

## RECENT ADMINISTRATIVE MANDAMUS CASES INVOLVING HEARING PROCEDURES

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Two recent decisions of the Courts of Appeal address some of the complicated procedural issues involved in administrative adjudication, including the relationship between administrative prosecutors and hearing officers, the power of reviewing courts to examine the mental processes of administrative adjudicators, and the rights of accused parties to present live evidence in their defense.

*Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal.App.4th 81 (2003), concerned, quite transparently, the efforts of the City of Beverly Hills to eliminate the sole adult cabaret operating within its borders. The City's municipal code requires adult cabarets to renew their permit every two years. To make this process more challenging, Assistant City Attorney Terence Boga demanded that the cabaret present all the papers it would have to file if it were seeking a permit for the first time, including site plans and letters of justification. The municipal code itself did not require this additional exercise.

The cabaret owners took the position that the submission of this extra material was superfluous, and it presumably was difficult and expensive as well. As a result, the City rejected the application as incomplete.

The owners requested an administrative hearing to review that determination. The City appointed its Risk Manager, David R. Holmquist, to preside over the hearing.

At the outset of the hearing, Holmquist informed the parties that Assistant City Attorney Boga "will be advising me and assisting me as necessary in these proceedings." Holmquist and Boga conferred throughout the hearing, "apparently in connection with evidentiary rulings and legal issues," although their conversations were not transcribed. The owners of the cabaret objected to the appointment of a municipal employee as hearing officer and to Boga's role as his advisor, but Holmquist overruled both objections.

To no one's surprise, Holmquist's decision upheld the City's determination that the application was incomplete. The owners of the cabaret sought a writ of administrative mandate.

The Superior Court granted the writ, ruling that Boga's active role in the denial of the permit, combined with his participation as the hearing officer's advisor, constituted "actual bias." The City appealed.

The Court of Appeal affirmed, albeit on somewhat different grounds. While it did not find "actual bias," the court concluded the hearing did not meet "minimum constitutional standards of due process."

The court acknowledged "the incredible variety of administrative mechanisms utilized in this country," ranging from inquisitorial proceedings, in which the adjudicating officer has an active investigatory role, to full adversarial hearings, which resemble trials.

While some flexibility is allowed in combining adjudicative and investigatory functions in inquisitorial adjudications, "to promote both the appearance of fairness and the absence of even a probability of outside influence on administrative hearings, the prosecutory . . . aspects of administrative matters must be adequately separated from the adjudicatory function."

The court offered a vivid description to prove its point: "When both the agency and the citizen are represented by counsel at a formal hearing before a supposedly neutral decision-maker who has not participated in the initial fact-finding process of the agency's investigation and prosecution of a matter, and then, in the midst of this seemingly adversary system, the same lawyer who represented the agency as advocate also advises the hearing officer with regard to its decision affecting that agency, the mental image comes to mind of a hearing in which the agency's lawyer, while representing the agency, raises an objection and then excuses himself from counsel table to consult with the hearing officer as to whether the objection should be sustained."

While the court was undoubtedly correct in ruling that Boga could not participate in the adjudication of a case in which he had been an advocate, another aspect of the court's ruling was more questionable.

The Superior Court had rejected the City's offer of a declaration by Holmquist in which he stated he had reached his decision without consulting Boga. The Court of Appeal held the refusal to admit this evidence was an abuse of discretion (although it did not affect the ultimate result), because a post hoc inquiry into the state of mind of an administrative adjudicator is appropriate when the basis for a decision is unclear.

The court relied upon two cases, although neither provided sound support for this conclusion. The first was *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), in which the federal Secretary of Transportation had issued an adjudicatory decision without stating his findings of fact. Although the Supreme Court authorized formal cross-examination of the Secretary about the mental processes underlying his ruling, the *Overton Park* decision was an anomaly rendered at a time when administrative procedures were still in flux, and it is unlikely that any court would permit such an inquiry today. Even the *Nightlife* court did not hold that the cabaret owners were entitled to cross-examine Holmquist on his asserted decisionmaking process.

Second, the Court of Appeal relied upon *City of Fairfield v. Superior Court*, 14 Cal.3d 768 (1975), which it said had "cit[ed] *Overton* with approval." In fact, *Fairfield* had expressly rejected the style of inquiry authorized in *Overton Park*, holding that if the adjudicator "does not state findings, the remedy, depending on the case, is to annul the administrative action or to remand the matter to the board for findings, not to take the depositions of the administrators as a substitute for findings."

The *Nightlife* court concluded by annulling the City's determination and remanded the case for a new administrative hearing before a different hearing officer with no prior advocacy role in the case.

This latter aspect of the court's ruling was arguably inappropriate as well. The merits of the case had been fully developed, and there remained for resolution only the legal issue of whether an applicant for a renewed adult-use permit must submit all the documentation required on an initial application.

It should have been apparent to all, particularly in light of the aversion to adult businesses shared by most municipalities in Southern California, that the case will find its way back up to the Court of Appeal no matter who prevails at the hearing. The court could have saved everyone, including itself, a lot of bother by providing a prompt and definitive decision on the merits of this simple issue instead of prolonging the litigation.

In the second case, *Southern California Underground Contractors, Inc. v. City of San Diego*, 108 Cal.App.4th 533 (2003), the San Diego City Council had permanently debarred the plaintiff (known as "SoCal") from contracting with the City, based upon a finding that it had engaged in corrupt practices while administering public works contracts. SoCal sought a writ of administrative mandamus to reverse that decision. As in *Nightlife Partners*, the dispute centered on whether the City had provided SoCal with a fair hearing.

The primary issue concerned SoCal's argument that the City Council had unfairly precluded the presentation of live testimony or cross-examination, requiring SoCal to rely upon deposition transcripts and other written submissions, plus an oral argument by counsel. The Court of Appeal concluded these procedures were adequate, but it reached this determination by misinterpreting two landmark decisions of the U.S. Supreme Court.

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court addressed whether there is a constitutional right to an evidentiary hearing *before* an administrative agency may terminate welfare and social security disability benefits, respectively.

The Court concluded in *Goldberg* that because a wrongfully-terminated welfare recipient faces an immediately desperate situation, the suspension of benefits without a *prior* hearing is unconstitutional. *Goldberg* also emphasized the importance of allowing the recipient to present evidence orally and to cross-examine adverse witnesses.

In *Mathews*, the Court decided that the erroneous termination of disability benefits creates a less dire circumstance, and a hearing therefore may be deferred until *after* the termination of benefits.

The Court of Appeal misread these cases, concluding that a hearing allowing the presentation of live evidence is required in welfare cases but is not required *at all* in many other situations, such as disability cases and, by extension, debarment proceedings. The court's error

was that *Goldberg* and *Mathews* differ regarding *when* the hearing occurs, not *whether* it occurs or whether it includes a right to cross-examine witnesses.

It is likely that respondents in debarment proceedings are not entitled to a "predetermination" hearing under *Goldberg*, and the Court of Appeal was correct in stating that there are some circumstances in which the presentation of live evidence is not constitutionally required either before or after the agency's determination becomes effective. However, even if its conclusions are valid, the process of reasoning whereby the court reached them was certainly erroneous.

As these two decisions demonstrate, the procedures for challenging agency process in administrative mandamus proceedings are complex, and courts often have difficulty applying the finer legal principles correctly.