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Special Project

FAIR TREATMENT FOR THE LICENSED PROFESSIONAL: THE MISSOURI ADMINISTRATIVE HEARING COMMISSION¹

INTRODUCTION

Although conditioning the practice of a profession or particular occupation upon the prior approval of an official body—licensure—is of ancient origin, it is only in the 20th century that the phenomenon has become pervasive.² Since the turn of the century the range of activities and number of individuals covered by occupational licensing laws have continually increased in every state,³ to the point that today, in Missouri alone, 34 occupations and professions, and over 218,000 people⁴ are subject to the control of state occupational licensing authorities.

This quantitative explosion of governmental regulation by licensing has, out of necessity, placed an increased emphasis on the procedure by which a state grants and revokes its approval because, assuming that the substance of the law is not subject to attack, procedural safeguards are the

1. This study was done under a research grant from the American Bar Foundation. The analyses, conclusions, and opinions expressed are those of the authors, however, and not those of the Foundation, its officers, directors, or others associated with its work.

The empirical research for this study was conducted during the Summer of 1971 by Mr. John S. Sandberg, who also prepared the final draft of the study. Mr. James D. Edgar and Mr. Virgil Kenneth Rohrer participated in much of the research preliminary to the empirical study. Messrs. Sandberg, Edgar and Rohrer were members of the staff of the Missouri Law Review at the time this article was prepared and each received his J.D. degree from the University of Missouri-Columbia in June of 1972.

2. See, e.g., COUNCIL OF STATE GOVERNMENTS, OCCUPATIONAL LICENSING LEGISLATION IN THE STATES 2, 23, 78-80 (1952), for the results of surveys indicating the growth of licensing in the last half-century.

Though it is only with the coming of modern society that licensing laws have become widely used, the concept of licensing is of medieval origin. The merchant, craft and professional guilds of the Middle Ages were used both to protect the community from unfair practices and to eliminate competition. *Id.* at 10-11. For a comparison between guilds and licensure, see Grant, *The Guild Returns to America*, 4 J. POL. 303, 458 (1942). Even statutory regulation appeared in England in the 16th century, when a law was passed restricting itinerant salesmen from freely practicing their trades. See *Emert v. Missouri*, 156 U.S. 296, 306 (1895).

3. As early as 1934 one study indicated that over 250 different trades and occupations were subject to licensing restrictions in one or more localities. W. GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* 194 n.4 (1956), citing W. BEARD, *GOVERNMENT AND TECHNOLOGY* 494 (1934). By 1960, New York City alone listed "nearly 1,400 categories of activity or employment . . . requiring licenses, permits, certificates or other official approval." Haitch, *About: Licenses*, N.Y. Times, March 5, 1961, (Magazine), at 100.

4. Based on figures provided by the licensing agencies. The breakdown by agency, number of activities licensed, and number of licenses is as follows:

individual's only protections if a state contends that the individual has not complied with the statutory requirements or conditions. The nature and extent of these procedural safeguards may very well determine whether or not the individual can realistically assert his claim or defense and thus protect his livelihood.

Administrative procedure acts have been passed, in one form or another, in many states to protect individual rights and to assure a fair and impartial determination of administrative (including licensing) disputes. But the likelihood that this goal of administrative due process is being achieved in occupational licensing disputes is doubtful, for several reasons:

- (1) many licensing agencies are only rarely involved in formal disputes, and are therefore unfamiliar with procedural requirements when disputes do arise;
- (2) the agency members are often the prosecutor, judge, and jury in the particular case;
- (3) the members of each agency are typically drawn from the regulated profession or occupation and are, therefore, usually untrained in legal procedure; and
- (4) the administrative procedure in many states is unclear or inadequate with respect to the protections extended.

While a few states have moved toward alleviating these problems,⁵ general reform has been lacking.

In 1965 Missouri proposed to remedy these defects, and thereby provide greater procedural protection for occupational licensees, by creating

<i>Agency</i>	<i>Number of Activities Licensed</i>	<i>No. of Licensees (1971)</i>
Bd. of Accountancy	2	1,695
Dept. of Agriculture	1	0
Bd. of Reg. for Arch., Pro. Eng. & Land Surveyors	3	13,320
Bd. of Barber Examiners	1	5,500 (est.)
Bd. of Cosmetology	3	36,513
Bd. of Podiatry	1	139
Bd. of Chir. Exam.	1	1,443
Dental Bd.	2	2,240
Bd. of Emb. & Funeral Dir.	2	4,231
Bd. of Reg. for the Healing Arts	3	13,000 (est.)
Highway Patrol	1	19,000 (est.)
Bd. of Nursing	3	33,227
Bd. of Nursing Home Administrators	1	0
Bd. of Optometry	1	608
Bd. of Pharmacy	1	4,566
Real Estate Comm'n	2	22,924
Comm'r of Securities	3	4,830
Veterinary Med. Bd.	1	1,250
Div. of Ins.	2	54,152
TOTAL	<u>34</u>	<u>218,638</u>

This amounts to 11.4% of Missouri's nonagricultural labor force.

5. See note 210 *infra*.

the Administrative Hearing Commission (hereinafter referred to as the AHC).⁶ Basically, the AHC was empowered by statute to "conduct hearings and make findings of fact and conclusions of law" on all questions involving the issuance, revocation, suspension or probation of certain occupational licenses,⁷ a power formerly exercised exclusively by the respective occupational licensing agencies.⁸ According to one of the drafters of the statute, the express objective of creating this unique commission was to place "a neutral lawyer in the position of holding a legal-like fair and impartial hearing in compliance with due process of the law."⁹

Over six years have now elapsed since the creation of the AHC. Has the AHC fulfilled the expectations of its creators by providing a solution to the procedural problems that have occurred in the past? Has the goal of providing an impartial tribunal to decide disputed questions of fact and law, without detriment to the bona fide purposes of occupational licensing laws, been met? Or have the predictions of the original opponents of the AHC become a reality? Has the AHC procedure proved to be, at best, a mere alternative to the proceedings conducted by the agencies before 1965? Has it, in addition, created such new problems as establishing the commissioner of the AHC as a "czar with a life or death strangle-hold"¹⁰ over an occupation, who makes "decisions in areas of conduct in which he is not an expert?"¹¹

The purpose of this article is to answer these questions and to make an objective appraisal of the effectiveness of the AHC in the light of its short but sometimes turbulent history.

Part I will outline briefly the problems and techniques of occupational licensing by governmental agencies, and will examine the current trends in both the legislatures and the courts toward allowing increased governmental control through licensure. The purpose of this part will be to put the role of the AHC in perspective with the entire field of licensing.

Part II will consider the common procedural protections afforded licensees in administrative proceedings conducted by licensing agencies under state administrative procedure acts, in order to provide a basis for comparison with the protections provided licensees under the AHC statute and rules.

6. §§ 161.252-342, RSMo 1969. For the text of the act, see APPENDIX No. 1.

7. § 161.272, RSMo 1969.

8. See, e.g., § 335.170, RSMo 1969, which has remained unchanged since 1965 and still states that the State Board of Nursing has the power to hear and decide questions relating to the denial, suspension or revocation of licenses. This provision was impliedly repealed by § 11 (see APPENDIX No. 1) of the original bill, which repealed all conflicting provisions of existing statutes. Some, but not all, of the statutes have since been revised to comply with the AHC statute. See, e.g., § 332.341 (3), RSMo 1969.

9. Letter from Lt. Gov. Thomas F. Eagleton to Gov. Warren E. Hearnes, July 14, 1965.

10. *Id.* (quoting opponent's arguments against the establishment of the AHC).

11. *Id.*

Part III will analyze the procedural protections offered by the AHC, and will examine the background of the AHC and its subsequent history. The effectiveness of the AHC will be evaluated on the basis of the results of empirical research into the satisfaction of the involved parties (*i.e.*, the agencies, licensees, commissioners and attorneys), and into the case histories. The article will conclude with an analysis of the AHC's strong and weak points and an answer to the question whether the AHC has proved an effective remedy.

I. OCCUPATIONAL LICENSING: AN OVERVIEW

A. Introduction

Once an occupation is subjected to state control by licensing, the individual must play the game by the rules. To understand the importance of these "rules" to the individual, it is helpful to lay a foundation covering the concept, method and motives for licensing and the courts' attitudes toward the expanding scope of occupational licensing laws.

B. What is a License?

Although in the past, many courts and writers have defined a license as a governmental permission to do something that would otherwise be illegal,¹² such a definition has been seriously questioned today.¹³ Although prior permission is a condition to engaging in the activity licensed, most courts recognize that a licensing program is regulation of a lawful activity. Of course, a license does not have to be called such in order to be one. Any governmental permission may be a "license" in effect, although it be called a "permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission."¹⁴ If some form of permission is a condition precedent to engaging in an activity, it is, definitionally, a "license."

These definitions embrace a range of included activities of such magnitude that the scope of the definition is almost incomprehensible. For example, while it is easy to understand that licenses to drive, hunt, practice law, practice medicine or be a plumber are all properly includible within the scope of the definition, a zoning variance, while technically a "license," is not commonly understood as such. One encounters the same classification problem with a union card, a federal approval of a corporate merger, an occupancy permit, a burial permit, a tax exemption, or even

12. See, e.g., *Galvan v. Superior Court*, 70 Cal. 2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969); *Knecht v. Medical Serv. Ass'n*, 186 Pa. Super. 456, 143 A.2d 820 (1958); *City of Ft. Worth v. Gulf Ref. Co.*, 83 S.W.2d 610 (Tex. 1935); 2 BOUVIER'S LAW DICTIONARY 1976 (8th ed. 1914); COUNCIL OF STATE GOVERNMENTS, *supra* note 1 at 5; W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 538 (5th ed. 1970).

13. Holmer, *The Role and Function of State Licensing Agencies*, 40 STATE GOV'T 34 (1967).

14. Administrative Procedure Act § 2(e), 5 U.S.C. § 551 (8) (1970). This is the federal "definition" of license. Interestingly, the states, which have the greatest impact in the licensing field, do not define "license" in their statutes or administrative procedure acts.

admission to the White House press corps—all of these “activities” require as a condition precedent some form of governmental permission.

If the definition of “license” is restricted to the field of occupational licensing (eliminating for the moment business licenses, revenue licenses and “implied” licenses), the range of activities still remains unmanageably broad. Licensing laws govern dry cleaners,¹⁵ hypertrichologists,¹⁶ cotton classifiers,¹⁷ cotton samplers,¹⁸ horseshoers,¹⁹ tree experts,²⁰ car salesmen,²¹ and persons fishing for sockeye or pink salmon in the Fraser River system,²² to name a few. The problem is further aggravated by the proliferation of licensing authorities (local, state, federal and quasi-governmental agencies), and divergent schemes of licensing. Nevertheless, there appear to be some fundamental or common characteristics as to the types and purposes of licenses and the methods of licensure.

Categories of licensed activities are definable based on the purpose that the law requiring licensure is meant to accomplish. Broadly speaking, licenses are used for the alternative purposes of revenue, registration, or regulation; but each category has attributes of the other two categories.

Requiring an individual or organization to obtain a license in order to raise revenue is quite common. Municipalities are the most common users of revenue licenses. Assuming it has the power to license,²³ a municipality may license a broad range of activities.²⁴ The result is that the licensing is more aptly described as “business” rather than occupational. However, “business” licenses, although basically used for revenue, do regulate the subject of the license either implicitly or explicitly. As all taxing measures regulate to some degree, a license tax is at least implicitly regulatory, if not sometimes prohibitory. This becomes obvious when activities such as tattooing and fortune telling require a license fee of \$100 per day.²⁵ Furthermore, explicit regulatory measures may also be included in the ordinance or statute. For example, the City of Columbia, Missouri requires that all applicants for a general business license be of “good moral character.” In determining such character, the City License Inspector may consider the applicant’s penal, license, and personal background.²⁶

15. CAL. BUS. & PROF. CODE §§ 9500-90 (West 1964).

16. CONN. GEN. STAT. REV. §§ 20-267 to -278a (1969).

17. 7 U.S.C. § 53 (1970).

18. *Id.* § 51 (b) (1970).

19. ILL. REV. STAT. ch. 66, §§ 13-27 (1969).

20. *Id.* ch. 5, §§ 163-87 (1969).

21. CAL. VEHICLE CODE §§ 11700-21 (West 1960).

22. 16 U.S.C. § 776 (1970).

23. See generally 51 AM. JUR. 2D *Licenses and Permits* § 107 n.13 (1970), and cases cited therein.

24. See, e.g., COLUMBIA, MO., REV. ORDINANCES § 11.030 (A) (1964), which subjects to a tax:

All kinds of vocations, occupations, professions, enterprises, establishments, and all other kinds of activities and matters, . . . any of which are conducted for private profits or benefits either directly or indirectly

25. *Id.* § 11.160.

26. *Id.* § 11.060.

While most authorities contend that the purpose of licensure is to regulate or tax—or both²⁷—licenses are also used for the purpose of registration. A registration license raises revenue incidentally, if at all, and it is not regulatory, since minimal or no requirements or restrictions are put on the licensee. Two examples are marriage and bicycle licenses; neither raises any revenue or has any substantial regulatory impact. Instead, licensure is the administrative method used by government to keep a record of people or bikes.

The main and most important purpose of licensing is regulation, and it is this purpose that is behind most of the laws requiring the licensing of individuals engaged in certain occupations. The purpose is achieved by conditioning the practice of an occupation or profession upon (1) education, experience or examination,²⁸ and (2) responsible performance after acquisition of the license. Requirements of the first type, in addition to those of professional competency, may include requirements of citizenship, residency, good moral character, apprenticeship, or recommendation by presently licensed individuals. Programs seeking to insure post-licensing performance requirements typically impose general or specific prohibitions against certain types of conduct.

The method by which regulation is achieved is dependent to a degree upon the level of government involved. Municipal governments that use licenses to regulate occupations usually license through a branch of the city government.²⁹ The trades regulated by municipalities are normally those not licensed by the state, since the state usually pre-empts municipal authority when it licenses. The federal government licenses through agencies operated and staffed by the federal government. At the state level, however, most of the licensing power is delegated to independent agencies, which may be administratively consolidated in a state department, but are controlled by and composed of members of the occupation.³⁰ This, for example, is the technique in Missouri, with only a few exceptions. The Division of Registration (under the Department of Education) is composed of 15 different licensing authorities.³¹ Each of these authorities, which is described either as a "Board" or "Commission," is composed of and controlled by between three and seven members, appointed by the Governor and approved by the Senate.³² In practical effect, these boards are completely independent; they are responsible only to the Governor

27. See 51 AM. JUR. 2D *Licenses and Permits* § 4 n.7 (1970).

28. COUNCIL OF STATE GOVERNMENTS, *supra* note 1, at 7.

29. Moore, *The Purpose of Licensing*, 4 J. LAW & ECON. 93 (1961); Note, *Occupational Licensing: An Argument for Asserting State Control*, 44 NOTRE DAME LAW. 104 (1968).

30. COUNCIL OF STATE GOVERNMENTS, *supra* note 1, at 28-39.

31. § 161.212, RSMo 1969. This statute only mentions 14 agencies, but the Board of Nursing Home Administrators is also under the Division of Registration. See § 344.010, RSMo 1969.

32. For a brief summary of the structure of each board see THE MISSOURI STATE GOVERNMENTAL SERVICES CATALOG 177-97 (June, 1970).

since the Division of Registration has no budget or personnel, and is an agency on paper only.³³ While these 15 independent agencies license occupations, there are several other licensing authorities, both of the occupational (*e.g.*, insurance brokers and agents) and business (*e.g.*, Public Service Commission) licensing varieties which are operated, staffed and funded by the state. A remarkable fact, however, is that the majority of the boards in Missouri—as in most states³⁴—are operated and controlled by the very members of the occupation licensed.

C. *Why License: The Stated Reason*

Protection of the public is the philosophy stated to support licensing laws.³⁵ To obtain a license, the occupational licensee must have the requisite education, training or experience, and to retain a license he must continue to meet certain standards of conduct. The argument is that the public is thereby assured of a minimum level of competence in an occupation, and the health, safety and welfare of the people are protected.

While this is commendable there are clearly limits to the extension of protection to the public by occupational licensing. Some state courts have held that "common" occupations which do not threaten the health, safety or welfare of the people are not properly subject to the economic prior restraint of licensing. For example, one occupation that a number of state courts have held not subject to regulation is the practice of photography.³⁶ The judicial reasoning appears grounded on the notion that photography is one of the "ordinary lawful and innocuous occupations of life [which] must be open to all alike upon the same terms."³⁷ The licen-

33. The Department of Education also has no connection with the licensing agencies. In fact, the author of this article called the Department to find the address of one agency; no one could provide the information.

34. *See, e.g.*, NEW JERSEY PROFESSIONAL AND OCCUPATIONAL LICENSING STUDY COMMISSION, REPORT 20-22 (Jan., 1971).

35. W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 538 (5th ed. 1970). *See also* Holmer, *The Role and Function of State Licensing Agencies*, 40 *STATE GOV'T* 34, 35 (1967), where the author states:

Obviously, it is a legislative determination that the practice of the profession, or employment in the occupation is fraught with the public interest. . . . The nature of the public interest is not the same for all professions however. There are at least three kinds of public interest involved. In some cases, the primary purpose is the protection of the public health. In others, it is protection against fraud. In still others, it is simply a convenient means of assuring the public that a practitioner possesses certain minimum qualifications. If we recall the definition of licensing as "the administrative lifting of a legislative prohibition," the public purpose of the process is clearer. We forbid the practice of a profession until a license has been secured, and we condition the license on adequate preparation and responsible performance.

36. *See, e.g.*, *Sullivan v. De Cerb*, 156 Fla. 496, 23 So. 2d 571 (1945); *Bramley v. State*, 187 Ga. 826, 2 S.E.2d 647 (1939); and *State v. Gleason*, 128 Mont. 485, 277 P.2d 530 (1954). Of course, the decline of economic due process might cast some doubt on the continuing validity of these cases.

37. *State v. Ballance*, 229 N.C. 764, 770, 51 S.E.2d 731, 735 (1949).

sing of florists,³⁸ paper hangers³⁹ and stone masons⁴⁰ have also been held invalid by state courts.

This idea that certain "common" occupations should be available to all has not halted licensing of more and more occupations.⁴¹ The problem is that almost every occupation has its irresponsible, unscrupulous or incompetent individuals (as a person who has had his wedding pictures ruined by a photographer might attest). Defining a test to determine when the public needs additional protection beyond that afforded by general laws becomes difficult, but a usable set of standards is not impossible. The New Jersey Professional and Occupational Licensing Study Commission has concluded that an occupation should be licensed (or continue to be licensed) if, and only if:

The unregulated practice can clearly harm or endanger the health, safety and welfare of the public and when the potential for such harm is easily recognizable and not remote or dependent upon tenuous argument; and,

The public needs, and will benefit by, an assurance of initial and continuing professional and occupational ability; and,

The public is not effectively protected by other means; and

It can be demonstrated that licensing would be the most appropriate form of regulation.⁴²

Unfortunately, no legislature (or court) appears to have taken such an analytic approach to stem the impetus toward greater licensing.

D. *Why License: The Real Reason?*

Licenses, whether by design or nature, can create a beneficial economic situation for the licensee.⁴³ That the members of an occupational group would desire to be licensed might at first seem incongruous, since it is hard to understand why any group would want itself under governmental control. Sometimes groups do not have the desire, and licensing is imposed, as was the federal licensing of stock exchanges and brokers after the stock market crash of 1929.⁴⁴ But the members of the occupation may want licensing, for several reasons. Economic benefits are surely one of those reasons,⁴⁵ and the desire for recognition by others is another, *i.e.*, the mem-

38. *S.S. Kresge Co. v. Couzens*, 290 Mich. 185, 287 N.W. 427 (1939).

39. *Dasch v. Jackson*, 170 Md. 251, 183 A. 534 (1936).

40. *Gray v. Omaha*, 80 Neb. 526, 114 N.W. 600 (1908).

41. *See, e.g., Merrel v. Department of Motor Vehicles*, 71 Cal. 2d 907, 458 P.2d 33, 80 Cal. Rptr. 89 (1969), which upheld the licensing of motor vehicle dealers and salesmen.

42. REPORT, *supra* note 34, at 6. Based on this test, the Commission recommended that New Jersey regulate by licensure only 17 of the 42 occupations presently licensed in New Jersey. *Id.*

43. For a discussion of the economic effects of licensing, see Barron, *Business and Professional Licensing—California, A Representative Example*, 18 STAN. L. REV. 640 (1966); Moore, *The Purpose of Licensing*, 4 J. LAW & ECON. 93 (1961).

44. *W. Gellhorn*, INDIVIDUAL FREEDOMS AND GOVERNMENTAL RESTRAINTS 109 (1956).

