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Adjudatory Reports89

NYS Department of State
Office of Public Affairs and
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Glens Falls PBA v. PERB
 Village of Depew v. PERB and Depew PBA
 County of Greene v. PERB and CSEA
 Town of Henrietta v. PERB and CWA 1170
 CSEA v. PERB
 OCM BOCES v. PERB
 Glasheen v. PERB
 Orange Co Dep Sheriff v. NYS, PERB and Orange Co Sheriff
 Withdrawn (7)
 Town of Henrietta v. PERB and CWA
 Orange County and Sheriff v. PERB
 Co of Oneida Sheriff v. PERB and Dep Sheriff's
 Middle Country CSD v. PERB and CSEA
 North Tarrytown PBA v. Village
 (PERB submitted brief amicus curiae)
 Arlington CSD v. PERB and CSEA
 Suffolk Ct Emp Assn v. PERB, Unif Ct Syst and NYS
 Dismissed (4)
 Crosson v. PERB, Simmelkjaer and COBANC
 West Co CSEA v. PERB and CSEA
 Herberger v. PERB
 City of Buffalo v. PERB and Pipe Caulkers

* In these companion cases, the Court confirmed PERB's determination that procedural impediments to the receipt of wages pursuant to GML Section 207(c) are mandatorily negotiable save those specifically outlined by the statute. However, the Court reversed PERB's determination that a requirement that employees execute a medical confidentiality waiver was a mandatory procedural impediment. The Court concluded that such waivers are necessarily management prerogatives with respect to GML Section 207(c).

ADJUDICATORY REPORT
 Department of Public Service

This constitutes the biennial report required by Section V of Executive Order 131, concerning administrative adjudication, on steps taken by the Department of Public Service to comply with the Executive Order. As you know, the adjudicatory proceedings conducted by the Department under the Public Service Law are penalty assessments against operators of COCOTs (customer-owned or leased currency operated telephones)(Section 90); Article VII certification proceedings for gas and electric transmission lines (Sections 120 - 130); petitions to exercise franchises by gas and electric corporations (Section 68) and steam corporations (Section 81); and petitions by telephone corporations for certificates of public convenience and necessity (Section 99). (Our other formal proceedings, including rate cases, are rule making proceedings under the State Administrative Procedure Act (SAPA) and Executive Order 131, section I(C).)

Rules
 In our last report, we noted that we were in the midst of a major revision of our Rules of Procedure, Chapter 1 of 16 NYCRR. Since then, we have promulgated a new Subchapter A of those rules, constituting the general rules applicable to formal proceedings before the Commission. The new rules treat all the matters specified in Section III(B)(5) of Executive Order 131. A copy of the new rules is attachment A to this report; attention is called in particular to sections 4.2 (notice requirements), 5.1-5.10 (discovery), and 2.2 (recusal).

Training Program

Consistent with Section III(B)(6) of Executive Order 131, we conduct a program of continuing education in substantive, procedural, and ethical concerns. For example, we are fortunate to have available the offerings of Albany Law School's Government Law Center, and several judges have attended its courses on administrative practice and adjudication. Nearly all, including four this year, have attended a program entitled "Ethics in Administrative Adjudication," which examines the relationships between administrative law judges and their agencies, its counsel, and other personnel and includes, as contemplated by the Executive Order, consideration of the need to avoid pro-agency bias.

Several of our judges have attended programs at the National Judicial College at the University of Nevada. We have funds set aside for programs such as these, and plan eventually to have all our judges trained

there. Two judges will be attending the College's week-long Advanced Administrative Law course this March. One judge was awarded fellowships to attend the Economics Institute and Advanced Economics Institute for Administrative Law Judges at the University of Miami. And one judge recently participated in a program on "The Art of Negotiation" sponsored by the Governor's Office of Employee Relations.

Finally, we are planning an in-house training conference on dispute resolution and mediation. The conference will be held during the first quarter of 1993.

Article 78 Proceedings

Finally the Executive Order requires us to report statistics on Article 78 proceedings brought against our agency on adjudicatory matters and the outcomes of any such proceedings.

Adjudicatory Proceedings versus PSC

1) CNG Transmission v PSC et al. - Article VII

On July 14, 1992, the Appellate Division, Fourth Department, upheld the Commission's decision granting Empire State Pipeline a certificate of environmental compatibility and public need to build a 155-mile natural gas pipeline in western New York. The Court confirmed the Commission's conclusion that the Empire line was needed and our rejection of CNG's eleventh-hour proposal that it build a pipeline.

