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Legal Summaries

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**Pepperdine University School of Law
Legal Summaries***

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* Prepared by the Legal Summaries Editor of the Journal of the National Association of Administrative Law Judges at Pepperdine University School of Law. The Legal Summaries are selected case briefs of recent court decisions on issues involving administrative law.

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UNITED STATES SUPREME COURT**Barnhart v. Thomas**, 540 U.S. 20 (2003).

LAW: An applicant for disability benefits under the Social Security Act cannot qualify as disabled if he can perform his previous job, even if that job is disappearing from the economy.

FACTS: The Social Security Act provides benefits for those who have a “disability.” To qualify as disabled, a person must be impaired to the extent that he is unable to do his previous work or any other “substantial gainful work which exists in the national economy.” Pauline Thomas, who had previously worked as an elevator operator, applied for disability benefits. In an administrative hearing, she was denied benefits because her impairments did not prevent her from performing her previous work. Although Thomas argued that her job had largely disappeared from the national economy, the administrative law judge did not find the disappearance of Thomas’ previous job to be relevant. The ruling was affirmed by the district court but reversed by the Third Circuit Court of Appeals.

ANALYSIS: The Court read the statute as creating two separate requirements for disability; an applicant must be unable to do his previous work *and* unable to find any substantial work which exists in the national economy. While, by the terms of the statute, “substantial gainful work” must exist in the national economy, it is not clear whether “previous work” must also exist in the national economy. However, the Social Security Administration (SSA), through its regulations, has interpreted the statute to reject such a requirement. The five-step process promulgated by the agency, defers the inquiry into the state of jobs in the national economy until the last step, at which point many applicants have already been eliminated. This construction is to be given deference under the *Chevron* doctrine.

The Third Circuit’s interpretation of the statute was criticized by the Court for ignoring canons of grammatical construction which indicate that the qualifying phrase “which exists in the national economy” should only apply to “substantial gainful work.” Likewise, the Court refuted the Third Circuit’s concern that a strict reading could lead to absurd results. The Court reasoned that consideration

of an applicant's previous employment may function as a "proxy" for an analysis of employment existing throughout the economy regardless of whether a previous job exists in the economy; such an interpretation allows the SSA to avoid the burden of analyzing applications individually. Although the agency's interpretation may have imperfect applications in certain circumstances, it is ultimately a reasonable interpretation.

HOLDING: The decision of the Third Circuit Court of Appeals is reversed.

IMPACT: Applicants for disability benefits will not prevail if they can perform a previously held job, regardless of whether that job is available in the current national economy.

Cheney v. District Court, 124 S. Ct. 2576 (2004).

LAW: The government need not assert executive privilege before courts can consider its separation of powers argument in a writ of mandamus.

FACTS: President Bush created the National Energy Policy Development Group (Group) as a means of getting advice on matters of energy policy. The Group, which consisted of several federal agency members, was chaired by Vice President Cheney, who had the authority to include outside federal officers when appropriate. After five months had passed, the Group issued a final report and disbanded.

Following the report, Judicial Watch and the Sierra Club filed actions against the Group, claiming that it had not complied with the disclosure requirements of the Federal Advisory Committee Act (FACA). FACA, which imposes open-meeting and disclosure requirements, applies to groups that advise the President, but it does not apply to any committee composed entirely of Federal Government employees. While it is agreed that the President only appointed officials from the federal government, Judicial Watch and the Sierra Club contend that private individuals participated in non-public meetings, acting as *de facto* members of the Group.

Although the district court dismissed some of the actions, it held that the FACA could be enforced against the Vice President and

government actors under the Mandamus Act, and against agency members under the APA. The court also permitted a limited amount of discovery in order to allow for a determination of whether there were *de facto* members in the Group. The government sought a writ of mandamus, but the Court of Appeals denied the petition, because there were alternative remedies available, and the government could protect its rights by asserting executive privilege in the district court rather than obtaining a writ of mandamus. Moreover, the court placed a burden on the government to object to discovery orders and assert executive privilege with particularity.

ANALYSIS: The government's mandamus petition was not untimely. While Judicial Watch and the Sierra Club argued that the petition should be dismissed, they cite Federal Rule of Appellate Procedure 4(a), which applies not to mandamus petitions, but to notices of appeal. Likewise, the government is not barred by laches, as the government actively pursued its rights.