45. *Id.*

ber wants to be accorded the rank of a specialist or professional,⁴⁶ or he thinks he is entitled to such recognition.⁴⁷ Naturally, it is not common for a group to state that it desires licensing in order to achieve economic or social benefits.⁴⁸ More often, the stated reason is that licensing will help protect the public. To quote Gellhorn and Byse:

We lawyers are quick to attack those who invade our monopoly by engaging in the "unauthorized practice of law." We are concerned for the public at large—aren't we?⁴⁹

The legislative histories of licensing laws support the premise that the force behind the typical law is a desire for professional status,⁵⁰ and that there is usually no group to oppose the measure publicly.⁵¹ The exception to this premise occurs when the occupation desiring licensure infringes upon the powers of a previously licensed group. Thus, the medical profession in New York strenuously resisted efforts by the chiropractors to obtain licensed status, but after a diligent effort the chiropractors attained their goal.⁵² Along the same lines the naturopaths of South Carolina, after successfully obtaining governmental recognition, made an unsuccessful attack on the legislature's withdrawal of their status.⁵³

46. *Id.* at 107-09. See also Holmer, *The Role and Function of State Licensing Agencies*, 40 STATE GOV'T 34 (1967).

47. See Carey & Doherty, *State Regulation of Certified Public Accountants*, 40 STATE GOV'T 26 (1967), where the authors state:

It might be argued with some force that CPAs should be licensed and regulated under law simply because they are professional men. They have been educated and trained in a somewhat recondite and intellectual discipline. *Id.* at 26.

48. *But see* S.S. Kresge Co. v. Couzens, 290 Mich. 185, 287 N.W. 427 (1930), a case involving a city ordinance which required the licensing of florists. A florist testified: "The object of this ordinance lobbied by my florist committee was to get rid of those merchants [who] were underselling our association of florists." *Id.* at 191, 287 N.W. at 430.

49. W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 539 (5th ed. 1970).

50. See Hanft & Hamrick, *Haphazard Regimentation under Licensing Statutes*, 17 N.C. L. REV. 1, 4 (1938), where the authors state:

Did the man on the street put pressure on his representative in the legislature to protect him from unlicensed chiroprodists, tile layers and photographers?

A former Missouri state senator indicated licensed and unlicensed occupations are continually bombarding the legislature for more control or licensure status. Interview with John Downs, in St. Joseph, Mo., Aug. 13, 1971.

51. Future practitioners are the most obvious opponents, but [t]hose who may in [the] future find themselves excluded from an occupation, or delayed in their entry into it, are not yet aware of the difficulties they will face; unorganized and, indeed unknown, they remain unrepresented while licensing is debated. Who can present the public's opinion of whether it will or will not be disadvantaged by recognition of yet another profession or sub-profession? The "public" has no spokesman in these matters.

W. GELLHORN, *INDIVIDUAL FREEDOMS AND GOVERNMENTAL RESTRAINTS* 110-11 (1956).

52. W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 539 (5th ed. 1970), citing N.Y. Times, April 30, 1963, at 37, col. 1.

53. Dantzler v. Callison, 230 S.C. 75, 94 S.E.2d 177 (1956).

The normal progression of an occupational licensing law also indicates outside pressures by the "restricted" group.⁵⁴ Licensing laws usually start out at the certification (or registration) stage, where the practitioner, upon qualifying, becomes entitled to use a label, e.g.—public accountant. Only the title, not the profession, is restricted to licensees. Uncertified members may continue practice, but without the title. The next logical step is to eliminate all non-certified individuals by compulsory licensing. The group argues that the public is not being adequately protected because of the non-registered individuals and that the only solution is a complete prohibition against the practice or occupation by such unlicensed persons.⁵⁵ At this stage entrance qualifications become more rigid and control over licensed members more strict.⁵⁶ An occupation-controlled board usually attains this control, exercising it through the board's power to issue and revoke licenses. Since the board in most states is the prosecutor, judge and jury, a licensee who is involved in a dispute with the board is likely to lose on questions of disputed fact.⁵⁷ The result is that the group, if sufficiently powerful, will become almost autonomous.

The severity of restriction on licensed professions has led one author to suggest that the most restrictive laws are for the benefit of the practitioners while the least restrictive are enacted for the public benefit.⁵⁸ Moreover, it would appear futile to attack the enactment of more restrictive laws in the absence of an articulate constituency. Those most affected are either unorganized, or in the case of future practitioners, unknown or unaware.

E. *Licensing in the Courts: Contemporary Attitudes*

Since the right to engage in legitimate employment is recognized as included within the protection of the due process clause of the Constitution,⁵⁹ all licensing laws must be reasonable and "have a 'rational connection' with fitness to practice the particular vocation or profession. . . ."⁶⁰ Persons dissatisfied with the imposition of licensure have used these grounds in the past to attack licensing laws.⁶¹ Today, the probability that any such attack will be successful is extremely doubtful.

54. COUNCIL OF STATE GOVERNMENTS, OCCUPATIONAL LICENSING LEGISLATION IN THE STATES 24-27 (1952); Graves, *Professional and Occupational Restrictions*, 13 TEM. L.Q. 334, 334-36 (1939).

55. See Carey & Doherty, *State Regulation of Certified Public Accountants*, 40 STATE GOV'T 26 (1967).

56. See W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 114-18 (1956), where the author cites the course of the laws licensing beauty shop operators in Louisiana as an example of this progression.

57. See text accompanying notes 184-86 *infra*.

58. See Moore, *The Purpose of Licensing*, 4 J. LAW & ECON. 93 (1961).

59. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Truax v. Raich*, 239 U.S. 33 (1915). *Truax*, while not a licensing case, did involve the right to work.

60. *Doyle v. Board of Barber Examiners*, 219 Cal. App. 2d 504, 510, 33 Cal. Rptr. 349, 353 (1963). *Accord*, *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

61. See case cited notes 38-40 *supra*.

Since the decline of economic due process as a viable doctrine at the national level, the federal courts have interpreted their role in reviewing economically related laws narrowly—while simultaneously characterizing the concept of the public welfare as broad and inclusive.⁶² The result is that the courts have been reluctant to strike down licensing statutes, or regulations based on such statutes, except when a specific constitutional right has been threatened⁶³ or the law has been patently discriminatory.⁶⁴ The usual attitude was summarized by the Supreme Court when it said:

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.⁶⁵

....

. . . Law may exact a needless, wasteful requirement in many cases.⁶⁶

At the state level, the courts have had a relatively free rein to decide the limits of state legislative power, and have usually had little difficulty in finding a "rational basis" for licensing laws.⁶⁷ However, there are occasional indications of doctrinal limits. For example, the constitutionality of the requirement of residency for the practice of many professions was drawn into question recently by the Supreme Court in *Shapiro v. Thompson*.⁶⁸ Perhaps the main justification for residency requirements in licensing laws is the desire to deter the immigration of professionals. Under the reasoning of *Shapiro*, this is constitutionally impermissible as a restraint on interstate travel, since no compelling state interest is involved.⁶⁹

The courts' increasing refusal to review the scope of licensing laws appears based on the notion that the policy issue is basically political and

62. *Berman v. Parker*, 348 U.S. 26 (1954); *Nebbia v. New York*, 291 U.S. 502 (1934).

63. *Kunz v. New York*, 340 U.S. 290 (1951), is one example. This case held that a New York ordinance requiring a license to hold a religious meeting in the street was invalid because of insufficient standards, thus creating a danger that freedom of religion would be infringed. See also *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), where the Court said "states have power to legislate against what are found to be injurious practices in their internal, commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition . . ." *Id.* at 536.

64. See, e.g., *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

65. *Lee Optical Co. v. Williamson*, 348 U.S. 483, 488 (1955).

66. *Id.* at 487.

67. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 N.W.U. L. REV. 13, 24 (1958). But see *Morey v. Doud*, 354 U.S. 457 (1957), which invalidated an Illinois law licensing community currency exchanges because American Express was expressly exempted from the law. Justices Black, Frankfurter and Harlan dissented, believing there was a rational and reasonable basis for the law as it was written.

68. 394 U.S. 618 (1969).

69. See, e.g., Mo. ATT'Y GEN. OP. No. 276, May 22, 1970.

that the merits of the proposals are more appropriate for evaluation at the polls—rather than in the courts.⁷⁰ Unfortunately for the individual licensee, this is a worthless alternative. Since he is unable to object to the regulation itself, he must put his basic reliance on administrative procedural protections established to guarantee that the regulation is properly administered. However, the vagaries of administrative due process often make this an uncertain reliance at best.

II. ADMINISTRATIVE PROCEDURAL PROTECTIONS FOR THE OCCUPATIONAL LICENSEE

A. Introduction

Where a state has an Administrative Procedure Act (APA) proceedings by an occupational licensing agency to discipline a licensee, or actions by an individual to compel an examination or the issuance of a license, are typically, but not necessarily, governed by that act.⁷¹ While the particular licensing statute establishes the power of the agency, it usually specifically refers to the APA for further definition of the procedures to be followed in exercising these powers. Thus, a licensing board may be granted the power to promulgate rules, investigate complaints, initiate prosecutions, hold hearings, and decide appropriate punishments; but, unless otherwise provided, all such powers are subject to the restrictions of the APA.

In the last 30 years, an impressive amount of attention has been paid to the functions and activities of administrative agencies, and to the administrative procedural process in general. There has been significant movement for change, particularly in the early and mid-1940's, and substantial procedural reform, on both the state and federal levels, has resulted. While much attention has been paid to the general area of administrative law, however, *state* administrative procedure has been neglected to a surprising extent—particularly when it is realized that the ordinary person is much more likely to be affected by a state agency than by a federal agency, and that most lawyers are consequently more concerned with state, rather than federal, administrative procedure.⁷²

Due in no small part to this neglect, state administrative procedural reform has lagged far behind federal reform. Furthermore, the reforms that have been achieved are inconsistent in scope and applicability, so that a crazy-quilt pattern of procedural processes has resulted among the various states, and within individual states as well. This lack of uniformity, coupled with the decades of neglect legislators and legal scholars have visited upon

70. *Munn v. Illinois*, 94 U.S. 113, 134 (1876), cited in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

71. The state's APA only comes into operation when a hearing is required by law or constitutional right. See part II, § B of this article. In those states not having administrative procedure acts, the only restrictions on an agency's power are those in its enacting statute, and the state and federal constitutions.

72. I F. COOPER, *STATE ADMINISTRATIVE LAW* 1 (1965).

state administrative procedure, have to a large extent left its principles "submerged in a dark and unexplored morass."⁷³

State administrative procedural reform has mainly consisted of the promulgation, by the National Conference of Commissioners on Uniform State Laws, of the Model State Administrative Procedure Act (adopted in 1946)⁷⁴ and the Revised Model State Administrative Procedure Act (approved in 1961).⁷⁵ Both the Model Act and the Revised Act are extremely important to state administrative procedural protections. They deal, however, with major principles and not with details, and are based on the theory that the principles enunciated should govern the entire administrative structure because "[t]hey are essential safeguards of fairness in the administrative process" in regard to which "[m]ost state statutes are altogether deficient"⁷⁶ It should be emphasized that the principles embraced represent, in the minds of the drafters, "the irreducible minimum of basic fairness in the governmental processes of rule-making and administrative adjudication"⁷⁷

The major procedural protections established by the Model Act and Revised Act are, briefly, as follows:

[t]he requirement that each agency adopt essential procedural as well as substantive rules; that all rule-making be accompanied by proper notice and opportunity to submit views; that there be proper assurance of publicity for all administrative rules; that provision be made for declaratory judgments and rulings; that there be assurance of fundamental fairness in administrative adjudicative hearings, particularly as to notice, rules of evidence, taking official notice, separation of functions, and the assurance of personal familiarity with the evidence on the part of responsible deciding officers; and, finally, that provision be made for adequate judicial review.⁷⁸

The foregoing do not represent *all* of the principles embraced by the Model Act and the Revised Act. But even among those listed above, only a few are relevant to the present subject which is that of state occupational licensing. The basic principles involved in occupational licensing are (1) the right to a hearing; (2) guarantees that a hearing, after being granted, will be fairly conducted and lead to a just result, and (3) the right to effective judicial review. The Model Act⁷⁹ and the Revised Act are good

73. Cooper, *Turning the Spotlight on State Administrative Procedure*, 49 A.B.A.J. 29, 30 (1963).

74. Hereinafter cited as MODEL ACT. A model act (as opposed to a uniform act) is adopted when uniformity is not necessary or desirable. For an analysis of the Model Act, see Stason, *The Model State Administrative Procedure Act*, 33 IOWA L. REV. 196, 199 (1948).

75. Hereinafter cited as REVISED ACT.

76. 9C U.L.A. 177 (1967).

77. Stason, *supra* note 74, at 201 (emphasis added).

78. 1 F. COOPER, *supra* note 72, at 13.

79. Missouri's APA is substantially the Model Act, but there are differences between the two. Some of these differences will be noted.

models for analysis here, despite the fact that these two acts have been formally adopted in only ten states. They have, however, had a significant effect upon legislation in many other states.⁸⁰ This includes Missouri, for the Missouri APA is similar to the Model Act and to a large extent patterned after it.

B. *The Right to a Hearing and the
Right Privilege Doctrine*

The right to a hearing is, of course, the most basic procedural protection for the licensee. Without this right the licensee cannot rebut the charges against him or establish his own case. That licensees have been in the past and still are today occasionally denied this right is somewhat alarming, considering the emphasis procedural due process has received in the last decade. The reason for such denials is the anomaly termed the right-privilege doctrine. To the licensee the question of whether his governmental permission is a right or a privilege can determine the procedural protections he will receive. If it is the former, the licensee is entitled to procedural benefits of notice and hearing. He is entitled to his license, and can compel its issuance, if he meets the reasonable requirements set out in the statute. But if the license is characterized as a privilege, the person is entitled to nothing; the licensee is denied a hearing because no right is denied by the agency's action. Since there is no right, due process is not violated by a denial. The whim of the state controls the individual's existence as a licensee.

While licensing as a widespread method of government regulation is relatively new, the term itself is of common law origin. At common law it was defined as a "permission or right given by some competent authority to do an act, which without such authority, would be illegal, or a tort or trespass."⁸¹ It was a real property concept, and it was a true privilege, since without the license the person would be acting illegally. The license granted no estate or interest in the land and, therefore, revocation could be made at will.⁸²

When occupational licensing began, the common law definition was attached to this new use of the term "license." This was unfortunate since the courts failed to realize that the situations were not parallel and that the old use of the term might be inapplicable to governmental regulation.⁸³

80. The Model Act has been substantially adopted by eight states (including Missouri) and the Revised Act has been substantially adopted by three states. 9C U.L.A. 136 (1967).

81. BOUVIERS' LAW DICTIONARY 1974 (1914).

82. *Rouse v. Roy L. Houck Sons' Corp.*, 249 Oreg. 655, 439 P.2d 856 (1968); *Joseph v. Sheriffs' Ass'n*, 430 S.W.2d 700 (Tex. 1968). See 2 AMERICAN LAW OF PROPERTY §§ 8.109-110, 8.112 (A.J. Casner ed. 1952); RESTATEMENT OF PROPERTY §§ 512, 519 (1944).

83. See Barnett, *Public Licenses and Private Rights*, 33 ORE. L. REV. 1, 4 (1953), where the author suggests that the problem is entirely one of connotation: "If the noncommittal term 'certificate' had been used instead of the term 'license', the course of history might have been very different."

The first incongruity between the two situations is that licenses at common law were private in character. An owner of land was the only one who could grant the license and he did so at his pleasure, thereby making it a privilege. But occupational licenses are granted by the government (of which we are all owners) and, while the label may be the same, there "is no reason for applying the relationship of private law to an area of public law [where the] facts do not fit."⁸⁴

The second problem is that while real property licenses were authorizations to do something illegal at common law, the occupations licensed today by federal, state or local governments were, by and large, "legal" at common law.⁸⁵ An occupational license, therefore, grants permission to carry on an activity, in its nature lawful, but prohibited by statute or ordinance. The occupation is licensed in the interest of public welfare, but the license is merely a "permission to exercise a pre-existing right or privilege."⁸⁶ When the legislature declares the activity illegal, the pre-existing rights are transformed into a privilege, but it is a privilege only to the extent that everyone is not granted a license.⁸⁷

Many courts, however, have not recognized these incongruities. The resulting reasoning of these courts is usually similar to the following:

[T]he very fact that a license is granted to a person would seem to imply that the person granting the license can also revoke it. The license is nothing but a permission, and if one gives a man permission to do something, it is natural that the person who gives the permission will be able to withdraw the permission.⁸⁸

Fortunately, the courts have not automatically assumed that all licensed occupations exist at the pleasure of the authorities. The fact that they still do deny the right to a hearing to some licensees is hard to understand since as early as 1926, in *Goldsmith v. United States Board of Tax Appeals*,⁸⁹ the Supreme Court decided that an aggrieved applicant for an occupational license did indeed have such a right. Though the Court's statement that the licensee must be given "an opportunity by notice for hearing and answer"⁹⁰ was dictum, it was made "quite clear that due process entitles the applicant to a chance to rebut and explain the evidence against him."⁹¹

The federal courts have consistently followed this view and have required that a trial-type hearing be granted when a license is denied, not

84. Davis, *Must a Licensing Authority Act Judicially*, NFW ZEALAND L.J. 360, 363 (Dec. 18, 1956).

85. "That is just why licenses are required—to restrict the liberty in activities already existing at common law." Barnett, *supra* note 83, at 5-6.

86. *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 255, 72 N.E. 2d 697, 699 (1947).

87. Barnett, *supra* note 83, at 5.

88. *Ex parte Parker*, [1953] 1 W.L.R. 1150, 1154 (Q.B.).

89. 270 U.S. 117 (1926).

90. *Id.* at 123.

91. 1 K. DAVIS, ADMINISTRATIVE LAW 494 (1959).

renewed, suspended, or revoked, on the basis of issues of adjudicative fact.⁹² No hearing is required when the facts in dispute are not adjudicative; however, in this situation there is usually no real need for a hearing, and a hearing would probably not be the best method of resolving the dispute.⁹³

The denial of a trial-type hearing, when adjudicative facts are involved, would, on the basis of *Goldsmith*, appear to be a violation of the due process clause of the Constitution. Yet there is a significant body of case law at the state level which denies such an opportunity to be heard on the basis of the right-privilege doctrine.

Usually the courts consider the characteristics of the activity in determining whether it is a right or privilege. If the activity is of a non-beneficial nature and could be prohibited completely, the court concludes that it is a privilege and then takes the illogical step of assuming that the individual is not entitled to judicial or procedural protection. The step is illogical because the state has not prohibited the activity—yet the court is singling out an individual and treating him as if the activity had been prohibited.⁹⁴

It is hard to take the privilege doctrine seriously, both (1) because it has been increasingly criticized as unsound, and (2) because it usually appears as dictum, rather than the basis of the holding in a case.⁹⁵ Also, the decision denying a hearing is a sound one in many cases, even though the privilege doctrine may be invoked.⁹⁶ However, in spite of the long and frequent criticism of the doctrine, and its rejection in federal licensing cases, there are still occasional state cases which use it to justify denial of a hearing when disputed facts are involved.⁹⁷

Fortunately, this heresy has been finally noticed by the federal courts in actions against state agencies. The Court of Appeals for the Fifth Circuit in *Hornsby v. Allen*,⁹⁸ a 42 U.S.C. section 1983 case, held that an applicant for a liquor license was entitled to due process of law in connection with her application, and that this in turn, requires (1) ascertainable standards and (2) a hearing to determine whether these standards have been met. The court rejected the privilege argument completely.

Since liquor licensees are engaged in one of the professions most often considered privileged, this decision had far reaching implications; yet the Iowa Supreme Court in *Smith v. Iowa Liquor Control Commission*⁹⁹ later held that the question of whether the legislature could provide for revoca-

92. *Id.* at 493.

93. *Id.* at 494.

94. Comment, *The Use and Misuse of the Right-Privilege Distinction in License Revocation: What's so Hot About Cosmetology School?*, 31 U. CHI. L. REV. 577 (1964).

95. F. COOPER, *ADMINISTRATIVE AGENCIES AND THE COURTS* 78-79 (1951).

96. I K. DAVIS, *supra* note 91, at 502.

97. *Id.* at 502-03. See *Fink v. Cole*, 1 N.Y.2d 48, 133 N.E.2d 691, 150 N.Y.S.2d 175 (1956), and *Michael v. Town of Logan*, 247 Iowa 574, 73 N.W.2d 714 (1955).

98. 326 F.2d 605 (5th Cir. 1964).

99. 169 N.W.2d 803 (1969).

tion of a liquor license without notice or hearing was "hardly debatable."¹⁰⁰ In the light of state decisions of this sort, the only effective remedy appears to be an action in federal court under 42 U.S.C. section 1983, as the plaintiff in *Hornsby* did.

The Supreme Court cases of *Goldberg v. Kelly*¹⁰¹ and *Bell v. Burson*¹⁰² also indicate that the privilege anomaly is not long for this world. While the issue in *Goldberg* was the necessity of an evidentiary hearing before termination of welfare benefits, the language of the Court was considerably broader in scope. The Court said:

Termination [of benefits] involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" . . . The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," and depends upon whether the recipient's interest in avoiding the loss outweighs the governmental interest in summary adjudication.¹⁰³

The Court went on to say that the "crucial" factor was whether the termination deprives "an eligible recipient of the very means by which to live while he waits." Such a test seems applicable to occupational licensing, since the licensee may be denied the right to make a living and thus suffer grievous loss.¹⁰⁴

The Supreme Court also discounted the right-privilege distinction in *Bell v. Burson*, a case which involved the suspension of a driver's license under Georgia's Safety Responsibility Act. The Court, in holding that a driver was entitled to a hearing on the issue of liability before his license could be suspended, said:

[D]ue process requires that when a State seeks to terminate an interest such as that here involved it must afford "notice and opportunity for hearing appropriate to the nature of the case" before the termination becomes effective.¹⁰⁵

If notice and hearing must be provided before a driver's license can be suspended, can there be any doubt that the same rights apply to an occupational licensee?

