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RECENT MINNESOTA CASES AND LEGISLATIVE DEVELOPMENTS

Several brief commentaries regarding selected recent Minnesota Supreme Court decisions and acts passed by the Minnesota Legislature are contained in this Article. Other cases and statutes of greater importance will be treated more fully in Notes and Comments in this volume and subsequent issues.

Administrative Law—THE OCCUPATIONAL LICENSING ACT—Act of Apr. 9, 1976, ch. 222, 1976 Minn. Laws 722.

Although occupational licensure has an ancient lineage,¹ the proliferation of licensed occupations and the pressure for continued expansion² have engendered increased national interest. In reaction to Minnesota's lengthy statutory list of licensed occupations, the 1976 Minnesota Legislature imposed limitations to stem the impetus toward greater licensing.³ Additional occupations may be licensed only under limited circumstances⁴ and when other forms of regulation are inappropriate.⁵

Due, in part, to the explosion in the number of licensed occupations, the procedural safeguards afforded a licensee have assumed added im-

1. See G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 603-07 (1974); *Special Project—Fair Treatment for the Licensed Professional: The Missouri Administrative Hearing Commission*, 37 MO. L. REV. 410, 410 (1972) [hereinafter cited as *Special Project*].

2. G. ROBINSON & E. GELLHORN, *supra* note 1, at 608; Note, *Occupational Licensure: An Argument for Asserting State Control*, 44 NOTRE DAME LAW. 104, 104 (1968).

3. See Act of Apr. 9, 1976, ch. 222, 1976 Minn. Laws 722.

The following boards are affected by the 1976 amendments: board of examiners of nursing home administrators; board of medical examiners; board of nursing; board of chiropractic examiners; board of optometry; board of psychology; board of dentistry; board of pharmacy; board of podiatry; board of veterinary medicine; board of teaching; board of barber examiners; board of cosmetology; board of assessors; board of architecture, engineering and land surveying; board of accountancy; board of electricity; private detective and protective agent licensing board; board of examiners in watchmaking; board of boxing; and the board of abstractors. See MINN. STAT. § 214.01 (1976).

4. The legislature must determine that regulation is "required for the safety and well being of the citizens" based on the following factors: (1) a recognizable potential that the unregulated practice of an occupation may harm or endanger the health, safety and welfare of the state's citizens exists; (2) the occupation requires specialized skill or training and the public will benefit from assurances of initial and continuing occupational ability; and (3) alternative means of regulation will not protect the citizens. MINN. STAT. § 214.001(2) (1976).

5. Once it is determined that regulation is needed, the available modes are to be implemented in the following order: (1) creation or extension of common-law or statutory causes of civil action, and the creation or extension of criminal prohibitions; (2) inspection with enforcement by injunction; (3) registration whereby a designated title can be used only by persons on an official roster who have met predetermined qualifications; and (4) state licensure. *Id.* § 214.001(3).

portance. If an individual is charged with violation of licensing requirements, the nature and extent of these safeguards determine his ability to assert a claim or defense in an effort to protect his livelihood.⁶ In Minnesota, no standardized procedure has existed for processing complaints or inquiries concerning licensed professions. Statutory regulation of the investigation and hearing procedure was sparse.⁷ Whether acting pursuant to statute or under an informal procedure, the various licensing boards, composed largely of members of the particular licensed occupation, functioned as investigators and prosecutors as well as judges.⁸ Although the combination of roles in a single body has been criticized by commentators⁹ and some courts,¹⁰ the courts generally have held that this combination does not of itself create a risk of bias in violation of due process.¹¹

However, as recognized by the Federal Administrative Procedure Act, combination jeopardizes procedural fairness.¹² Notice and opportunity to be heard are valueless if the trier of fact is biased from involvement in either the investigation or prosecution of a claim or both.¹³ In addi-

6. *Special Project*, *supra* note 1, at 410-11.

7. *See, e.g.*, Act of June 4, 1975, ch. 329, § 15, 1975 Minn. Laws 934, 942 (architecting, engineering, and surveying); Act of June 5, 1975, ch. 360, § 9, 1975 Minn. Laws 1189, 1193-94 (nursing); Act of June 4, 1975, ch. 419, § 6, 1975 Minn. Laws 1403, 1405-07 (abstracting); Act of June 5, 1969, ch. 974, §§ 4, 8, 1969 Minn. Laws 1924, 1926-27 (dentistry).

8. Even though members of the board had already decided that the evidence supported allegations of illegal conduct, they would sit as judge and jury and re-evaluate the evidence. *See* statutes cited in note 7 *supra*.

9. *See* 1 R. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 49-55 (1942); Comment, *Procedural Due Process and the Separation of Functions in State Occupational Licensing Agencies*, 1974 Wis. L. REV. 833, 833 n.4 (citing ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 206 (1941)).

