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Professional Discipline: Unfairness and Inefficiency in the Administrative Process

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PROFESSIONAL DISCIPLINE: UNFAIRNESS AND INEFFICIENCY IN THE ADMINISTRATIVE PROCESS

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INTRODUCTION

STATE government, in its capacity both as an employer and a licensing authority, exercises substantial authority over professionals. It has the authority to revoke professional licenses1 and to fire professional employees.2 Because either action can effectively destroy a professional's career, the law demands that state governments exercise this power fairly.3 To protect the public against the unethical and

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3. It has long been recognized that a professional license is a valuable property right, which may be revoked only with due process of law. Millett v. Hoisting Eng'rs Licensing Div., 119 R.I. 285, 295, 377 A.2d 229, 235 (1977); see Hecht v. Monaghan, 307 N.Y. 461, 467-68, 121 N.E.2d 421, 423-24 (1954). The applicability of the due process clause to the initial application for a license has also been recognized. Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964); see K. Davis, Administrative Law Text § 7.13, at 184-86 (3d ed. 1972) [hereinafter cited as K. Davis I]. It has also been held that a tenured employee may not be discharged without due process of law. Slochower v. Board of Higher Educ., 350 U.S. 551, 555, 559 (1956); Gosney v. Sonora Indep. School Dist., 603 F.2d 522, 525 (5th Cir. 1979).

Perhaps the most important aspect of due process is the requirement of an impartial tribunal. See K. Davis I, supra, §§ 12.01-.06, at 245-53; B. Schwartz, Constitutional Law § 7.9, at 251-53 (1979). This requirement of impartiality necessitates the disqualification of the trier of fact in numerous situations. For example, if the tribunal has a financial interest in the outcome of the proceedings, the requisite
incompetent individual, however, states must also act swiftly in cases of alleged wrongdoing and incompetence. Unfortunately, the disciplinary procedures that have evolved for addressing professional wrongdoing and incompetence are often neither fair nor efficient.  

Disciplinary proceedings often occur in an administrative setting in which the ultimate trier of fact has been involved in the preliminary investigation and prosecution. Such procedures threaten the goal of impartiality by increasing the possibility that the fact finder will have prejudged critical issues. Although the Supreme Court has held such procedures constitutional, the question remains whether they are sufficiently fair.  

A number of states, recognizing the potential risk of prejudgment, have enacted statutes that separate the investigative, prosecutorial and adjudicative functions. Often, however, these statutes guarantee impartiality will not exist. In Tumey v. Ohio, 273 U.S. 510 (1927), a criminal case, the Supreme Court found a denial of due process when the trier of fact retained for his own compensation the court costs assessed against those who were convicted, but received no monies from those who were acquitted. This direct pecuniary stake in the outcome constituted a denial of due process. Id. at 523.  

The Court extended the Tumey decision in Ward v. Village of Monroeville, 409 U.S. 57 (1972). In Ward, the mayor was the trier of fact. Although he had no direct financial stake in the outcome, the Court found the requisite “possible temptation” because “the mayor’s executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor’s court.” Id. at 60. Another potential reason for disqualification of the trier of fact is if he harbors personal bias or prejudice against one of the parties. Saunders v. Piggly Wiggly Corp., 1 F.2d 582, 584 (W.D. Tenn. 1924); K. Davis I, supra, §§ 12.01-.06, at 245-53; B. Schwartz, supra, § 7.9, at 253.  

4. This Article discusses general state license revocation statutes, which typically cover professionals such as physicians, physiotherapists, nurses, chiropractors, dentists, dental hygienists, veterinarians, pharmacists, podiatrists, optometrists, opticians, engineers, architects, landscape architects, public accountants, certified shorthand reporters, psychologists, certified social workers and licensed masseurs. Public school teaching is the principal profession for which such statutes (applicable only to professionals) have been enacted to protect government employees against unjust dismissal. See sources cited supra note 2. This Article does not purport to deal with special license revocation procedures that in a given state may be applicable to a single profession such as law. E.g., Cal. Bus. & Prof. Code §§ 6100-6118 (West 1974 & Supp. 1982); Ohio Rev. Code Ann. § 4705.02 (Page 1977); Schneyer, The Model Rules and Problems of Code Interpretation and Enforcement, 1980 Am. B. Found. Research J. 939, 944-47; Williams, Professionalism and the Corporate Bar, 36 Bus. Law. 159, 162-64 (1980). Nor does it cover general civil service laws that are primarily concerned with job security for non-professionals. E.g., 5 U.S.C. §§ 7501-7543 (1976 & Supp. V 1981); Cal. Gov’t Code §§ 19,570-19,588 (West 1980 & Supp. 1982) (as amended by Act of Sept. 13, 1982, ch. 985, § 2.5, 1982 Cal. Legis. Serv. 5199 (West), and by Act of Sept. 2, 1982, ch. 696, § 2, 1982 Cal. Legis. Serv. 4041 (West), and by Act of Sept. 10, 1982, ch. 916, §§ 1-2, 1982 Cal. Legis. Serv. 4930-31 (West)).  

5. See infra note 16 and accompanying text.  


7. See infra notes 61-76, 112-25 and accompanying text.
fairness at the expense of judicial and administrative efficiency. They make disciplinary procedures so cumbersome and costly that licensing and disciplinary boards may be deterred from taking action in appropriate cases. This Article examines the problem of prejudgment in professional disciplinary procedures and discusses alternatives that enhance fairness without sacrificing efficiency.

