

A RESPONSE TO “*ACCARDI* COMES TO MARYLAND”

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In his article about the *Accardi* doctrine – which, for those of you who are reading my article first, provides that administrative agencies should comply with their rules and regulations or risk the nullification of their actions – Jack Gohn concludes that “it is not too much to insist upon that every single time the government ceases to follow its own rules its actions will be overturned, whatever the cost.” I disagree. Respectfully, of course.

Before proceeding any further, I would like to make clear that I do not take issue with much of what Mr. Gohn writes. The government ought to follow the procedures it creates, and in an ideal world it ought to discharge its duties, hopefully with machine-like precision. The failure to be perfect, however, is inevitable – even in government, as shocking as that may seem – and an agency’s failure to comply perfectly with its rules and regulations should not be fatal in all cases and circumstances, “whatever the cost.” The rule should be that an agency’s failure to adhere strictly to its procedures does not provide a basis for nullifying the agency’s decision in the absence of some adverse impact on a party’s substantial rights.

Unfortunately, at least from the perspective of a former government lawyer whose clients were mostly but not always perfect, this has not been the rule that the Court of Special Appeals has applied since it first recognized the *Accardi* doctrine by name in 1978. In those cases, the court has held that an agency’s failure to comply strictly with its regulations renders the agency’s actions void, without regard to

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whether an individual has been prejudiced by the non-compliance in question, when those regulations affect individual rights or confer important procedural benefits.

For a number of years, I had tried to persuade the Court of Appeals to step in and announce a different rule than that applied by the intermediate appellate court for the better part of a quarter century. Agency transgressions that are technical in nature and without any substantive effect whatsoever simply should not provide a basis for nullifying the agency's action and giving the subject of that action a windfall. Administrative law is more than just a game of "gotcha."

Although the Court of Appeals has had several opportunities to do so, until very recently, it sidestepped the question whether the Court of Special Appeals' application of the *Accardi* doctrine represents a proper interpretation of Maryland administrative law. In avoiding the issue, however, the Court of Appeals strongly suggested that it has disagreed with the intermediate appellate court's position that a violation of the *Accardi* doctrine renders an agency's action void, without regard to whether an individual is prejudiced by the agency's failure to follow strictly its regulations.

In upholding the validity of an agency's action, despite the agency's failure to comply strictly with its own rules, the Court of Appeals in *Board of Physician Quality Assurance v. Levitsky*, 353 Md. 188, 201 (1999), expressed its "disagreement with the approach taken by the Court of Special Appeals" in *Young v. Board of Physician Quality Assurance*, 111 Md.App. 721, *cert. granted*, 344 Md. 568, *cert. dismissed*, 346 Md. 314 (1997), which held that the same rule violation was fatal under the *Accardi* doctrine. Stating more precisely the nature of its disagreement with the approach taken by the Court of Special Appeals in *Young* and other cases, the Court of Appeals in *Maryland*

Transportation Authority v. King, 369 Md. 274 (2002), cited *Levitsky* for the proposition that “[a]n agency’s violations of procedures which do not ‘compromise the accused’s opportunity for a full and fair hearing on the charges,’ or which were not raised during the administrative proceedings, furnish no basis to invalidate the agency’s decision.” *Id.* at 286 (quoting *v. Levitsky*, 353 Md. at 206-07).

Acknowledging the Court of Special Appeals’ application of the *Accardi* doctrine, the Court of Appeals in *King* stated that, “at least to some extent, a similar doctrine is reflected in Maryland administrative law.” 369 Md. at 286. Quoting the principal source of the administrative law doctrine that applies in cases such as this, the Court of Appeals observed in *King* that “the judicial review section of the Maryland Administrative Procedure Act provides that a reviewing court may ‘reverse or modify the [administrative] decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision . . . (iii) results from an unlawful procedure [or] (iv) is affected by any other error of law’” *Id.* (quoting Md. State Govt. Code § 10-222(h)(3)(iii) and (iv)) (1999 Repl. Vol.) (brackets added by the Court of Appeals). This portion of the APA is unambiguous. A party must show that his or her substantial rights may have been prejudiced to overturn agency action that is alleged to be the result of an unlawful procedure. *See also* A. ROCHVARG, MARYLAND ADMINISTRATIVE LAW 131 (2001) (“A party aggrieved by an agency decision must demonstrate in order to have a court reverse and vacate the agency decision that the party was prejudiced by the error.”) (citing § 10-222(h)(3) of the State Government Article).

