NOTES

Notice Requirements and the Entrapment Defense Under the Georgia Administrative Procedure Act

Since the enactment of the Georgia Administrative Procedure Act,[1] courts have been striving to define the procedural requirements imposed by its provisions. The most recent effort at clarification was made by the Georgia Court of Appeals during this survey period in the case of *Schaffer v. State Board of Veterinary Medicine.*[2]

Dr. Schaffer, a licensed veterinarian, had his license revoked by the Georgia State Board of Veterinary Medicine for several alleged infractions of the Georgia Veterinary Practice Act, as amended.[3] Dr. Schaffer contended that he was given insufficient notice of the charges against him under §14(a)(2)(D) of the Georgia Administrative Procedure Act.[4] He also asserted that he had been entrapped with respect to one of the charges against him. The Board rejected these contentions, denying Dr. Schaffer's timely request for a more definite statement of the matters asserted, and holding that entrapment was not cognizable as a defense in an administrative proceeding.

The Georgia Court of Appeals unanimously reversed the decision of the State Board of Veterinary Medicine, holding that Dr. Schaffer was given insufficient notice of the charges against him under §14(a)(2)(D), and that the defense of entrapment, as described in the criminal code of Georgia,[5] was available to defendants in administrative proceedings.

I. The Notice Requirement

Section 14 of the Georgia Administrative Procedure Act requires reasonable notice to all parties in contested cases. Subsection (a)(2) provides that the notice shall include:

> (A) A statement of the time, place and nature of the hearing;
> (B) A statement of the legal authority and jurisdiction under which the hearing is to be held;
> (C) A reference to the particular section of the statutes and rules involved;

1. Ga. Code Ann., ch. 3A-1 (1975).
2. 143 Ga. App. 68, 237 S.E.2d 510 (1977), *cert. dismissed,* 240 Ga. 313, 240 S.E.2d 887 (1977).
3. Ga. Code Ann., ch. 84-15 (1975).
4. Ga. Code Ann. §3A-114(a)(2)(D) (1975).
5. Ga. Code Ann. §26-905 (1977).

(D) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matter in detail at the time, the notice[6] may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
(E) A statement as to the right of any party to subpoena witnesses and documentary evidence through the agency.[7]

The Georgia Act is in keeping with a national trend toward providing more procedural safeguards for defendants in administrative proceedings, by requiring specific notice of the charges made in contested cases in which the administrative board or agency is acting as a judicial body and the defendant's legal rights, duties, privileges, or immunities are jeopardized.[8]

This trend was specifically endorsed in Georgia in *Anderson v. McMurry*,[9] in which the Georgia Supreme Court held that all parties to a quasi-judicial administrative proceeding are entitled to notice, a hearing, and an opportunity to present evidence under judicial forms of procedure.

In *Schaffer*, the court was concerned not with the *necessity* of notice, but with the *sufficiency* of the notice given under §14 of the Administrative Procedure Act.[10]

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6. Section 9 of the Revised Model Administrative Procedure Act, upon which title 3A, section 114 of the Georgia Code appears to be based, uses the term "initial notice" rather than simply "notice." The National Conference's terminology is clearer than that used in the Georgia version, but the substantive import appears to be the same. REVISED MODEL ADMIN. PROC. ACT §9 (1961); GA. CODE ANN. §3A-114 (1975). For a discussion of the enactment and general provisions of the Georgia Administrative Procedure Act, see Sierk, *Administrative Law*, 18 MERCER L. REV. 1 (1966).

