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The North Carolina Administrative Procedure Act - Its Effect on the North Carolina Board of Law Examiners

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racial discrimination in an effort to eliminate the past effects of racial discrimination. But as noted earlier, the Supreme Court has sanctioned as constitutional the utilization of the "mathematical ratio" as "a starting point in shaping a remedy" for the past effects of racial discrimination.[47]

CONCLUSION

The decisions rendered in the principal cases and the reasoning used by the courts in arriving at those decisions are reflective of a recently developed trend. That trend is the utilization by both the federal district and appellate courts of the controversial procedures described above to erase the past evil effects of racial discrimination in employment. Currently, many cases similar to the principal cases are being brought before the federal district and appellate courts for adjudication. Significantly, the federal district and appellate courts are using the procedures described in *Carter, Afro* and *Patterson* in arriving at decisions similar to those rendered in the principal cases. Several very recently decided cases provide some indication that the trend has become well-established and will continue for some time to come.[48]

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The North Carolina Administrative Procedure Act— Its Effect on the North Carolina Board of Law Examiners

INTRODUCTION

On February 1, 1976, the North Carolina Administrative Procedure Act[1] will go into effect. It is perhaps one of the least known and possibly one of the most important enactments of this type in recent years. The impact of this act on state government has not been determined. It will take many years of judicial and legislative action to understand how broad this act will be. However, the preliminary efforts alone being directed toward its implementation have indicated a substantial effect on state agencies.[2]

47. Swann v. Charlotte-Mecklenburg Bd. of Educ., *supra* note 36.

48. Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); U.S. v. T.I.M.E. D.C., Inc., 517 F.2d 299 (5th Cir. 1975); Stevenson v. International Paper Co., 516 F.2d 103 (5th Cir. 1975); Dozier v. Chupk, 395 F. Supp. 836 (S.D. Ohio 1975); Officers for Justice v. Civil Service Comm'n San Fran., 395 F. Supp. 378 (N.D. Calif. 1975).

1. As used in this article, the statute referred to as the "North Carolina Administrative Procedure Act," is N.C. Gen. Stat. § 150A-1 to -64 (Supp. 1974), referred to in the text as the N.C.A.P.A.

2. This author was employed by the office of the Secretary of Administration to

The purpose of this act is to require all agencies, with limited exceptions,[3] to establish basic minimum procedure requirements for the adoption, amendment or repeal of administrative rules.[4] The N.C.A.P.A. defines an agency as "every agency, institution, board, commission, bureau, department, division, council, member of council of state, but does not include those agencies in the legislative or judicial branches of the state government. . . ."[5] The act then defines a rule as any agency regulation, standard, or statements of general applicability that implement or prescribes law or policy of describes the organization, procedure, or general practices.[6] This act states six limited exceptions which need not meet the basic requirements of the act, but are very minor exceptions.[7] For the purpose of this article those exceptions need not be discussed. Once these rules are promulgated, they must be filed on or before February 1, 1976, in order for them to have any force or effect.[8] After the rules are filed they cannot be changed without notice and an opportunity for a public hearing. Furthermore, this notice must come at least ten days before the scheduled hearing and twenty days before any change in the status of the rule.[9]

The N.C.A.P.A. provides a second requirement known as a contested case procedure. The Administrative Procedure Act defines contested case as any agency proceeding by whatever name it is called in which the legal rights or duties or privileges of a particular party are to be determined. The Act defines, in particular, licensing as an example of a contested case.[10] After the contested case has been conducted in the prescribed manner for such a hearing,[11] the aggrieved party who is not satisfied with the decision of the hearing may apply to the Wake County Superior Court for a judicial review of the the agency determination.[12]

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help the Department implement the Act in this Department. As a result of this employment, there were numerous meetings with the Attorney General's office and weekly intern meetings with other employees implementing this Act in other state agencies. Out of these meetings came the conclusion that this Act is an extremely broad Act with many varied implications.

