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ADMINISTRATIVE LAW

In 1978, the United States Court of Appeals for the District of Columbia Circuit held that a statute proscribing medical "misconduct" was unconstitutionally vague as applied to a physician whose license had been suspended for performing acupuncture in a manner that the supervisory commission deemed unacceptable.[1] The constitutional flaw was that the commission had not properly promulgated standards to put the physician on notice as to what constituted misconduct with regard to acupuncture treatments.[2] This past year in *Woods v. District of Columbia Nurses' Examining Board*,[3] the court quietly, yet dramatically, extended this holding. The *Woods* court held that a registered nurse, who had already been granted a hearing prior to the revocation of her license, had a constitutional right to a reinstatement hearing and, furthermore, that even a hearing would not be sufficient in this case, as the standards governing reinstatement were void for vagueness.

Barbara Woods was licensed to practice nursing in both Maryland and the District of Columbia.[4] In 1978, the Maryland Board of Examiners of Nursing revoked her Maryland license due to various incidents of unsatisfactory performance.[5] Upon receiving a copy of the Maryland revocation order, the District of Columbia Nurses' Examining Board began disciplinary proceedings against Woods that resulted in a hearing, after which her District of Columbia license was also revoked.[6] Woods later applied to the District of Columbia Board for reinstatement, based in part upon the fact that her license had previously been restored in Maryland.[7] When her application was denied without a hearing, she brought suit in the District of Columbia Court of Appeals.[8] This suit for reinstatement was consolidated with her previously filed suit challenging the constitutionality of the origi-

1. Lewis v. District of Columbia Comm'n on Licensure to Practice the Healing Art, 385 A.2d 1148 (D.C. 1978).

2. *Id.* at 1153.

3. 436 A.2d 369 (D.C. 1981).

4. *Id.* at 370.

5. *Id.* at 371. The alleged misconduct included various incidents of patient neglect as well as sleeping on duty. *Id.* at 370-71.

6. *Id.* at 371-72. While the District of Columbia proceedings were in progress, Woods had petitioned for reinstatement in Maryland. That petition was granted shortly after her District of Columbia license was officially suspended. *Id.* at 372.

7. *Id.*

8. *Id.*

nal revocation proceedings.[9]

As consolidated, the suit alleged that the original revocation deprived Woods of her fifth amendment right to due process as it was based (1) on conduct occurring in Maryland, and (2) on the findings of the Maryland Board which were challenged as defective.[10] Additionally, she alleged that the subsequent reinstatement proceedings were also unconstitutional under the fifth amendment because she was denied a hearing and, alternatively, that the standards governing reinstatement were unconstitutionally vague.[11]

The court did not pass on the constitutionality of the initial revocation.[12] Instead, it ruled that the reinstatement proceedings were constitutionally defective for the reasons cited by the plaintiff.[13] In holding that due process required a reinstatement hearing,[14] the majority noted that the right to practice one's chosen profession is a liberty interest that cannot be taken away without some kind of a hearing.[15] And, because the denial of a reinstatement application effectively precludes one from practicing a profession, the due process clause guarantees a hearing for reinstatement applications as well as initial revocations.[16] However, the majority did not cite any support for this proposition. Nevertheless, it held that Woods had a fifth amendment right to a reinstatement hearing and that the regulations governing occupational and professional licensing boards, which specifi-

9. *Id.*

10. *Id.* at 370. The alleged defects in the Maryland proceeding related mostly to manipulation of the hearing date by the Maryland Board of Examiners of Nursing. The original date for the hearing was rescheduled solely for the convenience of the Board. On the morning set for the rescheduled hearing, the Board notified Woods' attorney that it was going to postpone the hearing until that afternoon, with full knowledge that the attorney had a prior court commitment that afternoon. Thus, Woods was forced to attend the hearing without benefit of counsel because the Board refused to reschedule the hearing a third time. *Id.* at 371.

11. *Id.* at 370, 372-73.

12. *Id.* at 370.

13. *Id.* at 370, 372-73.

14. The majority also held that the District of Columbia Administrative Procedure Act (DCAPA), D.C. CODE ANN. § 1-1509 (1981) requires a hearing in "contested cases". *Woods*, 436 A.2d at 373. However, this basis for the decision is insignificant since the only reason that Woods' reinstatement was a "contested case" is because the majority determined that Woods had a constitutional right to a reinstatement hearing under the DCAPA. *See* D.C. CODE ANN. § 1-1502(8) (1981) (definition of contested case includes agency proceedings where party has constitutional right to a hearing).

15. *Woods*, 436 A.2d at 372. The court cited many Supreme Court cases supporting this proposition, including Willner v. Commission on Character and Fitness, 373 U.S. 96, 102-03 (1963) and Greene v. McElroy, 360 U.S. 474, 492 (1959).