The Court held that mandamus could be issued in this case. Although mandamus is an extraordinary remedy, it would be proper to issue it in this case. Courts may issue mandamus to restrain lower courts that might endanger the executive's ability to perform its functions by endangering the separation of powers. Moreover, the government does not have to assert executive privilege in order to object. *Nixon* does not apply; whereas the executive's confidentiality is of paramount importance in a civil case, the need to uncover evidence in a criminal case outweighs concerns of privilege. In addition, civil litigation contains fewer checks than the criminal justice system. Whereas a criminal prosecutor will exercise discretion in bringing criminal charges, checks against frivolous civil litigation are inadequate to protect against the filing of meritless claims against the executive. The Court also noted that the discovery requests in *Cheney* were broad, thereby threatening the integrity of government confidentiality.

Finally, the Court refused to order the court of appeals to issue a writ of mandamus. Discretion to issue the writ is given to the court that is petitioned, and the Court of Appeals did not abuse its discretion in failing to grant a writ to the government. The Court thereby remanded the matter to the court of appeals, allowing it to address the parties' arguments.

HOLDING: The holding of the court of appeals is vacated, and the case is remanded.

IMPACT: The executive is protected from requests for discovery in civil actions, and is not required to make an affirmative showing of privilege before requesting mandamus relief.

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

Mengistu v. Ashcroft, 355 F.3d 1044 (7th Cir. 2004).

LAW: The *Chenery* doctrine precludes an administrative agency from defending its action on a ground that is not stated or discernible in the initial decision. Moreover, an agency decision must create a “rational bridge” between factual findings and the agency’s conclusion in order to survive review.

FACTS: Thomas Mengistu, an Ethiopian whose ethnic background is Eritrean, came to the United States on a student visa in 1989. His visa expired in 1991, and the immigration service began deportation proceedings against him in 1992. Mengistu applied for asylum, but the judge denied the application and ordered deportation. Mengistu appealed to the Board of Immigration Appeals (Board) in 1993; the Board affirmed the order in 2000.

After the order, Mengistu made a motion to reopen the case on the basis of changed conditions. War broke out between Ethiopia and Eritrea in 1998, and Ethiopia began to persecute its Eritrean minority. Mengistu argued that his life or freedom would be threatened if he were required to return to Ethiopia. However, the war ended in December of 2000, and the Board denied his motion. In its denial, the Board stated that, since the motion had been filed, Ethiopia had begun to withdraw troops, and the United Nations had deployed a peacekeeping mission.

ANALYSIS: The court noted that, if the Board had argued that Mengistu’s failure to respond to the immigration service undermined his ability to carry the burden required to reopen a deportation proceeding, the court might have deferred to the Board’s discretionary power. However, the cessation of war was the only

ground cited by the Board in its decision, and the *Chenery* doctrine precludes an administrative agency from defending its actions on a basis that was not discernible in the initial agency decision. Moreover, Mengistu's failure to reply was not a compelling ground for the agency's denial of his motion, so the court could not conclude that this was harmless error. The court noted that Mengistu's silence may have indicated that Mengistu found it unnecessary to support his contention that there was persecution of Eritreans in Ethiopia, as the Board's decision did not indicate that persecution had ended.

The Board's decision, which merely stated that Ethiopia was withdrawing its troops, and the United Nations had deployed peacekeepers, was held to be insufficient by the court. The opinion did not build a "rational bridge" between these underlying facts and the agency's conclusion that Mengistu did not require asylum. Persecution of Ethiopia's Eritrean minority could conceivably persist even after the war is over, and the Board made no attempt to address the question of persecution, or shift the burden of proof to Mengistu. The court also noted that neither Ethiopia nor Eritrea would issue Mengistu a passport, and that several reports indicated that persecution of Eritreans has continued. However, the court concluded that questions relating to the substance of Mengistu's asylum claim should be considered on remand.

HOLDING: The decision of the Board of Immigration Appeals is vacated, and the matter is remanded to the Board.

IMPACT: The Board of Immigration Appeals must reconsider Mengistu's motion and, in its decision, must explicitly connect its findings to its conclusions.

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228 (10th Cir. 2004).

LAW: The national do-not-call registry is a valid commercial speech regulation which does not violate the First Amendment. Moreover, the Federal Communications Commission's "established business relationship" exception is not arbitrary and capricious, and the

Federal Trade Commission has the authority to enact its do-not-call rules.