3. N.C. GEN. STAT. § 150A-1 sets out the scope of this Act, "This chapter shall apply except to the extent and in the particulars that any statute makes specific provisions to the contrary. The following are specifically exempt from the provisions of this Act. . . ." These exceptions are: the Employment Security Commission, the Industrial Commission, the Occupational Safety and Health Review Board, and the Utilities Commission.

4. N.C. GEN. STAT. § 150A-9.
5. N.C. GEN. STAT. § 150A-2.
6. N.C. GEN. STAT. § 150A-10.
7. *Id.*
8. N.C. GEN. STAT. § 150A-59(c).
9. N.C. GEN. STAT. § 150A-12.
10. N.C. GEN. STAT. § 150A-2(2).
11. N.C. GEN. STAT. § 150A, Art. 3.
12. N.C. GEN. STAT. § 150A, Art. 4.

THE APPLICABILITY OF THE N.C.A.P.A. ON THE STATE BAR EXAMINERS

With this basic understanding of this Act, this writer can now turn his attention to the purpose of this article. The focus of this article is to examine the effect of this act upon one particular area of a state government activity, the licensing of attorneys by the North Carolina State Bar Examiners.

There are two threshold issues that will first need to be considered before a determination can be made whether the N.C.A.P.A. applies to the Board of Law Examiners. First, does the Board of Law Examiners fall under the definition of agency? N. C. Gen. Stat. § 150A-2 defines an agency as: "every agency, institution, board, commission . . . of the state government of the State of North Carolina." However, this section excludes those agencies in the legislative or judicial branches of the state government. Therefore, the Board of Law Examiners would fall under the definition only if it is: (1) a board, and (2) not a part of the judicial branch of the state. It is obvious that this licensing board meets the first criteria of the Act. However, the question remains of whether the Board is created as a separate state agency or whether it is one of the exceptions in § 150A-2. The most important question for determination is whether the Board will be required to conform to the N.C.A.P.A. The courts of North Carolina will have to answer this question. Since there is no case law in North Carolina on this point, an analysis will have to be made as to where the board falls. There are agencies in the judicial branch which are readily identifiable, for example, the offices of the clerks of court and the administrative divisions of the courts. It is this writer's position that these agencies are the exceptions covered in § 150A-2. Looking further into this question, it shall be necessary to turn to the statute which created the State Bar from which the Board of Law Examiners are appointed. Chapter 84-15 of the General Statutes specifically states that the State Bar is created as an agency of the State of North Carolina. "There is hereby created as an agency of the State of North Carolina, for the purposes and with the powers hereinafter setforth, the North Carolina State Board."[13] This legislation did not create the State Bar as a creature of judiciary, but as an independent agency in order to license and control the conduct of attorneys in North Carolina and to use the State Bar as an agency to help with the administration of justice. Nowhere in the enabling legislation is it stated that it belongs under the judicial brach of State government.

This position is supported by North Carolina case law. In *Baker v.*

13. N.C. GEN. STAT. § 84-15.

Varser,[14] the court held that the purpose of a statute creating the North Carolina State Bar is to render more effective service in improving the administration of justice, particularly in dealing with the problems of admissions to the Bar, and of disciplining and disbarring attorneys at law. While this does not specifically state the proposition that the State Bar is an independent agency, it, by implication, suggests that the Bar acts independently in order to discipline the legal profession. If such an agency were under the judiciary, it would be very difficult to allow it to function properly in this area. It could allow the judiciary to impose its control on the agency that is designed to police it. Based on these considerations, it appears that the definition of agency does apply to the N. C. State Bar, and therefore would apply to the Board of Law Examiners.

