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Unnecessary Immunity: Fetta v. Board of Medicine

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by JOHN PAUL JONES

At an unnecessarily high cost for patients who complained of unprofessional and sexually invasive treatment, the Supreme Court of Virginia last fall brought down the curtain on the third of three judicial acts of review in Fetta v. Board of Medicine. In the end, a doctor won immunity for his misconduct and the Board of Medicine lost its attempt to revoke his license because it unfairly interfered with an evidentiary hearing. The conduct of disciplinary proceedings by licensing boards is no doubt better for the admonition given the Board of Medicine but the net result need not have been so distasteful.

Dr. Patrick J. Fetta had treated several women patients using procedures which lacked an accepted therapeutic purpose and were beyond the legal scope of chiropractic medicine, concluded the hearing officer after a formal evidentiary hearing. The hearing officer also found that the doctor had committed sexual battery on two patients.

Tainted Evidentiary Proceeding

Four physician members of the Board of Medicine attended that hearing, put numerous questions to witnesses and, at least once, offered the hearing officer an opinion on the admissibility of certain evidence. A quorum of the Board, which included the four doctors who had attended the evidentiary hearing, subsequently reviewed the hearing transcript and heard arguments by counsel. It then voted, 14-0, to adopt the hearing officer’s findings of fact and conclusions of law, and to revoke Dr. Fetta’s license to practice chiropractic.

Dr. Fetta then appealed to the circuit court, claiming that participation by Board members in the evidentiary hearing violated his right to a hearing conducted either by the Board or by a hearing officer. The circuit court vacated the Board’s decision to revoke Dr. Fetta’s license and held that the presence of Board members at an evidentiary hearing assigned to a hearing officer was unlawful, so tainting the Board’s subsequent decision as to warrant dismissal of the charges against Dr. Fetta.

Although the record made it clear that the Board doctors who attended the hearing were more than simply silent spectators, their presence alone was, for the circuit court, enough to violate the doctor’s right under Section 54.1-110 which reads: Every hearing in a contested case shall be conducted in accordance with the provisions of the Administrative Process Act (Section 9-14-5 et seq.). When a hearing officer presides, the regulatory board shall determine whether the hearing officer is to hear the case alone or whether the board is to hear the case with the hearing officer.

The circuit court found that Section 54.1-110 offered the Board only two options: a hearing conducted by the Board (or at least a quorum) or a hearing conducted by a hearing officer alone.

The Court of Appeals affirmed, finding the fatal flaw to be the Board’s decision to detail three members to “participate with the hearing officer.” The Supreme Court considered that only the remedy ordered by the courts below was controversial enough to warrant review. Saying little about participatory error, nevertheless, the Court affirmed the decision below. Three courts reached the same two conclusions. First, when Board members visit an evidentiary hearing, ask questions, and offer opinions on evidence (as permitted by the presiding officer), they violate Section 54.1-110. Second, when the same Board members later join in the Board’s deliberation, all participating members become legally incapable of passing judgment on the case.

Cessation of Presiding

What ought to have preceded these conclusions of law is a finding of fact that the hearing officer stopped presiding—that is, directing, controlling and governing proceedings. Any finding about the cessation of presiding, moreover, ought to be firmly grounded in record evidence, i.e., in the transcript of the administrative hearing. No such findings appeared in the opinions of the three courts reviewing Dr. Fetta’s case. The only facts deemed worthy of judicial mention were that the board doctors were allowed by the hearing officer to ask questions of the witnesses and, on at least one occasion, to offer an opinion on the admissibility of evidence. The former better buttresses
the conclusion that the hearing officer
never stopped presiding, for, otherwise,
how could she still be in a position to
allow or to refuse questions by the inter­
loping board doctors? The latter proves
nothing more than that an indulgent
hearing officer was willing to listen.
Elsewhere in the transcript
lie additional evidence that the
hearing officer never stopped
presiding. At the outset, Dr.
Fetta’s counsel appealed to the
hearing officer to exclude the
intruding board doctors, and
then abided by her decision to
the contrary. When Dr. Fetta’s
counsel later objected to the
Board doctors putting questions
to witnesses, both sides accep­
ted the hearing officer’s ruling
that she would allow some ques­
tions by the Board doctors but
she would control the privilege
on a question-by-question basis. In fact,
it was the hearing officer’s own stated
conclusion that, however the Board doc­
tors might describe their contributions,
she continued to preside because she
controlled their questions and because
her findings of fact and conclusions of
law would be what constrained the full
Board’s decision afterward.
The Board doctors complied often
enough so that the hearing officer’s explicit finding that she, and not they,
ought to preside, deserves the judicial deference such a finding of fact is ordinarily due.
After all, she was there at the time, and
the judges of the reviewing courts
were not. A careful reading of the transcript
suggests that the Board doctors usurped
not the presiding power of the hearing officer but the prosecuting duty of the
Board’s hapless counsel.