This principle does not appear solely in the APA. Rather, other authority that

the Court of Appeals cited in *King* similarly expresses the view that agency action is not void in the absence of a showing of prejudice. See *Dept. of Public Safety and Correctional Services v. Howard*, 339 Md. 357, 370 (1995) (“[T]he record does not reflect any prejudice to the officers that was caused by the delay. They were not suspended pending the investigation. They have not pointed to any witnesses whose memory faded or who has become unavailable.”); *Resetar v. State Board of Education*, 284 Md. 537, 550, cert. denied, 444 U.S. 838 (1979) (“The County Board’s regulation provides no penalty and makes no provision in the event of a violation of the limit imposed. Resetar has suffered no prejudice. . . . We are of the view that neither the delay nor the temporary reinstatement had the effect of stripping the County Board of authority to dismiss Resetar.”).

Other decisions also confirm that agency action that fails to comply with governing regulations and procedures may be invalidated, but only when it prejudices an individual’s rights. In *Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439 (2002), for example, the Court of Appeals affirmed the reversal of a licensing decision that failed to comply with established “need criteria” and thus “aggrieved” businesses which were “directly affected by the issuance of an additional towing license in the geographical area where they alone hold licenses.” *Id.* at 442. Prejudice may be presumed when an agency’s action is not “authorized” by its regulations, *Ward v. Dept. of Public Safety and Correctional Services*, 339 Md. 343, 353 (1995), but it does not automatically result from an agency’s failure to follow its regulations strictly.

Until last May, no Court of Appeals’ decision had directly addressed the Court

of Special Appeals' position that, in cases involving a violation of the *Accardi* doctrine, *i.e.*, where an agency has failed to comply with rules or regulations intended to create important benefits for individuals, it does not matter whether a party was prejudiced. The Court of Appeals broke its long silence on the issue when it rendered its decision in *Pollock v. Patuxent Institution Board of Review*, __ Md. __ (2003).

In that case, a Patuxent inmate challenged the revocation of his parole when he tested positive in a urinalysis drug test, claiming that prison officials failed to comply strictly with the chain of custody provisions of a Patuxent drug testing directive. In its review of the case, the Court of Special Appeals stated that the agency's action would be rendered void, regardless of whether the violations resulted in any prejudice to the inmate, if the directive was designed to confer important procedural benefits. The court upheld the agency's action, however, stating that a showing of prejudice was necessary because the directive was intended to be used for internal management purposes only, and concluding that the inmate failed to demonstrate that he was harmed by the agency's failure to comply strictly with its directive.

The Court of Appeals affirmed, stating that “[w]e adopt the ‘*Accardi* doctrine’ and hold that it is applicable to administrative hearings in Maryland.” Slip op. at 3. In the course of doing so, however, the Court explicitly “modified” the long line of intermediate appellate court decisions that have held that prejudice need not be shown when an *Accardi* violation is established. Expressing its agreement with the Court of Special Appeals that prejudice must be established when an internal

management regulation is violated, the Court of Appeals held that the same requirement applies regardless of the nature of the regulation in question. “In the instances where an agency violates a rule or regulation subject to the *Accardi* doctrine, *i.e.*, even a rule or regulation that ‘affects individual rights and obligations’ or affords ‘important procedural benefits upon individuals,’ the complainant nevertheless must still show that prejudice to him or her (or it) resulted from the violation in order for the agency decision to be struck down.” *Id.* at ___, Slip op. at 47-48. Observing that “[i]n the instant case, Patuxent staff were generally following [the drug testing directive] but committed purely technical infractions, *i.e.*, ‘dotting the ‘t’s’ and crossing the ‘i’s,’” the Court of Appeals rejected Pollock’s challenge because he “failed to demonstrate prejudice.” *Id.* at 49.

In reaching the result that it did, the Court of Appeals’ decision follows the lead of the Supreme Court decisions that form the basis for the *Accardi* doctrine that the Court of Special Appeals has previously applied. In every one of those Supreme Court cases, a party’s rights were adversely affected by what can only be described as an agency’s total failure to comply with its regulations.