7. GA. CODE ANN. §3A-114(a)(2) (1975).

8. Dolphin v. Board of Review, 70 Wis. 2d 403, 234 N.W.2d 277 (1975); North Am. Van Lines, Inc. v. I.C.C., 386 F. Supp. 665 (N.D. Ind. 1974); Deel Motors, Inc. v. Department of Commerce, 252 So. 2d 389 (Fla. App. 1971); Stauffer v. Weedlum, 188 Neb. 105, 195 N.W.2d 218, *appeal dismissed*, 409 U.S. 972 (1972); California Ass'n of Nursing Homes, Sanitariums, Rest Homes v. Williams, 4 Cal. App. 3d 800, 85 Cal. Rptr. 735 (1970); Neely v. Board of Trustees, 205 Kan. 780, 473 P.2d 72 (1970); Rodale Press, Inc. v. FTC, 407 F.2d 1252 (D.C. Cir. 1968); Checker, Inc. v. Public Service Comm'n, 446 P.2d 981 (Nev. 1968); Burri v. Campbell, 102 Ariz. 541, 434 P.2d 627 (1967); City of N.Y. v. North Queensview Homes, Inc., 54 Misc. 2d 432, 282 N.Y.S.2d 850 (N.Y. City Civ. Ct. 1967); Juzek v. Hackensack Water Co., 48 N.J. 302, 225 A.2d 335 (1966); NLRB v. Tennsco Corp., 339 F.2d 396 (6th Cir. 1964); First Nat. Bank v. First Nat. Bank, 232 F. Supp. 725 (E.D.N.C. 1964); Conley v. Board of Educ., 143 Conn. 488, 123 A.2d 747 (1964); Cassidy v. County Bd. of Appeals, 218 Md. 418, 146 A.2d 896 (Md. Ct. App. 1964); McCarthy v. Coos Head Timber Co., 302 P.2d 238 (Ore. 1956); *but see:* Trager v. Peabody Redev. Auth., 367 F. Supp. 1000 (D. Mass. 1973) (where results of proceeding will possibly affect large numbers of people, no individual notice required); People v. Lockheed Shipbldg. & Const. Co., 35 Cal. App. 3d 776, 111 Cal. Rptr. 106 (1973) (no notice necessary where prompt action is necessary as a matter of public policy); Independent Broker-Dealer's Trade Ass'n v. S.E.C., 442 F.2d 132 (D.C. Cir.) *cert. denied*, 404 U.S. 828 (1971) (no notice required where defendants had actual knowledge and ample opportunity for submission of their views); Rodriquez v. Swank, 318 F. Supp. 289 (N.D. Ill. 1970) *aff'd*, 403 U.S. 901 (1970) (no notice required for revocation of government grants).

9. 217 Ga. 145, 121 S.E.2d 22 (1961).

10. GA. CODE ANN. §3A-114 (1975). In the only other occasion the Georgia Court of Appeals has had to examine the notice requirements under §14 of the Administrative Procedure

Dr. Schaffer received notice that a hearing would be held in twenty-six days, at which time he would have to answer seven separate charges against him. The notice, received in July, 1975, included allegations concerning three incidents which had occurred the previous November, over eight months earlier. Two of the incidents concerned rabies vaccinations administered to "a dog named 'Smokey'." The third concerned heartworm medication prescribed for "a dog named 'Mopsy'." The persons who sought treatment for "Smokey" and "Mopsy" were not named.

Within four days of receipt of the notice, Dr. Schaffer requested a more definite statement of the matters asserted and a continuance so that he might prepare defenses to the seven charges. In summarily denying his request, the Board asserted that it had "already provided Dr. Schaffer with a 'short and plain statement of the matters asserted' which fully comports with all legal requirements."[11]

At the opening of the hearing on August 13, 1975, the prosecutor was allowed to amend one of the above charges to specify that the incident happened on November 1, 1973, rather than on November 1, 1974, as alleged. The first day, the prosecutor stated that additional matters had recently come to the attention of his office, and that further charges might need to be added as the hearing progressed. He therefore requested that additional charges be allowed. The Board granted the request, and at the conclusion of the first day of the hearing the record was left open. The Board set October 16, 1975, as the second hearing day. On August 29, the Board allowed two additional charges to be added and on September 30, three more were added. The hearing resumed on October 16, was recessed at the end of the day, and was resumed and completed on November 20.

