute discretion spoken of by Benjamin are merely cases where the court is implicitly finding that the exercise of discretion was proper, while expressing the decision in terms of unreviewability. If the action of the Commissioner in the *Sheridan* case, for example, was of a type which the courts characterize as "arbitrary", "unfair" or "capricious" the exercise of discretion would probably have been found to be reviewable. The Court of Appeals has stated: "In the absence of *clear expression* by the Legislature to the contrary, the courts may review the exercise of a discretionary power vested in an administrative officer or body to determine whether the case discloses circumstances which leave no possible scope for the reasonable exercise of discretion in such manner."¹⁶ [Emphasis added.] In view of the decisions on this question it may well be that the *clear expression* required for a preclusion of judicial review must be a positive prohibition rather than a negative implication.

ABUSE OF DISCRETION

The principle that mandamus lies to correct an abuse of discretion by an administrative body was recognized as long ago as 1893.¹⁷ An early statement of the principle was that: "If . . . administrative action is arbitrary, tyrannical and unreasonable, or is based on false information, the relator may have a remedy

13. BENJAMIN, *op. cit. supra* note 9, p. 353.

14. 278 N. Y. 59, 15 N. E. 2d 398 (1938).

15. *Levi v. Regents*, 256 App. Div. 444, 10 N. Y. S. 2d 1013 (3d Dep't), *aff'd* 281 N. Y. 627, 22 N. E. 2d 178 (1939).

16. *Schwab v. McElligott*, 282 N. Y. 182, 186, 26 N. E. 2d 10, 12 (1938).

17. *Baird v. Board of Supervisors*, 138 N. Y. 195, 33 N. E. 827 (1893).

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through mandamus to right the wrong which he has suffered."¹⁸ It appears from the early cases that actions which would not ordinarily be thought of in terms of the quoted combination of adjectives were found by the court to be subject to correction by mandamus.¹⁹ The statement is, however, typical of the language used by the courts at that time and which is used with minor variation even in recent cases.²⁰ The cases in which an administrative act is found subject to correction by mandamus generally fall into one of a few broad categories.

Unauthorized Regulation

When an administrator is given the power to regulate a certain activity he is bound by the restrictions imposed by the legislature in granting the authority. Frequently the authorizing statute will be silent as to whether the administrative body may act in a certain manner. This does not mean that the administrator is completely free to promulgate such regulations as he sees fit. A common example of this type of authority is found in licensing statutes where specific directives to the licensing officer are absent. Judicial intervention in such cases has not been confined to instances of flagrant discrimination by the administrator, but has been held appropriate when the official uses a standard of conduct not prescribed by the legislature. Thus where the State Racing Commission had statutory power to grant or refuse licenses to hold races, and had based the refusal of a license to one applicant on the ground that the entire racing season had been divided among other tracks, the court held that the refusal was arbitrary since the statute did not provide for such exclusive allotment.²¹ It has been held further that even where a limitation on the number of licenses issued by an officer may be in the public interest, the administrator is not justified in refusing licenses to qualified applicants in the enforcement of the limitation unless the limitation is imposed by the legislature.²²

Similar to these is the type of case exemplified by *People ex rel. Sprenger v. Department of Health*,²³ where the court held that the refusal of a license to a private hospital on the sole ground that it would lower property values in the area of its

18. *People ex rel. Lodes v. Department of Health*, 189 N. Y. 187, 194, 82 N. E. 187, 189 (1907).

19. See *People ex rel. Empire City Trotting Club v. State Racing Comm.*, 190 N. Y. 31, 82 N. E. 723 (1907).

20. See *Small v. Moss*, 277 N. Y. 501, 507, 14 N. E. 2d 808, 810 (1938); *Schwab v. McElligott*, 282 N. Y. 182, 186, 26 N. E. 2d 10, 12 (1940).

21. *People ex rel. Empire City Trotting Club v. State Racing Comm.*, *supra* note 19.

22. *Picone v. Commissioner*, 241 N. Y. 157, 149 N. E. 336 (1925).

23. 226 N. Y. 209, 123 N. E. 379 (1919).

location was an abuse of discretion and subject to correction by mandamus. In *Ormsby v. Bell*,²⁴ however, the court refused to issue a mandamus to the license commissioner of New York City when he denied a license to a theatre which had been newly erected next to a dry cleaning establishment. There was no limitation on the issuance of theatre licenses to justify the refusal, but a city ordinance forbade the licensing of a dry cleaning establishment located next to a theatre. The *Ormsby* case stands as an exception to the general rule in the cases involving unauthorized regulation, and is an indication that the courts may take equitable considerations into account where there are competing property interests. In a later case the court once again invoked the general rule and held that the refusal of a license to a theatre on the ground that it would cause a traffic hazard in the area was improper.²⁵

False Information

It is often said that there is an abuse of discretion by an official when his action is based on false information. One court has said that such action is "arbitrary" in the legal sense though done in the best of faith.²⁶ Actions based merely on conclusions have also been held to be arbitrary.²⁷ Such statements appear to be merely individual expressions of the general rule that judicial review of administrative findings of fact (where such review is allowable) may be had in mandamus proceedings.²⁸

Statutory and Constitutional Violations

Another instance wherein the courts find an abuse of discretion is when the refusal of an official to act violates the law. This is not necessarily a case where there is a "duty specifically enjoined by statute." In *New York State Soc. of Prof. Eng. v. Education Dep't*,²⁹ the court recognized that the Education Department's power to change the name of an institution was discretionary but held that the refusal in this case to order the removal of the word "engineering" from the name in question, when a statute forbade such use,³⁰ was subject to correction by mandamus. The court said: ". . . any act of any board which

24. 218 N. Y. 212, 112 N. E. 747 (1916).