In the lead case that gave birth to the *Accardi* doctrine, *United States ex rel. Accardi v. Shaughnessy*, the complaining party’s application to suspend his deportation was summarily denied, despite a regulation authorizing a hearing. 347 U.S. 260, 266-68 (1954). In other cases, *Accardi* violations occurred that warranted reversal of the agency’s action when an employee was discharged by an official who had no regulatory authority, and the discharge occurred without an evidentiary hearing in violation of a regulation, *Service v. Dulles*, 354 U.S. 363, 383-89 (1957); when the government agency’s

failure to follow its regulations in terminating an individual's employment violated the employee's procedural rights "in at least three material respects," *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959); and when the agency's failure to comply with its regulations resulted in a "denial of benefits." *Morton v. Ruiz*, 415 U.S. 199, 236 (1974). Absent such prejudice, the Supreme Court has refused to invalidate agency action solely on the ground that the agency did not comply strictly with its regulations. *See American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 537-39 (1970). *See also United States v. Caceres*, 440 U.S. 741, 752-54 (1979).

Although the result that the Court of Appeals reached in *Pollock* is consistent with this authority, one aspect of the court's decision bears additional comment because of the unnecessary litigation it is bound to generate. In its application of the *Accardi* doctrine, the intermediate appellate court has required a showing of prejudice when the regulation at issue was not "intended primarily to confer important procedural benefits upon individuals" but was implemented "instead merely for 'the orderly transaction of business.'" *Pollock v. Patuxent Institution Board of Review*, 146 Md.App. at 74 (quoting *Durham v. Fields*, 87 Md.App. 1, 18 n.2, *cert. denied*, 323 Md. 308 (1991)). *See also, e.g., Board of School Comm'rs v. James*, 96 Md.App. 401, 421-22, *cert. denied*, 332 Md. 382 (1993). The Court of Appeals in *Pollock* appears to have agreed with this approach, stating that the drug testing directive at issue in that case "merely provides for the orderly transaction of Patuxent business of collecting and handling urine specimens," and noting that "[t]he provisions at issue here implicate no fundamental constitutional rights." Slip op. at 48. One problem with this approach is that it creates needless issues, as prejudice must be shown to nullify an agency's regulations,

regardless of their primary intent or purpose.

A secondary but equally troubling problem arises because reasonable minds can almost always differ about what a regulation's "primary" intent or purpose is. Teacher evaluation policies, for example, could be reasonably construed, as they were in one case, so that their primary "purpose is to confer 'important procedural benefits and safeguards' upon tenured teachers." *Board of Education of Baltimore County v. Ballard*, 67 Md.App. 235, 243 (1986) (citation omitted). They could also be construed just as reasonably, as they were in another case, such that "the stated purpose of the Procedures is an administrative one." *Board of School Comm'rs v. James*, 96 Md.App. at 424. *See also Board of Education v. Barbano*, 45 Md.App. 27, 39-44 (1980). Countless other regulations are susceptible, and have been subjected, to the same reasonable and conflicting interpretations with respect to what their main objectives are. None of these regulations, however, can have more than one "primary" purpose. The rule of law should guarantee more certainty than this. The requirement of prejudice provides that certainty when an agency fails to comply with its regulations, regardless of the regulations' principal intention.

Mr. Gohn's apparent mistrust of government officials is an insufficient reason for casting aside this requirement in favor of a rule that government action is void whenever an agency fails to comply strictly with its regulations. Perhaps I worked for the government too long, but I believe that most, if not all, officials try to do their jobs properly and that they do not follow agency rules and procedures only when it suits them, as Mr. Gohn suggests. I will concede, though, that this belief may not be shared by everyone, nor need it be because this is not the only protection that exists to safeguard us from arbitrary governmental actions. An agency that disregards its

own regulations risks the nullification of its actions if its conduct adversely affects the rights of an individual. An agency's non-compliance may also trigger graver consequences. See, e.g., *Board of Physician Quality Assurance v. Levitsky*, 353 Md. at 209 n.4 (“If . . . Med Chi is simply unwilling to follow the mandated procedures and live up to its responsibilities, the General Assembly may wish to reconsider Med Chi's role in the disciplinary process.”).

Mr. Gohn fails to explain, however, how any of us are made better off by a draconian rule that automatically strikes down governmental action any and every time an agency fails to dot every “i” and cross every “t,” even when the missing dot or cross hurts nobody. That's not just “gotcha.” That's “phooey.”