Administrative procedure acts have offered little help in eliminating the right-privilege doctrine. The Model Act, and Missouri's APA, con-

100. *Id.* at 807.

101. 397 U.S. 254 (1970).

102. 402 U.S. 535 (1971).

103. 397 U.S. at 262-63 (citations omitted).

104. *Id.* at 264.

105. 402 U.S. at 542. For further information on the status of the right-privilege doctrine, see generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Barnett, *Public Licenses and Private Rights*, 33 ORE. L. REV. 1 (1953); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964); Note, 44 TEXAS L. REV. 1369 (1966).

tribute little to guaranteeing a right for a hearing when adjudicative facts are involved. They seem concerned with basic principles that apply when a right to a hearing *exists*, rather than to enunciating principles which actually bring this right into existence. In fact, the reasoning of the Model and Missouri Acts can appear almost circular; the procedural protections they offer apply mainly to a "contested case," which is defined in the Model Act as:

a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.¹⁰⁶

This sounds very much like saying that a party is entitled to a hearing when he has a contested case, and has a contested case when he is entitled to a hearing.¹⁰⁷ It would seem that a better definition of "contested case" would have been desirable, and the Revised Act has moved in this direction. It specifically lists *licensing* as included in the term "contested case," and defines licensing as including "the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license."¹⁰⁸ Only licenses "required solely for revenue purposes" seem to be outside of the definition.¹⁰⁹

The requirement of the Model Act and the Revised Act that all parties are to be granted a hearing in a contested case also appears in the statute law of many states; without a clear definition as to what is and is not a contested case, however, this basic requirement adds little to procedural due process.¹¹⁰ Thus, by specifically putting licensing cases under the procedural requirement of a hearing, the Revised Act has made a significant advancement.

In spite of the deficiencies of the Model Act's definition of "contested case" and the failure of the privilege doctrine to pass completely out of the picture, it can generally be said that, in the occupational licensing area, when adjudicative facts are involved, a hearing is today a requirement and will be granted. This may result from a statute, from a state court's construction of the requirements of procedural due process, or from a section 1983 action, as in *Hornsby v. Allen*. In each instance, however, the result is the same: an occupational licensee who deserves to be heard will rarely be denied a hearing.

106. MODEL ACT § 1 (3). The Missouri provision, § 536.010 (3), RSMo 1969, is the same with the exception that "statute" is used in place of "law or constitutional right." This implies that a court could not read the requirement for a hearing into a statute. The point has never been raised.

107. The Missouri courts have thus interpreted this provision to mean that there is a "contested case" only when the state constitution, a statute, or municipal ordinance requires the agency to hold a hearing. *See, e.g., Kopper Kettle Restaurants, Inc. v. City of St. Robert*, 439 S.W.2d 1 (Spr. Mo. App. 1969), noted in 36 Mo. L. REV. 444 (1971).

108. REVISED ACT § 1 (4), 14.

109. *Id.* § 1 (3).

110. 1 F. COOPER, STATE ADMINISTRATIVE LAW 287 (1965).

C. A Fair Hearing?

It is an empty protection to be entitled to a hearing if there are no concurrent guarantees that the hearing will be fairly conducted. Many elements, naturally, are involved in the word "fair." But it would seem that, for a hearing to be fair, three elements are at least essential to the aggrieved party: (1) adequate notice of the charges against him; (2) sufficient procedural guarantees as to the conduct of the hearing, such as fair rules of evidence and the right to cross-examine opposing witnesses; and (3) an impartial deciding officer or board.

I. Notice

The Model Act is vague as to the requirements for notice; "reasonable notice," along with specificity as to the "time, place, and issues involved," is all that is required.¹¹¹ The Missouri APA, while initially only requiring "reasonable notice,"¹¹² now requires notice to include "a brief statement of the matter involved in the case unless a copy of the writing accompanies said notice."¹¹³ The Revised Act also goes further than the Model Act, especially in its requirement of reference to the rules and statutes involved and "a short and plain statement of the matters asserted."¹¹⁴ If there is no statute stating so, it is not necessarily required that the nature of the hearing be stated in the notice. Thus, a mere requirement that the issues be stated—as contained in the Model Act—may not adequately advise the party of the nature of the proceedings.¹¹⁵

At least 23 states have general legislation on the subject of pleadings and notice for agency hearings.¹¹⁶ Most follow the Model Act and require that the issues be stated; only six appear to require that the *nature* of the hearing be stated in the notice.¹¹⁷ As can be seen, approximately half of the states do not appear to meet (statutorily) the minimum requirements of the Model Act, even though specification of issues "is one of the basic elements of fair procedure."¹¹⁸ Missouri's APA does meet this standard, and, in addition, many of the licensing statutes in use before 1965 also provided for adequate notice.¹¹⁹

An additional, though rarely recognized problem, is that even if adequate notice is given the licensee may not realize the import of the notice. Whereas, the form of notice in judicial proceedings (*e.g.*, a petition or subpoena) makes it clear to the person that he is involved in a potentially

111. MODEL ACT § 8.

112. See § 536.060 (1), RSMo 1949.

113. § 536.067 (2), RSMo 1969. This provision was added in 1957.

114. REVISED ACT § 9.

115. I F. COOPER, *Supra* note 110, at 278-79.

116. Comment, *Administrative Procedure Legislation Among the States*, 49 CORNELL L.Q. 634, 643 (1964).

117. I F. COOPER, *supra* note 110, at 279.

118. R. BENJAMIN, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* 77 (1942).

119. § 335.170, RSMo 1969. This section was impliedly repealed by the AHC statute. See APPENDIX No. 1, § 11.

serious legal matter, the notice of the administrative hearing may just inform the licensee that he is to appear before an agency composed of fellow practitioners whom he may personally know. For example, the notice might be in letter form, which may not make the licensee sufficiently aware of the potential legal implications so as to recognize the need for an attorney.

Although the basic right to be given adequate notice of the charges against him seems beyond question today, many state agencies tend to wait until the hearing itself before fully acquainting the party with the facts of the case. In fact, there are indications in many cases that the agency itself may not be aware of the facts at the time of giving initial notice.¹²⁰ The Revised Act insures that a party will learn the particulars of his case before the hearing. This would seem a basic element of procedural fairness. There have been a considerable number of licensing cases which have been set aside by state courts because the notice given the affected party was not adequate to inform him of the charges against him.¹²¹ Because of their number, in fact, it can be said that in a great many of the states which have *not* legislated in this area, a party is still entitled to the notice provided for in the Model Act, as part of the procedural due process requirement.

2. Conduct of the Hearing

Once a party has attained proper notice of the hearing, and is adequately informed of the charges against him, there remains the question of whether the hearing will be fairly conducted. For a truly fair hearing, a party needs the protection of certain evidentiary rules, the right to confront and cross-examine the witnesses against him, and an impartial trier of fact.

a. Evidence

Evidentiary rules in administrative proceedings create a difficult problem, for a delicate balance between competing interests must be met. Guidelines are certainly needed to protect both the party and the agency from the agency's possible ignorance of legal principle, yet agency expertise can often best be put to advantage when there is a degree of flexibility and informality available to meet the exigencies of a particular situation.¹²² Since these interests can conflict, there has been a general relaxation of evidentiary rules in the administrative process without the loss of concern over possible violations of basic elements of due process.¹²³

The Model Act's approach is that "agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs."¹²⁴ Also, "in-

120. 1 F. COOPER, *supra* note 110, at 283.

121. *Id.* at 285-86.

122. Comment, *supra* note 116.

123. *Id.*

124. MODEL ACT § 9 (1). The comparable Missouri provision is § 536.070, RSMo 1969. The only provision of this section relating to the admissibility of evidence

competent, irrelevant, immaterial, and unduly repetitious evidence" may be excluded.¹²⁵ This standard is considerably less rigorous than the common law rules of evidence, but certainly does not admit everything that the "whim and fancy of counsel may offer."¹²⁶ Most notably, it allows admission of hearsay evidence—although it requires such evidence to be of greater credibility than "mere rumor."¹²⁷ The most frequent form of hearsay found in administrative proceedings are affidavits. Affidavits can be quite helpful, particularly in expediting a hearing, and are admissible under the Model Act if not objected to on the ground of inability to cross-examine.¹²⁸

The Revised Act makes a significant departure in this area, but the departure may actually be a great leap backward. This act provides that "the rules of evidence as applied in [non-jury] civil cases in the [District Courts of this state] shall be followed."¹²⁹ It does, however, provide that when it is necessary to ascertain facts not easily susceptible to proof under these rules, evidence of the type "commonly relied upon by reasonably prudent men in the conduct of their affairs" is admissible.¹³⁰ Irrelevant, immaterial, or unduly repetitious evidence is *mandatorily* excluded.¹³¹

Neither one of the two major changes seems that advisable. In the first instance, no one really seems to know what the rules of evidence in non-jury cases are.¹³² For a layman, the problems are only increased when it comes to a decision on what evidence to admit. The problem is further compounded by making exclusion of "irrelevant, immaterial, or unduly repetitious evidence" mandatory.¹³³ Experienced judges often have trouble in making distinctions in this area. The provisions of the Model Act would seem far more realistic, when the nature of an agency hearing is considered along with the advantages of having a degree of informality and flexibility. These countervailing factors seem to outweigh the admittedly desirable

is subsection 7, which allows the exclusion of "wholly irrelevant, repetitious, privileged or unduly long" evidence. This section does not mention "competent" evidence, but § 536.140 (2) (3), RSMo 1969, does require that the decision of the agency be based on "competent" evidence. The result is that under both the Missouri and Model Acts the rules of evidence as applied in civil actions are in effect. In Missouri, even if an objection to incompetent evidence is made and sustained, the evidence shall "nevertheless be heard and preserved in the record . . ." § 536.070 (7), RSMo 1969.

125. MODEL ACT § 9 (1).

126. Stason, *The Model State Administrative Procedure Act*, 33 IOWA L. REV. 196, 205 (1948).

127. *Id.*

128. Harris, *Administrative Practice and Procedure: Comparative State Legislation*, 6 OKLA. L. REV. 29, 48 (1953). Section 536.070 (12), RSMo 1969, provides that there must be a specific objection to the use of an affidavit.

129. REVISED ACT § 10 (1).

130. *Id.*

131. *Id.*

132. Dakin, *The Revised Model State Administrative Procedure Act—Critique and Commentary*, 25 LA. L. REV. 799, 809-10 (1965).

133. *Id.* at 809.

theory behind the provisions of the Revised Act—that it is advantageous to have uniform rules of evidence in all adjudications within a state.¹³⁴

Apparently, only 22 states have legislated in this area; nine of them basically follow the theory of the Model Act, three follow the Revised Act, and two follow varying theories of their own.¹³⁵ However, in spite of the many differences among states as to admissibility of evidence, all that have legislated in the area allow the admission of evidence which is “incompetent under strict rules of evidence so long as it has some probative value.”¹³⁶ This includes Missouri.¹³⁷

b. Confrontation and Cross-examination

Admission of hearsay evidence, within certain guidelines, would seem desirable. It would only be undesirable if the aggrieved party never had a right to confront and cross-examine the witness against him. The Model Act gives the right to cross-examine the witnesses who *testify*, and the right to submit rebuttal evidence.¹³⁸ The Revised Act drops the “testify” and “rebuttal” provisions, and provides that “a party may conduct cross-examinations required for a full and true disclosure of the facts.”¹³⁹ This seems to be a well-balanced provision, for the right to cross-examine could be pushed so far that it would collide with the interest in allowing agencies to admit hearsay evidence in certain situations.¹⁴⁰ This would “interfere unnecessarily with the efficient conduct of the work of many agencies.”¹⁴¹

At least 25 states have legislated and, as usual, there is great variance.¹⁴² Eight states reflect the general theory of the Revised Act—that cross-examination is desirable but may be waived, when it is not necessary for full disclosure of the facts.¹⁴³ About seven others follow the Model Act theory of guaranteeing the right to cross-examine the witnesses who testify. The remainder offer varying guarantees which extend further than those offered by either Act.¹⁴⁴ Missouri falls into the latter category; section 536.070 (2) RSMo 1969, provides that

- (2) Each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him.

134. Comment, *supra* note 116.

135. *Id.* at 644-45.

136. *Id.* at 645.

137. See note 124 *supra*.

138. MODEL ACT § 9 (3).

139. REVISED ACT § 10 (3).

140. I F. COOPER, *supra* note 110, at 372.

141. *Id.*

142. *Id.* at 373.

143. *Id.*

144. *Id.* at 373-74.

- (3) A party who does not testify in his own behalf may be called and examined as if under cross-examination.

The varying standards of the states illustrate the difficulty in reaching a balance between avoiding impairment of agency effectiveness, and insuring that the right to a fair hearing is not infringed.¹⁴⁵ It is difficult to say when due process requires the right to cross-examine to be granted, and when rebuttal evidence alone is sufficient.¹⁴⁶ Generally, state courts have held that cross-examination is necessary when there is good reason to believe that its denial might impede the truth, and several decisions have held that the right to cross-examine should be granted when witnesses actually testify.¹⁴⁷ When a letter, affidavit or report is admitted into evidence, however, the courts usually compromise on cross-examination, and grant it only when it is necessary "for a full and true disclosure of the facts."¹⁴⁸

c. Unbiased Determination

All the procedural protections a licensee may possess can be rendered valueless if he is not adequately protected against bias on the part of the trier of fact. In spite of the danger of bias, however, few states have acted adequately to guard against it.

It is surprising that neither the Model Act nor the Revised Act proposes a separation of the adjudicative and the investigative functions of an agency. The Revised Act does in some ways appear to support the concept, by its provision against *ex parte* consultation between deciding officers and parties,¹⁴⁹ but this provision seems of lesser value in the occupational licensing field, where the trier of fact often constitutes the whole board or agency. The problem of the agency being investigator, prosecutor, judge and jury all in one is very severe in the area of occupational licensing, and the dangers in this can hardly be ignored.

The most obvious danger is the conflicts of interest involved. This combination of duties "violates the ancient tenet of Anglo-American justice that 'no man shall be a judge in his own cause.'"¹⁵⁰ The desire of administrative tribunals to advance and enforce public policy as they see it, stands in the way of objective evaluation of evidence; their convictions and experience allow them to find claims clearly established, when a disinterested judge would be in doubt.¹⁵¹ Individuals who must make and enforce the rules simply should not be allowed to determine whether a violation of these rules has been established.¹⁵² Making the problem worse is the fact that

145. *Id.* at 372.

146. *Id.*

147. *Id.* at 374.

148. *Id.* at 375.

149. REVISED ACT § 13; Comment, *supra* note 116.

150. *In re Larsen*, 17 N.J. Super. 564, 574, 86 A.2d 430, 435 (App. Div. 1952) (concurring opinion of Brennan, J.).

151. F. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 155 (1951).

152. *Id.* at 157.

few legislatures have provided much guidance or supervision as to licensing policy, but rather, have granted agencies broad discretion and "vague criteria for assessing conduct . . ." ¹⁵³ This results in little predictability of application, and unfair results which are beyond correction by judicial review, because of the broad discretionary power granted the agency. ¹⁵⁴

The makeup of the agency often further adds to the danger of a biased result. While the agency itself may have a conflict of interest in its prosecution of the case, the individual members of the agency often have a conflict of interest as to public policy. As mentioned before, members of licensing boards are typically drawn from the profession to be regulated. A good example would be state boards of nursing; in 44 states (including Missouri), members of these boards are made up entirely "from nominees of the state nursing associations." ¹⁵⁵ It is "not thought proper to select those who regulate public utilities from nominees of the utility companies, or an insurance commissioner from nominees of the insurance companies," yet this is standard procedure in the occupational licensing area. ¹⁵⁶ Because of this, licensing boards often do not represent a cross-section of the profession they are regulating. Instead, the representation is often confined to the element of the profession that is politically dominant. ¹⁵⁷ This can orient the members of an agency towards private professional goals, rather than public policy or public interest. ¹⁵⁸ Aware of this, and faced with an expensive and possibly damaging suit, the licensee is often forced to submit to agency demands of questionable validity, either by modifying or withdrawing his suit, or accepting a license under imposed conditions. ¹⁵⁹

Unfortunately, the problem of bias has often been overlooked in discussions of needed improvements in administrative procedure. Many seem to feel that the right of appeal and review somehow deemphasizes the seriousness of the problem; a party will be protected simply by requiring that the decision be properly supported by the record. ¹⁶⁰ But, judicial review is often not an adequate protection.

D. Judicial Review

Statutory provisions covering judicial review of actions by or against licensees are relatively simple. The only important provisions are those covering the prerequisites for appeal, the scope of review, and the relief that can be granted.

153. Dean, *The Opportunity to be Heard in the Professional Licensing Process in Pennsylvania*, 67 DICK. L. REV. 31, 34 (1962).

154. *Id.* See also pt. II, § D of this article.

155. Holmer, *The Role and Function of State Licensing Agencies*, 40 STATE GOV'T 34, 35 (1967).

156. *Id.*

157. Dean, *supra* note 153, at 37.

158. *Id.*

159. *Id.* at 39-40.

160. Gerber, *The Act as Viewed by an Administrator*, 16 AD. L. REV. 54, 56 (1963).

Review provisions obviously apply only to the licensee, since the board is the trier of fact, and would not dismiss an action and then appeal that same dismissal. The licensee may appeal if he "is aggrieved by a final decision in a contested case."¹⁶¹ He must first exhaust his remedies; but under licensing statutes, his only remedy is the hearing. The aggravement and final order requirements also must be satisfied. But these prerequisites rarely, if ever, pose problems.

The scope of review is the most important aspect to the licensee. The injury or review is based on the record,¹⁶² and may extend to a determination of whether the action of the agency

- (1) Is in violation of constitutional provisions;
- (2) Is in excess of the statutory authority or jurisdiction of the agency;
- (3) Is unsupported by competent and substantial evidence upon the whole record;
- (4) Is, for any other reason, unauthorized by law;
- (5) Is made upon unlawful procedure or without a fair trial;
- (6) Is arbitrary, capricious or unreasonable;
- (7) Involves an abuse of discretion.¹⁶³

The broadest of these provisions is the requirement under both the Missouri Act (quoted above) and the Model Act, that the agency's decision be based on "competent and substantial evidence upon the whole record." The parallel but less exacting provision under the Revised Act is the "clearly erroneous" test. Unfortunately, if the agency has made a concerted effort to base its decision on the record, the licensee has little chance of prevailing under either test, since "the court shall not substitute its discretion for discretion legally vested in the agency."¹⁶⁴ The licensee's best chance for reversal is on questions of law, since the court will weigh the evidence for itself.¹⁶⁵ Unfortunately, however, the disputed questions are rarely of law.

These review provisions do not really aid the licensee; they assume that the licensee has been provided a fair hearing. However, another alternative has developed for the licensee on the federal level—that of a 42 U.S.C. section 1983 action. Two lines of attack have developed from these actions. First, *Hornsby v. Allen*, and more recent cases, have established the principle that a licensing agency must use ascertainable standards in issuing or denying a license.¹⁶⁶ While these cases have marked a significant break-

161. § 536.100, RSMo 1969.

162. MODEL ACT § 12 (4); REVISED ACT § 15 (d); § 536.130, RSMo 1969.

163. § 536.140 (2), RSMo 1969. Section 12 (7) of the Model Act is similar. Section 15 (g) of the Revised Act is also similar, except for the important substitution of the "clearly erroneous" test for the "whole record" test.

164. § 536.140 (5), RSMo 1969.

165. See § 536.140 (3), RSMo 1969.

166. See, e.g., *Turner v. Thompson*, 421 F.2d 771 (5th Cir. 1970), cert. denied, 398 U.S. 937 (1970); *Barnes v. Merritt*, 376 F.2d 8 (5th Cir. 1967). In the former case the court held that the denial was properly based on ascertainable standards. In the latter case the court held that there were no ascertainable standards.

through in allowing federal intervention in state licensing, their effect is severely limited in application. Since once ascertainable standards are present, as they usually are in licensing statutes, no claim arises under section 1983, unless the standards are applied in an unconstitutional manner,¹⁶⁷ or are unconstitutional on their face.¹⁶⁸

The second line of attack has far-reaching implications for the occupational licensee. A 1969 Fifth Circuit Court of Appeals case, *Mack v. Florida State Board of Dentistry*,¹⁶⁹ considered the due process requirements of a fair hearing. The plaintiff, a dentist, alleged that the defendant had not maintained a separation of functions in the investigatory, accusatorial, prosecutorial and deliberative phases of its proceedings involving him, and thus, had denied him due process of law.¹⁷⁰ The district court held that the following violated the constitutional concept of fundamental fairness:

- (1) The adjudicator of fact being kept appraised of the facts of the investigation prior to hearing;
- (2) The adjudicator of fact having the authority to file the accusation;
- (3) The legal advisor to the adjudication making legal decisions for the adjudicator of facts and acting as prosecutor as well;
- (4) Only the prosecutor and not the defense counsel [being] present at the deliberative sessions of the adjudicator;
- (5) The executive Secretary in charge of the investigation [being] present during the deliberative sessions.¹⁷¹

The lower court answered plaintiff's prayer, and ordered defendant to hold a new hearing following the fourteenth amendment requirements of due process, as spelled out by the courts, or to grant plaintiff a license.¹⁷² The court of appeals modified the lower court's ruling,¹⁷³ and avoided the allegations of procedural defects by holding that the plaintiff had had no hearing because it was presided over in an inept manner, that counsel for both sides were disruptive and unrestrained, and the rules of evidence were inadequately applied.¹⁷⁴ In so holding, the court stated that a licensee who is about to lose a professional license, which he has held for 20 years, is entitled to develop his defense free from events such as those that took place in the case.¹⁷⁵ The court also suggested that a lawyer, or someone with legal experience, should preside at the hearing.¹⁷⁶

167. See e.g., *Ali v. State Athletic Comm'n*, 316 F.Supp. 1246 (S.D.N.Y. 1970), where ascertainable standards were present but were applied in such a manner as to deny plaintiff equal protection of the law.