FACTS: The do-not-call registry is the result of a decade-long effort to protect consumer privacy and reduce the risk of telemarketing abuse. Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), finding that consumers considered unsolicited telemarketing to be an invasion of privacy. Additionally, Congress found that commercial calls posed a larger threat to the public interest than political or charitable calls. In the TCPA, the Federal Communications Commission (FCC) was granted the authority to establish a database of consumers who found telemarketing to be intrusive. In 1994, Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act), which authorized the Federal Trade Commission (FTC) to prohibit telemarketing that consumers would find coercive.

The FCC and FTC first attempted to implement the TCPA and Telemarketing Act by creating company-specific lists. Telemarketers were required to maintain lists of consumers who had asked that particular seller not to call them, and these requests had to be obeyed. However, this initial effort was ineffective; agencies credited this failure in large part to the burden imposed on consumers, who would have to contact multiple telemarketers in order to maintain their privacy, and the failure of telemarketers to honor consumers' requests. While the agencies kept these rules available as an option for consumers, they decided to create the do-not-call registry as an additional means of protecting consumers' rights.

In 2003, the FCC and FTC, acting in concert, created the national do-not-call registry. The registry contains the phone numbers of individuals who have indicated that they do not want to receive unsolicited phone calls. Commercial telemarketers, but not callers who are making charitable or political fundraising calls, are prohibited from calling numbers on the registry absent an express business relationship with the consumer or the consumer's express written permission.

The court consolidated four challenges to the do-not-call registry in *Mainstream Marketing*. These included First Amendment challenges to the list itself and to its registry fees, a dispute over the validity of the FCC's "established business relationship" exception, and a challenge to the FTC's authority to enact do-not-call

regulations. The Tenth Circuit found that the telemarketers' challenges lacked merit, and upheld the agencies' do-not-call regulations.

ANALYSIS: The do-not-call registry was held to be a valid commercial speech regulation under the *Central Hudson* test – there is a substantial government interest in curbing unsolicited calls, the regulation directly advances that interest, and the registry is narrowly tailored to achieve the result, as it only restricts calls that are aimed at unwilling listeners. Likewise, requiring telemarketers to pay a small annual fee to access the registry is constitutional, as these fees merely offset expenses incident to the administration and enforcement of the program. Thus, the regulation survived a First Amendment challenge.

The court rejected the argument that the FCC's exception for companies which have an established business relationship with customers is arbitrary and capricious in violation of the Administrative Procedure Act. The FCC considered telemarketers' concerns that the exception would have an anti-competitive effect, asking parties to address these issues in its notice of rulemaking. The FCC considered, but ultimately rejected, proposed rules that would lessen the potential anti-competitive effect. Moreover, in rejecting the alternative proposals, the FCC explained its reasoning. If the FCC restricted the exception so that all telecommunications companies were unable to call customers, companies would lack the flexibility to discuss new services or products; such a restriction would not be in the public interest. Other proposals were criticized as failing to protect consumers' privacy rights. Finally, the FCC cited factors which limited the anti-competitive effect of the regulation: equal access to customers who were not on the registry, the ability of individual customers to override the exception, and the availability of other means of marketing services. The court saw the FCC's conclusion as a reasoned policy decision which should be deferred to, not an arbitrary and capricious exercise of the agency's will.

The court also concluded that the FTC had the statutory authority to promulgate do-not-call regulations. First, the court noted that the FTC's interpretation of the Telemarketing Act was a reasonable construction of the statute, and was therefore entitled to deference under the *Chevron* doctrine. In addition, the court noted that,

subsequent to the enactment of the Telemarketing Act, Congress acted in a manner that was concordant with the FTC's understanding. Congress directed the FCC and FTC to make their do-not-call rules consistent, and also authorized the FTC to collect registry fees in conjunction with the do-not-call registry. Moreover, Congress ratified the FTC's authority, further affirming the agency's authority to regulate.

HOLDING: The district court's judgment is reversed.

IMPACT: The FCC and FTC may continue to regulate telemarketing using the national do-not-call registry.

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 297 F. Supp. 2d 74 (D.D.C. 2003).

LAW: Agency rules narrowing the scope of general permits do not constitute a "final" action which the court has jurisdiction to consider, as parties have the option of applying for general permits, and are therefore not proscribed from engaging in the discharge of pollutants.

