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ADMINISTRATIVE LAW AT THE LOCAL LEVEL: THE NEW YORK CITY EXPERIENCE

CORPORATION COUEL MICHAEL CARDOZO SPEAKS TO THE AMERICAN BAR ASSOCIATION ON THE SECTION OF ADMINISTRATIVE LAW & REGULATORY PRACTICE
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Introduction

If you listened closely to the previous introduction -- you might have asked yourselves: "Why in the world is this guy Cardozo speaking to us? He never practiced before a federal administrative agency in his life. Where is his experience before the SEC or the FTC or HUD or any of the other alphabet soup agencies in DC before whom we practice? What the heck does [being a fancy sports lawyer at Proskauer Rose representing the NBA, or] representing Mayor Bloomberg or the City of New York, have to do with administrative law?

Well the fact is that, while I certainly can't claim to be an administrative law expert, a significant part of the work of the New York City Corporation Counsel's Office deals with administrative law. Not the federal agencies with which most of you are familiar, but rather with local administrative tribunals.

Tonight, I would like to speak to you about the impact municipal administrative tribunals have on the every day lives of city residents. While I will draw on my experience in New York City, the issues I will discuss have their parallel, I believe, in municipalities throughout the United States.

For New Yorkers and other city dwellers, administrative law is nothing less than the enforcement of rules that shape the quality of every day life. Parking tickets, waste disposal, air pollution, noise, building and fire safety, and taxes are just a few examples. How administrative disputes in these and numerous other areas are resolved has a direct and immediate impact on the quality of life of everyday New Yorkers. And I have no doubt that the manner in which comparable disputes are handled in Chicago, Boston, Los Angeles, Dallas or any other city in this country has a similar impact on the residents of those cities.

Volume Comparison

To get a sense of the volume and magnitude of administrative law decisions on city residents' lives, consider this:

- On the federal level:

- In the last 12 months, approximately 85 cases at the SEC were resolved by ALJ decisions, settlements or defaults.
- In FY 2007, HUD administrative law judges disposed of 62 cases.

- In the past two and a half years, administrative law judges at the FCC have held five hearings, and disposed of 13 cases.

- Concededly, some of those disputes are very, very large, and involved millions if not billions of dollars.

- Let me give you the New York City comparison:

  - Each year the City holds approximately one million hearings -- live or by mail -- for parking violations. That's right, I said one million hearings.

  - Each year in New York City there are approximately 200,000 administrative hearings for quality of life violations such as street cleanliness, pollution, and fire violations.

  - Last year the City's Office of Administrative Trials and Hearings, which conducts administrative hearings for other City agencies, such as disputes between City agencies and city employees, resolved by trial or settlement almost 2,000 cases.

  - In 2007, the City Tax Commission, which hears challenges to real estate tax assessments, reviewed 42,118 applications seeking reductions in assessed values. The value of the properties for which reductions were sought totaled over $120 billion.

In short, the volume of administrative proceedings in New York City is huge. Moreover, many of the respondents do not speak English and most are self-represented. Tonight, I want to spend a few minutes talking about how the City deals with this volume, and the legal issues this volume raises.

Scope of Administrative Law in Cities

In the modern era New York City, like most cities across the country, has delegated to administrative tribunals appeals of zoning determinations, employee disciplinary decisions and other issues.

But over time New York City, and to some extent other municipalities as well, have created other administrative tribunals that deal with matters formerly handled in the criminal, and to some extent the civil courts.

Starting in the 1970s, the City recognized that many issues, primarily those involving quality of life complaints, were overwhelming the dockets of already overburdened courts. In response, the City moved many issues that traditionally had been resolved in the City's criminal courts into administrative law tribunals.

Of particular note, the City established the misleadingly titled Environmental Control Board, which handles not only environmental complaints such as noise and air pollution, but also the gamut of quality of life violations, such as street cleanliness, waste disposal, and fire, building, and parks violations.

Another innovation was the creation of a central tribunal where fully independent administrative judges hear cases from other agencies. In 1979, the City became the first municipality in the country to create such a central tribunal.

Central panels have become a feature of modern administrative law and now exist in about half of the states in the country and in New York City, Chicago and the District of Columbia. New York City's Office of

Administrative Trials and Hearings began by handling disciplinary and discrimination decisions involving most of the City's approximately 300,000 city employees and now hears a wide array of cases from other agencies, such as contracts, licenses, and vehicle forfeitures.

The smorgasbord of administrative tribunals in New York City includes other types of tribunals as well. Some administrative courts in New York City are located within larger agencies but hear cases that range beyond the purview of the larger agency. The Adjudication Division in the Department of Finance, for example, hears the one million parking violation cases filed every year.

Still other tribunals hear cases arising from an agency's particular regulatory activities. For example, there are tribunals in the Departments of Consumer Affairs, Health and Mental Hygiene, and Taxi and Limousine Commission.

Unfortunately, we have become a victim of our own success. The literally hundreds of thousands of cases transferred from the criminal courts no longer clog court dockets. And the flexibility of a non-criminal proceeding frequently means that the deterrent effect of an administrative sanction is far preferable and fairer to all concerned to a conviction in criminal court.

But these cases and the large number of other administrative cases place an enormous burden on the administrative tribunals and the over 500 City administrative law judges.

