

**Matter of Learning Annex Holdings LLC v City of
N.Y.**

2008 NY Slip Op 32460(U)

August 1, 2008

Supreme Court, New York County

Docket Number: 0116004/2007

Judge: Emily Jane Goodman

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PRESENT: _____

PART _____

Justice

Index Number : 116004/2007

LEARNING ANNEX HOLDINGS LLC

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

per the is decided per attached

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

Dated: 8/1/08

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X

In the Matter of Application of

LEARNING ANNEX HOLDINGS, LLC,

Petitioner,

Index No. 116004/07

for a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules

-against-

CITY OF NEW YORK, ENVIRONMENTAL
BOARD,

Respondent.

-----X

Emily Jane Goodman, J.S.C.:

Petitioner Learning Annex Holdings, LLC brings this proceeding for a judgment annulling several decisions rendered against it following appeals before the City of New York, Environmental Control Board (ECB), in which the ECB upheld numerous Notices of Violation (NOV) brought against petitioner.

Petitioner maintains thousands of "newsracks," located all over the city, which display, and offer for free, petitioner's catalogue. The ECB is charged with, among other things, enforcing Administrative Code of the City of New York (Administrative Code) § 19-128.1, which creates rules for the maintenance and placement of such newsracks.

This proceeding involves numerous NOV's issued to petitioner

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for such infractions of section 19-128.1 of the Administrative Code as failing to weight its newsracks so they cannot fall over, and placing newsracks too close to fire hydrants or street corners. The NOV's were issued from 2003 through 2006. Petitioner's petition concerns some 28 NOV's determined which were upheld by the ECB.

Hearings were held over a period of time on the validity of the various NOV's, which were generally handled in groups. After each hearing, the administrative law judge (ALJ) rendered a decision in the ECB's favor. The decisions upholding the NOV's were, in each case, rendered and mailed to petitioner over five business days after the hearings were held. The import of this fact is that, under section 19-128.1 (f) (1) (c) of the Administrative Code, the ALJ "shall render a decision" on the NOV within five business days of the conclusion of the hearing.

Petitioner appealed each of the ALJ's decisions, on the ground that they were not rendered within five days of the hearing. In each instance, the ECB Appeals Unit responded to the effect that:

[i]n your letters, you assert that ECB did not render its decisions within five business days after the conclusion of the hearings, as required by Section 19-128.1 (f) (1) (c) of the Administrative Code of the City of New York. This is a complaint against ECB process, and not an objection to the respective hearing officer's findings of fact or conclusions of law. It therefore states no issue for review as an appeal before ECB.

See e.g. Answer, Ex. KKK.

Petitioner insists that the denials of its appeals were arbitrary and capricious, and an abuse of discretion, in that the ECB did not deal with the question of the timeliness of the notice of the ALJ's decisions, and so, its denial of petitioner's appeals did not comport with the requirements of the Administrative Code. Consequently, petitioner believes that each denial should be annulled.

There is no law directly on point concerning what penalty, if any, should follow the ECB's failure to render its decisions in the manner required by the Administrative Code, and the actions involving the right to a speedy trial offered by petitioner are neither helpful nor relevant. See e.g. *Matter of Franc C.*, 70 NY2d 408 (1987). However, courts have provided some guidance on the use of so-called "mandatory" words in statutes regarding administrative agencies, such as appear in section 19-128.1 (f) (1) (c) of the Administrative Code.

"Although the Legislature's use of mandatory language, such as shall or must, is not conclusive, such a word of command is ordinarily construed as peremptory in the absence of circumstances suggesting a contrary legislative intent [citation omitted]. A different rule ... has evolved from cases involving statutory limitations imposed on administrative agencies." *Matter of Janus Petroleum Inc. v New York State Tax Appeals*

Tribunal, 180 AD2d 53 - 54 (3d Dept 1992). "The courts have repeatedly held that unless the language used by the Legislature shows that [a] designation of time was intended as a limitation on the power of the body or officer, the provision is directory rather than mandatory ." *Grossman v Rankin*, 43 NY2d 493, 501 (1977); see also *Matter of Janus Petroleum Inc. v New York State Tax Appeals Tribunal*, 180 AD2d at 55. The "rules of statutory construction are of limited value, however, for the line between mandatory and directory statutes cannot be drawn with precision [interior quotation marks and citation omitted]." *Janus*. at 55. It is also established that "[a]s a general rule public policy, for the convenience and necessity of government, has much to do in the finding that the minor details of duties imposed upon a public body or public official are directory and not mandatory [internal quotation marks and citation omitted]." *Matter of Rochester Gas & Electric Corporation v Maltbie*, 272 App Div 162, 165 (3d Dept 1947).

The present matter is also analogous to caselaw surrounding CPLR 4213 (c), dealing with the time requirement imposed on judges to render decisions following a trial.

CPLR 4213 (c) reads: "[t]he decision of the court shall be rendered within sixty days after the cause or matter is finally submitted or within sixty days after a motion under rule 4403, whichever is later, unless the parties agree to extend the time."

The Court of Appeals stated long ago that "[t]he words 'shall' and 'must' when found in a statute are not always imperative." *Matter of State of New York v Black Lake Bridge Co.*, 207 NY 582, 585 (1913). In more recent years, in construing CPLR 4213 (c), the Appellate Division, Third Department, has held that subdivision (c) "has been made precatory in effect." *Allied Scrap & Salvage Corporation v State of New York*, 26 AD2d 880, 880 (3d Dept 1966). Similarly, in discussing a then-recent change in the language of CPLR 4213 (c), the Supreme Court, Westchester County, noted that the word "must" in the section had been changed to "shall" by the Legislature, and that "shall" "is not always mandatory and may be merely directive." *Kessler v Hunter*, 53 Misc 2d 965, 966 (Sup Ct, Westchester County 1967).

Courts in other states have found the same to be true. See *Frank v Streeter*, 192 Conn 601, 472 A2d 1281 (Conn 1984) ("[r]ecent cases in other jurisdictions have held that statutory and constitutional provisions containing specific time periods for the rendering of judgments are directory rather than mandatory," citing, inter alia, *Allied Scrap and Salvage Corporation v State of New York*, 26 AD2d 880, *supra*. Also, at least one appellate court in New York has applied a standard requiring the recipient of the untimely judgment to show prejudice. See *Kawasaki v Kasting*, 124 AD2d 1034 (4th Dept 1986).

In the present case, Administrative Code § 19-128 (f) (1) (c) states that the ALJ "shall" render a decision within five days. However, the mandatory nature of the five-day notice period is dubious, no prejudice has been cited, and there is no reason given as to why the decision should be rendered with such dispatch, especially in an era of overloaded administrative dockets. Therefore, this court finds that the five-day requirement is a "minor detail[]" of the duties imposed on the ALJ and is precatory in nature, not mandatory. Therefore, petitioner is not entitled to have the ECB decisions on the NOV's annulled.

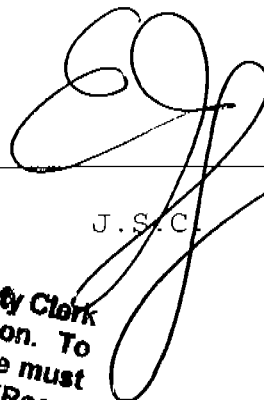
Accordingly, it is

ORDERED and ADJUDGED that the petition is denied, and the proceeding is dismissed.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: August 1, 2008

ENTER:



 J.S.C.

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