FACTS: This case concerns the administration of the Clean Water Act (CWA). While the CWA prevents parties from discharging pollutants into the nation's waters, the act allows the Army Corps of Engineers (Corps) to issue general and individual permits. These permits authorize groups to discharge pollutants and is intended to allow projects which have a minimal effect on the environment to proceed efficiently. The CWA allows the Corps to issue general permits for any category of activities that are similar in nature and cause minimal environmental effect when performed separately or cumulatively. Activities that fulfill the conditions for general permits may be performed without the case-by-case determination required when obtaining individual permits. A party that discharges pollutants without, either meeting the conditions of a general permit or obtaining an individual permit, may be subject to enforcement by the Corps or the Department of Justice.

The Corps has issued various nationwide permits (NWP) since the inception of the CWA, the most prominent of which is “NWP 26.” In 1996, the Corps proposed the reissue of several NWPs, including NWP 26, which were set to expire within the year. After extension of the permit and two comment periods, the Corps replaced NWPs with a series of replacement permits. The new permits greatly restricted the scope of qualifying activities, minimizing the allowable impact, and requiring less of an impact before notification procedures must be followed. Several parties, including the National Association of Home Builders (NAHB), filed suit; these actions were later consolidated.

ANALYSIS: The district court, agreeing with the Corps, concluded that the court lacked subject matter jurisdiction because the issuance of an NWP is not a final agency action. The court laid out the requirements for finality, noting that there must be a definitive declaration of agency policy, as well as legal consequences, inherent in the decision. While the court admitted that there was a clear expression of policy by the Corps, it disagreed with the notion that parties whose activities are no longer included within an NWP are subject to final legal consequences. The general permit system does not deny parties the right to obtain permits, but merely streamlines the permitting process by limiting the number of individual decisions that the agency must make. Therefore, parties have not been subjected to a final decision if they cannot operate under a general permit, as the option of obtaining an individual permit continues to exist. Moreover, the delay and cost incurred in applying for an individual permit are not sufficient to make the agency’s decision a final agency action. For the action to be final, an agency must explicitly prohibit a party from engaging in a given activity, either by denying the party an individual permit or by commencing an enforcement action.

HOLDING: The court granted summary judgment in favor of the government.

IMPACT: Affected polluters may not challenge the Corps’ regulations until they fail to acquire an individual permit or are subjected to discipline.

ARIZONA STATE COURT

Winters v. Ariz. Bd. of Educ., 83 P.3d 1114 (Ariz. Ct. App. 2004).

LAW: A nexus must be shown between a teacher's actions and his fitness to teach before disciplinary action may be taken on the basis of the teacher's behavior. This nexus may be shown when off-campus conduct relates to a teacher's fitness to practice and adversely affects the school community.

FACTS: The Arizona Board of Education (Board) initiated disciplinary proceedings against Claude Winters' teaching certificate on the basis of five separate incidents. Winters' behavior in these incidents included disorderly conduct, discharge of a firearm, threatening a former student, and threatening neighbors' children. Although three of the incidents were not prosecuted, Winters pled guilty to the unlawful discharge of a firearm and aggravated harassment. Winters received a hearing before the Professional Practices Advisory Committee (PPAC), which recommended that Winters' certificate be revoked. The Board adopted the PPAC's recommendation, and the trial court affirmed the Board's decision.

ANALYSIS: The trial court is limited to determining whether the agency's decision is supported by substantial evidence and not arbitrary, capricious, or an abuse of discretion. In examining the record, the court disagreed with Winters' allegation that neither the PPAC nor the Board made a finding that he had engaged in unprofessional conduct, as the record showed that the hearing officers considered Winters to have acted unprofessionally.

Winters criticized the Board for failing to define "immoral or unprofessional conduct," but, as he failed to raise the argument previously, he was limited to the argument that there is no nexus between his conduct and the finding that he was unfit to teach. Winters claimed that there was no evidence that his behavior, which took place off-campus, affected the operation of the school or harmed his relationship with students. As the finding of a nexus is a conclusion of law, the court was able to make an independent judgment as to whether the underlying factual findings provided a basis for a finding of unprofessional conduct.

The court declined to limit "unprofessional conduct" to direct

interactions between teachers and students, but the off-campus conduct must relate to a teacher's fitness to practice and have an adverse effect on the school. Winters' conduct, which he fully admitted to, related to his fitness, as the incidents suggested a pattern of violent behavior which involved children and young adults. Moreover, the Board is not required to demonstrate the effect of a teacher's conduct on students, as conduct such as Winters' gives rise to reasonable inferences of unfitness. As this nexus was implicit in the Board's findings, the court upheld the Board's decision.