168. See, e.g., *White v. City of Evansville*, 310 F. Supp. 569 (S.D. Ind. 1970).

169. 296 F. Supp. 1259 (S.D. Fla. 1969), modified, 430 F.2d 862 (5th Cir. 1970), cert. denied, 401 U.S. 954 (1971).

170. *Id.* at 1261.

171. *Id.* at 1263.

172. *Id.* at 1264.

173. If the ruling had not been so modified the district court's decision would have invalidated almost every state's procedure for handling licensing disputes.

174. 430 F.2d at 864.

175. *Id.*

176. *Id.*

The *Mack* court went a long way in emphasizing that due process in substance, and not just in form, must be provided to a licensee. Even so, judicial review, whether federal or state, is normally not a sufficient protection against licensing board irregularities because of several factors, among them: (1) the agency discretion may be so broad that an unfair decision will be properly supported by the record; (2) the party very often is not represented by counsel, and may not be aware of his rights as to judicial review; (3) despite a victory, the fact of a dispute may be damaging to his reputation; (4) agency bias (which leads to distrust and lack of confidence in state government) is not really reviewable; and (5) resorting to judicial review may be costly and time-consuming—not to mention, less than rewarding.¹⁷⁷

Considerations of good government and an overloaded court system demand that a fair result be reached by the hearing, rather than through judicial review. Apart from the overwhelming need for comprehensive administrative procedure legislation in those states which have yet to adopt it, it is suggested that the most pressing need in state administrative law today is a provision for the separation of functions between investigative and adjudicative responsibilities in administrative proceedings. Of all the states, it is suggested that Missouri, in the field of occupational licensing, has taken a significant step in this direction.

III. THE ADMINISTRATIVE HEARING COMMISSION— ALTERNATIVE OR ANSWER?

A. Introduction

The first part of this article attempted to stretch a broad overview of occupational licensing. The second part of the article concerned itself with general procedural protections that are available, or should be available, to the occupational licensee, who is aggrieved by agency action at the state level. It has been stated that such a licensee, to be properly protected, needs three broad protections: (1) a guarantee to a hearing; (2) a guarantee that the hearing, after being granted, will be fairly conducted, and lead to a just result; and (3) the right to effective judicial review.

As has been pointed out, most states are deficient in offering these protections, in one or more respects. Before 1965, Missouri would certainly have had to have been included as one of those states. In 1965, however, the Missouri General Assembly created the Administrative Hearing Commission (AHC), a new concept in state occupational licensing procedure. The AHC's express purpose was "to accomplish a fair and impartial hearing in an orderly, prompt and judicial manner."¹⁷⁸

The main purpose in this third section is to analyze the AHC in

177. For a classic example of this, see *Kopper Kettle Restaurants, Inc. v. City of St. Robert*, 439 S.W.2d 1 (Spr. Mo. App. 1969), noted in 36 Mo. L. Rev. 444 (1971).

178. See the AHC rules and preamble in APPENDIX No. 2.

order to determine whether it has been a success or a failure in alleviating deficiencies in state occupational licensing procedure. This analysis of the AHC has two additional, although subsidiary, goals. The first is to point out weaknesses in the AHC's structure and functions, in the hope that both the General Assembly, and the parties involved with the AHC can work to overcome them. The second is to outline particular problems any state is bound to encounter in implementing a similar system, and to suggest means of dealing with such problems.

The material in this section is based largely on the results of empirical research conducted during the summer and fall of 1971, with the aid of an American Bar Foundation grant. The research was aimed at obtaining information from two broad sources. In the first group were the agencies and individuals that have been functionally related to the AHC, both in the past and present. This source included drafters of the statute, legislators, commissioners of the AHC, the agencies (including board members and attorneys), licensees and attorneys for licensees. These sources were reached by conducting numerous interviews, and through frequent correspondence. A cross section of each group was consulted for its views and opinions on all aspects of the AHC. The other source was the case files of the AHC. The history of each of the 204 cases¹⁷⁹ that the AHC has handled was researched to obtain empirical data for analysis. Unfortunately, an additional source of information—agency files of revocation actions before 1965—was unavailable.¹⁸⁰ The absence of such pre-AHC data foreclosed a major research goal, namely an empirical comparison of pre-AHC procedures with those followed since 1965.

B. The "Creation" of the AHC

1. The Moving Forces

An attempt by a legislature to reduce or eliminate the powers of an administrative body seems fated to run into substantial opposition. The reason for this opposition lies, quite frankly, in the fact that the agency, its members and its "friends" have vested interests in maintaining the status quo.¹⁸¹ When confronted with a reform proposal, the agency may contend that it is more skilled and knowledgeable with respect to its jurisdiction, and that any change will limit its continued effectiveness to control its subjects. The sponsors of Senate Bill 284, which established the AHC, met such opposition, and were able to overcome it only because of strong public support and individual hard work.

The real origin of the concept of the AHC goes back several years before 1965. As early as 1962, members of the Missouri Attorney General's

179. Except as otherwise noted, this analysis is based on data as of September 1, 1971, at which time the empirical research ended.

180. The agencies are usually only required to keep records for two or three years. See, e.g., § 334.100, RSMo 1969.

181. See, e.g., Kansas City Times, Nov. 15, 1971, at 9C, col. 1, where an editorial stated: "[E]xisting agencies have their own supporters and [sic] prepared to fight to preserve their pockets of power."

office had expressed dissatisfaction with the procedures used in occupational licensing cases.¹⁸² Despite minor variations among the various statutes creating the different boards, all proceedings were governed basically by Missouri's Administrative Procedure Act.

Each agency had an assistant attorney general assigned to it to act as general counsel.¹⁸³ After investigation of a complaint, if the board contemplated a proceeding under the APA (*e.g.*, to revoke a license), it advised its counsel to draft a formal complaint. At the hearing on the complaint, the assistant would then act as the "prosecutor," and the board members would sit as the court. After the hearing, the board would deliberate, and then direct its "prosecutor" to draft findings of fact and conclusions of law supporting its decision. If an appeal were necessary, the same assistant would usually handle the appeal. Because of their familiarity with each step of such proceedings, some of these assistant attorney generals noticed several shortcomings in these proceedings.

The basic problem was that of the "classic case."¹⁸⁴ In the "classic case," the agency, after receiving a complaint about some allegedly illegal activity by a licensee, would have its investigators look into the allegations. (Or, if the agency did not have investigators, it might hold an investigative hearing at which the complainant and witnesses would testify.) After the investigator reported back to the agency, the members of the board would meet, evaluate the report, and then, based on that evidence, decide if formal action were necessary. If the board decided in the negative, that, naturally, would close the matter. Concern would arise only when the board decided to proceed, and the licensee decided to contest the action.¹⁸⁵ Although the members of the board had already decided (with the advice of counsel) that the evidence supported the allegations of illegal conduct, at the hearing they would, figuratively, don black robes, sit as judge and jury, and re-evaluate the same evidence. In addition, the leading witness for the agency was often the board's own employee-investigator. Thus, even if the licensee had controverting evidence, the board was usually predisposed to decide against him, because (1) it had already decided against the licensee in filing the complaint; and (2) from a practical standpoint, it would tend to give weight to the testimony of its own employee.

The licensee was left with no real defense in any action where the facts were in dispute. Even judicial review was effectively precluded by the

182. Interview with Albert J. Stephan, in St. Louis, Mo., Aug. 20, 1971 [hereinafter referred to as Interview with Stephan]. Mr. Stephan is presently counsel for the Board of Registration for the Healing Arts. He was an assistant attorney general from 1961 to 1966, during which time he was counsel for numerous administrative agencies.

183. Assistant attorney generals still act as general counsel for the agencies before the AHC, unless the agency has private (*e.g.*, Board of Registration for the Healing Arts) or house counsel (*e.g.*, Division of Insurance).

184. Interview with Stephan.

185. It should be noted that many actions, under both the AHC and pre-AHC procedures, are not disputed. Either the evidence is so overwhelming that the licensee has no real defense, or the licensee does not appear at all.

requirement that the licensee must prove that the board's decision was not supported "by competent and substantial evidence upon the whole record."¹⁸⁶

This "controverted facts" situation occasionally produced dissatisfactions even in cases where the board decided that the allegations against the licensee were not substantial. Since many complaints originated from the public (*i.e.*, clients or patients),¹⁸⁷ it was commonly asserted that a board (being composed of members drawn from its own profession or occupation) was protecting its "own" if it dismissed a complaint. On the other hand, if the board found the licensee "guilty," some board members found it difficult to impose a full sanction when the evidence establishing the violation, although clear, was not one hundred percent conclusive.¹⁸⁸

The "classic case" emphasized the three in one problem of having the same body exercise the conflicting functions of prosecutor, judge and jury. A common understanding of human nature would itself suggest the difficulty of fairly executing the duties of each position, regardless of the good intentions of the person or persons involved. The proper exercise of any one function conflicted with the exercise of the others. Members of the Attorney General's office were concerned with this dilemma, but under the existing system there seemed no solution.

While the "classic case" was the most serious problem, there were others. The lack of legal training of the members of a board was one. A board, like a court, frequently had to rule on motions or objections. But the board, unlike the court, was not legally trained and was normally without the benefit of its counsel, who was acting as "prosecutor." The prosecutor could not simultaneously fill the roles of advocate, and of legal advisor to the board, although some tried.¹⁸⁹ To avoid difficulties, the "prosecutor" and opposing counsel would, if at all possible, stipulate facts and agree on the presentation of evidence. The deficiencies of such a practice are obvious. The board members' lack of legal training had the further detrimental effect of stultifying the practice of filing written briefs after the hearing. (Under the AHC practice the term "briefs" is used to describe materials submitted *after* the hearing, and which are normally described as "proposed findings of fact and conclusions of law.") Licensees' attorneys apparently realized the futility of submitting briefs. Thus, one assistant attorney general, despite six years of practice with licensing agencies, could recall only one or two instances in which briefs were filed.¹⁹⁰

186. § 536.140 (2), (3), RSMo 1969.

187. According to most of the agencies, client-licensee problems are the major source of complaints.

188. Interview with James Flanagan, William Dolan, and Robert Leonard, Real Estate Commissioners, in Columbia, Mo., Aug. 18, 1971.

189. A former assistant attorney general indicated how one agency solved this problem. When opposing counsel objected, the assistant would signal the presiding officer what the appropriate ruling was by pulling on his earlobe.

190. Interview with Stephan.

Another problem was the absence of any "legal" atmosphere at the proceedings. The licensee would receive a formal notice of the charges against him; but if a "podiatrist thought that he was going to just sit down and talk with some other foot doctors, it frequently happened that [he] did not see a lawyer."¹⁹¹ Licensees often did not fully comprehend the possible ramifications of the action. As a result, they did not exercise the rights they did have.¹⁹²

A final, though fortunately rare problem was the use by a board of its power to eliminate certain licensees, and thereby, restrict competition. Several persons indicated that this problem had arisen, although no one would give examples for the record.

Despite the shortcomings of the pre-AHC system, a movement for change never got past the discussion stage, until a case arose, not exactly in the "classic" form, which attracted widespread attention to the need for fair and impartial hearings to licensees.¹⁹³ In 1959, Dr. Harold Lischner, a doctor of medicine licensed by the state of California, and then an instructor at the University of Missouri Medical School, applied for a Missouri medical license. The Board of Registration for the Healing Arts, over the course of some years, twice denied his application after hearings. During the interim period, Dr. Lischner moved to Pennsylvania, where he applied for and obtained a license to practice. In November of 1963 Dr. Lischner again applied for a Missouri license, and requested and was granted a hearing, before the Board of Registration for the Healing Arts. The hearing was presided over by the board members, a written record was made and Lischner was represented by counsel.¹⁹⁴

The record disclosed the following testimony: Lischner was a graduate of an accredited medical school;¹⁹⁵ his former and present colleagues had only praise for his professional competence; because of moral and religious beliefs, he had been a conscientious objector during World War II; while 18 or 19 years old, he was arrested for having left a conscientious objectors' camp, but charges against him arising out of the incident were later "dropped" without a trial or conviction;¹⁹⁶ he conceded that he would, as a matter of conscience, disobey laws which infringed upon the right of free speech, or which would require restrictive covenants for housing.¹⁹⁷

Because of the unusual nature of the testimony (there were no wit-

191. *Id.*

192. Several persons interviewed disagreed with this conclusion. One individual commented that licensees and applicants are "usually well-versed in their rights." Interview with Robert Jones, Assistant Attorney General, in Jefferson City, Mo., June 30, 1971.

193. *Lischner v. Board of Reg. for the Healing Arts*, No. 22261 (Cir. Ct. Cole Cty., Nov. 16, 1964).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

nesses for the Board), the assistant representing the Board, Alfred J. Stephan, brought the case to the attention of Attorney General Thomas Eagleton, prior to the Board's decision on the application.¹⁹⁸ Both Stephan and Eagleton agreed that the Board had "no legal grounds for denying [Lischner] a license to practice the healing arts in Missouri," and the Board was so advised.¹⁹⁹ Nevertheless, the Board voted unanimously to deny Lischner a license on March 21, 1964.²⁰⁰ The Board was asked to reconsider its position, since the Attorney General's office had decided that it would not defend the decision, if it were appealed.²⁰¹ Reconsideration became impossible when several events succeeded in freezing the Board to its position. Governor John M. Dalton threw his support behind the board's decision, and promised the Board outside counsel for the appeal.²⁰² At about the same time, the *St. Louis Post-Dispatch* broke the story on its front page, saying Lischner had been denied a license "because of his beliefs in pacifism and his record as a conscientious objector."²⁰³

With the news coverage the controversy became more heated. The approaching gubernatorial election gave the dispute a political flavor, with Secretary of State Warren Hearnes joining Eagleton in criticizing both the Board's action, and Governor Dalton for supporting the Board.²⁰⁴ The *Post-Dispatch* gave the case much prominence, and in a veritable deluge of articles and editorials, severely criticized the Board's action.²⁰⁵ At this point, the issue quickly escalated beyond the facts of the *Lischner* case. In an editorial the *Post-Dispatch*, after stating that the question of whether Lischner should get a license was for the courts, said: "the broader policy question for public concern is whether a Missouri licensing board (this or any other) should undertake to judge an applicant's moral character by judging his opinions and thoughts."²⁰⁶

As expected, Lischner appealed the case (to the Circuit Court of Cole County), contending that the Board's denial of licensure constituted a deprivation of due process and equal protection of the law; and that the Board's action was arbitrary and capricious, and not based upon competent

198. Interview with Stephan; Interview with Sen. Thomas Eagleton, in Jefferson City, Mo., July 24, 1971 [hereinafter referred to as Interview with Eagleton].

199. Letter from Thomas Eagleton to William D. Perry, President of Board of Registration for the Healing Arts, March, 1964 (exact date unknown).

200. *St. Louis Post-Dispatch*, April 2, 1964, at 1A, col. 1. The reason for the delay between the hearing in November and the decision in March is unknown.

201. Interview with Eagleton.

202. *St. Louis Post-Dispatch*, April 2, 1964, at 1A, col. 1.

203. *Id.*

204. *St. Louis Post-Dispatch*, April 21, 1964, at 7C, col. 3.

205. From April through December, 1964, there were 18 news articles (several of them headlines), 17 editorials, 3 editorial cartoons and numerous letters to the editors. The editorials at times became quite vehement, one editorial being entitled "The Medical Inquisitors." *St. Louis Post-Dispatch*, May 13, 1964, at 2C (Editorial).

206. *St. Louis Post-Dispatch*, May 17, 1964, at 2C (Editorial).

and substantial evidence upon the whole record.²⁰⁷ The Board's decision was reversed in a memorandum opinion, which adopted plaintiff's requested findings of fact and conclusions of law.²⁰⁸ The Board accepted the decision and granted Lischner his license.

Although the Lischner case was hardly typical, it did focus attention on the problems in the licensing structure. The problem was not that board members were anything but persons of the highest caliber. The Board of Registration for the Healing Arts was made up of good men. The problem was that "good men make mistakes."²⁰⁹ The defect was in the system.

2. Legislative History

Lischner, despite its dissimilarity from the "classic" case, provided a perfect springboard for solving the long noticed, but unchanged problems. Realizing this, newly elected Lieutenant Governor Eagleton, along with Stephan, Cullen Coil (a former Missouri Supreme Court Commissioner) and others set out to establish an alternative system. Initially, they considered the procedures in several other states,²¹⁰ and the federal system. However, the "drafters" concluded that the alternatives all had the same defect: the licensing authority was still both the prosecutor and the ultimate trier of fact, even though the person conducting the hearing was independent.²¹¹ A general court-martial type procedure, with an attorney acting as a legal adviser to a court composed of the members of the agency, was also considered and discarded.²¹² This latter system (as was the case with other hearing examiner alternatives) overcame the lack of legal expertise in the board, but left the "prosecutor-judge-jury syndrome"²¹³ un-

207. Plaintiff's Requested Findings of Fact and Conclusions of Law, *Lischner v. Board of Reg. for the Healing Arts*, No. 22261 (Cir. Ct. Cole Cty., Nov. 16, 1964).

208. *Lischner v. Board of Reg. for the Healing Arts*, No. 22261 (Cir. Ct. Cole Cty., Nov. 16, 1964).

209. *St. Louis Post-Dispatch*, May 13, 1964, at 7C (Editorial).

210. The drafters were generally hazy on the extent to which they relied on other states' procedures in drafting the AHC procedure, though they did admit considering alternatives employed by other states. California, Maine and Alaska are three states that have adopted alternatives.

California's APA provides for a hearing examiner, unrelated to the agency, to preside over and conduct the hearing. The agency has the ultimate decisional power, though it may adopt the examiner's decision. See CAL. GOV'T. CODE §§ 11370-528 (West 1966), as amended, (West Supp. 1972). See generally Bobby, *An Introduction to Practice and Procedure under the California Administrative Procedure Act*, 15 HAST. L.J. 258 (1964). Alaska's system is similar to the California procedure. See ALASKA STAT. § 44.62.250 (1967).

Under Maine's system the hearing officer not only presides over the hearing but also has the ultimate decisional power. ME. REV. STAT. ANN. tit. 5, §§ 2401-07 (1964). See generally, Sawyer, *The Quest for Justice in Maine Administrative Procedure*, 18 ME. L. REV. 218 (1966). Quite possibly the drafters lifted the AHC's name from Maine; their commission is also called the Administrative Hearing Commission.

211. Interview with Eagleton.

212. Interview with Stephan.

213. Interview with Eagleton.

changed. The conclusion was reached that an independent trier of fact was essential. It was agreed that one "trier" would be fully capable of handling the docket, after an analysis of the past case load. The proposed legislative bill sought the establishment of one commissioner to hear these disputes, and further required him to be an attorney.

The initial drafts left power with the commissioner to decide punishment, but after consultation with the agencies, the drafters decided to leave this responsibility within the agencies' jurisdiction. The agencies' professional expertise in their respective fields, and political expediency in passing the bill, influenced this decision.²¹⁴

Another significant decision at this juncture was to exclude the supervisor of liquor control, whose jurisdiction comprehends thousands of licensees, and whose authority is frequently challenged. The drafters concluded that inclusion of the supervisor would generate enough opposition to seriously jeopardize the bill's chances of enactment.

The method of steering the bill through the legislature was planned carefully. Senator John Downs was enlisted as the primary upper house sponsor. Twenty-eight out of the 34 other senators joined in sponsoring the bill. Representatives Ronald Reed and Jack Schramm spearheaded the lower house fight.

The bill passed the Senate in substantially the same form as introduced.²¹⁵ An amendment offered by Senator Earl Blackwell, whereby the governor would appoint a commissioner on a case by case basis, was defeated because of the belief that it would be difficult to get quality persons under such a plan.²¹⁶

The House battle was not as easy. Although a number of groups publicly endorsed the bill, including several licensing agencies,²¹⁷ there was active opposition by four groups²¹⁸ and behind the scenes lobbying by

214. *Id.*; Interview with Stephan.

215. The final Senate vote was 24-4 in favor of the bill. Mo. S.JOUR., 73d Gen. Ass'y 979 (1965). It is interesting to note that some of the sponsors did not vote.