2) Independent Payphone Assoc. of NY et al. v PSC - COCOT

On June 5, 1991, Supreme Court confirmed Commission Opinion 90-12, which prohibited COCOTs from blocking 10XXX+0 calls. The petitioners essentially had claimed that the Commission's order arbitrarily subjected them to fraud from pay phone users, that we had violated the State Administrative Procedure Act and that our opinion amounted to a "taking." In rejecting the petitioners' arguments, the Court simply noted that the Commission's decision was rationally based. The Association has appealed.

3) Teleplex v PSC - COCOT

On September 26, 1991, Supreme Court dismissed, as non-final, an Article 78 proceeding challenging a Commission decision which had approved New York Telephone's withdrawal of its blocking service, 10XXX Restrict Service. As indicated above in *Independent Payphone Association of N.Y. v PSC*, the Court had previously upheld the underlying PSC Opinion 90-12 prohibiting COCOTs from blocking 10XXX+0 calling. Teleplex has obtained Court permission to perfect its appeal.

4) Town of Wheatfield v PSC - Article VII

The Appellate Division, Fourth Department, upheld the Commission's certification of Empire State pipeline in the face of a challenge by the Town of Wheatfield to Article VII's notice provisions. The opinion also concludes that someone who does not become a party to an Article VII proceeding until the petition for reconsideration stage lacks standing to seek judicial review of the Commission's determination.

5) Niagara Mohawk v PSC and JMC Selkirk - Article VII

The Court of Appeals denied Niagara Mohawk's motion for leave to appeal an Appellate Division decision that affirmed a Commission opinion allowing JMC Selkirk to construct a two mile spur in Selkirk, New York.

6) Matter of Clarkstown v PSC

On March 26, 1991, the Court of Appeals denied Clarkstown leave to appeal the Appellate Division's decision in this case. The Second Department had dismissed Clarkstown's petition challenging the Commission's decision to waive a Clarkstown local zoning ordinance that would have prevented construction of a metering and regulating station associated with a Columbia Gas pipeline. The Appellate Division concluded that the Commission properly waived the local zoning ordinance because changing the terminus of the pipeline would have conflicted with FERC's decision.

7) Matter of Skyview Acres Cooperative, Inc. v PSC - Article VII

The Court of Appeals denied Skyview Acres leave to appeal the Clarkstown decision.

ADJUDICATORY REPORT
 Department of Social Services

Pursuant to Executive Order No. 131 issued by Governor Mario Cuomo on December 4, 1989, each agency is required to publish a report that sets forth the steps taken by the agency to comply with the Order. The previous report, for the period ending November 30, 1990, detailed

the initial steps taken to comply with the Order, including changes in organizational structure, Department regulations and practices, and hearing procedures. Those provisions remain in effect.

In the Plan, the Department indicated that it would develop regulations describing the applicable procedures in certain areas as required by the Order, Section III, B, 5. The Department is presently engaged in developing regulations in the following areas:

1. Procedures for conducting hearings concerning residential programs for adults. These regulations are being reviewed by staff of the Department.

2. Procedures for conducting hearings which are requested by families which are discharged involuntarily from shelters for homeless families. These regulations were published in the New York *State Register* on April 22, 1992.

The Department also is considering developing regulations which would establish procedures for conducting hearings to contest certain sanctions against social services districts which fail to comply with the statutory and regulatory requirements for providing foster care and preventive services to children and families.

The Order (Section V) requires that this report include "statistics on Article 78 proceedings brought against the agency, including the outcome of such proceedings and the reasons for any reversal or modification of an agency determination." In order to establish a consistent reporting period for future reports, the following statistics on Article 78 proceedings are from the period commencing July 1, 1990, through June 30, 1992:

Cases Opened:	303
Cases Closed:	207
The closed cases resulted in the following outcomes:	
Stipulations of Settlements:	112
Decisions Favorable to the Department:	56
Withdrawn or Abandoned by Petitioner:	21
Decisions Adverse to the Department:	18
Reasons for Adverse Decisions:	
Mistake of Law as Applied to Facts:	11
Record Deficient:	7