HOLDING: The Board's judgment to revoke Winters' certificate is affirmed.

IMPACT: Agencies are required to show, or at least imply in the record, a nexus between a licensee's actions and fitness to practice.

CALIFORNIA STATE COURT

Lockyer v. City of San Francisco, 95 P.3d 459 (Cal. 2004).

LAW: Local executive officials do not have the authority to refuse to enforce a statute because of a belief that it violates the Constitution unless there has been a judicial determination that the statute is unconstitutional.

FACTS: In February 2004, Gavin Newsom, the Mayor of San Francisco, asked his county clerk to revise applications for marriage licenses in order to eliminate discrimination on the basis of gender or sexual orientation. Newsom expressed his belief that such discrimination was prohibited by the California Constitution, and that his request was made pursuant to his duty to uphold the constitution. The clerk altered the forms and began issuing marriage licenses to same-sex couples.

Actions seeking to halt the issuance of same-sex marriage licenses were filed soon after the city began to perform marriages of gay and lesbian couples. Eventually, the Attorney General filed a petition for a writ of mandate, claiming that the city officials' actions were unlawful and threatened the stable administration of the laws.

ANALYSIS: The court noted that marriage is largely controlled by the state legislature, and that the legislature has enacted comprehensive marriage regulations. Mayors and other city officials may be given authority to “supervise and control” the actions of a county clerk, but they do not have the authority to expand a clerk’s authority to grant marriage licenses. Moreover, local executive officials do not have the authority to refuse to enforce an allegedly unconstitutional statute unless there has been a judicial determination of its unconstitutionality.

Noting that the constitutionality of a statute is presumed, the court also cited case history to demonstrate the proposition that local officials are unable to declare a statute unconstitutional. In addition, the court rejected the notion that a declaration of unconstitutionality might be a valid means of allowing the case to come before the court, as the city has the option of persuading affected parties to challenge the statutes in court. Thus, local officials did not possess the authority to neglect their ministerial duties because of a belief that a governing statute is unconstitutional.

The court also indicated that allowing officials to ignore laws that they consider unconstitutional would create adverse consequences. Local officials are unlikely to have the legal training to make delicate constitutional decisions. Additionally, the personal determination made by an executive would be made without the due process protections afforded when constitutional questions are heard in court. Such a situation would also cause laws to be haphazardly applied, as multitudes of officials could refuse to enforce laws based on their diverse interpretations of the constitution.

Because the mayor and city officials did not possess the authority to perform same-sex marriages, the marriages were to be considered void. As the court is addressing a legal question which can be broadly applied, the court will not need to invalidate the marriages on an individual basis. Moreover, the couples’ due process rights are not violated, as the couples have been given the opportunity to participate in the relevant proceedings. Finally, the court declined to maintain the status of the marriages until a substantive constitutional decision is reached, as these marriages are considered to have been void from the beginning. Also, allowing the validity of the marriages to remain uncertain could create further reliance on the part of same-sex couples, leaving the potential for irreparable harm.

HOLDING: The Attorney General's petition for mandamus is granted.

IMPACT: The same-sex marriages performed in San Francisco are void, as the officials had no authority to grant couples marriage licenses to gay and lesbian couples.

Quintero v. City of Santa Ana, 7 Cal. Rptr. 3d 896 (Ct. App. 2003).

LAW: An individual may be deprived of procedural due process in an administrative hearing if there is an appearance of unfairness, even if there is no showing of actual bias.

FACTS: Quintero's discharge was upheld by the Santa Ana Personnel Board (Board). Subsequently, Quintero filed a petition for writ of mandate, as Halford, the attorney prosecuting his case, had previously acted as the Board's representative, thereby denying him the right to a fair hearing.

ANALYSIS: Procedural due process entails a hearing before an impartial and uninvolved decision-maker. If actual bias is not present, a party claiming a procedural due process violation must demonstrate that, in light of the facts, the probability of actual bias is intolerably high. While there must be more than a "unilateral perception of bias," due process demands an appearance of fairness. Although Halford had not performed dual roles in Quintero's case, his interactions with the Board increased the likelihood that his presence as an advocate would unduly influence the Board in its decision-making process. The possibility that Board members might look to Halford, the prosecutor, for guidance created the appearance of bias.

While dual representation may be appropriate, there needs to be enough separation between the attorneys and their roles, and an inquiry into the probability of actual bias will be determined by the totality of the circumstances in a given case.