10. *See* *Simard v. Board of Educ.*, 473 F.2d 988, 993 (2d Cir. 1973); *Koelling v. Board of Trustees*, 259 Iowa 1185, 1202-03, 146 N.W.2d 284, 294-95 (1966); *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 210-11, 94 N.W.2d 711, 722 (1959).

11. *See* *Withrow v. Larkin*, 421 U.S. 35, 54 (1975); *Intercontinental Indus., Inc. v. American Stock Exch.*, 452 F.2d 935, 942-43 (5th Cir. 1971); *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968); *Brinkley v. Hassig*, 83 F.2d 351, 357 (10th Cir. 1936); *Reyburn v. Minnesota State Bd. of Optometry*, 247 Minn. 520, 527-28, 78 N.W.2d 351, 357 (1956); *State ex rel. Ging v. Board of Educ.*, 213 Minn. 550, 565, 7 N.W.2d 544, 553 (1943).

12. *See* Administrative Procedure Act, 5 U.S.C. § 554(d) (1970).

13. *See* *Simard v. Board of Educ.*, 473 F.2d 988, 993 (2d Cir. 1973). Bias may occur when the adjudicator has close ties to either the persons or the goals of the prosecutors or when the adjudicator is subordinate and responsible to the prosecutor. Personal involvement in the investigation of a case or ex parte communications from prosecutors or investigators also may cause an adjudicator to prejudge facts. *See* Comment, *supra* note 9, at 844.

Judges long have been concerned with the problem:

Concern [with concentration] springs from the fear that the agency official adjudicating upon private rights cannot wholly free himself from the influences toward partiality inherent in his identification with the investigative and prose-

tion, combination has the appearance of injustice.¹⁴

To provide greater procedural fairness in the disciplining of occupational licensees, the 1976 Minnesota Legislature separated investigation and prosecution from the judicial responsibility of the licensing boards¹⁵ by shifting the investigatory authority of all licensing boards to the attorney general's office.¹⁶ The new procedure requires that all oral and written complaints received by a licensing board be forwarded promptly to the attorney general's office.¹⁷ The allegations are investigated by the attorney general's office in consultation with a designated representative¹⁸ of the board and other qualified persons as required. During the

cuting aspects of the case; in other words, that the atmosphere in which he must make his judgments is not conducive to the critical detachment toward the case expected of the judge. In a sense the combination of functions violates the ancient tenet of Anglo-American justice that "No man shall be a judge in his own cause."

In re Larsen, 17 N.J. Super. 564, 567, 86 A.2d 430, 435 (App. Div. 1952) (Brennan, J., concurring) (citations omitted).

14. "The litigant often feels that, in this combination of functions within a single tribunal or agency, he has lost all opportunity to argue his case to an unbiased official and that he has been deprived of safeguards he has been taught to revere." ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 204 (1941) (minority views).

15. See MINN. STAT. § 214.001(1) (1976). The 1973 Minnesota Legislature mandated the appointment of "public members" to professional examination and licensing boards and changed the method of financing the boards. See Act of May 24, 1973, ch. 638, § 3, 1973 Minn. Laws 1544, 1545. A public member is

a person who is not, or never was, a member of the profession or occupation being licensed or regulated or the spouse of any such person, or a person who does not have or has never had, a material financial interest in either the providing of the professional service being licensed or regulated or an activity directly related to the profession or occupation being licensed or regulated.

MINN. STAT. § 214.02 (1976). A 1975 statute standardized the terms, compensation, and removal of board members, required reports on board activities, and relocated the officers of the boards and commissions. Act of May 15, 1975, ch. 136, §§ 49-51, 1975 Minn. Laws 386, 410-13.

16. See MINN. STAT. § 214.04(1) (1976). The changes embodied in the 1976 amendments apply to the professions listed in note 3, *supra*, with the exception of the legal profession. Other provisions of the 1976 amendments shift the authority to set fees from the legislature to the boards, MINN. STAT. § 214.06 (1976), empower the boards to promulgate continuing education requirements for license renewal, *id.* § 214.12, standardize the names of governing boards, *id.* § 214.01, and regulate the position of executive secretary, *id.* § 214.04(3). These provisions became effective July 1, 1976. See Act of Apr. 9, 1976, ch. 222, § 210, 1976 Minn. Laws 722, 824.

17. Complaints may be received by the executive secretary of a board, a board member, or anyone working for a board. See MINN. STAT. § 214.10(1) (1976). The executive secretary, hired by the board as its chief administrative officer, is not a member of the board. *Id.* § 214.04(3).