The volume of matters faced by these local administrative agencies raises three pressing challenges: voluminous case loads, ethical conduct by administrative judges and hearing officers, and the rights of pro se litigants.

Due Process

A fundamental principal underlying all these issues and related aspects of administrative law in cities is due process.

A cousin of mine, whom some of you may have heard of, Benjamin Cardozo, has instructed us, in essence, that "due process is the process that is due."[1] In all due respect to cousin Ben, that is not very helpful guidance. It certainly does not tell us what due process means in an administrative law system with the volume in New York City.

Obviously, the process that is due for a small parking ticket is less extensive than for a more complicated case with more severe consequences.

But it is important to keep in mind that for most New Yorkers, administrative tribunals are the only way they interact with City government. The Administrative Law Judge or hearing officer thus becomes the face of justice in the city. The litigant at risk of paying a parking or noise pollution fine, or being assessed higher taxes, must feel and know that he or she is being afforded due process.

The City has sought to protect due process by statute. The New York City Charter sets minimum standards of due process for all City administrative tribunals, including, for example, notice of hearings, findings of fact based solely on the record, and a written decision. Parties have the right to a hearing with due process,

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[1]. *Snyder v. Massachusetts*, 291 U.S. 97, 116-17 (1934).

including the opportunity to be represented by counsel, issue subpoenas, call witnesses, cress examine, and present oral and written arguments.

Volume and Efficiency

Technology is obviously one way to address volume.

Consider, as one obvious example, parking violations.

A parking agent should have a hand held device from which to access drivers' records and to issue parking tickets.

But the related question is how, without wasting the whole day in line, does someone challenge what she may believe is a wrongfully issued ticket? Too often a citizen decides that she can't afford the time to fight City Hall, and will pay what she believes to be a wrongfully assessed sanction. We have to change this. Today New Yorkers can contest parking tickets by mail or online. Eventually, proceedings should be able to be conducted back and forth via the internet. Obviously modern technology, properly utilized, offers numerous other ways to deal with the volume.

Judicial Ethics

But no matter how efficient the administrative proceeding is, there must be an assurance that the administrative law judge or hearing officer is fair and unbiased.

In New York State, before 2007, no state or local law bound administrative law judges and hearing officers to a comprehensive code of professional conduct or ethics specific to administrative officers.

This has now changed. Last year the City adopted a Code of Conduct providing uniform rules for administrative law judges that enhance accountability and increase professionalism.

Since most city administrative law judges and hearing officers work part time or on a per diem basis -- the Code of Conduct addresses questions such as: What can administrative law judges and hearing officers do when not serving as a judicial officer? Can they be engaged in politics? Are they limited in the kinds of outside legal work they can undertake?

Many tribunals are connected to a City agency. Accordingly, the Code of Conduct prescribes the ethical obligations of an administrative law judge to remain impartial and to avoid the appearance of partiality. For example, the administrative law judge generally may not initiate, permit, or consider ex parte communications.

These rules are a good start. And given the economic realities cities face, and the need to have part time, not full time, administrative judges, is it necessary -- and is it realistic -- to place more ethical restrictions on ALJs limiting what they can do when not servings as administrative judges? The organized bar, I suggest, should be looking at the issue and offering constructive advice.

Pro Se Litigants

Let me turn to another significant issue facing local administrative law judges: pro se litigants. Picture this situation. You return to your car tonight, assuming you found a parking place on 54th Street, and find a $150 parking ticket. You call Jim Gerkis and he says that he would be glad to represent his fellow ABA member. His fee: his standard $1,000 an hour. Do you accept? If you said yes, would you see me afterwards as I think the Brooklyn Bridge may be for sale. If you told Jim you declined to pay his fee, then you can understand why there are so many pro se litigants in administrative cases.

Since most local administrative proceedings typically involve small sums, it follows that most litigants represent themselves. Indeed, one benefit of proceedings before administrative tribunals, as distinct from the criminal courts, is that they are less formal and intimidating and more readily allow a pro se litigant to give an effective presentation.

At the same time, however, an additional responsibility is placed on the administrative law judge or hearing officer to ensure that the pro se litigant receives due process.

The City's recently adopted Code of Conduct for administrative judges establishes an affirmative responsibility for the administrative law judge or hearing officer to ensure that pro se litigants have the opportunity to present their cases.

In addition, the Code of Conduct suggests a number of appropriate steps to advance a pro se litigant's ability to be heard, such as requiring the ALJ to explain the nature and process of the hearing and to question witnesses to elicit general information and to obtain clarification.

Should more be done to safeguard the rights of pro se litigants in administrative proceedings? Can this be done without making the administrative process even more bureaucratic and even more expensive to the municipality?

Scrutiny from the outside world, I suggest, would help us answer these questions.

Conclusion

I want to conclude with these final thoughts.

It is easy to underestimate the importance of municipal administrative law. Rarely, if ever, will a city's administrative tribunal decide one case that is worth billions, or that will make the front page headlines of the day. But taken together the millions of cases heard by administrative tribunals are responsible for making America's cities and their residents healthier, safer and more prosperous.

The questions I raised tonight deserve the serious attention of academics and the bar. I hope you will lead in that endeavor.

Thank you.