HOLDING: The lower court's judgment is reversed, and the case is remanded.

IMPACT: A violation of procedural due process may be found even

if an attorney is not performing advisory and prosecutorial roles in the same case. If the attorney's dual roles create a likelihood that the hearing will appear unfair, due process may be violated.

ILLINOIS STATE COURT

Emerald Casino, Inc. v. Ill. Gaming Bd., 803 N.E.2d 914 (Ill. App. Ct. 2003).

LAW: The use of "shall" in a statute, which only applied to one particular licensee, was mandatory, and required the Illinois Gaming Board (Board) to grant the licensee's application for renewal and relocation.

FACTS: The Illinois Gaming Board is authorized to issue ten riverboat gambling licenses, including four Mississippi River licenses, under the state's Riverboat Gambling Act. Emerald Casino was given one of the Mississippi River licenses in 1992. When the casino wished to relocate to Rosemont in 1997, the Board refused the application, and an administrative law judge agreed with the Board's denial.

After the decision, the legislature amended the Act, incorporating a section which allowed a licensee to apply for renewal and approval of relocation, indicating that the Board "shall" grant the licensee's application if the new home municipality agrees. This legislation seemed to apply exclusively to Emerald. Emerald submitted a second application, but the Board denied the application and issued a disciplinary complaint against Emerald's license. Emerald filed a complaint in the circuit court; the court granted the Board summary judgment.

ANALYSIS: The court rejected the Board's argument that the case is not yet ripe because the rationale behind the ripeness doctrine is not present, as the issue of legislative intent is clearly defined rather than abstract. Additionally, the court concluded that Emerald was not required to exhaust administrative remedies, as the case fit within established exceptions to the exhaustion doctrine. The relevant issues, which relate to statutory interpretation, fit within the expertise of the courts and not the Board. Likewise, the scope of an agency's

power is a question to be determined by judges, not agencies. Finally, the lengthy administrative procedures could cause irreparable harm to Emerald. Thus, declaratory judgment was a fitting remedy in this case, particularly because it raised concerns relating to statutory construction.

The court found the word “shall” to be mandatory in this case. “Shall” typically indicates that an action is mandatory, but the meaning must be considered in light of the legislation as a whole, as well as the intent of the legislature. Judges have interpreted “shall” as mandatory where the statute is not directed at technicalities and where it protects a right or benefit. The word has also been interpreted as directory in cases where a mandatory interpretation would frustrate the purpose of the statute or violate the principle of the separation of powers. A mandatory reading of “shall” permits a construction that is in accordance with the intention behind the amendment. Significantly, the legislature was aware that the statute would only apply to Emerald, and must have created the legislation with the intent of allowing Emerald to relocate. A directory reading of “shall” would be unlikely to accomplish the legislature’s intent, given the Board’s animosity towards Emerald.

Finally, the court dismissed the Board’s contention that construing “shall” to be mandatory would undermine the Board’s legitimate duties to protect the public. The Board may still initiate disciplinary proceedings, and the legislative record indicates that the amendments were not intended to divest the Board of the authority to revoke gaming licenses.

HOLDING: The circuit court’s orders are reversed, and the matter is remanded.

IMPACT: The Board must allow Emerald Casino to relocate to Rosemont.

MARYLAND STATE COURT

Spencer v. Md. State Bd. of Pharmacy, 846 A.2d 341 (Md. 2004).

LAW: While the Maryland State Board of Pharmacy (Board) denied a licensee due process by refusing to recuse panel members who

represented the Board at an earlier point in the litigation process, the Board did not abuse its discretion by refusing to refer the case to the Office of Administrative Hearings.

FACTS: Linda Spencer, a pharmacist, was charged by the Maryland State Board of Pharmacy for practicing with an expired license. The Board attempted to resolve the matter in a conference, which was ultimately unsuccessful. At the conference, Stanton Ades and Laura Schneider represented the Board. Ades and Schneider later sat on the Board's panel to hear Spencer's case. Spencer made a motion for the matter to be referred to the Office of Administrative Hearings (OAH) or to recuse Board members from the proceedings, but these motions were denied by the Board. The Board ultimately placed Spencer on probation, imposed a fine, and reprimanded her.

Spencer alleged a deprivation of procedural due process before the circuit court, which vacated the Board's order. The court of special appeals remanded the case to the circuit court, instructing the court to remand the case to the Board and direct the Board to hear the case before the OAH.