25. *Small v. Moss*, 279 N. Y. 288, 18 N. E. 2d 281 (1938).

26. *People ex rel. Hultman v. Gilchrist*, 114 Misc. 651, 188 N. Y. Supp. 61 (Sup. Ct.) *aff'd* 197 App. Div. 940, 118 N. Y. Supp. 944 (1st Dep't 1921).

27. *Fedder v. McCaffrey*, 110 N. Y. S. 2d 488 (Sup. Ct. 1952); *Park Slope Chevrolet v. Moss*, 27 N. Y. S. 2d 501 (Sup. Ct. 1941).

28. See BENJAMIN, *op. cit. supra* note 9 p. 353 *et seq.*; *Monument Garage v. Levy*, 266 N. Y. 339, 194 N. E. 848 (1935).

29. 262 App. Div. 602, 31 N. Y. S. 2d 305 (3d Dep't 1941); *cf. People ex rel. Schau v. McWilliams*, 185 N. Y. 92, 77 N. E. 785 (1906).

30. EDUCATION LAW § 1461.

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violates the law and which the board refuses to change when their attention is called to it, without giving any reason, is arbitrary, unfair and capricious.’³¹

Just as mandamus is proper to force action to correct an illegal condition, it is improper where an action would create an illegal condition. In *Dr. Bloom Dentist Inc. v. Cruise*,³² the court held that the city clerk could not be compelled to issue a permit for a sign when use of the sign by the applicant would violate Regent’s regulation on professional conduct. Refusal of a permit for the use of an X-ray machine was held improper, however, when it was based merely on a suspicion that the applicant would engage in illegal activity.³³

It would seem to be an obvious corollary to the cases on statutory violations that if discretionary administrative action or inaction is unconstitutional,³⁴ or based on an unconstitutional statute,³⁵ that mandamus may be used to force proper action.

SPECIAL GROUNDS FOR REFUSAL OF MANDAMUS

Even in cases where mandamus would otherwise be appropriate, the presence of some overriding factor may cause a denial of this remedy to the petitioner. Where a statute does not authorize an officer to act in a particular case there can be no compulsion by mandamus.³⁶ If the court feels that there is a more appropriate remedy it will deny mandamus. In *Walsh v. La Guardia*,³⁷ the court refused to order the mayor and police commissioner of the City of New York to stop the operation of unfranchised bus lines in that city, maintaining that an injunction and not mandamus was the proper remedy. It further stated that: “The interference of the Supreme Court in the details of municipal administration is not to be encouraged.”³⁸

It has already been noted that mandamus will not be granted where it would cause a statutory violation. In *Colonial Beacon Oil Co. v. Finn*,³⁹ a building permit had been denied for a reason not authorized by the legislature. The administrator, however,

31. 262 App. Div. 602, 604, 31 N. Y. S. 2d 305, 308; see *Walsh v. LaGuardia*, 269 N. Y. 437, 199 N. E. 652 (1936).

32. 259 N. Y. 358, 182 N. E. 16 (1921).

33. *Sausser v. Dep’t of Health*, 242 N. Y. 66, 150 N. E. 603 (1926).

34. *Baird v. Board of Supervisors*, 138 N. Y. 195, 33 N. E. 827 (1893).

35. *Concordia Collegiate Inst. v. Miller*, 301 N. Y. 189, 93 N. E. 2d 632 (1950); *Davison v. Flammigan*, 273 App. Div. 870, 76 N. Y. S. 2d 849 (2d Dep’t 1948).

36. *Wong v. Finkelstein*, 299 N. Y. 205, 86 N. E. 2d 563 (1949).

37. 269 N. Y. 437, 199 N. E. 652 (1936).

38. *Id.* at 442, 199 N. E. at 654.

39. 245 App. Div. 459, 283 N. Y. Supp. 384 (3d Dep’t 1935), *aff’d* 270 N. Y. 591, 1 N. E. 2d 345 (1936).

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had overlooked the fact that a granting of the permit might cause a violation of a zoning ordinance. The court reversed a mandamus order granted in the lower court, and held that where the action of the official was justified, even though the reason for that action was erroneous, mandamus would not be allowed since it is available only to enforce a legal right.