I. PREJUDGMENT IN THE ADMINISTRATIVE SETTING

In order for a professional to practice his profession, he must obtain a license from the state. Once licensed, he is subject to various forms of disciplinary action—including license revocation—should he engage in prohibited conduct. Similarly, a professional employed by the government may be subject to disciplinary action, including dismissal. State statutes or rules often delineate the actions for which a licensed professional or government employee may be disciplined. Typically these actions include unprofessional conduct and incompetence, but may also include criminal conduct unrelated to professional ability.

Professional discipline statutes usually provide that disciplinary proceedings against a professional may be commenced when there are reasonable grounds to believe that the professional has committed certain statutory violations. In many cases, the same board and possibly the same individuals who make the initial determination of reasonable cause also ultimately decide whether the professional in fact engaged in improper conduct. In deciding that “reasonable

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8. See infra notes 61-76 and accompanying text.
grounds" exist, a disciplinary board is already making a determination against the employee or licensee. In a close case, such a determination can be quite damaging because the decision-makers may be unable to distinguish between reasonable grounds and actual guilt. Thus, the

The Colorado statutes with respect to nurses illustrate the problem. These statutes provide that a disciplinary proceeding "may be commenced when the board has reasonable grounds to believe" that the licensee has committed acts in violation of the licensing statute. Colo. Rev. Stat. § 12-38-218(2) (1978). The statute empowers the same board that decided that such grounds exist to conduct the disciplinary hearing. Id. § 12-38-218(4). The Rhode Island nurses statute provides that on the filing of a complaint, two or more members of the board "shall immediately investigate such charges." R.I. Gen. Laws § 5-34-25 (Supp. 1982). If the entire board concludes that the investigation reveals reasonable grounds for believing the licensee is guilty, it conducts a hearing to determine guilt or innocence. Id.

The Ohio legislature has established state boards to regulate many of the professions licensed by the state. Typically, the board is empowered to suspend or revoke the professional's license for cause. See, e.g., Ohio Rev. Code Ann. § 4703.15 (Page 1977) (architects); id. § 4725.11 (optometrists). The licensing statutes themselves contain no provisions to prevent the boards from conducting the initial investigation into the licensee's conduct. The entire process, however, is subject to the Ohio Administrative Procedure Act. Ohio Rev. Code §§ 119.01-.13 (Page 1978 & Supp. 1982). That statute permits, but does not require, the board to appoint a hearing officer, for license revocation hearings. Additionally, there is no provision to prevent the examining board from conducting the initial investigation. While the board's final decision is appealable, id. § 119.12 (Page Supp. 1982), the Ohio APA requires a court to affirm the agency decision "if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence." Id. The ability of the court to receive additional evidence undoubtedly provides the licensee with some additional protection.

The structure of the disciplinary process for the professional employee is also seriously flawed. Tenure legislation, which seeks to protect the employee against arbitrary dismissal, often fails to guarantee a truly neutral decision-maker who has not prejudged the issue. The Alabama statute illustrates the problem. An Alabama teacher may be dismissed by a majority vote of the employing board. Ala. Code § 16-24-9 (1977). The teacher may appeal such an action to the state tenure commission, which must sustain the board's action unless it was "arbitrarily unjust" or not in compliance with the statute. Id. § 16-24-10(a)-(b) (as amended by Act No. 81-686, § 2, 1981 Ala. Acts 1157). The commission's action is subject to judicial review, but is "final and conclusive" if it is in compliance with the statute and is not "unjust." Id. § 16-24-38 (1975). This standard of judicial review is quite narrow. See Alabama State Tenure Comm'n v. Mountain Brook Bd. of Educ., 343 So. 2d 522, 524-25 (Ala. 1978).

While the Alabama statute provides numerous procedural protections, it does not ensure fairness. The employing board commences the disciplinary process by notifying the teacher of the reasons for the proposed cancellation of his contract. Ala. Code § 16-24-9 (1977). Presumably, this is done after some discussion of the facts. Thus, the ultimate trier of fact receives ex parte knowledge of the alleged facts, makes a decision to initiate charges and then sits as a jury. Moreover, it often must decide whether to believe the accused teacher or one or more supervisory personnel whom it has hired and with whom it has a more direct and closer relationship. The possibility of unfairness is manifest, and a narrow standard of review exacerbates the problem.
danger of unfairness to the accused is severe. In addition to this potential for unfairness, the practice creates the suspicion that final decisions are "rationalizations of the preliminary findings which the [board], in the role of prosecutor, presented to itself."\textsuperscript{17} From the vantage point of the profession being regulated or the individual being charged, there is at the very least an appearance of prejudgment.

Even assuming that the trier of fact can separate a determination of reasonable grounds from an ultimate decision on the merits, other dangers inhere in a procedure that combines prosecutorial and adjudicatory functions. The basis for the reasonable grounds determination may be prejudicial evidence or, at the very least, material that is never introduced at the later contested hearing. This raises the possibility that as a result of ex parte contacts with staff investigators or others the ultimate deciders of fact will be influenced by evidence that the accused is unable to refute during the hearing on the merits because he is unaware it has been communicated. Federal government studies prior to the passage of the Administrative Procedure Act (APA or Act)\textsuperscript{18} noted the difficulties inherent in combining prosecutorial and adjudicatory functions. These studies concluded that such a practice "undermines judicial fairness"\textsuperscript{19} and is "plainly undesirable."\textsuperscript{20}

Determinations of employers and licensing boards are of course reviewable in court. Although the standard of review varies,\textsuperscript{21} most statutes require affirmance if the board's factual findings are sup-


\textsuperscript{19} Report on Administrative Management, supra note 17, at 68.