ANALYSIS: The court distinguished between the Board's failure to recuse its panel members and its failure to refer the case to the OAH. Although Spencer had been denied due process when she was not allowed to be heard before an impartial decision-maker, this harm did not imply that Spencer's case could only be heard before the OAH. The decision to refer a case to the OAH is left to the discretion of the Board, and the Board could have provided Spencer with sufficient due process by recusing Ades and Schneider. Moreover, it was not arbitrary or capricious for the Board to forego the OAH.

Spencer's argument that a remand will create *res judicata* or double jeopardy issues is rejected by the court. As the Board acts to protect the public rather than punish, it is not subject to double jeopardy. Moreover, *res judicata* is not applicable, as a final decision has not been reached.

HOLDING: The judgment of the court of special appeals is reversed in part, and the case is remanded with directions.

IMPACT: The Board must provide a more impartial hearing for Spencer, but she is not entitled to a hearing before an Administrative

Law Judge.

NEBRASKA STATE COURT

Lariat Club, Inc. v. Neb. Liquor Control Comm'n, 673 N.W.2d 29 (Neb. 2004).

LAW: A show cause order which failed to advise a licensee that character and reputation would be considered in a revocation proceeding denied due process to the licensee.

FACTS: After Calburt Sheets, owner of the Lariat Club bar, had been stopped and arrested, the Liquor Control Commission issued a show cause order, which required the Lariat Club to show cause as to whether or not the license should be suspended. The order mentioned Sheets' outstanding warrant, previous DWI conviction, possession of marijuana, and conviction for driving with a suspended license. No mention of Sheets' personal character was made. The Commission held a hearing on the show cause order and ultimately decided to cancel the Lariat Club's liquor license. The Commission ordered the cancellation of the license based solely on Calburt Sheets' character and reputation.

ANALYSIS: Due process requires, at a minimum, notice and the opportunity for a hearing. Because the Lariat Club was not advised that Sheet's character and reputation would be considered, it was denied the opportunity to prepare and produce evidence relating to the issue of Sheets' character. Therefore, the Lariat Club was given inadequate notice and was denied due process.

HOLDING: The district court's affirmation of the Commission's decision is reversed, and the case is remanded to the district court with instructions to remand the case to the Commission.

IMPACT: The Lariat Club must be given another hearing in which it will be given the opportunity to produce evidence relevant to Sheets' character.

NEW JERSEY STATE COURT

In re Red Bank Charter Sch., 843 A.2d 365 (N.J. Super. Ct. App. Div. 2004).

LAW: The Commissioner's decision to renew a charter school was quasi-legislative, and an adjudicatory hearing on the decision was not necessary. Moreover, this decision was not arbitrary or capricious, and was therefore proper. The Commissioner, however, must hold adjudicatory hearings to consider whether the school's practices exacerbate the district's existing racial imbalance.

FACTS: In October 2001, the Red Bank Charter School applied to the Commissioner of Education for the renewal of its charter and expansion of the school to incorporate a larger number of students. The Commissioner, acting under the Charter School Program Act of 1995, has the authority to grant a renewal, but is required to conduct a "comprehensive review" of the charter school, including a "structured interview" and visit to the school.

That November, the Red Bank Board of Education filed opposition to the application, arguing that the Charter School had increased segregation and requesting a hearing to assess the school's effect on segregation. As part of its review process, the Department of Education asked the Charter School to reply to the Board's objections. The Charter School responded by saying that the factors influencing segregation were outside the school's control and existed before the creation of the Charter School; the decline in the number of white children in Board-controlled schools was due to the growth of private and parochial schools as well as the home schooling movement. The Board objected and asked for permission to respond, but the Commissioner did not appear to acknowledge the Board's request.

After his review, the Commissioner renewed the charter and allowed the Charter School to expand. The Commissioner's renewal did not make any mention of possible segregation or the Board's challenge to the school. The Board made an administrative appeal to the State Board of Education, which affirmed the Commissioner's decision, stating that the Board had not made a demonstration that the Charter School had a segregative effect or that it would impermissibly impact the racial composition of schools in the area.

The Board appealed this decision to the court.

ANALYSIS: The court rejected the Board's claim that the Commissioner breached his duty to investigate the Charter School's potential segregative effect. The Commissioner must ensure that the continued operation of a charter school does not result in segregation. While there is a racial imbalance between the Charter School and other schools in the district, the imbalance could conceivably stem from other factors.