The second determination must be made in recognition of the fact that even if an agency falls under the definition of "agency", the N.C.A.P.A. does not apply if the legislation which creates the particular agency is contrary to the N.C.A.P.A. The policy of the N.C.A.P.A. is—"This chapter shall apply, except to the extent and in the particulars that any statute makes specific provisions to the contrary."[15] Thus, the question is whether the legislation that created the North Carolina State Bar makes specific provisions for rule making. The N.C.A.P.A. states that if an agency has provisions for rule making and adjudicatory procedures, then the N.C.A.P.A. does not apply. Looking to Chapter 84 which creates the Bar, it provides that the Bar may establish rules for admission to the Bar.[16] This is a simple legislative delegation of the power to make rules. The legislation is completely silent as to the method of procedure for establishing these rules. Where the legislation is silent, there can be no specific statutory language contrary to the N.C.A.P.A. Therefore, where the statute is silent as to how the agency is to establish rules, procedures and standards, the minimum requirements of the N.C.A.P.A. shall apply.[17]

Finally, in comparing the stated purpose of the North Carolina State Bar with the stated legislative purpose and intent of the N.C.A.P.A., "to establish as nearly as possible a uniform system of administrative procedures for state agencies,"[18] both purposes are consistent and the purpose of the N.C.A.P.A. complements the intent of Article 4 of N.C. Gen. Stat. § 84.

Once it has been determined that the two threshold issues have been met, it is possible to turn to the effect of the N.C.A.P.A. on the Board of

14. 240 N.C. 260, 82 S.E.2d 90 (1954).
15. N.C. GEN. STAT. § 150A-1.
16. N.C. GEN. STAT. § 84-17.
17. N.C. GEN. STAT. § 150A-9.
18. N.C. GEN. STAT. § 150A-1(b).

Law Examiners. Article two of the N.C.A.P.A. requires that the rules, regulations, standards, policies or statements which describe the organization, procedures, or practice requirements of any state agency be promulgated and then filed with the Attorney General's office by February 1, 1976, so as to have the same effect as they had prior to this date. However, § 150A-59(c) states that only those rules previously in existence and filed shall become effective upon the filing requirement. Any rule not filed shall be ineffective after this date.[19]

The North Carolina State Bar has its rules in published form.[20] The areas of concern for this article are (1) the effect of the N.C.A.P.A. on the published rules promulgated for admission to the North Carolina Bar, and (2) what effect the N.C.A.P.A. will have on the State Bar after the administering of the examination to the applicants. These rules should be turned over to the Attorney General for filing. However, the question turns to the particular rules. Are these rules sufficient to meet the N.C.A.P.A. requirements; specifically, the rule for general applicants? Rule VI sets out a number of requirements[21] including the requirement that the applicant shall "(S)tand and pass a written bar examination as prescribed in Rule XI hereof."[22] Rule XI requires that one examination be given each year in Raleigh, North Carolina, on such dates as the Board may set and on such subject matter as the Board may deem proper. Article 4 states that the Board shall determine what shall constitute the passing of an examination. It is precisely at this point that a vital determination arises. Is the published rule stating that the Board shall determine what constitutes passing of the examination, sufficient to meet the N.C.A.P.A. requirement? This rule vests with the Board of Examiners the ability to set some standard. What is that standard?

Turning to the N.C.A.P.A., it requires registration of every rule, regulation, ordinance or standard.[23] The rules of the Board require the examiners to determine a standard for what constitutes a passing of the examination. The N.C.A.P.A. requires that any standard established by an agency which effects persons outside that agency, and particularly in the area of licensing, must be filed or it shall not be effective. Thus, the N.C.A.P.A. not only requires that the agency must file something

19. N.C. GEN. STAT. § 150A-59(c), "Rules previously in existence shall be ineffective after February 1, 1976, except that they shall immediately become effective upon filing in accordance with the provisions of this Article."

20. RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF NORTH CAROLINA; published by the Board of Law Examiners. The Bar has numerous rules for admissions, conduct of attorneys and practice requirements, but this article is only concerned with the specific area of rules governing Bar admissions rules.

21. *Id.*, Rule VI.

22. *Id.*, Rule XI, § 1(8).

23. N.C. GEN. STAT. § 150A-58.

relative to its general statutory authority to act in prescribed areas, but also exactly what that agency shall do in the prescribed areas. If that agency has a required standard, it must inform the persons concerned as to the necessary requirements in order to obtain the privileges it administers.

