When Can An Agency

Appeal Itself?

The special case of *MDCIS v Shah*

By Max R. Hoffman, Jr.

Since the creation of administrative agencies, parties who believe they are aggrieved by agency decisions have sought recourse, if not refuge, in the courts. But what happens when the person aggrieved is a department of state government, which is dissatisfied with its constituent agency and decides to take the agency to court? Traditionally when a dispute occurs between different parts of the executive branch, courts are reluctant to intervene. Barring the doors to the courthouse simply pays homage to the doctrine of separation of powers.

The court of appeals created an exception in *Michigan Department of Consumer and Industry Services v Shah*, 236 Mich App 381; 600 NW2d 406 (1999), app den 461 Mich 948; 607 NW2d 723 (2000), finding that the Michigan Department of Consumer and Industry Services (department) had standing to obtain judicial review of a Board of Medicine disciplinary subcommittee order, which rejected the department's complaint and dismissed all charges against a medical physician. The decision by the court of appeals may be a result of special statutes unique to professional licensing, but it raises significant questions when the government is allowed to appeal an agency's decision.

The *Shah* Case

The appellee, a physician, sought to resolve a separate criminal proceeding by entry of a no contest plea by his wholly-owned professional corporation. The department then filed a complaint under the Public Health Code, MCL 333.16101, alleging several violations of Article 15 of the Public Health Code, all of which attributed the conviction of the corporation to the individual physician personally.

In *Shah*, following a contested case hearing, the hearing officer issued a proposal for decision finding that the appellee had not been personally convicted of any crime and recommending that all charges against him be dismissed. The disciplinary subcommittee adopted the hearing officer's recommendation and dismissed the complaint.

Disciplining Licensed Health Professionals

A brief explanation of the health professional disciplinary process may be useful, using the Board of Medicine as an example, although the Public Health Code covers all licensed health professionals, including dentists, nurses, pharmacists, and others.

The Public Health Code establishes the Michigan Board of Medicine as an agency within the Department of Consumer and Industry Services. The Public Health Code also establishes what constitutes a violation of licensing requirements, so as to require a suspension, revocation, or other discipline of the physician. Finally, the Public Health Code creates a disciplinary subcommittee as a subdivision of the Board of Medicine assigned the task of sanctioning physicians.[1]

Fast Facts

Traditionally, the court has been reluctant to get involved with disputes between different parts of the executive branch.

Licensed health professionals are different than other licensees under our laws.

The elimination of Chapter 6 of the Administrative Procedures Act under the Public Health Code removes the obstacles to an appeal by the agency.

Physician disciplinary proceedings are contested cases under Chapter 4 of the Administrative Procedures Act, 1969 PA 306, as amended; MCL 24.271. The department is authorized to conduct the contested case proceedings, and is empowered to hold hearings and report its findings to the appropriate disciplinary subcommittee.[2] The department delegates the adjudicatory function to a hearing officer who is employed by or under contract with the department.[3]

Not only does the department hold the hearing and provide the hearing officer, but it also serves as the "complaining party" under rules promulgated by the department and the Board of Medicine. 1997 MR 7, R 338.1601. Until 1995, any appeal by an aggrieved licensee from a decision by the disciplinary subcommittee would go to the circuit court and would be subject to the provisions of Chapter 6 of the APA.

History of Professional Licensing

On at least three occasions over the last 15 years, the Michigan legislature has attempted to provide a cure for the perceived need to better police "bad" physicians.[4] One of the frequent criticisms directed against the licensing boards was delay, especially delay attendant to appeals to circuit courts. Hoping to streamline the process, the legislature substituted appeals to the circuit court with a claim of appeal to the court of appeals.

Implementation required two different changes to two different statutes. First, MCL 333.16237(6) was amended to provide that for final orders on or after January 1, 1995, any appeal would be only to the court of appeals as of right. A corollary provision was then added to the APA as follows:

> *Sec. 115(4) Chapter 6 does not apply to final decisions or orders rendered under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws. MCL 24.315(4); MSA 3.560(215)(4).*

The elimination of Chapter 6 of the APA to administrative actions under the Public Health Code has broader implications than merely shifting the appeal from circuit courts to the court of appeals. For purposes of licensed health professionals, the obstacle to appeal by the agency was gone. The appellee in *Shah* argued that the department cannot be "an aggrieved person" because "person" is defined in the APA as follows:

> *(6) "Person" means an individual, partnership, association, corporation, governmental subdivision, or public or private organization of any kind* ***other than the agency engaged in the particular processing of a rule, declaratory ruling, or contested case.*** *MCL 24.205(6); MSA 3.560(105)(6).* (Emphasis added.)

In reply, the court said:

> *Finally, we reject respondent's contention that the Administrative Procedures Act (APA), MCL 24.201 et seq.; MSA 3.560(101) et seq., prohibits petitioner from bringing the instant appeal. As indicated above, because the disciplinary committee's decision was issued on December 23, 1995, the APA does not govern who can bring the instant appeal. MCL 333.16237(6); MSA 14.15(16237)(6).* Shah, *supra, p 386.*

Instead, the court viewed the question as whether the department was "an aggrieved party" under MCR 7.203(A)(2).

To qualify as "an aggrieved party," as simple as it sounds, the department had to qualify both as a "party" and as one who is "aggrieved." As to the first requirement, the department is a "party" by virtue of its own rules.[5] Because the department had bootstrapped itself into the role of complaining party under its own rules, it was now in a position to appeal a determination made by its agency.

Thus, the only real question before the court of appeals was whether the department is "aggrieved" under MCR 7.203(A)(2). The court of appeals viewed this as an issue of standing—or did the department have standing to pursue the appeal?