An adjudicatory hearing is not required in this context. In examining the charter, the Commissioner is not acting in an adjudicatory capacity; furthermore, the statutes do not require hearings in charter application and renewal proceedings. The Commissioner is not required to provide a statement of reasoning unless the charter is denied. The renewal decision, being quasi-legislative, implicates a more relaxed standard of review than an adjudicative determination. The court must determine whether a decision is arbitrary, capricious, or unreasonable; the reasons upholding the decision must be discernable from the record, but do not need to be formally stated. Although the Commissioner did not discuss segregation concerns in his approval letter, the record provided enough evidence supporting the contention that the Charter School did not foster segregation. Therefore, the decision to renew the charter was not arbitrary or capricious.

However, the court expressed concern with the enrollment statistics, which indicate that the Charter School educates a highly disproportionate number of white students compared to district schools. While the court rejected the Board's desired remedy of closing an otherwise satisfactory charter school, it encouraged the Board to bring actions challenging practices of the Charter School, such as the sibling preference policy and the withdrawal policy, which appear to increase the school's racial imbalance. Furthermore, the court criticized the Commissioner for failing to address exacerbation concerns in a later hearing, and directed him to conduct a hearing to determine whether the Charter School has exacerbated segregation and to fashion an appropriate remedy.

HOLDING: The State Board's decision to renew and expand the charter is affirmed. The court remands issues relating to the school's adverse effect on racial imbalance to the State Board, allowing the

Commissioner to conduct a hearing and develop a remedy if necessary.

IMPACT: The Charter School is allowed to keep its charter, however, the Commissioner must conduct an adjudicatory hearing on the issue of whether the schools practices exacerbate existing segregation.

TEXAS STATE COURT

Willmann v. City of San Antonio, 123 S.W.3d 469 (Tex. Ct. App. 2003).

LAW: An advisory committee may violate the Texas Open Meetings Act if the committee functions as a decision-maker on a practical level, with actual decision-makers “rubber stamping” the committee’s proposals.

FACTS: In 1997, the San Antonio City Council appointed five of its members to the Municipal Court Committee (Committee), which reviewed and discussed applicants for appointment, and reappointment, as municipal court judges. However, Committee meetings did not comply with the notice and recording requirements of the Texas Open Meetings Act (TOMA). Eventually, the Committee gave its recommendations to the Mayor and City Council and asked the Council to concur with its selection at an open meeting. Before the meeting, the Committee chair informed the non-recommended judges that they had not been recommended for reappointment and thanked them for their service. The draft ordinance presented in the City Council meeting contained the names of those individuals who had been recommended for reappointment. In addition, discussion of the candidates was limited, as only three individuals were discussed in depth.

The non-recommended judges sued the City. They claimed that the ordinance violated the Texas Constitution, which did not allow officers to be removed from office until successors had been appointed and qualified. Additionally, the judges claimed that the decision-making process violated TOMA, as the City Council’s action was merely a “rubber stamp” approval of conclusions

previously arrived at during the Committee's meetings. The trial court granted summary judgment in favor of the City, claiming that there was no evidence supporting a violation of TOMA and that the ordinance did not violate the Texas Constitution.

ANALYSIS: The question of whether the TOMA applied in these specific circumstances was a matter of first impression for the court, which looked to the Attorney General opinions and relevant Texas case law in arriving at its conclusion. The court refuted the notion that there can never be a "meeting" unless there is a quorum, as TOMA is to be broadly construed and the government cannot circumvent its requirements by purposely avoiding a quorum. Moreover, while the Committee is an "advisory committee" in form, there was a genuine issue of material fact as to whether the Committee's practical authority extended beyond its advisory function. If the evidence suggests that the City Council "rubber stamped" decisions predetermined by the Committee in closed meetings, TOMA may have been violated. Thus, the trial court erred in granting summary judgment to the City.

However, the Texas Constitution was held to be inapplicable to the situation at hand. The provision requiring a duly qualified successor was not intended to grant a personal right to an officer, but was enacted to prevent a vacancy which might inconvenience the public. Because the number of judges remained static despite the lack of successors, the provision does not apply.

HOLDING: The trial court's judgment on the judges' TOMA claim is reversed and remanded.

IMPACT: The affected judges are given an opportunity to go to trial and demonstrate that the Commission's actions violated TOMA.

