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# Unnecessary Immunity

## *Fetta v. Board of Education*

by JOHN PAUL JONES

At an unnecessarily high cost for patients who complained of unprofessional and sexually invasive treatment, the Supreme Court of Virginia last fall brought down the curtain on the third of three judicial acts of review in *Fetta v. Board of Medicine*.<sup>1</sup> In the end, a doctor won immunity for his misconduct and the Board of Medicine lost its attempt to revoke his license because it unfairly interfered with an evidentiary hearing. The conduct of disciplinary proceedings by licensing boards is no doubt better for the admonition given the Board of Medicine but the net result need not have been so distasteful.

Dr. Patrick J. Fetta had treated several women patients using procedures which lacked an accepted therapeutic purpose and were beyond the legal scope of chiropractic medicine, concluded the hearing officer after a formal evidentiary hearing. The hearing officer also found that the doctor had committed sexual battery on two patients.

### **T**ainted Evidentiary Proceeding

Four physician members of the Board of Medicine attended that hearing, put numerous questions to witnesses and, at least once, offered the hearing officer an opinion on the admissibility of certain evidence. A quorum of the Board, which included the four doctors who had attended the evidentiary hearing, subsequently reviewed the hearing transcript and heard arguments by counsel. It then voted, 14-0, to adopt the hearing officer's findings of fact and conclusions of law, and to revoke Dr. Fetta's license to practice chiropractic.

Dr. Fetta then appealed to the circuit court, claiming that participation by Board members in the evidentiary hearing violated his right to a hearing conducted either by the Board or by a hearing officer. The circuit court vacated the Board's decision to revoke Dr. Fetta's license and held that the presence of Board members at an evidentiary hearing assigned to a hearing officer was unlawful, so tainting the Board's subsequent decision as to warrant dismissal of the charges against Dr. Fetta.<sup>2</sup>

Although the record made it clear that the Board doctors who attended the hearing were more than simply silent specta-

tors, their *presence* alone was, for the circuit court, enough to violate the doctor's right under Section 54.1-110 which reads:

Every hearing in a contested case shall be conducted in accordance with the provisions of the Administrative Process Act (Section 9-6.14:1 *et seq.*). When a hearing officer presides, the regulatory board shall determine whether the hearing officer is to hear the case alone or whether the board is to hear the case with the hearing officer.

The circuit court found that Section 54.1-110 offered the Board only two options: a hearing conducted by the Board (or at least a quorum) or a hearing conducted by a hearing officer alone.

The Court of Appeals affirmed, finding the fatal flaw to be the Board's decision to detail three members to "participate with the hearing officer."<sup>3</sup> The Supreme Court considered that only the remedy ordered by the courts below was controversial enough to warrant review. Saying little about participatory error, nevertheless, the Court affirmed the decision below. Three courts reached the same two conclusions. First, when Board members visit an evidentiary hearing, ask questions, and offer opinions on evidence (as permitted by the presiding officer), they violate Section 54.1-110. Second, when the same Board members later join in the Board's deliberation, all participating members become legally incapable of passing judgment on the case.

### **C**essation of Presiding

What ought to have preceded these conclusions of law is a finding of fact that the hearing officer stopped *presiding*—that is, directing, controlling and governing proceedings. Any finding about the cessation of presiding, moreover, ought to be firmly grounded in record evidence, *i.e.*, in the transcript of the administrative hearing. No such findings appeared in the opinions of the three courts reviewing Dr. Fetta's case. The only facts deemed worthy of judicial mention were that the board doctors were allowed by the hearing officer to ask questions of the witnesses and, on at least one occasion, to offer an opinion on the admissibility of evidence. The former better buttresses

the conclusion that the hearing officer never stopped presiding, for, otherwise, how could she still be in a position to allow or to refuse questions by the interloping board doctors? The latter proves nothing more than that an indulgent hearing officer was willing to listen.