\textsuperscript{20} Committee on Admin. Proc. in Gov't Agencies (Appointed by the Attorney General at the Request of the President, to Investigate the Need for Procedural Reform in Various Administrative Tribunals and to Suggest Improvements Therein), Report on Administrative Procedures, S. Doc. No. 8, 77th Cong., 1st Sess. 56 (1941).

\textsuperscript{21} Kentucky limits the court's review to whether: "(a) The board acted without or in excess of its power; (b) The order appealed from was procured by fraud or misconduct; (c) Substantial evidence supports the order appealed from; (d) The board's decision is supported by the law." Ky. Rev. Stat. § 325.360(10) (1983) (public accountants). Some states also permit the court to determine if the proceedings were unconstitutional or so "arbitrary or capricious" that the board exceeded its authority. E.g., Colo. Rev. Stat. § 12-23-120 (1978) (electricians); Wash. Rev. Code § 18.32.750 (1978) (dentists). Rhode Island succinctly provides that "[a]ny person . . . may appeal [from the board's decision] to the proper court under normal civil procedures for a review thereof." R.I. Gen. Laws § 5-8-19 (1976) (engineers and land surveyors).
ported by substantial evidence in the record considered as a whole. This standard of judicial review, however, does not adequately ensure fairness. There can be "substantial evidence" to support a determination and yet that determination can be erroneous. This is particularly true if the determination depends on questions of credibility. Although disciplinary statutes provide numerous procedural protections for both government employees and professionals, the structure of the process often fails to guarantee an impartial decision-maker.

II. Prejudgment and the Courts

The Supreme Court has addressed the problem of prejudgment in a number of instances, most recently in Withrow v. Larkin. In Larkin, a doctor sought to enjoin a disciplinary hearing to be conducted by the same board that had investigated the charges against him. The district court agreed that this would constitute a due process violation and issued a restraining order. The Supreme Court reversed, unanimously holding that the procedure suffered no constitutional infirmity.

There was of course no dispute that due process demands an unbiased tribunal. In fact, as the Court noted, "our system of law has always endeavored to prevent even the probability of unfairness." Nevertheless, the Court permitted the board to preside at the hearing, stating:

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a . . . difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudg-

25. Id. at 39.
26. Larkin v. Withrow, 368 F. Supp. 796, 797 (E.D. Wis. 1973) (per curiam), rev'd, 421 U.S. 35 (1975). According to the district court, "for the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process." Id.
27. 421 U.S. at 55.
28. Id. at 47 (quoting In re Murchison, 349 U.S. 133, 136 (1955)).
ment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.  

In reaching this conclusion, the Court found support in a number of its decisions. Primary reliance was placed upon FTC v. Cement Institute. In that case, Portland cement producers had been charged with violating section 5 of the Federal Trade Commission Act by using a particular pricing system. Before conducting its hearing, the Federal Trade Commission (FTC) had investigated the parties and reported to both Congress and the President concerning the legality of the pricing system. Some FTC members had disclosed that they believed the pricing system to be illegal. As a result, one of the cement companies, alleging bias, requested that an FTC Commissioner be disqualified from conducting the hearing. The Court noted that a judge would not be disqualified from deciding a particular case merely because he had previously expressed an opinion regarding the lawfulness of the type of conduct in question. It refused to disqualify the Commissioner, stating that "the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court."  

Cement Institute was concerned primarily with a prior opinion on a legal issue—the legality of a particular pricing system. Larkin, on the other hand, addressed prejudgment of a factual issue—whether a...
professional licensee had engaged in prohibited conduct. The two situations differ and require different treatment.  

The Court in Larkin thought otherwise. It noted that judges often make prior mental commitments even to given factual determinations. For example, a judge may decide a motion for a preliminary injunction and then preside over the injunction proceeding. Similarly, he may decide whether evidence is sufficient to hold a criminal defendant for trial and then, if the trial is conducted without a jury, make the ultimate finding of guilt or innocence. Moreover, a judge who is reversed on appeal may decide the same question on retrial. But the triers of fact in these cases, as in Cement Institute, are individuals with some training in distinguishing degrees of proof in making factual and legal determinations. This is not necessarily the case with licensing and disciplinary boards. Furthermore, a trial judge is not typically involved in the investigation or prosecution aspects of a case and all evidence is received within the confines of a contested hearing. Both factors lessen somewhat the danger of prejudgment.

The Larkin Court also cited as support the First Circuit decision in Pangburn v. CAB. In Pangburn, the Civil Aeronautics Board (CAB or Board) had, pursuant to its statutory mandate to investigate air accidents, determined that the "probable cause of this accident was the failure of the pilot to properly plan and execute the approach to a landing." In a later proceeding on a different record, the Board reviewed a factual determination by the Federal Aviation Administration (FAA) trial examiner and his recommendation that the pilot involved in the accident should be suspended for ninety days. The pilot claimed a denial of procedural due process because the CAB was not impartial, having already committed itself with respect to the cause of the accident. The court rejected this argument, stating that "the mere fact that a tribunal . . . has taken a public position on the facts, is [not] enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required."

