

**MULTISTATE PERFORMANCE TEST  
JULY 2010**

The MPT Question administered by the State Board of Law Examiners for the July 2010 Maryland bar examination was City of Ontario. Two representative good answers selected by the Board are included here, beginning at page 2.

The National Conference of Bar Examiners (NCBE) publishes the MPT Question and the “point sheet” describing the issues and the discussion expected in a successful response to the MPT Question. The “point sheet” is analogous to the Board’s Analysis prepared by the State Board of Law Examiners for each of the essay questions.

The NCBE does not permit the Board to publish the MPT Question or the “point sheet” on the Board’s website. However, the NCBE does offer the MPT Question and “point sheet” for sale on its website.

**Materials for an unsuccessful applicant:** An applicant who was unsuccessful on the July 2010 Maryland bar examination may obtain a copy of the MPT Question, his or her MPT answer, representative good answers selected by the Board, and the “point sheet” for the July 2010 MPT Question administered as a component of the Maryland bar examination. This material is provided to each unsuccessful applicant who requests, in writing, a copy of the answers in accordance with instructions mailed with the results of the bar examination. The deadline for an unsuccessful applicant to request this material is January 4, 2011.

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**REPRESENTATIVE ANSWER 1**

To: Lawrence Barnes  
From: Applicant  
Date: July 27, 2010  
Re: Liquor Control Commission Procedures

Introduction

This memorandum has been prepared to analyze whether under applicable legal authority, courts would extend preclusive effect to decisions rendered under the procedures set forth in city ordinances.

Definition of the Doctrine of Preclusion

The doctrine of preclusion gives finality to matters already decided where there has been opportunity to litigate them and courts have long applied the doctrine in the interests of finality. *Thompson*. Here, the City Attorney was to give finality to matters already decided regarding the liquor control ordinances in the City of Ontario.

Applicability of the Doctrine of Preclusion

The doctrine of preclusion applies only where the administrative agency has the authority to adjudicate disputes and where the agency, in fact, does decide the disputed issues properly before it. *Thompson*. Here, the Commission – which consists of the Mayor and the City Council – is the agency that has been given authority by the Franklin Liquor License Control Act and City Liquor Control Ordinance to adjudicate disputes and they do in fact adjudicate disputes pursuant to Clause 5 – to conduct hearings and render decisions.

Opportunity to Litigate and Due Process Requirements

The doctrine of preclusion applies when the parties had an opportunity to litigate the claim or issue before the agency and thus the agency procedures must comport with the minimal requirements of due process. *Thompson*. The more an agency acts like a court, the more sound the reasons for giving preclusive effect to its decisions. *Thompson*.

The doctrine of preclusion does not apply where the administrative agency acts “legislatively” in adopting rules, or “ministerially” in implementing action without discretion. *Thompson*.

City of Ontario Procedures

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**Liquor License Commission**

Here, the mayor and city council constitute the Liquor Control Commission. The Commission is charged with administration of the Franklin Liquor Control Act and the City Liquor Control Ordinances in the City of Ontario. Even though this is a city administrative agency, they are creatures of the state, and are considered state agencies. Further, the functions of the Commissions, including the application process, the authorization of enforcement maintaining records, receiving liquor license fees, conducting hearings, and imposing penalties, all creates comingling of the investigatory, prosecutorial and adjudicative functions and therefore, this comingling creates a possibility of severe danger of partiality and therefore, an issue with due process.

**Notice of Hearing**

Satisfaction of due process includes notice and opportunity to be heard. *Lui.* Notice includes informing the accused of the specific violations and with enough specificity that he/she could defend against the charges. *Lui.* Opportunity to be heard does not demand that the witness testify under oath and be subject to cross-examination, but only require that the person aggrieved be given a chance to defend against the charges. *Trenton Nursing Home (Trenton).*

Here, the City provides a written notice of the charge or charges against the licensee. Further, the hearing requirements explicitly states that no license should be suspended/revoked without a hearing. Therefore, most likely the City comports with the requirements of due process regarding notice and hearing. However, the issue comes regarding the impartiality of the process because the Mayor not only is on the Commission and has the multiple power and duties, but is also the person who gives notice and hearing and conducts the hearing, therefore creating a danger of impartiality, which is a violation of the due process requirements. The City should hire an independent person to conduct the hearing therefore comporting with due process.