216. Interview with former state senator John Downs, in St. Joseph, Mo., Aug. 13, 1971; Interview with former state representative Ronald Reed, in St. Joseph, Mo., Aug. 13, 1971.

217. The bill was endorsed by the following groups:

Little Hoover Commission

Administrative Law Committees of the St. Louis, Kansas City and Missouri Bar Associations

State Board of Registration for the Healing Arts

Executive Committee, Missouri Medical Association

Board of Pharmacy

Board of Cosmetology

Dental Board

Letter from Lt. Gov. Thomas Eagleton to Gov. Warren E. Hearnes, July 14, 1965.

218. Those in opposition were the Missouri Funeral Directors Association, Missouri Optometric Association, Missouri Real Estate Association, and the Missouri Division of Insurance. *Id.*

many others.²¹⁹ The amendments offered proved the opposition. For example, amendments proposing deletion of the Real Estate Commission and the Board of Nursing were offered, though only the former passed.²²⁰ Another amendment deleted the requirement that the commissioner be an attorney.²²¹ However, the Division of Insurance was added to the AHC's jurisdiction.²²²

Substantially crippled by amendments, the bill was passed,²²³ and referred to a House-Senate committee, which was heavily stacked in favor of the Senate version of the bill. In the committee report political maneuvering eliminated all of the crippling amendments.²²⁴ This report was adopted by a close vote in the house,²²⁵ with the help of some last minute arm-twisting by Lieutenant Governor Eagleton.²²⁶ However, the battle was not over. Opposition continued in an effort to have the bill vetoed, but Governor Hearnes signed the bill on August 24, 1965.

In retrospect, Senate Bill 284 was passed because of the sponsors' hard work, and the active support of the St. Louis Post-Dispatch.²²⁷ Missouri had taken a commendable step toward providing procedural protection for licensees. Nevertheless, the fight necessary to pass the bill cast doubt on whether the AHC could effectuate its purpose.

C. *Proceedings Before the AHC*

Regardless of whether the agency or the licensee²²⁸ initiates the action, the mechanics of proceedings before the AHC are simple; there are few technical requirements and no traps. The statute and rules are straightforward. The AHC enabling act eliminated numerous minor differences in proceedings under each agency's statute, and in addition, added a few vital changes.

The first basic change was one of addition and clarification. Under the individual statutes, no express provisions governed the requirement of a hearing when an agency refused to examine an applicant, or refused to issue or renew a license. For example, one statute merely stated: "The

219. Interview with former state senator John Downs, in St. Joseph, Mo., Aug. 13, 1971.

220. Mo. H. JOUR., 73d Gen. Ass'y 1743-47 (1965).

221. *Id.*

222. *Id.* at 1776-78.

223. *Id.* at 1778-79. The vote was 91 to 56.

224. Interview with Eagleton; Interview with John Downs, in St. Joseph, Mo., Aug. 13, 1971; Interview with former state representative Ronald Reed, in St. Joseph, Mo., Aug. 13, 1971.

225. The vote adopting the report was 88 to 55, 82 votes being necessary for passage. Mo. H. JOUR., 73d Gen. Ass'y 1820-21 (1965).

226. Interview with former state representative Ronald Reed, in St. Joseph, Mo., Aug. 13, 1971. The difficulties that the sponsors encountered in the legislature casts some doubt on the ability of other states to adopt similar statutes. *But see* note 330 and accompanying text *infra*.

227. Interview with former state representative John Downs, in St. Joseph, Mo., Aug. 13, 1971.

228. For the sake of simplicity, "licensee" will be used to designate all individuals appearing before the AHC, whether or not currently licensed.

Board may refuse to license individuals of bad moral character, or persons guilty of unprofessional or dishonorable conduct. . .,"²²⁹ without stating the procedure that should be followed. Section six of the bill expressly covered this situation, by allowing the individual, upon refusal of any agency to examine an applicant, or to issue or renew a license, to file a complaint with the commission and thereby obtain a hearing.²³⁰ The result is that today, when a dispute arises in the field of occupational licensing, the most basic procedural right—the right to a hearing—is guaranteed in Missouri by statute.

A second basic change was the statutory requirement that the commissioner of the AHC publish rules of procedure.²³¹ The rules that have been subsequently published,²³² and the conduct of the parties involved have brought about some significant procedural improvements.²³³

As noted earlier in this study, one of the most important rights of the licensee in a revocation or nonrenewal proceeding is the right to adequate notice of the charges against him. The AHC rules on notice go far beyond the requirements of the Model Act,²³⁴ and also eliminate any problems that might be caused by the Missouri and Revised Acts.²³⁵ The statute and rules require the commissioner to serve (either personally or by certified mail) the respondent (usually the licensee) with the complaint.²³⁶ Notice of the hearing is to be attached to the complaint, and must:

- (b) Inform the respondent of his right to file an answer within ten days of receipt of the complaint.
- (c) Inform all parties of their right to request a pre-hearing conference, to be represented by legal counsel and to a full, fair and open hearing²³⁷

229. § 334.100, RSMo 1969.

230. § 161.302, RSMo 1969. See APPENDIX No. 1 for the text of the act. In fact, the boards did grant hearings in such cases (*e.g.*, the *Lischner* case); but whether such hearings were required under the previous statutes was open to question.

This unfortunately does not mean that the right-privilege doctrine is dead in Missouri. *Bloom v. Board of Architects, Pro. Eng. & Land Surveyors*, 474 S.W.2d 861 (St. L. Mo. App. 1971), clearly indicates that the doctrine still has vitality. "[E]ngaging in the practice of architecture . . . is a matter of privilege . . . and not a matter of right." *Id.* at 864. The court held that the plaintiff, a licensed Nebraska architect, was not entitled to a Missouri architect's license because (1) there was no agreement for reciprocity between Missouri and Nebraska and (2) he had not met the educational experiences and moral standards prescribed by statute. Interestingly, the Board admitted that the Nebraska examination was essentially the same as the one used in Missouri. *Bloom v. Board of Registration for Architects & Pro. Eng., AHC No. 68003* (Nov. 26, 1968). Nevertheless, the court held that the Board's decision was one of "grace."

231. § 161.302, RSMo 1969.

232. See APPENDIX No. 2 for the text of the rules.

233. See Table III *infra* for a survey of licensees' attorneys on practice and procedure before the AHC.

234. See pt. II, § C(1) of this article.

235. See *id.*

236. § 161.282, RSMo 1969; AHC rule 7.02.

237. AHC rule 7.01 (3).

These provisions provide protections greater than those found in ordinary civil actions in court, and leave little risk that a licensee will not be fully and adequately informed of his rights, or of the nature and manner of conduct of the proceedings.

Proper conduct of the hearing was the drafters' second major concern.²³⁸ The statutory requirement that the commissioner publish rules of procedure has itself been a significant advance, because, as is well known, in many states such rules are not readily available.²³⁹ Every step of a proceeding is now governed by this single set of rules. There are no variations from one agency to another as was the case before 1965. Real estate agents receive the same treatment as nurses. Also, the establishment of one administrator has enhanced the uniformity and consistency of proceedings in several respects. First of all, the commissioner is a full time officer, whose sole responsibilities are to conduct a fair hearing, and to render an impartial decision. (By statute the commissioner cannot have outside employment while in office.) Secondly, while the AHC statute and rules have not expressly altered the substantive laws and evidentiary rules applicable to administrative proceedings, these proceedings are now supervised by an individual with legal training. As a result, rulings on motions and evidentiary objections are now more likely to be consistent and correct, and in addition, it is now more probable that the final decision will be based on "competent" evidence. Finally, the adversary nature of actions before the AHC makes it more likely that all relevant issues will be properly raised, briefed and decided. The detailed findings of fact and conclusions of law, which the AHC has produced, supports this assumption. Further, these detailed opinions have produced the twin benefits of establishing precedent (which aids predictability), and allowing effective judicial review. The practice of having all hearings transcribed, similarly enhances effective judicial review.

The third, and by far the most important change initiated by the AHC was the substitution of an impartial trier of fact in place of the board members; this substitution was the principal goal of the drafters. The statute made this change by simply providing that:

The administrative hearing commission shall conduct hearings and make findings of fact and conclusions of law in those cases wherein, under the law, a license issued [by any one of the listed agencies] may be revoked or suspended, or wherein the licensee may be placed on probation or wherein an agency refuses to permit an applicant to be examined upon his qualifications or refuses to issue

238. It should be emphasized that while most of this discussion analyzes the AHC rules and statute from the licensee's viewpoint, all of the procedural protections apply equally to a licensing agency, whether it is the petitioner or respondent.

239. On the availability of rules at the state level, see Cohen, *Publication of State Administrative Regulations—Reform in Slow Motion*, 14 BUFFALO L. REV. 421 (1965).

or renew a license of an applicant who has passed an examination for licensing or who possesses the qualifications for licensure without examination²⁴⁰

Several aspects of the AHC statute make this procedure preferable to that employed by other states. First of all, the AHC is the only hearer and trier of fact; the agency has no discretion as to the employment of the AHC procedure. Secondly, the statute contains an automatic capture clause,²⁴¹ and a clause repealing any inconsistent provisions of existing statutes.²⁴² The latter provision eliminated the need expressly to amend existing statutes, in order to bring particular licensing agencies within the AHC's jurisdiction.²⁴³

These modifications and changes brought about by the creation of the AHC can best be illustrated by a step-by-step analysis of each stage of the proceedings.²⁴⁴ The pre-complaint proceedings remain substantially unchanged, and within the agencies' sphere of responsibilities. The boards retain their powers of investigation and prosecution, but it is important to remember that the manner in which the boards exercise these functions varies substantially from board to board.

The day to day business of a licensing board is normally supervised by an executive member of the board, who may or may not be a full-time employee. While the board members make all final decisions, the executive member is the one who executes the various functions of drafting and conducting examinations, renewing licenses, initiating investigations and all other day to day procedures.²⁴⁵ The manner in which investigations are conducted depends upon the type of agency and its statutory authorization.

Agencies like the Board of Barber Examiners, Boards of Cosmetology and Board of Pharmacy have inspectors whose primary functions are to make periodic investigations of licensees to see if they are complying with the current health and safety regulations. A report of each investigation is made to the board. Violations are rare and the licensee is usually given an opportunity to make corrections or compliance. Since 1965 investigations by the above agencies have never proceeded to the complaint stage.²⁴⁶

240. § 161.272, RSMo 1969.

241. Mo. Laws 1965, at 277, § 12.

242. *Id.* § 11.

243. These provisions do not prevent an agency from expressly exempting itself from the AHC.

244. The following discussion is based on interviews or correspondences with licensees, their attorneys, the commissioners, and the agency members and their counsel. See also APPENDIX Nos. 1 and 2, and Tables 1-5 *infra*.

245. This only applies to independent licensing authorities. The state-controlled and operated agencies are staffed by full time employees.

246. Interview with Lloyd W. Tracy, Secretary of the Board of Pharmacy, in Jefferson City, Mo., July 22, 1971; Interview with Lawson E. Quinn, Secretary and Treasurer of Board of Barber Examiners, in Jefferson City, Mo., July 22, 1971. Letter from Jean Casey, Board of Cosmetology to Missouri Law Review, Aug. 30, 1971.

If an agency has no full-time investigators, as is the case with several, there are alternative modes of operation. First, one or more of the board members may personally investigate the allegation, or hire someone (an attorney for example) to investigate.²⁴⁷ Another option is to require a formal notarized statement from the complainant.²⁴⁸ (This practice leaves the weeding out of specious complaints to the AHC). A third alternative, extensively used until 1970, when it was declared illegal, was the "investigative hearing."²⁴⁹

Whether the board makes its own investigation or employs investigators, the procedure is similar to that used in a criminal action. There are several distinct steps taken before formal action is brought, and at each step a decision is made whether to proceed further. Complaints about a licensee's illegal activity originate from various sources—third parties (often clients), other governmental agencies (e.g., prosecuting attorneys), newspapers, or the board's own investigator. Correspondence with available witnesses is first used to clarify the facts. If in the executive member's opinion the answers support a suspicion of illegal activity, an employee of the board or agency will be detailed as an investigator to obtain further evidence. Most complaints never reach this stage because they are licensee-client misunderstandings which are easily resolved by letter, phone call, or conference between the parties. If such approaches yield no results, however, or if the allegations are more serious, an investigator may interview witnesses and collect evidence. He may contact the licensee, although this is not the usual practice.²⁵⁰ The investigator's final report is referred to the executive member, who may again decide that the allegations either have no merit or are so difficult to prove that the case must be closed. If his decision is otherwise, the report is channeled on to the board as a whole. The board may meet with the licensee in a further attempt to settle the complaint.²⁵¹ The board will decide whether to file a complaint, based on a majority vote. An affirmative vote will cause the report to be referred to the agency's counsel, who then drafts the complaint unless he is of the view that no case can be made,²⁵² which again will end the matter.

When the time comes to draft a formal complaint the AHC statute comes into effect. Though "no technical forms of pleading are required"²⁵³

247. For example, the Real Estate Commission follows this procedure. Interview with James Flanagan, William Dolan, and Robert Leonard, Real Estate Commissioners, in Columbia, Mo., Aug. 18, 1971.

248. The Real Estate Commission and the Board of Accountancy are examples of Boards following this practice. *Id.*; Interview with Ruth Woodson, Executive Assistant to the Board of Accountancy, in Jefferson City, Mo., Aug. 3, 1971.

249. See text accompanying notes 302-06 *infra*.

250. The licensee is usually aware of the fact that the agency is investigating him. See Table III, question 5, *infra*.

251. In approximately one-half of the cases there is some form of communication between the board and the licensee or his attorney. See Table III, questions 8, 10, *infra*.

252. Most of the agencies' counsel indicated that this did happen occasionally.

253. AHC rule 3.01 (1). See APPENDIX No. 2.

in the complaint, the petitioner-agency "must set forth in brief form the specific act or acts of misconduct made against a licensee,"²⁵⁴ and further specify the following:

- (a) What license or licenses have been issued to respondent and whether they are currently in good standing.
- (b) The statutes or regulations which the petitioner believes have been violated by the respondent.
- (c) Sufficient facts adequately to appraise respondent of the charges being made against him in order that he may properly defend himself at the hearing.²⁵⁵

After the complaint is filed with the commissioner, the commissioner serves a copy of the complaint upon the licensee, along with a notice of hearing. Assuming that the licensee wishes to contest the allegations,²⁵⁶ and consults an attorney,²⁵⁷ he has 10 days to file an answer. Since the proceedings are similar to civil cases, discovery is the next stage. Any of the parties may use depositions or interrogatories, as in a civil suit,²⁵⁸ and they are often used if there are complicated issues of fact. Subpoenas *ad testificandum* and subpoenas *duces tecum* are also available to the parties.

A pre-hearing conference may be held before or after discovery. Although the commissioner may require a pre-hearing conference on his own motion, in practice one is held only at the request of one or more of the parties.²⁵⁹ The commissioners have encouraged the use of pre-hearing conferences and they are frequently employed.²⁶⁰ The conference has two purposes, the first being an informal settlement of the dispute.²⁶¹ The survey of licensees' attorneys indicates that if a settlement and dismissal are to occur, such a resolution of the controversy would most likely occur at this stage of the proceedings.²⁶² If the parties cannot agree, the second goal of the conference becomes important. This goal is to insure that there may be an orderly and efficient hearing, and the goal is sought to be accomplished by having the parties discuss the following topics:

254. AHC rule 3.01 (2).

255. *Id.*

256. In 30% (26 out of 85) of the cases reaching a final decision, the licensee either did not contest the complaint or did not appear at the hearing.

257. In 46 of the 204 cases considered, the licensee was not represented by counsel.

258. AHC rule 6.00.

259. Interview with AHC Commissioner John W. Carter, in Jefferson City, Mo., Aug. 25, 1971.

260. Two-thirds of the attorneys who responded to the survey indicated that a pre-hearing conference was held. See Table III, question 11 *infra*.

261. According to the survey, an attempt at settlement was made in two out of every three cases. See Table III, question 12 *infra*.

262. See Table III, question 16 *infra*. For the reasons for these dismissals, see Table III, question 17 *infra*. The settlement may be in the form of a consent order. See AHC Rule 7.02 (5). The licensee may also waive the hearing. See AHC Rule 11.

- (1) simplification of the issues;
- (2) necessity or desirability of amendments to the pleadings;
- (3) possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) limitation of the number of expert and character witnesses;
- (5) Whatever pre-hearing motions have been filed in the case;
- (6) manner and conditions upon which depositions can be taken;
- (7) anticipated length of the hearing and the time and location of conducting such a hearing;
- (8) such other matters as may aid in the disposition of the action.²⁶³

The next stage is the hearing itself and it must be held at least 20 days after notice, unless the parties agree otherwise. If discovery proceedings are used a continuance is granted as a matter of course. The hearing is conducted under rules established by the Missouri APA and the AHC rules. The place of the hearing is determined by the commissioner and is usually in a courtroom in the area of the respondent's and witnesses' residence. Witnesses testify and are cross-examined under oath, and the hearing is transcribed. Approximately 75% of the hearings are concluded within one day.²⁶⁴

Oral argument may be allowed at the close of the evidence, but written briefs are usually used instead.²⁶⁵ The petitioner is granted 30 days to file such briefs; the respondent is granted an extra week or two. The briefs, along with the transcript and exhibits, provide the material upon which the commissioner decides the case. The findings of fact and conclusions of law, which are usually handed down within two weeks, may include a recommendation as to punishment, if the respondent is found "guilty." The case is dismissed if the respondent is found "not guilty."

If the decision is in the agency's favor, the agency must hold a hearing on punishment within 30 days unless the parties have agreed that the recommendation of the commissioner be binding. The licensee may appear at the hearing before the board and offer evidence relevant to the disciplinary action. Such evidence may relate to extenuating or mitigating circumstances, or may include testimony of character witnesses. The agency itself may offer evidence but usually refrains from doing so as it is already familiar with the facts from its involvement in the pre-complaint proceedings. Once the disciplinary order is entered, there is a "final order" which is appealable under the terms of the Missouri APA.

If licensee or applicant is the person aggrieved and wishes to object there are minor differences in procedure. A licensee or applicant may bring an action when the agency

263. AHC rule 5.01 (1)-(8).

264. See Table III, question 15 *infra*.

265. Oral argument has been used in 20% of the cases; written briefs are filed in one-half of the cases. See Table III, questions 18-20, *infra*. This represents a marked increase in comparison with the pre-AHC use of oral and written argument. See text accompanying note 190 *supra*.

- (1) refuses to examine the applicant;
- (2) refuses to issue a license when the applicant has passed the examination or is entitled to licensure without examination or;
- (3) refuses to renew a license.²⁶⁶

The complaint must be brought within 30 days of any such refusal and must allege the grounds upon which the applicant believes he is entitled to the examination or license.²⁶⁷ If the licensee files the complaint without the benefit of counsel these rules are liberally construed on his behalf.²⁶⁸

Discovery, the pre-hearing conference, and the hearing are conducted as stated above. The only other changes are in the findings of fact and conclusions of law, which, if in the petitioner-licensee's favor, must state an "appropriate order to accomplish such examination or licensure or renewal."²⁶⁹ Additionally, the agency has the right to judicial review if it is aggrieved by a final decision, a prerogative not required under pre-AHC law.

The foregoing description of the typical procedures employed by the AHC provides a foundation for a discussion of the interrelation of the parties with the AHC and their views on its success or failure.

D. *The AHC—Alternative or Answer?*

1. The Agencies' Opinions

The agencies under the jurisdiction of the AHC cover a diverse range of activities, from medical doctors and securities brokers to automobile inspectors and meat processors. The opinions expressed by the agencies on the value and effectiveness of the AHC extend over an equally broad spectrum. The views of agency members, employees, and attorneys varied from those highly laudatory of its success to those extremely critical of its shortcomings.

The criticisms will be detailed first. One of the most frequent attacks on the Commission is that it has installed one man in the position of a "czar" with a "life-or-death stranglehold" over the agency's function, with the result that the power of the agency to control its licensees has been usurped.²⁷⁰ This argument first appeared while the act was being debated in the legislature²⁷¹ and has not abated during the six years which have elapsed since passage. However, these arguments appear to overlook certain facts. The act did not strip the agencies of their control; the agencies retain all of their traditional functions save one—that of trier of

266. § 161.302, RSMo 1969.

267. *Id.*; AHC rule 3.01 (3).

268. AHC rule 3.01 (5). Thus, in one case a letter from the licensee to the AHC sufficed as the complaint.

269. § 161.302, RSMo 1969; AHC rule 8.01 (1).

270. Letter from Lt. Gov. Thomas F. Eagleton to Gov. Warren E. Hearnes, July 14, 1965.

271. *Id.*

fact in adjudicative disputes. Investigation, prosecution, and punishment²⁷² are powers still solely within the agencies' jurisdiction. The extent to which the agencies may employ their various powers is also within their discretion. The "agencies can still investigate to 'beat hell'; they can accuse whomever they want."²⁷³ Only when the licensee is entitled to a hearing does the responsibility shift to the AHC. For the licensee to be found in violation of any particular statute the prosecuting agency must, of course, meet its burden of proof. However, this burden is technically no different today than it was before 1965.