At the conclusion of the hearing Dr. Schaffer's license was revoked. The revocation was affirmed by the Glynn County Superior Court.[12] The court of appeals reversed, stating:

> The appellant was given short notice of the pending proceedings. Parts of the notice were inexcusably vague. The notice was amended at the hearing. Additional charges were added during the course of the hearing. In some cases, evidence on the additional charges was presented within three weeks. These factors together operated to place the appellant at an unfair disadvantage which was not cured by the long recesses in the hearing.[13]

Act, the court held only that where the record failed to show that the charges against the defendant were based upon a written, verified accusation, no copy of a written, verified accusation need be served upon the defendant. Salerno v. Board of Dental Examiners, 119 Ga. App. 743, 168 S.E.2d 875 (1969). There were other significant holdings in this case regarding other provisions of the Georgia Admnistrative Procedure Act. For a general discussion of this case see Bryan, *Administrative Law*, 22 MERCER L. REV. 19, 27 (1971).

11. 143 Ga. App. at 69, 237 S.E.2d at 511.

12. Facts taken from the opinion of the court, 143 Ga. App. at 68-70, 237 S.E.2d at 511-512.

13. *Id.* at 70-71, 237 S.E.2d at 512.

The court remarked that the fundamental requirement under the Administrative Procedure Act is notice which is calculated to apprise the party of each claim asserted so that he can prepare any defense he may have against each charge.[14] It added that merely giving a veterinarian the name of an animal, the treatment of which was being asserted as the grounds for the license revocation, and the date of treatment was not the "plain" notice the statute required and that, therefore, such a limited notice was unreasonable. The court stated further that:

> The law requires more than a mere assurance that a respondent in a disciplinary hearing will be afforded a future opportunity to rebut the case made against him. What it requires is that the respondent be given reasonable notice so that he can conduct his defense, including adequate and meaningful cross-examination of adverse witnesses, from the onset of the proceedings.[15]

Although *Schaffer* is the first Georgia case dealing with notice requirements under the Georgia version of an administrative procedure act, the holding in this case is consistent with decisions reached under similar provisions in other jurisdictions.

In *Horne Brothers, Inc. v. Laird,*[16] the Court of Appeals for the District of Columbia held that where a contractor's opportunity to bid on government contracts may be suspended, fairness requires that specific notice be given the contractor of the facts making up at least some of the charges against him.

In a case construing the Federal Administrative Procedure Act,[17] *Golden Grain Macaroni Co. v. FTC,*[18] the Ninth Circuit Court of Appeals held that a defendant must be informed of matters of fact as well as given notice of an administrative hearing in order for the proceedings to comply with the notice requirements of due process.

New York has adopted notice guidelines similar to those adopted by the Georgia Court of Appeals.[19] In New York, no person may lose substantial rights because of wrongdoing proved but not charged.[20] In *Bateman v. City of Ogensburg,* the New York Court of Appeals stated: "It is essential to the ability of a person to prepare a defense that he know the nature of the allegations against him."[21]

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14. *Id.* at 69, 237 S.E.2d at 511.
15. *Id.* at 70, 237 S.E.2d at 511-12.
16. 463 F.2d 1268 (D.C. Cir. 1972).
17. 5 U.S.C.A. §§551-706 (1977).
18. 472 F.2d 882, *cert. denied,* 412 U.S. 918 (9th Cir. 1972).
19. Bateman v. City of Ogensburg, 55 App. Div. 2d 781, 389 N.Y.S. 2d 486 (1976).
20. *Id.* at 487, *citing* Murray v. Murphy, 24 N.Y.2d 150, 157, 299 N.Y.S.2d 175, 181, 247 N.E.2d 143, 147 (1969).
21. *Id. See also* Morelli v. Board of Educ., 42 Ill. App. 3d 722, 356 N.E.2d 438 (1976) (holding in dictum that administrative officers or boards in proceedings before them may not receive any evidence without notice to all parties that evidence will be taken).