16. *Woods*, 436 A.2d at 373.

cally denied this right, were unconstitutional.[17]

Once Woods' right to a reinstatement hearing was established, the majority was able to consider her second claim that the hearing itself would necessarily violate due process because the regulations governing reinstatement were overly vague.[18] These regulations, which were entitled "Reconsideration or Reinstatement," stated that the District of Columbia Nurses' Examining Board could reissue a license upon a showing of cause satisfactory to it.[19]

The majority defined the test of unconstitutional vagueness as whether "persons of common intelligence must necessarily guess at what conduct the regulation either proscribed or required."[20] Stating that it was difficult to envision a regulation requiring more guesswork,[21] the majority found it to be unconstitutionally vague in several ways. First, the Board could reinstate Woods' license upon a showing of satisfactory cause, but the regulation was silent as to what cause should be considered satisfactory.[22] Second, even if a showing of satisfactory cause was made, the Board was still free to deny reinstatement since the regulation used the word "may," thus making its decision purely discretionary.[23] Finally, the court noted that the regulation failed to differentiate between the concepts of reconsideration and reinstatement.[24] According to the majority, an individual who applies to an administrative agency for reconsideration of a license revocation decision is asking the agency to admit that it erred in its original decision; an individual who petitions for reinstatement does not challenge the correctness of the original decision but instead asks the agency for reissuance of the license in light of subsequently occurring facts.[25] The constitutional flaw in enmeshing these two distinct concepts was that the Board

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17. *Id.*

18. The standards had been promulgated by the Council of the District of Columbia in its 1972 set of regulations which were made applicable to 21 occupational and professional licensing boards, including the Nurses' Examining Board. *Id.*

19. As cited in the court's opinion, the regulation reads as follows:

> A person whose application for a license or renewal of a license has been denied or whose license has been cancelled, suspended, or revoked by the Board may, by filing a new application accompanied by the proper fee, request the Board to reconsider the matter. Upon showing of *cause satisfactory to it*, the Board *may* issue the license for which application has been made.

5 DD DCRR § 60.4 (emphasis in original). 436 A.2d at 373.

20. *Woods*, 436 A.2d at 374. This test for vagueness was based on the Supreme Court's opinion in Papachristou v. City of Jacksonville, 405 U.S. 156, 162-64 (1972).

21. 436 A.2d at 374.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 374-75.

might consider irrelevent factors in deciding whether to reissue a license. For example, as Woods asked for reinstatement rather than reconsideration, the court pointed out that the Board acted erroneously in reexamining her conduct prior to the initial revocation.[26] Instead, the Board should have looked to events occurring after the revocation, such as her reinstatement and satisfactory performance in Maryland.[27]

The majority hinted that any one of these factors standing alone would have been enough to render the reinstatement procedure unconstitutionally vague. In combination, they were fatal and the majority held that the Nurses' Examining Board, and indeed every occupational licensing board covered by the regulation, was without power to deny reinstatement applications until clearer standards were enunciated.[28]

Dissenting, Judge Kern argued that the court should have ruled on the validity of the original revocation proceeding as well as the reinstatement.[29] Since Woods had been accorded a full and fair hearing and the Board's findings were supported by substantial evidence, he would have affirmed the original revocation.[30] As to Woods' reinstatement application, the dissent felt that the record was unclear and that the case should therefore be remanded to the Board.[31]

The dissent's view, that the court should have decided the validity of the original revocation, seems to be the more sound. If the original revocation were deficient, there would have been no need to examine the constitutionality of the reinstatement proceeding. However, the dissent's argument that the case should have been remanded to the Board for clarification has less merit. If, indeed, the fifth amendment entitled Woods to a reinstatement hearing and if the standards governing reinstatement were unconstitutionally vague, a remand would be counterproductive. In such a case, the lack of clarity in the administrative record would be a direct manifestation of the regulation's unconstitutional vagueness.

The key issue, therefore, is whether the majority's substantive conclusions are correct. The majority's first conclusion, that Woods was entitled to a reinstatement hearing, is crucial since a negative resolution of this issue would have disposed of the vagueness argument. This conclusion is by no means clearly mandated. While there is ample authority for the proposition that some kind of hearing must precede the initial revocation

26. *Id.* at 375.
27. *Id.*
28. *Id.*
29. *Id.* (Kern, J., dissenting).
30. *Id.* at 375-76 (Kern, J., dissenting).
31. *Id.* at 376-77 (Kern, J., dissenting).

of an occupational license,[32] the majority did not cite any case constitutionally requiring subsequent reinstatement hearings. Thus, a brief examination of this area appears warranted.[33]

Due process analysis requires a court to make two distinct determinations:[34] first, whether *any* process is due[35] and then, if so, *how much* process is due. Assuming that a reinstatement applicant is entitled to at least some process,[36] the more difficult question is how much process is due. In *Mathews v. Eldridge*,[37] the Supreme Court identified three factors for courts to consider in answering this question: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[38] While these factors lend support to courts that have concluded that an occupational license may not be initially revoked absent a full and fair hearing, they do not so compel a hearing for reinstatement.[39]

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32. *See, e.g.*, the cases cited in *Woods*, 436 A.2d at 372.