The agencies have also retained "authority" over their licensees in other important respects. The power to promulgate rules is but one example. Another example is well illustrated by the recent case of *Bloom v. Board for Architects, Professional Engineers & Land Surveyors*.²⁷⁴ In that case the Board refused to grant Bloom, a Nebraska certified architect, a reciprocal license. Bloom brought an action before the AHC, and the commissioner ordered the Board to grant the license on the ground that the Board's refusal was arbitrary, capricious, and in excess of the Board's statutory authority.²⁷⁵ The St. Louis Court of Appeals affirmed the circuit court's reversal of the AHC, holding that, in the absence of any agreement for reciprocity between Missouri and Nebraska, the Board had the sole power to determine whether Bloom met the educational and experience standards set by the statute.²⁷⁶ This case illustrates the fact that the boards retain all substantive powers granted under their respective enabling acts, and that such powers are unaffected by the AHC statute.

A criticism related to the contention that the AHC statute "stripped the agencies of their power" is that a "czar" cannot possibly "govern" 19 different areas of conduct with any kind of effectiveness. The argument that the commissioner cannot thoroughly familiarize himself with the manners of each agency's law, and therefore cannot make responsible decisions, was also frequently asserted in 1965,²⁷⁷ and is still made today.

One man not a member of our profession cannot be aware of our problems. We feel that no one man is qualified to sit in judgment over [19] boards. [The commissioner] is not technically qualified or informed.

Commissioners past and present agree that this criticism is groundless:²⁷⁸

272. § 161.292, RSMo 1969. Based on a comparison of the punishment imposed by the agencies, which follow the AHC's recommendation approximately 70% of the time. When an agency has not followed the recommendation, the punishment imposed has been more severe in approximately 50% of the cases and less severe in the remaining cases.

273. Letter, *supra* note 270.

274. 474 S.W.2d 861 (St. L. Mo. App. 1971).

275. *Id.* at 863.

276. *Id.* at 864-65. *But see* note 230 *supra*.

277. Letter, *supra* note 270.

278. Interview with AHC Commissioner John W. Carter, in Jefferson City, Mo., Aug. 25, 1971; Interview with former AHC Commissioner Eugene Bushman, in Jefferson City, Mo., Aug. 25, 1971.

[A]ny attorney, with above average intelligence, willing to work, can read the complaint, hear the evidence and testimony of witnesses, read the briefs and research the cases in the briefs and then write a sound [decision].²⁷⁹

Since the questions which the AHC typically decide concern whether the licensee has complied with the law, as set out in the agency's statute and rules, the needed expertise is simply the legal ability to construe and interpret these requirements. Counsel for the agency and for the licensee exhibit a similar expertise when initiating or defending an action, yet no one has questioned the ability of these persons to understand the law.

Moreover, the issues are frequently neither complicated nor peculiar to any one particular agency. Approximately one-third of all revocation proceedings involve three characteristics or activities proscribed by each licensing law—drug addiction or alcoholism, conviction of a felony, and lack of good moral character.²⁸⁰ These questions are basically ones of fact. While other cases have involved substantial problems of interpretation or construction of statutory terms, none of the commissioners expressed any difficulty in understanding the issues, although some indicated that substantial research has sometimes been necessary. Former Commissioner Bushman answered the "no expertise" criticism by saying "I was bored after three years. The job had ceased to be challenging." It should also be noted that while the most difficult and complicated cases have arisen in the real estate and insurance fields, neither the Real Estate Commission nor the Division of Insurance ever expressed any doubts about the commissioner's ability to understand the issues to make a reasonable decision.

Interrelated with this last criticism is the belief of some agency members that since the commissioner is not an expert, he cannot render a "fair decision":

The hearing commissioner does not understand our profession so [he] is usually very unfair in his rulings.

.....

One man not a member of our profession cannot be aware of our problems, and cannot render a fair decision.

There has also been general dissatisfaction by some boards with the AHC's rulings:

He has required the registration of [applicants] unqualified by law.

.....

The AHC usurps the board's rightful authority to determine [questions of violations].

.....

279. Interview with AHC Commissioner John W. Carter, in Jefferson City, Mo., Aug. 25, 1971.

280. Based on the survey of licensees' attorneys (see Table III *infra*) and the AHC case records.

It did not seem that the commissioner tried to understand the board's position.

By bringing or defending the action, the agency *ex necessitate* has concluded that its position is correct. Any failure to win will inevitably cause some understandable dissatisfaction.²⁸¹ Nevertheless, the decision records do not indicate that the AHC has rejected agency judgment to any great extent. In fact, the agencies have been remarkably successful. In revocation proceedings, for example, the petitioning boards have been victorious almost 90% of the time, having lost only 8 of 70 cases going to final decision.²⁸² Seven of these eight losses have involved the Real Estate Commission (four losses) and the Division of Insurance (three losses). But these are two agencies which now express general approval of the AHC,²⁸³ despite disagreements in the past. If one adds to the 70 cases going to final decision those disputes settled by consent or without a formal opinion (*i.e.*, dismissed at some point before final decision with the agreement of the parties) the boards' views have prevailed in about 73% (93 out of 126) of the total proceedings initiated by the boards.²⁸⁴

The record of the agencies when the licensee is the petitioner is not as impressive. The licensee (or applicant) has prevailed (either by decision or settlement) in 21 out of 36 cases.²⁸⁵ From the survey and interviews this statistic appears to explain some of the dissatisfactions with the AHC expressed by board and agency members. The board or agency members believe that they should have the right to make the determination whether, for example, an applicant has "good moral character." Without an unreviewable preogative on this issue, the board or agency members believe that they cannot upgrade their own standards.²⁸⁶ Thus, the criticisms suggest a dissatisfaction with the basic policy of the AHC statute—to limit the preemptive power of the boards to determine questions of fact and law—rather than any dissatisfaction with the way in which the AHC has actually conducted itself.

281. Ten out of 23 board members responding to a survey said they were not satisfied with the decisions of the AHC. See Table IV *infra*. Some of this dissatisfaction may have been caused by several cases in which the AHC was reversed on appeal. Nineteen cases have been appealed; 4 cases are pending, 3 cases have been dismissed on appeal; 1 case was affirmed in part and reversed in part; 6 cases have been affirmed; and 5 cases have been reversed. All of the reversals have been on questions of law.

282. See Table I *infra*.

283. Interview with James Flanagan, William Dolan, and Robert Leonard, Real Estate Commissioners, in Columbia, Mo., Aug. 18, 1971; Interview with Michael Pfaff, Counsel for the Division of Insurance, in Jefferson City, Mo., Aug. 17, 1971.

284. See Table I *infra*. Because most of the actions brought against the Superintendent of the Missouri Highway Patrol by the owner of a motor vehicle inspection station or an inspector (mechanic) result in consent orders (licensee agrees that he violated the law; the Patrol agrees to reissue the license immediately or by a specified date), the statistics on these cases have been omitted.

285. See Table II *infra*.

286. Isn't it questionable whether a licensing agency can upgrade standards without a change in the statutes or rules?

The attorneys for the agencies or boards are more favorably disposed towards the AHC than the members. Although agency counsel frequently disagree with AHC decisions, they nevertheless agree that a proceeding before an independent trier of fact is essential for due process. In addition, they agree that the hearings are conducted in a fair manner, and that the agency usually gets a "fair shake." Counsels' opinions of the commissioners, past and present, were also complimentary. The commissioners, in their words, were "scrupulously fair" and "extremely conscientious" in discharging the functions of a quasi-judicial officer.

It should be pointed out that some of the attorneys for the agencies agreed that it would be desirable to revert to the pre-AHC procedure under which the agency or board held its own hearing.²⁸⁷ This thought, based on the genuine belief that the agency or board can render a better decision than the AHC, has manifested itself throughout the last six years in various lobbying attempts and avoidance schemes.

Several agencies fought hard to defeat or at least to eliminate themselves from the AHC statute from the very moment it was first introduced in the Senate.²⁸⁸ Despite legislative rejection of the exemption petitions, lobbying efforts to restrict the AHC have continued. In 1967, the Division of Insurance attempted to have itself exempted from the Commission's jurisdiction. The Division urged that, as an agency staffed with professionals (as opposed to most other independent boards) it was as well-equipped as the AHC to handle licensing disputes involving insurance agents, brokers and companies.²⁸⁹ A compromise which eliminated only the licensing of insurance companies from AHC jurisdiction was reached only when the supporters of the AHC threatened to kill the entire bill which included other changes unrelated to the AHC.²⁹⁰ Other attempts by agencies to exempt themselves from the AHC have also been made.²⁹¹ One such attempt may have succeeded. A 1967 revision of the Board of Accountancy statute re-enacted the pre-1965 provisions which allow the Board to hold its own hearings, without mentioning the AHC,²⁹² as other amendments have.²⁹³ While the form of this amendment may have been the product of oversight rather than an overt plan, the Board of Accountancy may not be technically subject to the AHC, although it has, in fact, never challenged the AHC's jurisdiction.

The original bill did not explicitly repeal provisions of other statutes conflicting with the AHC bill, because the drafters decided that this was

287. According to the survey of board members there is a 50-50 split on this question. See Table IV *infra*.

288. See pt. III, § B (2) of this article.

289. Interview with former AHC Commissioner Eugene Bushman, in Jefferson City, Mo., Aug. 25, 1971.

290. *Id.*

291. *Id.*

292. See § 326.130, RSMo 1969.

293. See, e.g., § 332.341, RSMo 1969.

an impossible task.²⁹⁴ Subsequent amendments to licensing statutes have not always helped. One section now provides:

Notwithstanding *any other provision* of this section [an applicant] shall not be entitled to a certificate . . . if the *board* finds . . . that the applicant is not a person of good moral character.²⁹⁵

Does this mean the board's determination is conclusive? Is this an attempt to avoid the AHC? Again, it is unclear.

Other avoidance schemes have been more obvious. A 1967 decision of the AHC irritated the Division of Insurance. After the Division's attempt to exempt itself from the AHC failed, the Division began a practice of informal circumvention of the AHC. An insurance agent must have a contract with an insurance company before he can be licensed, and this contract may be cancelled by either party at any time. The Division, after investigating a licensee and establishing grounds for a complaint, would inform the licensee's company of the allegations. The company would take the "hint" and cancel the agent's contract, thereby causing the agent's license automatically to lapse. While this practice has since been discontinued, the abrupt drop-off in the number of cases filed by the Division after 1967 supports the assertion that this practice was employed.²⁹⁶

Another practice which can circumvent the AHC is that of informal settlement. Formal settlements are encouraged and occur quite frequently within the AHC in the form of consent orders and dismissals with prejudice. In such a case, the licensee may admit the allegations of the complaint in exchange for a promise of lenient punishment. This process is similar to plea-bargaining and can be beneficial to both parties. Each saves time and money without substantial sacrifice of purpose.²⁹⁷ With the high percentage of favorable decisions won by the agencies before the AHC, settlements are naturally becoming more frequent. However, it should be noted that informal settlements are not always either visible to or subject to the approval of the AHC. They are handled entirely by the agency. In the typical case, the licensee agrees to surrender his license in exchange for

294. Interview with John Downs, in St. Joseph, Mo., Aug. 13, 1971. In retrospect, the drafters felt that explicitly repealing the conflicting sections would have solved many problems.

295. § 327.331 (5), RSMo 1969 (emphasis added).

296. Following are the number of cases filed per year by the Division of Insurance and the percentage they comprise of the total filed that year:

Year	Number Filed	% of Total
1966	22	53.6
1967	9	27.3
1968	3	14.2
1969	1	2.3
1970	1	2.3
1971 (through Sept.)	5	27.7

297. The survey of licensees' attorneys (Table III) included a question on the fee charged to the licensee. In 22 cases the fee was greater than \$600; most of these cases were contested.

the opportunity to reapply for it at a latter date. Whether or not informal settlements are desirable (e.g., the goal of "deterrence" is obviously sacrificed because with the informal settlement, no public record of the action is generated), they are frequently used.

A practice no longer employed is refusing to renew the licensee's permit rather than to seek revocation. Most licensing statutes require the licensee to "renew" his license annually.²⁹⁸ In the past, if the agency had received complaints about a licensee, it could avoid the time and expense of prosecuting a complaint by refusing to renew the license. The licensee often conceded without a fight, either because he could not afford to contest the action, or did not think he would have a chance if he did contest.²⁹⁹ The frequency of this practice is unknown, although a number of agencies conceded that they had used it.

The legality of refusing to renew a license solely on the basis of unsupported allegations of illegal activity was first questioned in the 1970 AHC case of *Graham v. Real Estate Commission*.³⁰⁰ The Real Estate Commission had denied petitioner's request for renewal of his license because several of his customers had complained of certain of his activities. The petitioner filed a complaint with the AHC, contending that the Real Estate Commission had no discretion not to renew his license once the statutory requirements (e.g., payment of a fee) had been met. The AHC agreed, finding that the section in question³⁰¹ required renewal upon proper application, because the legislature could hardly have intended that the Real Estate Commission make a yearly re-examination of the credentials of every broker and salesman. The *Graham* decision was not appealed because the same issue was before the Kansas City Court of Appeals in the case of *State ex rel. American Institute of Marketing Systems v. Real Estate Commission*³⁰² on a writ of prohibition.

The American Institute of Marketing Systems (AIMS) had applied for the annual renewal of its license, and, instead of allowing or refusing renewal, the Real Estate Commission held investigative hearings to determine if its application should be denied. Several hearings were held before the writ was brought. AIMS argued that the Commission had no statutory power to hold investigative hearings or to refuse AIMS' request for renewal. The Kansas City Court of Appeals agreed on both points.³⁰³ The court

298. See, e.g., § 331.050, RSMo 1969. The licensee still technically has his license since it has not been suspended or revoked. The license "lapses" until the licensee obtains his yearly renewal.

299. Robert Ginzburg was one licensee who did contest the refusal to renew his license. See *Ginzburg v. Division of Insurance*, AHC No. 70017 (June 17, 1971). Mr. Ginzburg did indicate that he knew of several insurance agents who did not contest the refusal to renew for the reasons stated. Interview with Robert Ginzburg, in St. Louis, Mo., Aug. 20, 1971.

300. AHC No. 70001 (June 29, 1970).

301. § 339.060, RSMo 1969.

302. 461 S.W.2d 902 (K.C. Mo. App. 1970).

303. *Id.* at 908.

decided that the AHC statute had stripped the agencies of all powers to hold hearings, that the Real Estate Commission could only refuse to renew a license for a "reason or condition which might warrant the refusal of the granting of a license,"³⁰⁴ and that allegations alone were not such a reason or condition.³⁰⁵ The Real Estate Commission's statutory obligation was to renew the license irrespective of the allegations, and thereafter to initiate proper revocation proceedings.

After the decision in the *AIMS* case, agency or board counsel advised against refusing to renew licenses. Some agencies indicated, however, during interviews, that they had not received such advice. The members of one agency, although admitting they knew of the *AIMS* case, refused to answer the question whether they were still following the practices condemned in that decision.³⁰⁶

When it is remembered that there is a considerable body of administrative opinion hostile to the concept of the Administrative Hearing Commission, the decision in *AIMS* is particularly significant. The position of the AHC as the trier of fact was strengthened because the licensing agencies are no longer permitted to bypass the AHC by treating a refusal to renew as an option within their discretion and not subject to the AHC. The licensing agencies cannot hold their own "investigative" hearings to determine the sufficiency of allegations of fact bearing upon the status of a licensee. Instead of authorizing two proceedings, with the attendant time and expense (an agency investigation and hearing on the renewal issue, followed by an AHC proceeding dealing with a failure to issue), the licensee and the board have only one proceeding before the AHC—a proceeding at which all issues can be resolved and disposed.

As indicated earlier, not all of the agencies have disagreed with the concept of having an independent trier of fact. Several agencies supported the idea from its inception and an increasing number are recognizing its value. For example, the Board of Registration for the Healing Arts, after losing the *Lischner* case on appeal, supported the idea of having hearings "conducted by someone . . . legally trained, a judge or a licensing commissioner."³⁰⁷ While other agencies have complained that the AHC device reduces their capacity to control illegal conduct, the record of the Board of Registration for the Healing Arts indicates how effective an agency can be. The Board has been involved in 33 disputes and has prevailed, either through favorable decision or settlement, in every instance.³⁰⁸ This remarkable record suggests that an agency retains substantial power, if, and only if, it exercises its investigatory and prosecutorial powers in a diligent and responsible way. The reputation for integrity which the

304. § 339.060, RSMo 1969.

305. 461 S.W.2d at 906.

306. The survey of board members indicated that this practice is still used. See Table IV *infra*.

307. St. Louis Post-Dispatch, Dec. 4, 1964, at 1A, col. 1.

308. See Table I *infra*.

Board has thereby acquired has the beneficial side effect of encouraging informal settlements.³⁰⁹

Another body which appears pleased to be relieved of the obligation to hear and decide complaints is the Real Estate Commission. The present commissioners of this agency have observed that the holding of adjudicative hearings is unduly time-consuming.³¹⁰ With the AHC assuming this burden, the commissioners have more time for their professional responsibilities as well as more time for their other duties as commissioners. The Real Estate Commissioners also stated that the AHC has not frustrated the policies of the licensing laws but, rather, has had just the opposite effect by allowing those policies to be more effectively achieved. Under the previous agency-run proceedings, the Real Estate Commissioners believed that an agency was naturally reluctant to revoke a license because no independent evidentiary hearing was available to establish that a licensee had violated the law. As a result it was asserted that the agency was inclined to be unduly lenient in punishing the licensee. Under the AHC, however, the commissioners of the Real Estate Commission "have no reluctance whatsoever about revoking a license, if a man has violated the law according to the Commissioner [of the AHC]."³¹¹ The conclusion of these commissioners was: "We like it and we think it is great."³¹²

2. The Licensees' Opinions

The prevailing opinion of those responsible for the establishment of the AHC was that the licensees would be the primary beneficiaries. It was intended that due process for the licensee would be a reality rather than a dream. In the judgment of both the licensees and their attorneys, this goal has been achieved. Both groups were overwhelmingly complimentary of the theory of the AHC as well as the way in which it has worked out in practice.

Looking at the record alone, the licensees (and applicants) have been triumphant in 33% of the actions. While only 20 final decisions³¹³ have been in their favor, 34 other complaints have been settled or dismissed to the individual's benefit. This modest won-lost ratio may not look impressive at first glance, but when it is considered that each of the 20 outright victories occurred in a contested case where, a fortiori, a victory at the hearing level would have been very unlikely before 1965, the record becomes impressive, indeed. In addition, many of the favorable settlements and dismissals were undoubtedly influenced by the conclusion that actions adverse to the licensee would not be upheld by an independent trier of fact (the AHC).

309. Interview with Stephan.

310. Interview with James Flanagan, Robert Leonard, and William Dolan, Real Estate Commissioners, in Columbia, Mo., Aug. 18, 1971.

311. *Id.*

312. *Id.*

313. See Tables I & II *infra*. Actually, 23 decisions have been in the licensees' favor, but 3 of these were reversed on appeal.

However, case statistics, by themselves, do not indicate that the objective of fair and impartial hearings has been attained. The survey of licensees' attorneys gives a clearer picture.³¹⁴ There follow four of the questions asked in the survey of licensees' attorneys, together with the responses:

In your opinion was the decision a just one?

38—Yes

6—No

Were you satisfied with the way the proceedings were conducted?

51—Yes

4—No

Would you have preferred a court trial to the AHC hearing?

12—Yes

51—No

Were the proceedings preferable to a proceeding before the agency (as before the creation of the AHC)?

54—Yes

4—No

The foregoing statistics speak for themselves. The comments made in the survey further amplify the attorneys' satisfaction with the conduct of hearings before the AHC:

Commission was extremely fair, helpful and cooperative.

.....

Commissioner acted with complete fairness and impartiality.

.....

I cannot speak too highly of the intelligent and judicious manner in which the commissioner handled the case

.....

AHC [provides] a quick and just way to have a hearing.

The questionnaire on suggested changes in the AHC³¹⁵ throws further light on the attorneys' opinions of the AHC. Almost 80% of the attorneys responding to the survey felt that the AHC's procedure should cover liquor licensees, and over 60% indicated that the AHC should be expanded to include general areas of administrative law other than licensing.³¹⁶ These recommendations appear to reflect the attorneys' satisfaction with the concept and workability of the AHC.

The licensees interviewed concurred in their attorneys' approval of the Commission, although many were critical of their own licensing agencies. One licensee first commented that the agencies "don't give a damn about the welfare of the public if the public's welfare interferes with their own selfish interests," but then stated that the hearing was conducted

314. See Table III *infra*.

315. See Table I *infra*.

316. Interestingly, only about 20% of the attorneys thought it would be a good idea to give the AHC jurisdiction over bar admissions and disciplinary actions. Attorneys are different—aren't they?

"very fairly." Another individual, after saying "nobody could have got a fairer hearing," followed with the left-handed compliment that the AHC "isn't a JP court."³¹⁷

This impressive support is in contrast with the agencies' divergent opinions on the effectiveness of the Commission. But, from the beginning, it was never expected that the agencies would unqualifiedly back the change, or that they would be as enthusiastic as the licensees. Still, this predicted endorsement by the licensees must be given great weight in answering the question: Is the AHC a mere "alternative" or has it proved to be a genuine "answer" to the deficiencies in the licensing process?