38. See Professor Davis' analysis based on the difference between legislative facts and adjudicative facts. K. Davis I, supra note 3. at 248-49. See generally K. Davis, Administrative Law, Cases—Text—Problems 265-78 (5th ed. 1973) [hereinafter cited as K. Davis II].
39. 421 U.S. at 56.
40. Id.
41. Id. at 56-57. This was the situation in NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947), which the Larkin Court cited in support of its holding. See 421 U.S. at 49. In Donnelly, the Supreme Court had decided that an NLRB hearing examiner who had found the company guilty of an unfair labor practice could preside over the retrial of the same company. 330 U.S. at 236-37. The Court found no due process violation. See id.
42. 311 F.2d 349 (1st Cir. 1962).
43. Id. at 356.
44. Id. at 351.
45. Id. at 358 (emphasis added).
The constitutionality of the procedure in Pangburn, however, does not diminish the unfairness of the procedure to which Dr. Larkin was subjected. Moreover, the potential for unfairness of the Pangburn procedure is not as compelling as that in Larkin. Pangburn was given a de novo hearing before a separate agency—the FAA—in which the trial examiner had made no prior judgments and the CAB's earlier findings were not introduced into evidence. Thus, the investigator-prosecutor-adjudicator scheme, which remained intact in Larkin, was interrupted in Pangburn by the involvement of an outside agency. Perhaps more importantly, the identical finding by a separate agency lends credence to the CAB's assertion that the decision rested solely on the record without its being "bound by findings made in an earlier . . . proceeding." Of course, Pangburn would have posed a far more difficult question if the CAB had rejected an FAA finding in favor of the pilot.

More closely analogous to the facts in Larkin, and more persuasive in its analysis, is the Sixth Circuit decision in American Cyanamid Co. v. FTC. Surprisingly, however, the Larkin Court distinguished that case. In American Cyanamid, an FTC hearing examiner concluded that several drug companies had not engaged in unfair methods of competition in their production and sale of tetracycline. On appeal, the FTC reversed this decision. Prior to the FTC's decision, the drug companies had moved to disqualify FTC Chairman Dixon from participating in the proceeding, basing their motions on his earlier activities as counsel to the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee. That subcommittee had conducted an investigation and public hearings into pricing and other practices of the ethical drug industry in 1959 and 1960, and examined the manufacture and sale of tetracycline. The public hearings concerned several issues involved in the FTC proceeding in question.

The court noted that Commissioner Dixon had "personally supervised all the investigatory activities" of the subcommittee staff and had participated in the selection of witnesses and documents and had "conducted extensive examinations of witnesses in connection with factual issues involved in the present appeals." On the basis of Dixon's questions and comments, the court concluded that he had "formed an opinion" that tetracycline prices were artificially high and

46. Id. at 356.
47. 363 F.2d 757 (6th Cir. 1966).
48. 421 U.S. at 50 n.16.
49. 363 F.2d at 762.
51. 363 F.2d at 766.
52. Id.
53. Id. at 765.
54. Id.
collusive and that the patent interference settlement between Pfizer and Cyanamid was improper. Those facts were "inseparably a part of the ultimate findings of fact of the [FTC] in disagreeing with the decision of the trial examiner." Given these and other circumstances, the court concluded that Dixon's participation resulted in a denial of due process, requiring it to vacate the FTC decision.

Like the proceeding in American Cyanamid, a disciplinary proceeding in which the investigator later serves as the trier of fact increases the likelihood of prejudgment on a critical issue. The commingling of investigatory and adjudicatory functions, atypical as it was in the tetracycline situation, is a daily occurrence in disciplinary proceedings. The Supreme Court in Larkin, however, concluded that the Constitution tolerates such commingling. Entirely apart from any specific constitutional infirmities, the question remains whether the basic unfairness of the procedure counsels against its use.

III. LEGISLATIVE RESPONSES

A. Inefficient Alternatives

Some states, in their efforts to ensure fairness in the disciplinary process, mandate layers of investigatory, adjudicatory and appellate procedures. Though their concern for fairness is laudable, these disciplinary procedures are cumbersome and costly.

55. Id.
56. Id.
57. Id. at 767-68. The court was careful to limit the potential scope of its decision:

Our decision on this issue goes no further than to hold that disqualification is required when, as in the present case, the legislative committee investigation involved the same facts and issues concerning the same parties named as respondents before the administrative agency, and to the extent here presented. We do not hold that the service of Mr. Dixon as counsel for the subcommittee, standing alone, necessarily would require disqualification. Our decision is based upon the depth of the investigation and the questions and comments by Mr. Dixon as counsel.

Id. at 768.
58. See supra note 16.
60. There are dangers in allowing an individual who has investigated misconduct and determined that there is probable cause to suspend a professional's license to sit as a trier of fact in a later de novo hearing. The state board that is responsible for professional discipline may view its role as more of a prosecutor than as a disinterested finder of fact. A board of education may find it difficult to be unbiased when the chief executive of the school district has already recommended dismissal of a tenured teacher. And the danger of bias undoubtedly increases when an individual actually conducts an investigation (as opposed to passing upon another's work) and then sits as the trier of fact to hear and pass upon the credibility of witnesses.

The New York professional license revocation statute provides an excellent example of an altogether too cumbersome process. The statute requires the state education department to investigate complaints against professionals and to refer “the results” to a professional conduct officer. If, after consultation with a professional member of the applicable state board, that officer determines that substantial evidence indicates professional misconduct, he may proceed with a contested hearing. A hearing panel, consisting of five or more members of the state board for the particular profession, then issues a written report containing a “determination” of guilty or not guilty on each charge, “findings of fact,” and a recommendation as to the penalty. A three-member regents review committee, before which the licensee or his counsel may appear, reviews the panel transcript and report and transmits “a written report of its review to the board of regents.”