Elsewhere in the transcript lies additional evidence that the hearing officer never stopped presiding. At the outset, Dr. Fetta's counsel appealed to the hearing officer to exclude the intruding board doctors, and then abided by her decision to the contrary. When Dr. Fetta's counsel later objected to the Board doctors putting questions to witnesses, both sides accepted the hearing officer's ruling that she would allow some questions by the Board doctors but she would control the privilege on a question-by-question basis. In fact, it was the hearing officer's own stated conclusion that, however the Board doctors might describe their contributions, she continued to preside because she controlled their questions and because her findings of fact and conclusions of law would be what constrained the full Board's decision afterward.

The Board doctors complied often enough so that the hearing officer's explicit finding that she, and not they, presided deserves the judicial deference such a finding of fact is ordinarily due. After all, she was there at the time, and the judges of the reviewing courts were not. A careful reading of the transcript suggests that the Board doctors usurped not the presiding power of the hearing officer but the prosecuting duty of the Board's hapless counsel.

## **Wrong Adjudicative Event**

If the Board doctors did not preside, then the evidentiary hearing was not legally deficient as measured by Section 54.1-110. The three courts focused on the wrong adjudicative event. All three recognized the harm to proper administrative decision-making which permitted some members of a collective decision-making body to enter into the evidentiary hearing itself while leaving others to settle for its printed record. But all three courts pointed in the wrong direction in isolating the resultant error. What the four Board doctors did at the evidentiary hearing was permissible. What they did at the deliberative meeting afterward was not. The evidentiary hearing and its report could still have formed the basis for proper Board action against Dr. Fetta.

The Board should have excused those members who attended the evidentiary hearing from its subsequent deliberations. Because the Board has 16 members, and only four attended Dr. Fetta's hearing, others sufficient for the Board's quorum of 11 would still have been

**The Board should have excused those members who attended the evidentiary hearing from its subsequent deliberations.**

available to pass judgment on the hearing officer's report. The Board, however, did not exclude the four who had attended the evidentiary hearing, and the case did not reach court until it was too late for a saving judicial order to exclude them.

As a federal court of appeals said in a leading case about federal agency decisional bias, "[I]t is entitled to an impartial tribunal whether it consists of one man [sic] or 20 and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."<sup>4</sup> In that case, the court found from a speech by the Chair of the Federal Trade Commission that he had prejudged a complaint of false advertising by the school, so the court invalidated the Commission's subsequent decision in which the Chair had participated.

## **A Better Response**

What would have been a better response by the Virginia courts to tainted deliberations rather than ordering the Board of Medicine to dismiss the case permanently, leaving serious charges against Dr. Fetta to be ignored forever?

*Cinderella Career and Finishing School* suggests one answer. The court remanded the case to the Commission for a new decision, directing the Commission to exclude its chair from its conference. The court apparently assumed that the other commissioners could, given a fresh start, produce a lawful decision even though they had once been exposed to their chair's biased views. The court's assumption was especially justified in *Cinderella Career and Finishing School* because the Commission's basic law

required it to make a decision solely on the basis of what it found in the record developed in a formal evidentiary hearing, and authorized the court to set aside a Commission decision that was not based on substantial evidence found in that record. Thus, the court could remand knowing it held a trump card should it find the Commission again improperly influenced in producing a new decision respecting the appellant.

A decision by the Board of Medicine to revoke a medical license is likewise constrained by the basic law. It, too, must be supported by substantial evidence in the record produced after a formal evidentiary hearing. A reviewing Virginia court would therefore have the same power to remand a new Board decision respecting Dr. Fetta's license if the Board's new decision was not adequately justified by explicit reference to the record produced at the evidentiary hearing.