3. The AHC Commissioners' Views

A licensee or applicant typically appears before the agency only once. The agencies appear more often, but, considered individually, their involvement is only sporadic. The commissioner is himself the only one who is associated with the AHC on a continuing day to day basis. Any discussion of Missouri's AHC procedures must, therefore, consider the commissioners' views on the effectiveness of the office, as well as how they view the commissioner's role in the entire administrative structure.

To date three individuals have filled the role of commissioner, two as full-time commissioners and one as an acting commissioner.³¹⁸ The commissioner, according to statute, must be an attorney, but he is prohibited from practicing law during his six-year term of office. The governor appoints the commissioner, with the advice and consent of the Senate and also appoints acting commissioners, if necessary. This latter provision, which has already been used to fill an unexpired term, would apparently allow the temporary appointment of an acting commissioner if the commissioner was, for example, to disqualify himself because of an interest or connection with a party.³¹⁹

The commissioner's duties as a quasi-judicial officer are apparent from a reading of the statute. Briefly, his tasks are to serve the complaint and

317. Somewhat surprisingly, a number of applicants and licensees were aware of the *Lischner* case and the basic reason for the establishment of AHC, i.e., the prosecutor-judge-jury problem. But this awareness apparently comes from being involved in a case, since the licensees also felt that their counterparts were generally unacquainted with the existence of the AHC. From interviewing doctors, dentists, nurses, insurance agents, barbers, real estate agents, and pharmacists who had never been involved in an action before the AHC, this writer would have to agree that licensees are unaware of the AHC. None of the persons interviewed could identify the AHC.

318. Eugene Bushman took office as the first Commissioner in November, 1965. He resigned in January, 1969, and Paul Williams was appointed as acting Commissioner. John Carter is the present Commissioner. He was appointed in February, 1970.

319. This provision would thus eliminate the doctrine of necessity, which was applicable to agency-conducted hearings. This doctrine states that if only one tribunal has jurisdiction over a case, the members of the tribunal cannot be disqualified unless the law provides for substitution of personnel. See, e.g., *Brinkley v. Hassig*, 83 F.2d 351 (10th Cir. 1936).

answer on the parties, set the date and place for the hearing, conduct a pre-hearing conference (if one is requested), rule on any pretrial motions, preside over hearing and oral argument, write findings of fact and conclusions of law, certify the record if judicial review is sought, and publish rules of procedure. These responsibilities are similar to those of a judge sitting without a jury.

The commissioner's most important responsibilities, however, are to preside at the hearing and to write the opinions. According to the present Commissioner, the latter is the most time-consuming and taxing duty of the two.³²⁰ While the opinions in uncontested cases are short and pro forma, the findings of fact and conclusions of law can become quite lengthy and difficult to write in actions involving hotly disputed questions of fact or law. For example, in one case there were 10 days of hearings, hundreds of exhibits, and numerous witnesses. In addition to reading the detailed briefs that were filed, the Commissioner had to sift through a record of over 1300 pages before reaching his decision.³²¹

The workload of the Commission, which was low in the first years, has been steadily increasing.³²² Cases are presently being filed at the rate of over 50 per year (between 20 and 25 cases may be pending at any one time), and decisions are being handed down at the rate of approximately one every two weeks.³²³ While a number of agency officials and attorneys thought there was too little work for the Commission, the present Commissioner maintains that in view of the rate at which he is handing down

320. Interview with AHC Commissioner John W. Carter, in Jefferson City, Mo., Aug. 25, 1971.

321. This particular case also proved that licensing cases can be expensive. The licensee's attorneys' fees were \$21,500.

322. Following is the number of cases filed per year:

(Nov.-Dec.)	1965	—	2
	1966	—	39
	1967	—	33
	1968	—	21
	1969	—	43
	1970	—	43
(Jan.-Sept.)	1971	—	23
	<u>Total</u>		<u>204</u>

The drop-off in cases filed in 1967 and 1968 was caused by the Division of Insurance's avoidance of the AHC. See note 296 *supra*. The increase in the last two years is also attributable to the addition of the Missouri State Highway Patrol to the AHC's jurisdiction. See note 284 *supra*. The Board of Nursing Home Administrators, the Commission of the Department of Agriculture (licensing of meat processors), and the Commissioner of Securities (licensing of securities brokers and dealers) have also been placed in the AHC's realm, but none of these agencies have as yet been involved in an action.

323. Eighty-eight cases have resulted in a decision, 59 of these being contested cases where the licensee appeared and actively defended the action. Seventy-three cases have been dismissed. The 20 cases involving the Highway Patrol are not included in the figures, since 17 of the 20 cases have ended in consent orders. See note 284 *supra*. In the 7 months from September, 1971, to March, 1972, the AHC handed down 21 decisions.

decisions and the time involved in presiding over hearings, an additional commissioner may well be necessary to handle the job in the future.

The commissioners all view themselves as quasi-judicial officers. They agree that one of their prime duties is to move the docket along and make prompt decisions. While commissioners have frequently been praised for their ability to keep the docket current,³²⁴ a recurring criticism is that cases take too long from start to finish. Some of this delay is required by statute (*e.g.*, 10 days to answer a complaint), and, after analyzing the cases, the balance of the delay appears to be unavoidable if justice is to be done. If the case is contested, it averages almost six months from beginning to end.³²⁵ This time span is not unreasonable because discovery procedures alone may push the hearing back weeks or months. Also, the parties have several weeks to file briefs after the record is transcribed (which often takes a month) and the commissioner needs some time to write the decision. But if a decision is needed in a hurry, as where a vehicle safety inspector seeks renewal of a license, it is reached quickly—in an average of only 37 days. The criticism of the delay in contested cases stems from the worry that unqualified licensees may continue to violate the law while the case is pending. According to attorneys familiar with the pre-1965 procedures, decisions were reached more promptly, but the protections of discovery, pre-hearing conferences, transcribed records, and briefs were unknown at that time. The only answer to the criticism of undue delay may be that "due process is a slow process."³²⁶

The commissioners have placed a high degree of emphasis on the importance of the pre-hearing conference, although they have differed in their approaches. While the first Commissioner, Eugene Bushman, preferred actively to participate in the conference, the present Commissioner, Commissioner Carter, does not involve himself in the discussions. He believes that he should hear the evidence at the hearing and not before. Regardless of the differences in attitudes between these two Commissioners,

324. As a result of this effort, three cases have been dismissed for lack of prosecution, though this was not done before numerous attempts were made to hear the case.

325. Time in days from filing of complaint to decision:

Cases reaching a final decision (excluding the Highway Patrol cases)		
85 cases	mean	— 174
	median	— 131
Contested cases reaching a final decision		
59 cases	mean	— 209
	median	— 167
Uncontested cases reaching a final decision		
26 cases	mean	— 94
	median	— 45
Highway Patrol Cases		
20 cases	mean	— 44
	median	— 37

326. Interview with Assistant Attorney General Harvey Tettlebaum, in Jefferson City, Mo., July 9, 1971.

conferences have been used in two out of every three cases.³²⁷ All of the commissioners have encouraged settlement, stipulations, limits on the number of witnesses, and other time-saving devices. They believe that such steps have increased the number of settlements, and, where no settlement is reached, expedite the hearing process.

The argument by the agencies that the commissioner is a "czar" without sufficient expertise to govern 19 different areas of conduct was dismissed by the commissioners as totally without foundation. On the "czar" criticism they all agreed that as a quasi-judicial officer, the commissioner's role is limited to one very narrow slice of the license-regulation spectrum. Each one of the Administrative Hearing Commissioners has apparently made a continuing effort to publicize the Commission's purpose and scope and to make its functions and responsibilities known to the agency and board members subject to its jurisdiction. Apart from this "educational" function, however, none of the commissioners has had any real contact with such boards and agencies. Each commissioner had the impression that if anything, he was isolated from the agencies. In answer to the "no expertise" argument it was pointed out that the cases often involve questions of statutory construction and interpretation, and that attorneys are better qualified to discharge this responsibility than non-lawyers, no matter how well qualified the latter may be in their own callings.

Because the primary goal of the AHC is to place an impartial legal expert in the role of trier of fact, the caliber of the individual selected to fill this post has an effect on the degree to which this goal is attained. In the opinion of the licensees, their attorneys, and the agencies' counsel, the Commission has been fortunate in attracting high quality commissioners.³²⁸ Some licensing board members were critical of the commissioners (e.g., "biased"), but such persons, by and large, were the same persons who were opposed to the AHC in principle. Other interested parties found the hearings well run and the decisions relatively prompt and impartial. In these respects, at least, the goal of the "creators" has been met.

E. *An Answer*

As previously stated, the professional or occupational licensee needs three broad protections: (1) a guarantee to a hearing; (2) a guarantee that the hearing, after being granted, will be fairly conducted and lead to a just result; and (3) the right to effective judicial review.

By statute, the AHC clearly entrenches the first protection—the guarantee to a hearing. The one statutory loophole caused by refusing to renew licenses was closed by the *AIMS* decision. Also, in revocation proceedings, the requirement that the licensee be afforded full notice of the nature of

327. See Table No. I *infra*.

328. The ability of the AHC to continue attracting high quality individuals for this job is seriously affected by the \$13,500 salary. Commissioner Carter indicated that this salary would be a prime factor in forcing him to leave.

the complaint means that the licensee can effectively assert his rights at the hearing.

The creators' primary reason for establishing the AHC was to achieve the second goal of guaranteeing a fair and impartial hearing which will lead to a just result. By providing for an independent, legally trained trier of fact, the statute eliminated ipso facto the most basic of the pre-1965 defects, that of the "classic case"³²⁹ in which the roles of investigator, prosecutor and judge were combined.

Today the "hearing officer" (*i.e.*, the AHC) is fully independent from the agency or board. The commissioner has but one responsibility—properly to exercise the functions of his office as trier of licensing disputes. While it cannot be unequivocally stated that in every case a "just" result is reached, the AHC statute and rules have provided for a predictable, uniform, and consistent administration of the licensing laws. At the same time, the proceedings have become more lawyer-like. The increased use of pre-hearing conferences, discovery devices, transcribed records, written briefs, and oral argument has upgraded the decision-making process. The resulting formality has, at the very least, given the AHC process the aura of impartiality and respectability. The consensus of the parties is that this goal of impartiality has been reached.

The need for the third protection—the right to effective judicial review—should diminish to the extent that the first two protections are strengthened. Nevertheless, transcribed records, correct evidentiary rulings and detailed opinions have improved the chance of more effective judicial review whenever necessary.

The continued vitality of the AHC is basically dependent upon the parties' approval of the Commission's performance. Overall, the parties have been pleased with the Commission's operation. The only dissatisfaction emanates from a few board and agency members, but even these dissatisfactions appear to be on the wane. The argument that certain licensing functions are unique and therefore inapropos for the AHC is contradicted by the experiences of several agencies which have proven that the system can work if the agency wants it to work. The Board of Registration for the Healing Arts has established an impressive record of aggressive regulation and control by utilizing its retained functions of investigation and prosecution with firm but fair policies. The Real Estate Commissioners similarly realize that the AHC has relieved them from a function (hearing

329. There is one exception to this statement that the problems of the "classic" case have been eliminated, as exemplified by the case of *Masters v. Board of Reg. for the Healing Arts*, AHC No. 71019 (Dec. 17, 1971), *rev'd*, No. 25,656 (Cole Cty. Cir. Ct., April 15, 1972). The case involved the revocation of Masters' probation—which had been granted by the Board after a decision by the AHC. The issue in the case was the propriety of the Board's hearing on the revocation of probation. While there is no doubt that the Board had the power to revoke Masters' probation, such an action has all of the inherent defects of agency-conducted hearings, since the Board is the prosecutor, judge and jury.

and deciding cases) for which they are not professionally equipped. There remains, however, some opinion that the various Board or Agency members are more capable of doing the Commission's job even though they are without legal training. Such persons are highly qualified and well-intentioned individuals. They are, for example, fine veterinarians, funeral directors, etc. But they are not necessarily qualified to judge their fellow licensees when the issues are disputed fact or legal questions unrelated to technical competence. Possibly, as one assistant attorney general has suggested, the solution is merely one of educating these board or agency members.³³⁰ If they understand the purposes and advantages of the AHC, they can, as some licensing boards have demonstrated, use the Commission with effective results.

That the AHC is an effective "answer" to the procedural problems previously encountered in agency-conducted hearings is readily apparent. It is much more than a mere alternative. Effective administration of the licensing laws has continued despite the regularizing of the adjudicative aspects of the proceedings by utilizing an independent trier of the facts in licensing disputes. The AHC's success is such that serious consideration should be given to extending its jurisdiction (or at least the principles of the AHC) to cover (1) liquor licensing; (2) bar admissions and disciplinary actions; and (3) other non-licensing administrative proceedings. The AHC has proved that it can work. It is an "answer" that other states may well wish to consider.

330. Interview with Assistant Attorney General Robert Jones, in Jefferson City, Mo., June 9, 1969.

TABLE I

AGENCY	(NO. OF TIMES APPEARING)	AGENCY AS PETITIONER	WON	LOST	DISMISSED W/O PREJUDICE	PENDING	OTHER
RE	(61)	60	10	4	20	15	
INS	(41)	32	14	3	2	2	
HA	(33)	29	26 ²	0			1 ⁴
HP	(20)	0					
EMB	(14)	3	2	0			
DENT	(7)	6	3	1	1 ⁵		
CHIRO	(5)	4	2	0		1	
NUR	(5)	2	1	0		1	
PHARM	(5)	4	1	0			
ACCT	(4)	4	1	0			
OPTOM	(3)	2	1	0			
BARB	(3)	1	1	0			
A, E & LS	(2)	0		0			
COSM	(1)	0					
TOTALS	(204)	147	62	8	24	19	1

Final Result Favorable to agency—93 cases (73%)
 Final Result Not Favorable to agency—33 cases (27%)

Legend

RE	—Real Estate Comm'n	PHARM	—Board of Pharmacy
INS	—Division of Insurance	ACCT	—Board of Accountancy
HA	—Board of Registration for the Healing Arts	OPTOM	—Board of Optometry
HP	—Highway Patrol	BARB	—Board of Barber Examiners
EMB	—Board of Embalming and Funeral Directors	A, E & LS	—Board of Registration for Architects, Professional Engineers and Land Surveyors
DENT	—Dental Board		
CHIRO	—Board of Chiropractic Examiners	COSM	—Board of Cosmetology
NUR	—Board of Nursing		

1. In three cases, the licensee failed to renew his license.
2. One case was reversed on appeal and then dismissed.
3. In two cases, the licensee surrendered his license.
4. Licensee died before decision.
5. Licensee surrendered his license.
6. In two cases, the licensee surrendered his license.

TABLE II

AGENCY	LICENSEE AS PETITIONER	WON	LOST	DISMISSED W/O PREJUDICE	PENDING	OTHER
RE	(61)	0	1	—	—	—
INS	(41)	2	1	5	1	—
HA	(33)	1 ¹	0	1	2	—
HP	(20)	2	1	—	1	16 ³
EMB	(14)	2 ²	0	7 ⁵	—	2 ⁴
DENT	(7)	1	0	—	—	—
CHIRO	(5)	1	0	—	—	—
NUR	(5)	1	0	1	—	1 ⁴
PHARM	(5)	1 ¹	0	—	—	—
ACCT	(4)	—	—	—	—	—
OPTOM	(3)	1	0	—	—	—
BARB	(3)	1 ¹	0	1 ⁵	—	—
A, E & LS	(2)	2	0	—	—	—
COSM	(1)	—	—	1 ⁶	—	—
TOTALS	(204)	15	3	16	4	19

Final Result favorable to licensee⁷—21 cases (57%)

Final Result not favorable to licensee⁷—16 cases (43%)

FOOTNOTES

1. Cases reversed on appeal.
2. One case was reversed in part and affirmed in part.
3. Consent order.
4. Dismissed for lack of prosecution.
5. Cases dismissed after licensee was issued license.
6. Agency allowed applicant to take examination.
7. Excluding consent orders and pending cases.

16. If the case was dismissed, when was it dismissed?		
7 before pre-hearing conference		
19 after pre-hearing conference, but before a full hearing		
5 after a full hearing		
17. Why was the case dismissed, if it was?		
7 consent order		
9 lack of evidence		
6 difficulty of proof		
11 other reasons		
18. Did you file a written brief after hearing?		
23 Yes	26	No
19. Did the petitioner file a written brief?		
24 Yes	24	No
20. Did you have oral argument after hearing?		
10 Yes	39	No
21. Did the agency hold a hearing on punishment?		
12 Yes	7	No
22. Was the punishment imposed?		
12 as recommended?		
4 less severe than recommended?		
2 more severe than recommended?		
23. In your opinion, was the decision a just one?		
38 Yes	6	No
24. Approximately, what was the fee you charged to handle the case?		
13 \$0-200		
15 \$200-400		
8 \$400-600		
22 more than \$600		
25. Were you satisfied with the way the proceedings were conducted?		
51 Yes	4	No
26. Would you have preferred a court trial to the AHC hearing?		
12 Yes	51	No
27. Was the proceeding preferable to a proceeding before the agency (as before the creation of the AHC)?		
54 Yes	4	No

TABLE IV
SURVEY OF LICENSING BOARD MEMBERS*

	Yes	No
1. Are the licensees under your board's jurisdiction generally aware of the existence and procedures of the AHC?	14	11
2. Would the board prefer to hold its own hearings as to revocation or suspension of licenses without having to resort to the AHC?	12	13
3. Does the board hold investigative hearings?	20	4
4. Does the board ever refuse to renew a license?	16	9
If so, is the licensee advised of his opportunity to appear before the AHC?	15	1
5. Would the board prefer to have the AHC decide punishment?	3	21
6. Generally, has the board been satisfied with the decisions and operations of the AHC?	13	10

*68 questionnaires were sent out; 27 were returned, 12 agencies are represented in the results.

TABLE V
SUGGESTED CHANGES IN THE AHC*

	Yes	No	Not Answered
1. Should the jurisdiction of the AHC be expanded to cover			
Bar admissions?	7	39	12
Bar disciplinary actions?	8	39	11
Liquor licenses?	37	11	10
Licensing of insurance companies?	29	17	12
General questions of administrative law other than licensing (e.g., welfare eligibility)?	28	17	13
2. Should the commissioner's salary (\$13,500) be increased to that of a circuit court or appellate judge?	30	19	9
3. Should the commissioner be appointed under the Missouri Non-Partisan Court Plan rather than directly appointed by the governor?	31	17	10
4. Should appeals be to a court of appeals rather than circuit court?	18	32	8
5. Should the commissioner be able to set punishment rather than just recommend it?	28	23	7
6. Should a board of three commissioners hear the case rather than just one?	14	35	9

*This questionnaire was sent to 133 licensees' attorneys. Fifty-eight responded.

APPENDIX No. 1

161.252. Administrative hearing commission created—commissioner—appointment—term—compensation

There is hereby created a state administrative agency to be known as the "Administrative Hearing Commission," which is assigned to the division of registration and examination of the state department of education. It shall consist of one commissioner. The commissioner shall be appointed by the governor with the advice and consent of the senate. The term of the commissioner shall be for six years and until his successor is appointed, qualified and sworn. The commissioner shall be an attorney at law admitted to practice before the supreme court of Missouri, but shall not practice law during his term of office. The commissioner shall receive annual compensation of thirteen thousand five hundred dollars and shall be entitled to actual and necessary expenses in the performance of his duties. The office of the administrative hearing commission shall be located in the City of Jefferson and it may employ necessary clerical assistance, compensation and expense of the commissioner to be paid from appropriations from general revenue made for that purpose.

161.262. Acting commissioner, when appointed—compensation

If a commissioner during his term of office becomes temporarily incapacitated by illness or otherwise to perform the duties of his office, the governor shall appoint some person to perform the duties of the office during the incapacity of the commissioner. The person appointed shall have all the powers and duties of the office and shall possess all of the qualifications of the office except that he may continue in the private practice of law but shall not practice during this period before any agency mentioned in section 161.272 nor in connection with matters with which any of the agencies are involved. He shall receive the remuneration provided for the office of commissioner during the time which he serves.

161.272. Commission to conduct hearings, make determinations—boards included

The administrative hearing commission shall conduct hearings and make findings of fact and conclusions of law in those cases wherein, under the law, a license issued by any of the following agencies may be revoked or suspended or wherein the licensee may be placed on probation or wherein an agency refuses to permit an applicant to be examined upon his qualifications or refuses to issue or renew a license of an applicant who has passed an examination for licensure or who possesses the qualifications for licensure without examination:

- Missouri State Board of Accountancy
- State Board of Registration for Architects and Professional Engineers
- State Board of Barber Examiners
- State Board of Cosmetology
- State Board of Chiroprody and Podiatry
- Missouri Dental Board
- State Board of Embalming and Funeral Directors
- State Board of Registration for the Healing Arts
- Division of Insurance
- State Board of Nursing
- State Board of Optometry
- Board of Pharmacy
- Missouri Real Estate Commission
- Missouri Veterinary Medical Board

161.282. Complaints—notice—agency may retain counsel

Upon receipt of a written complaint from an agency named in section 161.272 in a case relating to a holder of a license granted by such agency or upon receipt of such complaint from the attorney general, the administrative hearing commission shall cause a copy of said complaint to be served upon such licensee in person or by certified mail, together with a notice of the place of and the date upon which the hearing on said complaint will be held. In any case initiated upon complaint of the attorney general, the agency which issued the license shall be given notice of such complaint and the date upon which the hearing will be held by delivery of a copy of such complaint and notice to the office of such

agency or by certified mail. Such agency may intervene and may retain the services of legal counsel to represent it in such case.