In effect, the N.C.A.P.A. will force the Board of Law Examiners to file the standard which they intend to use in grading the future bar examinations.[24] Once this standard is published, the bar examiners will be required to use that standard. At this point this standard becomes fixed. Moreover, any attempt to impose a new standard will require the bar examiners to announce their plan to change the standard and give an opportunity for a hearing to have input from the public.

If the Board of Examiners does not file the standards it shall require for passing of the examination, what are the ramifications upon this agency? The N.C.A.P.A. says that if the standard is not filed it shall be ineffective.[25] This means that the particular standard cannot be used against any applicants until the rule making procedures required by the N.C.A.P.A. are met.[26]

There exists a question as to whether the N.C.A.P.A. applies to the State Bar Examiners.[27] Assuming their position is that the Act does not apply to them, the bar examination given in August of 1976 will provide for an opportunity to test the N.C.A.P.A.

Assuming that the Examiners do not file their standard showing what shall constitute a passing grade, then upon the use of this unfiled standard against the applicants, their non-feasance should be challenged, not as to how the examination was graded, but for failure to meet their statutory requirement to file.

The second consideration of this article is the effect of the N.C.A.P.A. on the State Bar Examiners after the examination is administered. The applicants who must meet the standard and fail, shall thus have recourse to require that if the Examiners deny them a license, the Examiners must act in accord with a prescribed course of conduct. This is a very necessary requirement to regulate the manner in which the examiners determine eligiblity of the applicants. Prior to the N.C.A.P.A

24. For an example of a standard, a publishing of a rule which states that "70% of questions answered correctly will constitute passing for the purposes of this exam" would be sufficient.

25. N.C. GEN. STAT. § 150A-59(c).

26. N.C. GEN. STAT. § 150A, Art. 3.

27. A request was made to the Attorney General's office for a statement as to the State Bar Examiner's position, but at the time of this writing, no response has been received.

there was no statutory requirement that the State Bar Examiners set out its standards for obtaining a license. All that has been published is the procedure. Even an appeal from an applicant who failed to pass the examination is not provided for in the Bar Examiner's rules. All that is provided is that after an applicant has successfully passed the written exam, he may appeal from an adverse ruling denying him a license to practice.[28] The N.C.A.P.A. specifically provides that any person aggrieved by an agency decision may call for a contested case proceeding, and it specifically spells out the rules for submission of evidence and the particular methods for the conduct of the hearing.[29] This will provide a forum for the applicant who has been denied a license because of his failure to pass the examination, and will place the burden on the agency to justify the denial. If the outcome of the hearing is still not satisfactory to the aggrieved person, he shall be entitled to judicial review of this decision to deny his license.[30]

CONCLUSION

The requirement that the State Bar Examiners establish standards and provide review of their decision to deny a license to practice law is not a radical course of action. It is simply saying that if this system of regulation of the legal profession is to continue in its present state, then the method of regulation should be brought out in the open to allow each person who is attempting to meet the requirements the right to know exactly what he can expect. This will also afford persons adversely affected an opportunity to test their belief that they should be licensed.

This course of conduct can do much to assure the various sectors of our society that the standards for admissions are going to be applied to all applicants. This will remove many suspicions regarding the Examiner's motives and the methods they use in determining whether or not to issue a license. It will remove the stigma of racism associated with the examination, such as the "picture standard" that has heretofore been alleged by minority groups. It is, therefore, the position of this author that the effect of the N.C.A.P.A. would be beneficial to the Examiners. It is hopeful that the courts of North Carolina will take a benevolent view of the Act and not exempt the agency from the effects of the N.C.A.P.A.

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28. RULES GOVERNING ADMISSIONS TO THE PRACTICE OF LAW IN THE STATE OF NORTH CAROLINA (1975), § 1.
29. N.C. GEN. STAT. § 150A-3.
30. N.C. GEN. STAT. § 150A-43.