The holding in *Schaffer,* however, does go beyond the actual standards adopted in New York. For example, in *Kramm v. Board of Regents,*[22] a New York supreme court held that the notice given a pharmacist in a proceeding in which his license was at stake was sufficient if it apprised him only of the nature of charges made against him and of the possible consequences of the hearing. In *Kramm,* the notice stated that the hearing could result in suspension of the defendant's license and advised him to retain an attorney. This was held to be sufficient.

II. COGNIZANCE OF ENTRAPMENT DEFENSE

The seeds of cognizance of the entrapment defense in administrative proceedings were unintentionally sown by the United States Supreme Court in *Sorrells v. United States,*[23] a decision which recognized the entrapment defense in criminal trials. In *Sorrells,* the Court commented:

> Always the courts refuse their aid in civil cases to the perpetration and consummation of an illegal scheme. Invariably they hold a civil action must be abated if its basis is violation of the decencies of life, disregard of the rules, statutory or common law, which formulate the ethics of men's relations to each other. Neither courts of equity nor those administering legal remedies tolerate the use of their process to consummate a wrong. The doctrine of entrapment in criminal law is the analogue of the same rule applied in civil proceedings.[24]

Although obviously not intended as a catalyst for cognizance of the defense in administrative proceedings, the above quote was picked up forty-one years later by the Supreme Court of California and used as a justification for extending the defense to defendants in administrative hearings.[25] However, for many years after *Sorrells,* whether the entrapment defense would be recognized in administrative proceedings was an open question. Recognition of the defense was implied in dicta or assumed in several decisions,[26] but there was no express adoption.

Particularly interesting among cases during this period was the strongly worded opinion from the Supreme Court of Illinois in *In re Horwitz,*[27] a case involving a disbarment proceeding. Justice Shaw, relying on *Sorrells* and

22. 51 Misc. 2d 433, 273 N.Y.S.2d 413 (1966).

23. 287 U.S. 453 (1932).

24. *Id.* at 455 (citations omitted).

25. Patty v. Board of Medical Examiners, 9 Cal.3d 356, 508 P.2d 1121, 107 Cal. Rptr. 473 (1973); *see* text, note 32, *infra.*

26. Jones v. Dental Comm'n., 145 A. 570 (Conn. 1929); In re Davidson, 164 Nev. 514, 186 P.2d 354 (1947); Langdon v. Board of Liquor Control, 98 Ohio App. 535, 130 N.E.2d 430 (1954); Knight v. Louisiana State Bd. of Medical Examiners, 211 So. 2d 433 (Ct. App. La. 1968); Roberts v. Illinois Liquor Control Comm'n, 58 Ill. App. 2d 171, 206 N.E.2d 799 (1965); Ray v. Board of Liquor Control, 154 N.E.2d 89 (Ct. App. Ohio 1958).

27. 360 Ill. 313, 196 N.E. 208 (1935).

Butts v. United States,[28] proclaimed that Horwitz "was entrapped by a set of false and carefully arranged circumstances and evidence sufficiently valid, and apparently real, to deceive an experienced practitioner."[29] Justice Shaw assumed that the defense of entrapment was available in administrative proceedings but he never actually mentioned the distinction between an administrative and a judicial proceeding in connection with the applicability of the defense.

The first express recognition of the entrapment defense in an administrative proceeding occurred in a Florida case, *Peters v. Brown*.[30] Peters, a licensed dental technician in Miami, was charged with practicing dentistry without a license. The charges against Peters were based upon visits to his office by two paid beguilers. Peter's express allegation of entrapment was rejected as a defense by the administrative board. Justice Terrell, writing for the majority of the Florida Supreme Court, felt that the court should not sanction such apostasy from approved methods of gathering evidence for administrative proceedings. He held that "[i]t is contrary to law and public policy for an officer or member of an administrative board to induce the commission of a wrong or a crime for the purpose of securing a pretext to punish it."[31]

The public policies alluded to in *Peters* which support the cognizance of the entrapment defense in administrative proceedings were given more life and enumeration by the Supreme Court of California in the case which is becoming recognized as the leading case on the issue—*Patty v. Board of Medical Examiners*.[32]

Dr. Patty had been entrapped into violations of professional standards and violations of California's controlled substances law.[33] These charges

28. 273 F. 35 (8th Cir. 1921).