The board of regents, after considering the transcript and the reports of the hearing panel and its review committee, decides whether the licensee is guilty or not guilty of each charge. If the board decides that the licensee is guilty of any charge, it also decides the penalties to be imposed. If the board disagrees with the hearing panel’s determination of not guilty on any charge, it may not substitute its judgment for that of the panel, but rather must remand the matter to the panel for reconsideration or a new hearing. If the panel on reconsideration makes a second not guilty determination, that decision is final.

Decisions of the board of regents are reviewable in the Appellate Division, which must sustain the board’s factual determinations if they are supported by substantial evidence. The Appellate Division decision may be reviewed by the Court of Appeals.

The New York statute avoids the danger of prejudgment by empowering the professional conduct officer to decide whether to proceed to

63. Id. § 6510(1)(b).
64. Id.
65. Id. § 6510(3)(b).
66. Id. § 6510(3)(d).
67. Id. § 6510(4)(a)-(b).
68. Id. § 6510(4)(b). The statute does not specifically set out the function of the report, but it is clear that its purpose is to assist the board of regents to reach a final determination on the matter. See id. § 6510(4)(c).
69. Id. All decisions require “the affirmative vote of a majority of the members of the board.” Id. Thus, if several members are absent, it is possible that the board would be unable to act because a majority of its members could not agree on a particular decision.
70. Id.
71. Id.
a hearing. Although that officer must consult with one “professional member of the applicable state board” before deciding whether to proceed, the decision itself does not always require the board member’s concurrence.\textsuperscript{73} Moreover, the State Administrative Procedure Act\textsuperscript{74} forbids the board member with whom the professional conduct officer consults from sitting on the hearing panel in that particular disciplinary proceeding.\textsuperscript{75}

The structure that the New York statute mandates achieves the goal of fairness to the accused, but its cumbersome nature is unnecessary. The initial hearing occurs before a panel of at least five people. That panel’s recommendations are reviewed by a three-person regents review committee. That committee reports to the fifteen-member board of regents which makes the actual determination of guilt or innocence. Two judicial appeals may follow. While prejudgment is avoided and fairness is achieved, the procedure is so difficult and costly that disciplinary authorities may fail to take action in appropriate cases.\textsuperscript{76}

\textsuperscript{73} N.Y. Educ. Law § 6510(1)(b) (McKinney Supp. 1982-1983). If the complaint involves a question of professional expertise, however, the officer may seek, and if so, shall obtain the concurrence of at least two members of the applicable board. Id.

\textsuperscript{74} N.Y. A.P.A. §§ 100-501 (McKinney 1982).

\textsuperscript{75} See id. § 307(2).

\textsuperscript{76} The Rhode Island education statute, R.I. Gen. Laws tit. 16 (1981 & Supp. 1982), provides another example of a cumbersome procedure. That statute empowers the local board of education to dismiss a tenured teacher for cause. Id. §§ 16-13-3 to -4 (1981). The decision of the local board may be appealed to the commissioner of elementary and secondary education, who has the right to make a \textit{de novo} determination. Id. § 16-39-2; id. § 16-60-6(9)(h) (Supp. 1982). This broad scope of review and the commissioner’s obligation to conduct a hearing is a significant protection against arbitrary or unfair action. See Schiavulli v. Aubin, 504 F. Supp. 483, 487-88 n.4 (D.R.I. 1980). The commissioner’s decision is appealable to the board of regents, which determines whether it was arbitrary. Altman v. School Comm., 115 R.I. 399, 347 A.2d 37 (1975) (interprets R.I. Gen. Laws § 16-39-3 to limit review to whether decision was unfair, discriminatory or arbitrary). The statute grants the teacher a further right of appeal to the superior court, R.I. Gen. Laws § 16-13-4 (1981), and that judgment is reviewable by the Rhode Island Supreme Court. Schiavulli v. Aubin, 504 F. Supp. 483, 487 n.3 (D.R.I. 1980); Davis v. Rhode Island Bd. of Regents for Educ., 399 A.2d 1247, 1249 (R.I. 1979).

The Rhode Island procedure is unnecessarily cumbersome. If the local board of education is able to make an impartial decision, there is little reason to provide for a later \textit{de novo} hearing and three layers of appeal. If the local board’s finding is suspect, it seems inefficient to have it conduct the initial hearing. It would be far more efficient for the local board, on the basis of whatever investigation it deemed appropriate, to decide that its employee should be disciplined and then prove its charges before an impartial decision-maker. Moreover, in those cases in which management personnel have erred, it would save the board from the uncomfortable situation of having to decide to go forward with a case and then (on the basis of the employee’s evidence) to determine that its own managerial personnel were wrong. Additionally, the seemingly endless appeals that are built into the structure have the net effect of delaying the process and making it so costly that management might not proceed in some cases that in fact warrant action.
B. The Federal Administrative Procedure Act

A better solution to the unfairness present in many state statutes is found in the federal APA. The APA recognizes the danger of prejudgment inherent in the practice of assigning to one person or agency the duties of investigator, prosecutor and judge. Accordingly, it mandates an internal separation of functions to ensure that the investigative and prosecutorial functions are performed by persons other than those responsible for adjudicating.