33. It should be noted that this area does not lend itself to much "black-letter law." As the Supreme Court has recently stated, due process eludes precise definition insofar as it is a nontechnical concept based on actions of "fundamental fairness." Lassiter v. Department of Social Serv., 452 U.S. 18, 24-25 (1981).

34. *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 533 (1978).

35. *Id.* At least some process is due when the government deprives an individual of life, liberty, or property.

36. Rejection of an individual's reinstatement application would seem to deprive an individual of the right to practice his chosen profession. Arguably, only the initial license revocation deprives an individual of his liberty interest and, once a license is revoked, any liberty interest in practicing a profession is extinguished. However, this seems too narrow a view and the *Woods* holding that a reinstatement denial operates just as effectively to deprive an individual of his liberty to practice his profession seems the better approach. *See Woods*, 436 A.2d at 373. This is not to say, however, that *Woods* is correct in concluding that reinstatement applicants are entitled to just as much process (i.e., a hearing) as individuals whose licenses have been revoked for the first time; the questions of whether any process is due and how much process is due are analytically distinct. *See* L. TRIBE, *supra* note 34.

37. 424 U.S. 319 (1976).

38. 424 U.S. at 335. *See also* Sherman v. Commission on Licensure to Practice the Healing Art, 407 A.2d 595, 600-01 (D.C. 1979).

39. The *Mathews* factors appear to militate against constitutionally mandated reinstatement hearings. First, the individual's interest in obtaining a hearing is weaker where his or her license has already been validly revoked. Second, the government's interest is likely to be stronger as it might be able to point to the spectre of repeated reinstatement hearings and the concomitant fiscal and administrative burdens. Finally, the risk of erroneous judgment is less in the reinstatement context because a full hearing has already been provided prior to the initial revocation. As the *Mathews* Court noted, there comes a point when "the benefit of

Although present notions of due process do not appear to mandate reinstatement hearings, there may be an alternative theory upon which to justify the *Woods* holding. In a different context, the Supreme Court has held that the right of individuals "to ply their trade, practice their occupation, or pursue a common calling"[40] is "fundamental and basic and essential."[41] Analogizing these holdings (which concerned the article IV, Privileges and Immunities Clause) to the fifth amendment's guarantee of due process, one could argue that extra process is due when the government seeks to prevent individuals from practicing their chosen profession. Under this proposed theory, reinstatement hearings would be required with regard to occupational licenses, whereas reinstatement hearings might not be constitutionally mandated with regard to, for example, suspended drivers' licenses.

The *Woods* decision is indeed a dramatic expansion of due process law even though the majority did not, at least outwardly, seem to feel that it was extending established doctrine. While the added protection ensured by requiring reinstatement hearings seems noble, it is dubious whether the Supreme Court would agree with the District of Columbia Court of Appeals on this point.[42] Because the law is not fully developed in this area, a better approach may have been for the majority to support its conclusion with more substantial analysis. As to the vagueness issue, the majority's decision appears sound,[43] although it should be noted that this issue would not have been considered absent the court's first holding that reinstatement applicants have a constitutional right to a hearing.

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an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." 424 U.S. at 348.

40. Hicklin v. Orbeck, 437 U.S. 518, 524 (1978).

41. Baldwin v. Fish & Game Comm'n, 435 U.S. 371, 387 (1978). *See The Supreme Court, 1977 Term*, 92 HARV. L. REV. 71, 82-83 (1978).

42. *See supra* notes 38-39 and accompanying text.

43. As the *Woods* majority noted, there are two main reasons why unduly vague regulations and statutes are violative of due process. 436 A.2d at 373. First, they deprive individuals of notice as to what conduct is considered proscribed or required. *Id.* Second, they encourage arbitrary decision-making by the agency. *Id.* at 373-74. In the *Woods* case, this second rationale would appear the more decisive. The Nurses' Examining Board was given complete discretion in deciding whether to reinstate an occupational license, and its decision would inevitably be based upon "unarticulated and unannounced standards." Miller v. District of Columbia Bd. of Appeals & Review, 294 A.2d 365, 369 (D.C. 1972).