29. 360 Ill. at ____, 196 N.E. at 213.

30. 55 So. 2d 334 (Fla. 1951).

31. *Id.* at 336. Various states have recognized the applicability of the entrapment defense in liquor license revocations. *See, e.g.*, Langdon v. Board of Liquor Control, 98 Ohio App. 535, 130 N.E.2d 930 (1954). Several states have not; *see, e.g.*, Kearns v. Aragon, 65 N.M. 119, 333 P.2d 607 (1958); State v. Ward, 361 Mo. 1236, 239 S.W.2d 313 (1951). The applicability of the entrapment defense to liquor control proceedings will not be discussed because the *Schaffer* decision is restricted to proceedings in which a professional license is at stake and because the Georgia Administrative Procedure Act is not applicable to the regulation of alcoholic beverages. GA. CODE ANN. §3A-102(a) (1975); *see* Bryan, *Administrative Law*, 22 MERCER L. REV. 19, 20 (1971).

32. 9 Cal. 3d 356, 508 P.2d 1121, 107 Cal. Rptr. 473 (1973). For a detailed analysis of this case see Dudman, *The Defense of Entrapment in Administrative Proceedings*, 1 PEPPERDINE L. REV. 316 (1974), and Kaufmann, *Administrative Law—Defense of Entrapment—Entrapment Defense Is Available In Administrative Proceedings—Patty v. Board of Medical Examiners*, 7 LOY. L. REV. 187 (1974).

33. Dr. Patty was charged with the violation of two sections of the California Business aad Professions Code, section 2399.5 (prescribing dangerous drugs without prior examination or medical indication) and section 2391.5 (prescribing narcotics to persons not under treatment, as proscribed by the California Health and Safety Code, section 11163). CAL. BUS. & PROF. CODE §§2391.5, 2399.5 (West); CAL. HEALTH & SAFETY CODE §11163 (West).

called into question the applicability of the entrapment defense in an administrative proceeding in which the charges of unprofessional conduct were based upon both entrapment regarding the commission of an underlying crime and entrapment to commit an unprofessional act, *i.e.*, a wrong which is not criminal in nature.

Justice Tobriner, writing for a unanimous court, held that the defense was cognizable in both situations because underlying public policy considerations were identical whether entrapment is alleged in connection with the commission of a crime or an unprofessional act.

> [T]he purposes underlying the recognition of an entrapment defense—the preservation of the dignity of the legal process and of public confidence in it—are as applicable to the conduct of administrative proceedings as to criminal trials; administrative officials, no less than police or other law enforcement officers, subvert the fair administrative of justice when, instead of pursuing legitimate methods of prevention and detection of crime, they apprehend wrong-doers through schemes designed to foster or induce the commission of criminal conduct.[34]
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> . . . "Sound public policy" and "good morals" are incompatible with entrapment of an innocent person into the commission of a crime in order to revoke his professional license as clearly as they are incompatible with entrapment in order to obtain a criminal conviction. . . . The function of the enforcement officials is to investigate, not instigate, crime; to discover, not to promote, crime. (footnotes omitted)[35]

The court looked back to the rationale expressed by the Supreme Court in *Sorrells*[36] for indications of the purpose of the entrapment defense. The California high court thought that the defense had particular application where administrative agencies combine both investigative and adjudicative powers and felt that if entrapment was allowed as a tool for such agencies the door would be open for abuses and discrimination.[37]

The Georgia Court of Appeals, in *Schaffer*, acknowledged that the cognizance of the entrapment defense in administrative proceedings had not been previously decided in Georgia and specifically adopted the rationale of the *Patty* decision.[38]

During Schaffer's hearing before the State Board of Veterinary Medicine, the Board refused to consider his contention that he had been entrapped with reference to two of the charges against him. At the prosecutor's insistence, the Board ruled that the entrapment defense was not cognizable as a defense in an administrative proceeding.[39]

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34. 9 Cal. 3d at 359, 508 P.2d at 1122, 107 Cal. Rptr. at 474.