161.292. Commission's findings and recommendations—hearing by agency on disciplinary action

Upon a finding in any cause charged by the complaint for which the license may be suspended or revoked as provided in the statutes and regulations relating to the profession or vocation of the licensee, the commission shall deliver or transmit by certified mail to the agency which issued the license the record of the proceedings before the commission together with the commission's findings of fact and conclusions of law. The commission may make recommendations as to appropriate disciplinary action but any such recommendations shall not be binding upon the agency. A copy of the findings of fact, conclusions of law and the commission's recommendations, if any, shall be served upon the licensee in person or by certified mail. Within thirty days after receipt of the record of the proceedings before the commission and the findings of fact, conclusions of law, and recommendations, if any, of the commission, the agency shall set the matter for hearing upon the issue of appropriate disciplinary action and shall notify the licensee of the time and place of the hearing, provided that such hearing may be waived by consent of the agency and licensee where the commission has made recommendations as to appropriate disciplinary action. In case of such waiver by the agency and licensee, the recommendations of the commission shall become the order of the agency. The licensee may appear at said hearing and be represented by counsel. The agency may receive evidence relevant to said issue from the licensee or any other source. After such hearing the agency may order any disciplinary measure it deems appropriate and which is authorized by law. In any case where the commission fails to find any cause charged by the complaint for which the license may be suspended or revoked, the commission shall dismiss the complaint, and so notify all parties.

161.302. Complaint of license applicant-hearing-order

Upon refusal by any agency listed in section 161.272 to permit an applicant to be examined upon his qualifications for licensure or upon refusal of such agency to issue or renew a license of an applicant who has passed an examination for licensure or who possesses the qualifications for licensure without examination, such applicant may file within thirty days after the delivery or mailing by certified mail of written notice of such refusal to the applicant a complaint with the administrative hearing commission. Such complaint shall set forth that the applicant has passed an examination for licensure or is qualified to be examined for licensure or for licensure or renewal without examination under the laws and administrative regulations relating to his profession and shall set out with particularity the qualifications of such applicant for same. Upon receipt of such complaint the administrative hearing commission shall cause a copy of said complaint to be served upon the agency by certified mail or by delivery of such copy to the office of the agency, together with a notice of the place of and the date upon which the hearing on said complaint will be held. If at the hearing the applicant shall show that under the law he is entitled to examination for licensure or licensure or renewal, the administrative hearing commission shall issue an appropriate order to accomplish such examination or licensure or renewal, as the case may be.

161.312. Time and place of hearing

No hearing provided for in sections 161.252 to 161.342 shall be held less than twenty days after the issuance of notice of said hearing except with the consent of all parties. Hearings before the administrative hearing commission may be held in any county in the state or in the city of St. Louis, within the discretion of the hearing commissioner after he has considered the convenience of the parties involved.

161.322. Administrative procedure

The provisions of chapter 536, RSMo, and any amendments thereto, except those provisions or amendments which are in conflict with sections 161.252 to 161.342, and any civil rule hereafter adopted which supersedes an applicable pro-

vision of chapter 536, shall apply to and govern the proceedings of the administrative hearing commission and the rights and duties of the parties involved.

161.332. Judicial review

All final decisions of the administrative hearing commission shall be subject to judicial review as provided in and subject to the provisions of sections 536.100 to 536.140, RSMo, provided that in cases where a disciplinary order may be entered by the agency, no decision of the administrative hearing commission shall be deemed final until such order is entered. For purposes of review, the action of the commission and the order, if any, of the agency shall be treated as one decision. The right to judicial review as provided herein shall be available to administrative agencies aggrieved by a final decision of the administrative hearing commission.

161.342. Commission to publish rules—scope

The administrative hearing commission shall publish and file with the secretary of state rules of procedure for the conduct of proceedings before it. The administrative hearing commission may provide in such rules, among other things, for the filing of responsive or supplementary pleadings, for the conduct of a conference prior to any hearing wherein the issues to be determined at such hearing shall be defined, and for the conduct of a conference subsequent to any hearing for the purpose of determining the extent and scope of the commission's action.

Section 11 of the original act. (Not printed in the Revised Statutes.) Any provisions of existing statutes pertaining to the administrative agencies listed in section 3 (§ 161.272) which are in conflict with this act are repealed. Section 12 of the original act. (Not printed in the Revised Statutes.) If in the future there would be created by law any new or additional administrative agencies which agencies would have the power to issue, revoke, suspend, or place on probation any licensee, then such agencies will come under the provisions of this law.

APPENDIX No. 2

RULES GOVERNING PRACTICE AND PROCEDURE BEFORE THE MISSOURI ADMINISTRATIVE HEARING COMMISSION

Filed in the Office of Secretary of State the 5th day of October 1970. Amendments to Rule 7.02 and Rule 8 filed the 23rd day of February 1972. Rule 11 filed the 10th day of April 1972.

The rules governing the practice and procedure before this Commission are tools to accomplish a fair and impartial hearing in an orderly, prompt and judicial manner. Substantial compliance of these rules is required for a uniform administration of the law, although the ends of justice will control in any particular situation. They will be filed with the Secretary of State's Office in Jefferson City, Missouri, and will be amended from time to time.

RULE NO. 1. DEFINITION.

1.00 The following definitions are applicable to these rules unless otherwise specifically provided or unless plainly repugnant to the intent of the law or the context thereof.

- (1) "Commission" shall mean the Administrative Hearing Commission.
- (2) "Commissioner" shall mean the duly appointed Administrative Hearing Commissioner or the acting commissioner.
- (3) "Agency" shall mean those agencies subject to the jurisdiction of the Commission, which are as follows:

Missouri State Board of Accountancy;
Commission, State Department of Agriculture;
State Board of Registration for Architects, Professional Engineers, and
Land Surveyors;
State Board of Barber Examiners;
State Board of Cosmetology;
State Board of Chiroprody;

State Board of Chiropractic Examiners;
 Missouri Dental Board;
 State Board of Embalmers and Funeral Directors;
 State Board of Registration for the Healing Arts;
 State Board of Nursing;
 State Board of Optometry;
 Board of Pharmacy;
 Missouri Real Estate Commission;
 Commissioner of Securities;
 Missouri Veterinary Medical Board;
 Division of Insurance

(4) "Licensee" shall mean those persons holding a license granted by an agency.

(5) "Applicant" shall mean those persons who have been denied the opportunity to be examined upon their qualifications for licensure by an agency or those persons who have passed an examination for licensure, or those who possess the qualifications for licensure without an examination, and have been denied a license or license renewal by an agency.

(6) "Complaint" shall mean the initial pleading filed by or on behalf of an agency or the Attorney General in a case relating to the suspension or revocation of a license or the initial pleading filed by or on behalf of an applicant in a case relating to the examination, issuance or renewal of a license.

(7) "Answer" shall mean a responsive pleading filed by or on behalf of an agency, the Attorney General, or a licensee.

(8) "Supplementary Pleading" shall mean any other pleading in addition to a complaint or an answer which is filed in a proceeding before the Commission.

(9) "Petitioner" shall mean the party filing the complaint, which party shall be the moving party at the hearing and carry the burden of proving the issues raised in the complaint.

(10) "Respondent" shall mean the party charged in the complaint, which party shall have the right to respond to such pleading by filing an answer and to appear in person and be represented by legal counsel in any proceeding held in connection with such complaint.

(11) "Legal Counsel" shall mean any person currently enrolled by the Missouri Bar (integrated) and licensed to practice law in the State of Missouri.

(12) "Commission's Office" shall mean Room 131, Capitol Building, Jefferson City, Missouri, phone number 635-0128.

RULE NO. 2. POWERS AND DUTIES.

2.00 Powers and Duties—Agency or Attorney General Files Complaint.

The Commission shall conduct hearings and make findings of fact and conclusions of law in those cases wherein, under the law, a license issued by an agency may be revoked or suspended or wherein the licensee may be placed on probation. In such cases the Commission may make recommendations as to appropriate disciplinary action, which shall not be binding upon the agency.

2.01 Powers and Duties—Applicant Files Complaint.

The Commission shall conduct hearings and make findings of fact and conclusions of law in those cases wherein an agency refuses to permit an applicant to be examined upon his qualifications or refuses to issue or renew a license of an applicant who has passed an examination for licensure or who possesses the qualifications for licensure without examination. If the applicant shall show that under the law he is entitled to be examined for licensure, to be licensed or have his license renewed, then the Commission shall issue an appropriate order to accomplish such examination, licensure or renewal, as the case may be.

RULE NO. 3. COMPLAINTS.

3.00 Complaints—Who May File and Where.

(1) Any agency or the Attorney General may file a written complaint with the Commission, at its office in Jefferson City, Missouri, charging a licensee with having violated certain statutes or regulations relating to the profession or vocation of the licensee.

(2) An applicant may file a written complaint with the Commission, at its office in Jefferson City, Missouri, seeking an order permitting the applicant to be examined upon his qualifications for licensure or to require an agency to issue a license or to renew the license of said applicant.

3.01 Complaints—Form and Content.

(1) All complaints shall be in writing and shall be simple, concise and direct. No technical forms of pleadings are required. The complaint shall give the full name and address of the petitioner and the respondent. The original, which is to be filed with the Commission, must be signed by the petitioner, its, or his, authorized agent or legal counsel. There must be sufficient copies of the complaint to serve all necessary parties to the case. Suitable space shall be provided on the caption of the complaint for the Commission to affix the appropriate case number. All averments shall be in numbered paragraphs; the contents of each shall be limited as far as practicable to a statement of a single set of circumstances, and a paragraph may be referred to by number in all succeeding pleadings.

(2) All complaints filed by or on behalf of an agency or the Attorney General must set forth in brief form the specific act or acts of misconduct made against a licensee. The complaint shall, among other things, specify the following:

(a) What license or licenses have been issued to respondent and whether they are currently in good standing.

(b) The statutes or regulations which the petitioner believes have been violated by the respondent.

(c) Sufficient facts to adequately apprise respondent of the charges being made against him in order that he may properly defend himself at the hearing.

(3) All complaints filed by or on behalf of an applicant shall contain a short and plain statement of the facts showing that:

(a) The petitioner has passed an examination for licensure under the laws and administrative regulations relating to his profession or vocation and is entitled to a license or license renewal from the respondent; or,

(b) The petitioner possesses the qualifications for licensure without an examination under the laws and administrative regulations relating to his profession or vocation and is entitled to a license or license renewal from the respondent; or,

(c) The petitioner is entitled to be examined upon his qualifications for licensure by respondent under the laws and administrative regulations relating to his profession or vocation.

(4) All complaints filed by or on behalf of an applicant shall be filed after the delivery or mailing by certified mail of written notice of the agency's refusal to allow said applicant to be examined for licensure or to issue or renew a license.

(5) The requirements of Rule No. 3.01 will be liberally construed in those cases wherein an applicant prepares and files a complaint on his own behalf.

3.02 Complaints—How Served.

(1) Upon receipt of a complaint filed by or on behalf of an agency or an applicant, the Commission shall cause a copy of said complaint to be served upon the licensee or the agency, whichever be the case, in person or by certified mail.

(2) Upon receipt of a complaint filed by or on behalf of the Attorney General, the Commission shall cause a copy of said complaint to be served upon the licensee named in the complaint, in person or by certified mail,

and shall also serve a copy of such complaint upon the agency which issued the license by delivering a copy of the complaint to the office of the agency or by certified mail. In such situations, the agency will be permitted to intervene in the case and be represented by legal counsel retained by the agency.

RULE NO. 4. ANSWERS AND SUPPLEMENTARY PLEADINGS.

4.00 Answers.

(1) A respondent has the right to file an answer in response to any complaint served upon him. All answers shall be in writing and must admit those portions of the complaint which respondent believes are true and deny those portions of the complaint which respondent believes are not true. The answer shall contain a short and concise statement of those facts which the respondent believes are true and relevant to the issues raised in the complaint. The answer must be signed by the respondent, its, or his, authorized agent or legal counsel and shall be filed with the Commission at its office in Jefferson City, Missouri. A copy of the answer shall be mailed by respondent to all parties.

(2) In those cases wherein an applicant has filed a complaint and an agency files an answer, the answer shall set forth in brief form the specific grounds upon which it denied petitioner a license, a license renewal or the opportunity to be examined for licensure. Unless the answer specifically pleads that petitioner has failed to comply with Rule No. 3.01 (4), such requirements will be deemed as admitted or waived by respondent.

(3) All answers shall be filed within ten days after respondent receives a copy of the complaint. However, the failure to file an answer within the time provided herein will not prevent the Commission from holding a pre-hearing conference or a hearing at the time and place specified in the notice, nor will such failure divest the Commission of its jurisdiction to render a decision in the case.

4.01 Amendments and Supplementary Pleadings.

(1) Complaints may be modified or amended without leave of the Commission at any time preceding the filing of an answer by the respondent. After respondent has filed his answer, leave must be granted to amend or modify any complaint.

(2) Answers may be modified or amended without leave of the Commission at any time up to five days preceding the date on which the hearing in the case is actually held. After such time, all modifications or amendments to answers may be made only upon leave being granted by the Commission.

(3) Any pleading, other than a complaint or an answer, may be filed in any case pending before the Commission if leave is first granted.

RULE NO. 5. PRE-HEARING CONFERENCES.

5.00 Pre-Hearing Conferences—Setting.

(1) All pre-hearing conferences will be held as ordered by the Commission, with reasonable notice of the time thereof being given to the parties involved.

(2) Any party, or their legal counsel, may petition the Commission to hold a pre-hearing conference at a time prior to the setting of a conference by order of the Commission.

(3) The legal counsel who will actually handle the hearing shall be present at all pre-hearing conferences, unless excused by the Commission. Parties to an action may appear in person with counsel at a pre-hearing conference.

5.01 Pre-Hearing Conference—Subject Matter.

Legal counsel for all parties shall attend the pre-hearing conference and be prepared to discuss the following items:

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admission of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert and character witnesses;

- (5) Whatever pre-hearing motions have been filed in the case;
- (6) The manner and conditions upon which depositions can be taken;
- (7) The anticipated length of the hearing and the time and location of conducting such a hearing;
- (8) Such other matters as may aid in the disposition of the action.

RULE NO. 6. DISCOVERY.

6.00 Any party may take and use depositions and or written interrogatories in the same manner, upon and under the same conditions as in civil actions in the Circuit Court pursuant to Section 536.073 RSMo. 1969.

RULE NO. 7. HEARING.

7.00 Hearing—Notice.

(1) Attached to all complaints served by the Commission will be a notice of the place of and the date upon which the hearing on said complaint will be held.

(2) A copy of the notice will also be served upon the petitioner or his legal counsel.

(3) The notice shall:

- (a) Contain the caption and number of the case;
- (b) Inform the respondent of his right to file an answer within ten days of receipt of the complaint;
- (c) Inform all parties of their right to request a pre-hearing conference, to be represented by legal counsel, and to a full, fair and open hearing as provided for in Sections 161.252 et seq. and Chapter 536 RSMo. 1969, as amended.

7.01 Hearing—Location, Time, Continuance.

(1) All hearings shall be held in Jefferson City, Missouri, although they may be held in any county of the state or the City of St. Louis, at the discretion of the Commissioner, if it be shown at the pre-hearing conference or otherwise that the convenience of the parties involved requires such special setting.

(2) No hearing shall be held less than twenty days after the issuance of notice of hearing except with the consent of all parties.

(3) The hearing date may be continued from time to time upon order of the Commission and notice to the parties. Any party may request a continuance, provided good cause be shown. When a hearing is rescheduled, notice shall be given to all parties in letter form by certified mail and shall specify the location, time and date of the hearing.

7.02 Hearing—Procedure.

(1) The provisions of Chapter 536, RSMo. 1969, and any amendments thereto, except those provisions or amendments which are in conflict with Sections 161.252 to 161.342, RSMo. 1969, and any amendments thereto, and any civil rule hereafter adopted which supersedes an applicable provision of Chapter 536, shall apply to and govern the proceedings of the Administrative Hearing Commission and the rights and duties of the parties involved.

(2) All hearings shall be open to the public. All parties have the right to be present, represented by legal counsel, present evidence, and file briefs within the time period specified in Rule 7.02.

(3) Upon request of any party, the Commission shall issue subpoenas and, in a proper case, shall issue subpoenas duces tecum. The form in which all subpoenas shall issue, their method of service and the procedure for enforcing such subpoenas shall be governed by Section 536.077 RSMo. 1969. All subpoenas shall be served and witness fees paid by the party requesting them; however the Commission may have subpoenas and subpoenas duces tecum served by the Sheriff of the county in which the witness resides. Subpoenas and subpoenas duces tecum shall be available to any party for purposes of discovery.

(4) The petitioner will present his proof in the form of exhibits and witnesses, who shall submit to any questions and cross-examination under oath, following which the respondent shall present his proof in the form

of exhibits and witnesses, who shall also submit to questions and cross-examination under oath. Before testifying, witnesses may be excluded from the hearing, in the discretion of the Commission, and witnesses may be kept separate and prevented from conversing with each other until after all have testified. At the close of the hearing, the Commission will take the case under submission. Written briefs shall be filed by the parties who request leave to file written briefs within the time period fixed at the hearing, but no later than fifty (50) days after the close of the hearing.

(5) The parties may file a written stipulation as to some or all of the facts. Such stipulation shall not preclude the offering of additional evidence by any party. Parties may also stipulate to a violation and the suspension of any license for a period certain, in which case the Commission shall enter a Consent Order in accordance with such stipulation and dismiss the Complaint with prejudice. All stipulations shall be signed by the applicant or licensee and all attorneys of record of the parties.

(6) The Commission shall cause the proceedings in all hearings to be suitably recorded and preserved at its expense. In hearings involving the suspension or revocation of a license, wherein the Commission finds any cause charged by the complaint, the Commission shall, at its expense, cause the preparation of one copy of the transcript of the hearing. Under all other circumstances, copies of the transcript will be prepared at the request and expense of the party or parties concerned.

8.00 In all cases wherein a license may be suspended or revoked or wherein the licensee may be placed on probation, the Commission shall make findings of fact and conclusions of law and enter its decision within sixty (60) days after the close of the hearing. When requested by any attorney of record, a copy of the proposed findings and conclusions shall be mailed to all attorneys of record ten (10) days prior to the date upon which they will be entered and will become final. The Commission shall send to all parties, by certified mail, a copy of the findings of fact and conclusions of law when they become final.

(1) Upon a finding on any cause charged by the complaint, the Commission shall deliver or transmit by certified mail, to the agency which issued the license, the record of the proceedings before the Commission together with the findings of fact, conclusions of law and decision. In such cases, the Commission may make recommendations as to appropriate disciplinary action.

(2) If the Commission fails to find any cause charged by the complaint, the Commission shall dismiss the complaint.

8.01 In all cases wherein the petitioner seeks examination for licensure or the issuance or renewal of a license, the Commission shall make findings of fact and conclusions of law and enter its decision within sixty (60) days after the close of the hearing. When requested by any attorney of record, a copy of the proposed findings and conclusions shall be mailed to all attorneys of record ten (10) days prior to the date upon which they will be entered and will become final. The Commission shall send to all parties, by certified mail, a copy of the findings of fact and conclusions of law when they become final.

(1) If the Commission shall find that, under the law, the applicant is entitled to examination for licensure or licensure or renewal, it shall issue an appropriate order to accomplish such examination or licensure or renewal.

(2) If the Commission fails to find the applicant entitled to examination or licensure or renewal, it shall dismiss the complaint.

RULE NO. 9. JUDICIAL REVIEW.

9.00 All final decisions of the Administrative Hearing Commission shall be subject to judicial review as provided in and subject to the provisions of Sections 536.100 to 536.140, RSMo. 1969, as amended, provided that in cases where a disciplinary order may be entered by the agency, no decision of the Administrative Hearing Commission shall be deemed final until such order is entered. For purposes of review, the action of the Commission and the order, if any, of the agency shall be treated as one decision. The right

to judicial review as provided herein shall be available to administrative agencies aggrieved by a final decision of the Administrative Hearing Commission.

RULE NO. 10. AVAILABILITY OF COMMISSION'S RULES.

10.00 The rules of procedure of the Commission, and any amendments, additions or modifications thereto, shall be available to the public at the office of the Commission in Jefferson City.

RULE NO. 11 WAIVER OF HEARING.

11.00 A licensee may waive a hearing before the Administrative Hearing Commission and consent with the agency to the suspension, revocation or other relinquishment to the agency of his licensee or registration certificate. In that event a stipulation agreement shall be signed by the licensee and agency and filed with the Administrative Hearing Commission. A consent order approving the stipulation agreement shall thereafter be issued if it is determined by the Administrative Hearing Commission that the waiver of hearing and stipulation agreement were voluntarily made and entered into.