In contested hearings to which the APA applies, an administrative law judge (ALJ) may serve as the presiding officer. He rules on offers of proof and evidentiary questions, regulates the course of the hearing, makes determinations with respect to depositions and subpoenas, and disposes of procedural requests. In short, he helps to shape the record upon which the case will be decided. In performing these functions, the ALJ need not remain passive; he may take an active role in examining witnesses to obtain relevant facts and to test credibility. In addition, the ALJ typically makes the initial or recommended decision “unless the agency requires... the entire record to be certified to it for decision.”

Although the ALJ is an employee of a specific agency, several APA provisions seek to insulate him from agency pressure. Within the

78. 5 U.S.C. § 554(d) (1976). Because the typical federal agency has many employees, the performance of these inconsistent functions can be internally separated.
79. Id. § 556(b)(3) (Supp. V 1981). This provision also permits agency members to preside over the initial hearing, id. § 556(b)(2) (1976 & Supp. V 1981), but this seldom occurs.
80. Id. § 556(c)(3) (1976).
81. Id. § 556(c)(5).
82. Id. § 556(c)(4).
83. Id. § 556(c)(2).
84. Id. § 556(c)(7).
85. See K. Davis I, supra note 3, § 10.03, at 221.
86. 5 U.S.C. § 557(b) (1976).
87. Section 11 grants job security by providing that an administrative law judge may be fired “by the agency in which [he] is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.” 5 U.S.C. § 7521 (Supp. V 1981); 5 C.F.R. § 930.214(a) (1982). The Act also provides that his pay shall be “prescribed by the Office of Personnel Management [(OPM)] independently of agency recommendations or ratings.” 5 U.S.C. § 5372 (Supp. V 1981) (emphasis added). The OPM has established various salary classifications for administrative law judges. 5 C.F.R. § 930.210 (1982). Moreover, the OPM (and not the agency directly involved) decides who is to be promoted in the event the agency desires to fill a vacancy through promotion. Id. §§ 930.204, .206. While chances for promotion are undoubtedly affected by prior work experience, OPM regulations provide that “[i]nsofar as practicable, an agency shall assign its administrative law judges in rotation to cases.” Id. §
agency itself, the ALJ may not be made answerable to any agent or employee performing any investigative or prosecutorial functions for that agency. In addition, section 5 of the Act prohibits agents or employees investigating or prosecuting a particular case from advising or otherwise participating in the decision of that case, or a factually similar case. Finally, to eliminate the danger that a decision will be made on the basis of ex parte information, the ALJ may not “consult a

89. Id. § 554.
90. Id. § 554(d). Courts have been quite liberal in both their interpretation and application of § 5. For example, § 5 of the Act sets forth procedures to be followed “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.” Id. § 554(a) (1976 & Supp. V 1981). In Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), the Supreme Court was asked to decide whether administrative hearings in deportation cases were subject to the requirements of § 5. Id. at 35-36. Although the statute authorizing deportation contained no express hearing requirement, the Court pointed out that without such a hearing “there would be no constitutional authority for deportation.” Id. at 49. The Court concluded that the “required by statute” language of § 5 exempts from that section’s application only those hearings that an agency has the option of conducting. Id. at 50. According to the Court, the limiting words exempt only “hearings of less than statutory authority, not those of more than statutory authority.” Id. This liberal interpretation is similarly reflected in Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962). In that case, the Securities and Exchange Commission (SEC) charged the Amos Treat brokerage firm with willful violations of the Securities Exchange Act of 1934 and suspended the effectiveness of a stock registration underwritten by the firm. Id. at 261. At the time of the preliminary investigation underlying these charges, Manuel F. Cohen headed the SEC division responsible for the initial investigation. Id. at 262. By the time the preliminary investigation was concluded, Cohen had become a Commissioner of the SEC. Id. Thus, he participated as an employee in the initial investigation. Notably, the statutory language of § 5 did not compel the court’s conclusion. The subsection which contains the prohibitions relied upon by the court also provides that “[t]his subsection does not apply . . . to the agency or a member or members of the body comprising the agency.” 5 U.S.C. § 554(d) (1976). Nevertheless, the court concluded that this exemptive language was intended to permit a Commissioner to participate in the decision to investigate and in the ultimate adjudication, but only if he has not participated in the actual investigation. 306 F.2d at 266. This minimizes the danger of ex parte communication and protects against the possible inability of someone to judge a case that he both helped to shape and, as an SEC member, participated in the decision to suspend the stock registration and initiate formal charges. Id. After learning of Cohen’s participation, Amos Treat sought to compel discontinuance “by reason of Commissioner Cohen’s unlawful participation and the unlawful ex parte communications between the [SEC] and the members of its staff engaged in the prosecution of the case.” Id. at 263. The court of appeals agreed with Amos Treat, noting the need to separate the prosecutorial and decisional functions of an agency. Id. at 265. The court, finding § 5 of the APA applicable to Cohen’s activities as an employee, concluded that he could not “participate or advise in the decision” of the SEC. Id. at 266 (quoting 5 U.S.C. § 1004(c) (1976)). The prohibition of § 5, clearly applicable to Cohen when he served as an employee, “followed him and attended when he became a member of the [SEC].” 306 F.2d at 266.
person or party on a fact in issue, unless . . . notice and [an] opportunity . . . to participate” is given to all parties.91

The ALJ’s decision becomes the decision of the agency, unless one of the parties appeals.92 In the event of review, the agency does not sit as an appellate court reviewing a trial judge’s decision. Rather, it has all the powers it would have had if it were making the initial determination.93 Yet even in this de novo procedure, the ALJ’s decision is by no means insignificant. To the contrary, if the agency’s decision is appealed to the courts, the ALJ’s findings may be of considerable importance. Appellate courts generally apply the substantial evidence test94 in reviewing factual determinations of administrative agencies, and in such a review the initial decision of the hearing examiner is most important,95 especially when questions of demeanor and credibility are involved.96

The procedures mandated by the APA, although superior to many state statutes, do not achieve a complete separation of an agency’s investigative, prosecutorial and adjudicative functions. In the final analysis, the decision to proceed against a specific company or individual belongs to the same commissioners or board members who will ultimately render a decision.