35. *Id.* at 364, 508 P.2d at 1126, 107 Cal. Rptr. at 478.

36. 287 U.S. 435 (1932).

37. 9 Cal. 3d at 366, 508 P.2d at 1128, 107 Cal. Rptr. at 480.

38. 143 Ga. App. at 72, 237 S.E.2d at 513.

39. The prosecutor completely dominated the hearing and uncompromisingly construed legal points strongly against Dr. Schaffer. The court of appeals stated that this was one of

In reversing the ruling of the Board, the court of appeals looked to a provision of the Georgia Criminal Code for guidance:

> A person is not guilty of a crime if by entrapment his conduct is induced or solicited by a government officer or employee, or agent of either[,] for the purpose of obtaining evidence to be used in prosecuting the person for commission of the crime. Entrapment exists where the idea and intention of the commission of the crime originated with a government officer or employee, or with an agent of either, and he, by undue persuasion, incitement, or deceitful means, induced the accused to commit the act which the accused would not have committed except for the conduct of such officer.[40]

Because the defense was not allowed by the Board, the facts alleged by Dr. Schaffer to give rise to a defense of entrapment were not before the court on appeal. Therefore, whether there was entrapment involved in Dr. Schaffer's case remained undecided. However, in suggesting that the test provided in §26-905 of the Georgia Code would be applied to determine whether there had been entrapment with reference to any act giving rise to an administrative proceeding, the court carefully avoided ruling that that section was specifically applicable. They did, however, make the following statement: "In the present case, the appellant contends not that a *crime* was enticed by the state but that a violation of professional responsibility was enticed; [nevertheless] the principle is the same."[41]

Like the Supreme Court of California in *Patty*, the Georgia Court of Appeals specifically limited the entrapment defense to those administrative hearings in which the professional licensee is facing charges which could result in the loss of his right to pursue his profession.[42] They concluded that

> [e]very professional practitioner must continually face and reject very real temptations to cut corners or lower standards, and even the most ethical among us might finally succumb to the artificial temptation contrived by an insistent and clever agent of the state. Such an induced fall from professional standards, perhaps after years of circumspection, should not rightfully result in the loss of a professional license.[43]

III. CONCLUSION

Schaffer v. State Board of Veterinary Medicine is an important step toward defining a defendant's procedural rights and defenses in an admin-

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the factors calling for reversal: "While we have found no authority saying such a duality of function is necessarily prejudicial, *in this case* the duality added to the taint of the hearing." (emphasis added) 143 Ga. App. at 71, 237 S.E.2d at 512.

40. GA. CODE ANN. §26-905 (1977).

41. 143 Ga. App. at 73, 237 S.E.2d at 513 (emphasis in original).

42. *Id.* at 72, 237 S.E.2d at 513.

43. *Id.* at 73, 237 S.E.2d at 513.

istrative hearing governed by the Georgia Administrative Procedure Act. *Schaffer,* however, is limited to proceedings involving professional license revocations. Whether the notice requirements set up by the court of appeals will be extended to all proceedings covered by the Administrative Procedure Act and whether the entrapment defense will be recognized in administrative proceedings not covered by the Act remain open questions in Georgia. Nevertheless, *Schaffer* remains the most important decision thus far construing administrative procedural requirements and defenses in Georgia and will undoubtedly influence the development of administrative law in this state.

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