The actual notice provided to violators of the liquor license needs to provide more specific information that gives the licensee the ability to understand the charges/violations against him/her and with enough specificity that he/she could defend against the charges. The notice must be changed to include more specific information in the notice itself regarding the violations. Further, the notice must give more specific information regarding the time frame which the person must respond in order to properly defend the claim of violation.

**Conduct of the Hearings**

Due process also requires fair and independent tribunal. *Lui.* City and county administrative agencies are creatures of the state, and their agencies are state agencies. *Lui.* There is no impartiality if there is a comingling of the investigatory, prosecutorial, and adjudicative functions. *Lui.* If adjudicator has personal or institutional financial interests in the outcome, or is under institutional pressure to reach a particular result, there is severe danger of partiality. *Lui.*

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Here, the mayor is the person who not only conducts the hearings and has the power to issue subpoenas for witnesses, placing witnesses under oath, rule on objections, dismiss charges, conduct evidentiary hearings. It is critical to keep the function of the adjudicators separate from those prosecuting the matter. However, since the Mayor is mayor of the city, then the person “prosecuting” the matter is not independent of adjudicator. Further, the Mayor also has personal and financial interests in the outcome because payment of fines brings increased revenue for the City – again creating a partiality issue.

**Burden of Proof / Evidence**

An agency acts like a court when it provides the opportunity for representation by counsel and follow basic rules of procedure and evidence. *Thompson*. A party may defend by his own presentation of evidence, or by both means. *Trenton*. Courts more willing to preclude review if parties litigated after some prehearing disclosure, aggrieved parties have the opportunity to present evidence, and adjudicators be independent of those prosecuting the matter. *Thompson*. Admission of hearsay evidence alone is insufficient grounds for finding that the protections of due process have been violated, but the evidence as a whole must be evaluated. *Trenton*. Agency decisions based on “third hand accounts” from “unnamed sources” and the “accuracy of which” the court could not evaluate have been struck down.

Here the City hold the burden of proving the charged against the alleged victim, and the agency/mayor is given power regarding subpoenas, witness, rules on objections, dismissing charges, and conducting evidentiary hearings. Therefore, the agency acts like a court in respect to procedural matters.

Further, here, both the city and licensee can present evidence and cross examine witnesses. Also, the admission of evidence of any report by the police or other investigative authority relevant to the charges are proper because admission of hearsay evidence alone is insufficient for a violation of due process. Further, the fact and the Franklin Rules of Evidence do not apply is only a factor to be considered whether the aggrieved party had a full and fair opportunity to be heard. However, the City’s ability to present evidence through “other means” can be a violation of due process if the agency’s decisions are based on third hand accounts or unnamed sources. Here, most likely will only have to change the procedure of allowing the City to present evidence through other means that do not dispute its accuracy.

Prehearing discovery and no counsel are only some of the factors to be considered in determining whether the aggrieved party had a full and fair opportunity to be heard. *Trenton*. The rules do not state anything regarding the right to an attorney, which will be considered as a factor in determining due process violations.

How Changes Would Affect the City’s Goals of Cost and Time-Effectiveness

The public policy reasons for preclusive doctrine include adjudicating disputes once, bringing disputes to an end, and conserving judicial resources. *Thompson*. Here, although

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the city is aiming to accomplish the public policy reasons for preclusive doctrine, it must change its methods regarding the adjudicator and the notice give to violators. This might become more costly for the City to hire an independent adjudicator but an independent adjudicator could fulfill the due process requirements and allow for less litigation in the court system – possibly making it more cost effective. Further, the changing of the notice requirement most likely would not prove to be very costly for the City.

Conclusion

I would recommend changing the structure of the Commission to include independent persons who evaluate the licenses and independent persons who conduct the hearings. Further, I would recommend that the City redraft its notice requirement to comport with due process requirements.