18. The designated representative of the board may be the executive secretary or a member of the board selected by the board to assist the attorney general's office. See *id.* § 214.10(2).

investigation period, the representative of the board may attempt to correct improper activities and redress grievances through education, conference, conciliation, and persuasion. If these efforts fail, or if the investigation suggests illegal or unauthorized activities, a hearing by the board may be required.¹⁹ If either the attorney general or the board's representative requests the hearing, a verified written complaint must be submitted.²⁰ To ensure further the separation of adjudication from investigation and prosecution, the designated representative of the board consulted during the investigation is prohibited from voting on the case although he may participate at the hearing.²¹

In addition to standardizing the complaint procedure, the amendments empower all boards to issue subpoenas and to compel the attendance of witnesses and the production of evidentiary materials in all pending matters which relate to regulatory activities.²² Furthermore, the authority to bring an action in district court for injunctive relief to restrain any unauthorized practice or violation or threatened violation of a statute or rule has been extended to all licensing boards. A temporary restraining order may be granted "if continued activity by a person would create imminent risk of harm to others."²³

The separation of investigation and prosecution from adjudication resulted from the balancing of two potentially conflicting interests. On the one side is the agency's interest in protecting the public from the unauthorized or illegal practice of a profession.²⁴ Boards seek to carry out their policies effectively with the least amount of wasted time and money. On the other side, an individual threatened with discipline by a licensing board has a private interest in a fair proceeding.²⁵ However, the method proscribed by the legislature to provide greater procedural fairness to occupational licensees is not immune to problems.²⁶ Delays

19. Chapter 15 of the Minnesota Statutes governs the boards' hearings. The establishment of the new complaint procedure does not preclude a board from scheduling, on its own motion, a disciplinary proceeding based on investigation, findings, or reports. See MINN. STAT. § 214.10(2) (1976).

20. See *id.* § 214.10(2).

21. See *id.*

22. See *id.* § 214.10(3).

23. *Id.* § 214.11. Prior to the amendments, not all boards had this authority.

24. In general, protection of the public is the stated basis of licensing laws. Imposition of standards and regulations is viewed as assuring the public of minimum competence and as protecting the safety, health, and welfare of the people. *Special Project, supra* note 1, at 416; Note, *supra* note 2, at 107. Practitioners of an occupation may desire regulation, in addition, because of the economic and social benefits, recognition, and professional status which accompany licensure. *Special Project, supra* note 1, at 417-18.

25. See Comment, *supra* note 1, at 841.

26. Other methods were available: (1) internal separation by delegating investigative and prosecutorial functions to specific board members or delegating the adjudicatory role to specific members; (2) adjudication by an independent hearing examiner or by an administrative court; and (3) prosecution by independent prosecutors. See *id.* at 853-62.

in responding to complaints may result; costly additional personnel may be required; the attorney general's office may lack technical expertise for investigation; and turnover of staff may necessitate frequent retraining. In addition, the licensing boards could lose control over the implementation of their policy because the attorney general's office decides which cases to prosecute. The board's removal from investigation and prosecution may result in the loss of information valuable to the formation of policy.²⁷ Finally, adjudication by the boards requires that members rule on motions or objections despite their lack of legal training. The attorney general's office cannot render assistance because of its prosecutorial role at the board hearing.²⁸

The impact of the new complaint procedure is unknown.²⁹ At a minimum, the amendments interject clarity, uniformity, and certainty to procedures which were unclear and inadequate. The new procedures have the potential of avoiding many of the dangers inherent in strict separation of functions because complete separation is not imposed. The boards are not stripped of control. The attorney general's office investigates in consultation with a representative of the board; therefore, the board is not isolated from the investigation process, and the input of board expertise is assured. Attempts at conciliation, conference, and persuasion during the investigation period afford the board the opportunity to gain the information and understanding essential to policy formulation. Furthermore, authority to prosecute does not reside solely in the attorney general. Prosecution may be instigated by the attorney general's office, the board's representative, or the board itself irrespective of the attorney general's recommendation. In conjunction with the board's power to seek injunctive relief, the new complaint procedure should result in fairer, more effective regulation of the state's licensed occupations without jeopardizing the goal of protecting the public.

However, these alternatives do not effectively reach the desired goals. *See id.*

27. *See id.* at 862. Bias is still possible. The membership of a licensing board may represent the politically dominant element of a profession rather than a cross-section of the profession. Furthermore, members may be oriented toward the private professional goal of limiting entry into the profession rather than toward the implementation of public policy or protection of the public interest. *See Dean, The Opportunity to be Heard in the Professional Licensing Process in Pennsylvania*, 67 *DICK. L. REV.* 31, 37 (1962).

28. *See Special Project, supra* note 1, at 439.

29. The sections relating to the complaint investigation and hearings did not become effective until July 1, 1977. *See Act of Apr. 9, 1976, ch. 222, § 210, 1976 Minn. Laws 722, 824.*