Congress has supplemented the APA’s protections against prejudgment for the National Labor Relations Board (NLRB). The problem of prejudgment by NLRB members was overcome by completely separating that agency’s investigative and prosecutorial functions from the Board itself.97 The NLRB’s General Counsel, who is appointed by the President and is not responsible to the NLRB, is the

91. 5 U.S.C. § 554(d)(1) (1976). The parties include the person against whom the agency is proceeding, those who may have been allowed to intervene and the agency itself as represented by those who have tried the case on its behalf. There is an exception “for the disposition of ex parte matters as authorized by law.” Id. § 554(d).
92. Id. § 557(b).
93. Id.
94. Id. § 706(2)(E); Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951).
95. Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951). In Universal Camera Corp. the Supreme Court noted:
The “substantial evidence” standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board’s than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case.

Id.
96. See id.; NLRB v. James Thompson & Co., 208 F.2d 743, 745-46 (2d Cir. 1953).
agency's chief prosecutorial and investigative officer. As such, he or his designee determines whether to prosecute alleged unfair labor practices. The hearings are conducted by ALJs, and the NLRB members make the ultimate decisions, but no one in the decision-making process, including the NLRB itself, has any authority over the investigation or prosecution of the case.

C. State Statutes

1. The Model State Administrative Procedure Act

A Model State Administrative Procedure Act (Model State Act) was approved by the National Conference of Commissioners on Uniform State Laws in 1946 and was revised in 1961. Due to the increase in administrative functions and agencies since 1961, the Commissioners adopted an entirely new administrative procedure act in 1981. Like the federal APA, the 1981 Model State Act specifically prohibits ex parte communications and mandates the separation of investigative, prosecutorial and adjudicative functions. To date, however, no state has adopted these provisions. Instead, many states have continued to pattern their administrative procedures after the 1961 Model State Act.

Although the 1961 Model State Act addresses the problem of prejudgment inherent in administrative agency decisions, it does not mandate the separation of functions required by either the federal APA or the 1981 Model State Act. Consequently it is not satisfactorily effective in dealing with the prejudgment problem. Under the 1961 Model State Act, agencies are not required to utilize hearing officers to make the initial decision, nor is there a prohibition against assigning an employee or agency member to adjudicate a case after that person has performed investigatory or prosecutorial functions. Agency employees who serve as hearing officers may be supervised by those responsible for investigative or prosecutorial functions. Those supervi-

98. The Taft-Hartley amendments to the National Labor Relations Act specifically provide that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board." Id.

99. Id.

100. See United Food & Commercial Workers Int'l Union v. NLRB, 675 F.2d 346, 352-53 (D.C. Cir. 1982).


102. Id., Historical Note, 14 U.L.A. at 357.


104. Id. § 4-213, 14 U.L.A. at 116.

105. Id. § 4-214, 14 U.L.A. at 117-18.

106. See id., Commissioners' Prefatory Note, 14 U.L.A. at 55.
sory officials may determine salary levels, advancement opportunities and job tenure of the hearing officer. Moreover, the agency employee who prosecutes a case on any given day may sit as an adjudicator in a factually related case on another day.

The 1961 Model State Act does, however, achieve some minimal separation between the fact finder and those engaged in prosecuting or investigating a particular case. Section 13 limits ex parte communications with those exercising decision-making functions. As in the federal APA, a distinction is made between employees and members of the agency. An adjudicatory employee, who may be supervised by prosecutorial or investigatory personnel, may not communicate with any "person or party" regarding issues of fact in the case to which he is assigned unless all parties are given an opportunity to participate. With respect to issues of law, the employee may not communicate with "any party or his representative." Because the agency will be a party in most cases, the critical question becomes which agency employees qualify as representatives of the agency. If all staff persons are considered representatives, the adjudicating employee must be completely insulated from the entire staff. If, on the other hand, the term representative is construed too narrowly, communication about questions of law would be permitted with all other agency employees including the investigatory and prosecutorial personnel who had worked on the particular case. Several exceptions are made for agency members. They may communicate with one another and are entitled to the aid and advice of "personal assistants."

108. Id.
109. Id.
110. Id.
111. Id. Given the requirement that findings of fact must be based "exclusively on the evidence and on matters officially noticed," id. § 9(g), 14 U.L.A. at 404. there is certainly nothing improper in providing a staff for the agency member. If all agency employees are representatives of a party, the exception would permit agency members to have the assistance of a staff in deciding questions of law.

For a criticism of the 1961 Revised Model Act, see K. Davis II, supra note 38, at 581-89. With respect to § 13, Professor Davis wrote:

Section 13 goes much too far in denying to an agency the use of its staff. . . . Agency members, presiding officers, and members of the agency's staff should be allowed to communicate with each other, except that the Act should forbid communications between those who are participating in the decision of a contested case and staff members who in that case have participated in investigating, prosecuting, or advocating.