## **Rule of Necessity**

Even if it were assumed that the other Board members could not be sufficiently rehabilitated to make another—this time unbiased—decision on the record after once being exposed to the views of those who had attended the evidentiary hearing, the Rule of Necessity offers another alternative for a reviewing court. By the Rule of Necessity, a judge who would ordinarily be disqualified for bias may nevertheless hear a case when there just is no other judge to do it. The United States Supreme Court traced the origins of the Rule back more than five centuries in common law and then applied it in *United States v. Will*<sup>5</sup> to justify a federal court's hearing of a challenge to legislative adjustment in the compensation of federal judges. Kenneth Culp Davis, in his widely respected *Administrative Law Treatise*, wrote more than a decade ago that "[t]he doctrine is so clear that it is seldom litigated...." Nonetheless, there are numerous cases in which the Rule is applied, not only to judges, but to administrative board members deciding cases. Some are quite recent. In 1991, for example, the Supreme Court of Arkansas applied the Rule in *Acme Brick Co. v. Missouri Pacific R. Co.* upholding an order by the state's Highway Commission.<sup>6</sup> In 1990, the Court of Appeals of Missouri applied it to affirm a case decision by a city council in *Fitzgerald v. City of Maryland Heights*.<sup>7</sup>

Reviewing Virginia courts should have applied the Rule in *Fetta* if they

concluded that rehabilitation could not wipe the stain of bias even from those Board members who had not taken part in the evidentiary hearing. "It is well settled that where the Legislature vests in a particular officer or administrative agency the sole power of investigation and decision, the Legislature's purpose cannot be defeated by disqualification of the designated officer or agency on the ground of alleged prejudice or bias."<sup>8</sup> The failure of all three courts to apply the rule in *Fetta* frustrated the will of the General Assembly that the Board of Medicine decide license revocation cases. The failure also injured the legitimate expectations of complaining patients that their charges of sexual misconduct would receive serious audience.

When the Rule of Necessity is applied to decisions by judges, it sometimes permits even the final say by a biased or prejudiced decider. When the Rule is applied to decisions by agencies, it usually has a much less significant impact because of the availability of judicial review. Applied to the Board of Medicine in *Fetta*, the Rule would have permitted the Board no more than was permitted the FTC in *Cinderella Career and Finishing School*, a chance to make a proper administrative decision—subject to review by the courts. Dr. Fetta would still have had the safeguard of review by the same circuit court and court of appeals that invalidated the Board's original decision before permitting the Board (and the complaining patients) their second chance. Instead, the doctor got court-conferred immunity.

Every administrative board and agency empowered to decide cases is bound to avoid not only acting improperly but also merely appearing to do so. That duty is not well served by a board which interferes with evidentiary hearings after it assigns them to hearing officers. The practice surely suggests the board was prejudging a case not yet properly before it, and it surely undermines the authority of the officer supposedly enjoying the board's trust and confidence sufficiently to be assigned to preside in its stead. Just such a practice was apparently well established at the Board of Medicine, however, and so it was high time that the Board be admonished. For this discipline, the three *Fetta* judicial decisions are to be applauded. For unnecessarily affording the doctor immunity for his misconduct, however, the same decisions ought properly to be rued.

#### Notes

1. No. 911526, 1992 VA LEXIS® 91 (Sup. Ct. Sept. 18, 1992).
2. *Fetta v. Board of Medicine*, 20 Va. Cir. 334 (Richmond, 1990).
3. *Board of Medicine v. Fetta*, 12 Va. App. 1173, 408 S.E.2d 573 (1991).
4. *Cinderella Career and Finishing School, Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970).
5. 449 U.S. 200 (1980).
6. 821 S.W.2d 7 (Ark. 1991).
7. 796 S.W.2d 52 (Mo. 1990). See 1A Michie's Jurisprudence, *Administrative Law* Section 7 at p. 213; 11A Michie's Jurisprudence, *Judges* Section 14; 73

C.J.S., *Public Administrative Law & Procedure* Section 61(b) (1983).

8. *Komyathy v. Board of Education*, 348 N.Y.S.2d 28 (Sup. Ct. 1973) quoting from *Matter of Kaney v. State Civil Service Commission*, 77 N.Y.S.2d 8 (Sup. Ct. 1948).

### About the Author

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