Wrong Adjudicative Event

If the Board doctors did not preside,
then the evidentiary hearing was not
legally deficient as measured by Section
54.1-110. The three courts focused on
the wrong adjudicative event. All three
recognized the harm to proper adminis­
trative decision-making which permitted
some members of a collective decision-
making body to enter into the eviden­
tiary hearing itself while leaving others
to settle for its printed record. But all
three courts pointed in the wrong direc­
tion in isolating the resultant error.
What the four Board doctors did at
the evidentiary hearing was permissible.
What they did at the deliberative meet­
ing afterward was not. The evidentiary
hearing and its report could still have
formed the basis for proper Board action
against Dr. Fetta.

The Board should have excused those
members who attended the evidentiary
hearing from its subsequent deliberations. Because the Board has 16 mem­
ers, and only four attended Dr. Fetta’s
hearing, others sufficient for the Board’s
quorum of 11 would still have been
available to pass judgment on the hear­
ing officer’s report. The Board, howev­
er, did not excuse the four who had
attended the evidentiary hearing, and the
case did not reach court until it was too
late for a saving judicial order to
exclude them.

As a federal court of appeals said in a
leading case about federal agency deci­
Sional bias, “[i]nitigants are entitled to an
impartial tribunal whether it consists of
one man [sic] or 20 and there is no way
which we know of whereby the influ­
cence of one upon the others can be quan­
titatively measured.”4 In that case, the
court found from a speech by the Chair
of the Federal Trade Commission that he
had prejudged a complaint of false
advertising by the school, so the court
invalidated the Commission’s subse­
cquent decision in which the Chair had participated.

Rule of Necessity

Even if it were assumed that the other
Board members could not be sufficiently
rehabilitated to make another—this time
unbiased—decision on the record after
once being exposed to the views of those
who had attended the evidentiary hear­
ing, the Rule of Necessity offers another
alternative for a reviewing court. By the
Rule of Necessity, a judge who would
ordinarily be disqualified for bias may
nevertheless hear a case when there just
is no other judge to do it. The United
States Supreme Court traced the origins
of the Rule back more than five centuries
in common law and then applied it in
United States v. Will6 to justify a federal
court’s hearing of a challenge to legisla­
tive adjustment in the compensation of
federal judges. Kenneth Culp Davis, in
his widely respected Administrative Law
Treatise, wrote more than a decade ago
that “[t]he doctrine is so clear that it is
seldom litigated....” Nonetheless, there
are numerous cases in which the Rule is
applied, not only to judges, but to adminis­
tative board members deciding cases.
Some are quite recent. In 1991, for
example, the Supreme Court of Arkansas
applied the Rule in Acme Brick Co. v.
Missouri Pacific R. Co., upholding an
order by the state’s Highway Commis­
sion.6 In 1990, the Court of Appeals of
Missouri applied it to affirm a case deci­
sion by a city council in Fitzgerald v.
City of Maryland Heights.7

Reviewing Virginia courts should
have applied the Rule in Fetta if they

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settled that where the Legislature vests in a particular officer or administrative agency the sole power of investigation and decision, the Legislature’s purpose cannot be defeated by disqualification of the designated officer or agency on the ground of alleged prejudgment or bias. The failure of all three courts to apply the rule in Fetta frustrated the will of the General Assembly that the Board of Medicine decide license revocation cases. The failure also injured the legitimate expectations of complaining patients that their charges of sexual misconduct would receive serious audience.

When the Rule of Necessity is applied to decisions by judges, it sometimes permits even the final say by a biased or prejudiced decider. When the Rule is applied to decisions by agencies, it usually has a much less significant impact because of the availability of judicial review. Applied to the Board of Medicine in Fetta, the Rule would have permitted the FTC in Cinderella Career and Finishing School, a chance to make a proper administrative decision—subject to review by the courts. Dr. Fetta would still have had the safeguard of review by the same circuit court and court of appeals that invalidated the Board’s original decision before permitting the Board (and the complaining patients) their second chance. Instead, the doctor got court-conferred immunity. Every administrative board and agency empowered to decide cases is bound to avoid not only acting improperly but also merely appearing to do so. That duty is not well served by a board which interferes with evidentiary hearings after it assigns them to hearing officers. The practice surely suggests the board was prejudging a case not yet properly before it, and it surely undermines the authority of the officer supposedly enjoying the board’s trust and confidence sufficiently to be assigned to preside in its stead. Just such a practice was apparently well established at the Board of Medicine, however, and so it was high time that the Board be admonished. For this discipline, the three Fetta judicial decisions are to be applauded. For unnecessarily affording the doctor immortality for his misconduct, however, the same decisions ought properly to be revoc.

Notes
2. Fetta v. Board of Medicine, 20 Va. Cir. 334 (Richmond, 1990).
7. 796 S.W.2d 52 (Mo. 1990). See 1A Michie’s Jurisprudence, Administrative Law Section 7 at p. 213; 11A Michie’s Jurisprudence, Judges Section 14; 73