In other respects, § 13 does not go far enough. It should not only forbid insiders from improperly communicating with outsiders but it should also forbid outsiders from improperly communicating with insiders. It must deal with communications in both directions, not just in one direction. And to protect against contamination of the judging function, something more than communication must be dealt with; those who participate in the decision
Presumably an assistant's aid and advice may encompass both issues of fact and law.

The minimal separation of functions achieved by the 1961 Model State Act is an insufficient safeguard against prejudgment. States that have adopted the 1961 Model State Act should reevaluate their procedures in light of the 1981 revision. By adopting the separation of functions and ex parte communications provisions in the 1981 Model State Act, states, like federal agencies, would provide greater protection against prejudgment. The ideal solution would be to follow the lead of some states, which have enacted provisions that go further than both the 1981 Model State Act and the federal APA in ensuring fairness in disciplinary proceedings.

2. Other State Statutes

Several states have enacted statutes which, although somewhat cumbersome, are fairer than either the federal APA or the 1981 Revised Model State Act in professional discipline cases. For example, article 61 of the New York education statute sets out a detailed procedure which a public employer must follow if it seeks to dismiss a tenured employee. After charges against the teacher are filed with the district clerk or secretary, the board of education must meet in executive session to determine whether probable cause exists for the charges. If the board makes such a finding and if the teacher does not waive his rights, the commissioner of education schedules a hearing before a three-member panel. Both the board of education and the teacher select a member. The third member is chosen by mutual agreement of the first two panel members, or if they are unable to agree, from lists supplied by the American Arbitration Association.

The designation of such a hearing panel avoids the prejudgment problem. The panel has no prior knowledge of the facts, and unlike the board of education, it has made no preliminary finding that probable cause exists for the disciplinary action. The panel's determination, which is binding on both the teacher and the board of education, is appealable to either the commissioner of education or the courts.

Under a New Jersey statute, written charges against a teacher must be filed with the secretary of the local board of education. If the

must not be subordinate to whose who participate in investigating, prosecuting, or advocating, except that agency members must have ultimate responsibility for all functions.

Id. at 586-87.

113. Id. § 3020-a(2) (McKinney 1981).
114. Id. § 3020-a(2)-(3)(c).
115. Id. § 3020-a(3)(c).
board believes that the charge and the supporting evidence warrant dismissal of the teacher, it forwards the written charge to the commissioner of education. The commissioner determines whether the charge is sufficient to warrant dismissal; and if so, he conducts a hearing. An adverse decision by the commissioner is appealable to the State Board of Education. That decision is reviewable in court to determine whether "the findings made could reasonably have been reached on sufficient credible evidence present in the record" as a whole and whether the penalty imposed is arbitrary or constitutes an abuse of discretion. This statute successfully separates the commissioner's hearing and decision on the merits from the employing board's prior investigation and determination to initiate charges.

California provides another example of a procedure which, although optional, achieves fairness in professional discipline cases by following the federal APA model. In California, the same board that conducts the initial investigation may hear the case and render a decision. The Government Code, however, allows the various professional discipline boards to have a hearing officer preside and prepare a proposed decision. The hearing officer is not an employee of the agency, but rather is employed by the Office of Administrative Hearings, which hires and maintains a staff specifically to conduct such proceedings. Thus, a mechanism exists whereby the hearing takes place and the initial decision is made by someone who has had no prior connection with the proceeding and has not reached any tentative conclusions with respect to the merits. While the board may ignore the proposed decision, its very existence would undoubtedly assist the professional in any appeal because it would be relevant on the question of whether substantial evidence existed to support the agency's decision.

CONCLUSION

Many state disciplinary statutes fail to ensure a sufficiently fair hearing for the accused professional. Pursuant to such statutes, the same board or persons who initially determine that there is sufficient evidence to warrant a disciplinary hearing may ultimately decide

117. Id.
118. Id. § 18A:6-16 (West 1968).
119. Id. § 18A:6-27.
122. Id. § 11,517.
123. Id. § 11,370.3.
124. Id. § 11,517(b), (c).
125. See supra note 94 and accompanying text.
whether the professional has in fact engaged in improper conduct. Although the Supreme Court has determined that the procedures embodied in these statutes are constitutional, one must question whether states should be content in taking advantage of this holding.

Frequently, the person or persons who sit as the triers of fact are required to perform prosecutorial and investigative functions, a practice that increases the likelihood of prejudgment. Additionally, the adjudicator may receive alleged facts about a case outside the framework of a contested hearing. In the case of a disciplinary action against a professional employee, the procedure may also place the trier of fact in the position of deciding between the credibility of the employee and the veracity of a supervisor, or another with whom the adjudicator has a close professional relationship.

While no single solution guarantees an impartial trier of fact, several statutory models have made great strides toward that goal. Some statutes, however, although reducing the likelihood of prejudgment, do so at the cost of efficiency. These statutes are not a satisfactory solution to the prejudgment problem. The cumbersome nature of their procedures may deter an agency from initiating disciplinary action even though such action would serve the public welfare. If the initial trier of fact is impartial, the necessity or advisability of numerous administrative and judicial appeals is questionable.

The National Labor Relations Act and state statutes in New York, New Jersey and California efficiently avoid the problem of prejudgment and protect the professional against unfairness. The federal APA and the 1981 Revised Model State Administrative Procedure Act, while not completely eliminating the problem, are far superior to most existing state statutes.