It has also been said that a court will be reluctant to issue mandamus where it will embarrass an important administrative function.⁴⁰ In the *Luboil* case the petitioner claimed to be the low bidder for a public contract and sought to force the acceptance of his bid. Justice Shientag stated: “. . . rarely will the court, by way of an order in the nature of mandamus, direct an administrative agency to award a contract to a particular bidder.”⁴¹

Where a mandamus order would be futile the court will not issue it.⁴² In *Matter of Lindgren*,⁴³ the court refused to compel the board of elections to place the names of certain nominees on the ballot when the board had refused to do so on the ground that the nominees were in prison. After concluding that the nominees could not hold office if elected the court said: “It does seem reasonable to suppose that the election machinery . . . is for the purpose of doing a useful and not a useless thing.”⁴⁴

LIMITATION OF DISCRETION BY ADMINISTRATIVE PRECEDENT

An important question which frequently arises in cases of mandamus is whether an administrator is bound by his previous rulings handed down on a certain set of facts so that subsequent decisions on similar facts must conform to those previously rendered. In *Larkin v. Schwab*,⁴⁵ the statute involved was an ordinance passed by the Common Council of the City of Buffalo providing that no consent for the installation of a tank for the storage of gasoline in excess of five hundred and fifty gallons inside of the city could be granted without the consent of four-fifths of the council members. Although consent had been given for the installation of tanks in locations similar to the one proposed by the petitioner, the court held that the refusal of the council to grant a permit in this case was not an abuse of discretion. Judge Lehman said for a unanimous court:

40. *Luboil Heat and Power v. Pleydell*, 178 Misc. 562, 34 N. Y. S. 2d 587 (Sup. Ct. 1942).

41. *Id.* at 566, 34 N. Y. S. 2d at 592. *Contra, Arensmeyer-Warnock-Zarndt v. Wray*, 118 Misc. 619, 194 N. Y. Supp. 398 (Sup. Ct. 1922).

42. *Schulster v. Carney*, 276 App. Div. 592, 96 N. Y. S. 2d 703 (1st Dep't 1950).

43. 232 N. Y. 59, 133 N. E. 353 (1921).

44. *Id.* at 65, 133 N. E. at 355.

45. 242 N. Y. 330, 151 N. E. 637 (1926).

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The mere fact that consents were granted to owners of premises somewhat similarly situated does not in itself show that consent was arbitrarily refused to this applicant. The question is not whether someone else has been favored. The question is whether the petitioner has been illegally oppressed. Exercise of discretion in favor of one confers no right upon another to demand the same decision. Unlimited discretion vested in an administrative board by ordinance is not narrowed through its exercise. Calculated failure to lay down general standards in the ordinance should not be nullified by interpretation that each case passed upon creates a standard that must be generally followed thereafter.⁴⁶

Judge Lehman stated in a subsequent opinion that the rule of the *Larkin* case applied in cases where power was conferred on a legislative body, (and where the grant of power may, therefore, be plenary) and not in the case of a purely administrative body.⁴⁷ He did not indicate, however, whether he considered the paragraph quoted above as part of the rule so limited.

In *Marburg v. Cole*,⁴⁸ without mentioning the *Larkin* case, Judge Finch, speaking for the majority of the court, attempted through the greater portion of his opinion to justify the refusal by the Commissioner of Education of an endorsement of a foreign medical license on the ground that the preceding administrative rulings on such endorsements established a standard for subsequent cases. Chief Judge Lehman joined in Judge Desmond's dissenting opinion which denied that any standard could be derived from the preceding cases other than the standard established by the plain meaning of the statute.

The quoted language of the *Larkin* case was cited by the Court of Appeals in *Fiore v. O'Connell*,⁴⁹ however, in upholding a ruling of the State Liquor Authority denying a license to the petitioner after having granted one to another applicant who had qualifications almost the same as those of the petitioner. In 1952 the Third Department upheld the right of the Regents to change their mind by holding that permission to take the optometrist's examination need not have been granted to the petitioner merely because it had previously been granted to others with similar qualifications.⁵⁰

The rule quoted from the *Larkin* case would seem, therefore, to still govern this area, whether the body is a purely admin-

46. *Id.* at 336, 151 N. E. at 639.

47. *Small v. Moss*, 279 N. Y. 288, 18 N. E. 2d 281 (1938).

48. 286 N. Y. 202, 151 N. E. 637 (1941).

49. 297 N. Y. 260, 78 N. E. 2d 602 (1948).

50. *Marks v. Regents*, 279 App. Div. 476, 111 N. Y. S. 2d 362 (3d Dep't 1952).

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istrative one or a legislative body acting as administrator. The rule, when originally applied and when cited in later cases, has been applied only when it was the petitioner who was seeking to assert the binding force of administrative precedent. When the administrator cites his previous rulings, as in the *Marburg* case, the courts will apparently give weight to the precedents as a factor which may justify the administrator's action.

CONCLUSION

The adaptation of a common law remedy such as mandamus to a developing field such as administrative law is attended with the obvious danger that ancient theory will be allowed to frustrate modern necessities. The persistence with which the courts return to the use of the old phrases, after having abandoned the substance of the rules which these phrases express, is somewhat of a hindrance to present day practice. An authoritative recognition of modern realities in the field of the review of administrative activities would indeed be welcome.

Gerard Ronald Haas