The Traditional Role of Standing

The *Shah* court stated the test as follows:

> *To have standing to appeal means that a person must be "aggrieved" by a lower body's decision. MCR 7.203(A).* Shah, *supra, p 385.*

Traditional standing employs a two-prong test set forth by the Michigan Supreme Court in *Speaker v State Administrative Board*, 441 Mich 547, 554 (1993) as follows:

> *Standing is a legal term used to denote the existence of a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy. However, evidence that a party will engage in full and vigorous advocacy, by itself, is insufficient to establish standing. Standing requires a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large.* Alexander v Norton Shores, *106 Mich App 287; 307 NW2d 476 (1981).*

The second prong, that the party before the court must have an interest that is affected

in a manner different from the general citizenry, is sometimes excused in the case of a public official. Where the plaintiff is a public official, courts will not require a unique showing of harm but will require some demonstration that the official's duties include a supervisory or regulatory function over the subject matter of the litigation. *Killeen v Wayne County Civil Service Commission*, 108 Mich App 14; 310 NW2d 257 (1981), states the general rule that public grievances may be brought into court by public agents in their official capacity, but not as individuals who can only seek redress in the courts when their grievances are distinct from those of the general citizenry.

The *Shah* court found that the department had standing to file the appeal because

> *As an agency charged with enforcing the Public Health Code, MCL 333.16221; MSA 14.15(16221), petitioner has a cognizable interest in ensuring that a hearing referee properly applies the law in an administrative proceeding. In other words, petitioner has an interest in the litigation because misconstruction or improper application of the law would hinder its ability to enforce the law as the legislature intended. Compare, generally,* Attorney General v Liquor Control Comm, *65 Mich App 88, 92–93; 237 NW2d 196 (1977) (the Attorney General had standing to intervene because he had broad statutory authority to protect Michigan citizens). Further, this Court has implicitly found that petitioner is an aggrieved part that may appeal to this Court a final order of a disciplinary subcommittee. See* Dep't of Consumer and Industry Services v Hoffmann, *230 Mich App 170; 583 NW2d 260 (1998).* Shah, *supra, p 385–386.*

The court of appeals' opinion on standing occupies approximately three paragraphs. Any analysis may be an attempt to distill a pound of essence from a pint of opinion. Nevertheless, the decision in *Shah* clearly

establishes that the department can appeal its own constituent agency's decision, freed from the restrictions of the APA, and fully qualified as an aggrieved person under the rule.

The court of appeals adopted the concept that public officials can achieve standing when the subject of litigation is a matter over which they exercise authority. The decision may be seen as a unique product of special statutory circumstances. Perhaps the elimination of the barrier to appeal by avoiding Chapter 6 propelled this case into the court of appeals. Likewise, is the case more attractive to the court of appeals because the fact the question raised is a matter of statutory interpretation? (Does a conviction of a professional corporation equal conviction of a physician?) For whatever reason, the path is now made straight to the appellate gate and others will surely follow.

Anomaly or Common Practice?

Whether the legislature intended to create a new right of appeal for the department, the effort to streamline the appeal process clearly has created an anomaly for licensed health professionals. They are different than other licensees under our laws. Even if victorious at the agency level, they may face further appeals at the mercy of the department.

The *Shah* decision raises several fundamental questions: Is it useful public policy to have judicial oversight of certain boards or agencies and not others? Traditionally, licensing boards have been granted deference in the regulation of their profession, recognizing the expertise they naturally possess in their decision-making role. In the *Shah* case, the question was interpretation of a regulatory statute. While there may be justification to allow an appeal as to a question of law, the case is not bound by any such strictures. A department has the ability to appeal an agency interpretation of its own regulations and the department also has full authority to attempt to overturn any agency finding of fact. As a result, the doctrines of deference traditionally accorded licensing boards no longer pertain to the boards under the Public Health Code. Whether this result was intended or even appropriate is subject to significant debate.

Second, are there more efficient means to resolve disputes between departments or between agencies? There is little gain to be derived from expending our judicial resources on disputes between members of the executive branch. Would the public be better served if the agency engaged in rule making rather than attempting to establish its position on a case by case adjudication? Although the *Shah* case deals with a statutory interpretation, in other cases where a rule might provide direct benefit, a department may be disinclined to cooperate with the constituent agency when the department believes its interests are better suited in litigation than efforts at cooperation.

Third, if the department is allowed to appeal an agency decision, who defends the agency? In *Shah*, the appellee was presumed to be a sufficient defender of the disciplinary subcommittee's decision, but in *Hoffmann*, the licensee abandoned the appeal and the opinion became ipse dixit, perhaps, in part, because the court did not have an opposing party to frame the issues properly. Perhaps the standing test is not really met by a licensee who may not have a sufficient "stake in the outcome."

Fourth, statutory efforts that create special routes of appeal tend to defeat the goal of uniformity served by the passage of the Administrative Procedures Act. When the legislature creates exceptions to the Administrative Procedures Act, it creates additional issues of place, timing, and scope of appeal. Placing additional traps for the unwary along the appellate path does little to serve public policy. Certainly, greater benefit is derived by channeling administrative appeals through a common appeal process under the Administrative Procedures Act rather than carving out exceptions to the rule.

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Finally, one might well ask what happens to the licensee caught in the crossfire between a department and an agency. It would be unfortunate if the forum designed to deal with discipline of licensed health professionals simply became a staging ground for policy disputes between different parts of the executive branch. ✦

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Footnotes

1. MCL 333.16174(4); MCL 333.16221; MCL 333.16216.
2. MCL 333.16221. See also, MCL 333.16234.
3. MCL 333.16231a(2).
4. See generally House Legislative Analysis, House Bill 4076, et al. (3/24/93).
5. See *Michigan Administrative Law*, Chapter 10, p 31.