**REPRESENTATIVE ANSWER 2**

**MEMORANDUM**

To: Lawrence Barnes, City Attorney  
From: Applicant  
Date: July 27, 2010  
Re: Liquor Control Commission Procedures

You have asked me to determine how Commission decisions may be given preclusive effect and therefore, not relitigated in state and federal courts. I have examined the relevant law and city procedures in order to determine what changes should be made. First, this memorandum will outline the applicable law and the steps needed to achieve preclusion. Second, the memorandum will address the city procedures that already comply with the requirements for preclusion. Third, the memorandum will provide the city procedures that do not comply with the requirements for preclusion. Finally, the memorandum will state how the changes will affect the city's goals of cost and time-effectiveness.

Applicable Law: How to Achieve Preclusion

In order to determine how the city procedures may or may not comply with the requirements for preclusion, one must first examine the requirements themselves. "Preclusion gives finality to matters already decided where there has been an opportunity to litigate them" (*Thompson v. Franklin State Technical University*). The doctrine only applies where an administrative agency has the authority to adjudicate disputes and where the agency decides the disputed issue properly (*Thompson*). The parties must have an opportunity to litigate and therefore, the agency procedures must comply with the minimum requirements of due process. The heart of due process is notice and opportunity

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to be heard (*Lui v. Polk County Housing Board*). First, the accused must simply be given notice of the claims against him and sufficient information to defend himself: there is no requirement of formality (*Lui*). Second, there must be a fair hearing before an impartial tribunal. In agencies there is a likelihood that the various functions of the agency overlap. When the functions do overlap, the court may inquire where the functions are adequately separated so that there is no actual prejudice. At a minimum, the parties must be assured that the hearing officers are sufficiently independent that they will issue decisions based on the evidence and not on preconceived notions or institutional pressure (*Lui*).

Basically, the more an agency acts like a court, the more likely they are to receive preclusive effect for its decisions. Examples include: opportunity for representation by counsel; following basic rules of procedure and evidence; prehearing disclosure; opportunity to present evidence through witnesses and exhibits and to challenge the evidence presented by the other parties through cross-examination and objections; independent decision-makers; specific findings of fact and conclusions of law concerning dispute (*Thompson*). Importantly, agencies do not have to follow all the formalities of the Courts. The party must be given a chance to defend against the charges and any evidence permitted within the agency must be evaluated as a whole. Therefore, the rules of evidence do not have to be specifically followed in an agency procedure (*Trenton Nursing Home v. Franklin Department of Public Health*). All of the factors must be taken into consideration when determining whether the aggrieved party had a full and fair opportunity to be heard.

City and county administrative agencies are treated the same as state agencies due to their nature as creatures of the state. Therefore, all city agencies must follow the limits of due process detailed above. In order to answer your question, we must next apply the law to the current procedures for the liquor Control Commission.

City Procedures that Comply with the Requirements for Preclusion

*Notice Requirement*

The current city procedures partly comply with the notice requirement of due process. The accused is given a notice of the claims against them. The Court has held that informing the accused of the specific paragraphs of a lease that were violated was adequate notice (*Lui*). Here, the Commission provides the accused with the specific section that has been violated. The notice also provides information on the opportunity for a hearing. Therefore, the agency fulfills the most basic requirement of due process: notice and the opportunity to be heard. However, to complete the requirements for preclusion there must be some changes to both the notice and opportunity to be heard.

*Fair Hearing Requirement*

Currently, the city procedures comply with many of the requirements for due process. The parties are given an opportunity to litigate their claim before the Commission and therefore, the Commission has the authority to adjudicate disputes (*Thompson*). Additionally, the Commission follows basic rules procedure by providing timelines for

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hearings. Also, the accused is given the opportunity to have witnesses; there are evidentiary hearings and a court reporter is present. Furthermore, the burden of proof is placed on the City under a similar standard that would be used in the courts. The licensee also has the right to cross-examine witnesses and present evidence in its own defense. All of these actions illustrate that the agency is acting more like a court than performing legislative duties (*Thompson*). Therefore, it is more likely, the requirements of due process are being met.

City Procedures that Do Not Comply with the Requirements for Preclusion

*Notice Requirement*

While the notice provides the accused with the specific section they have violated, the notice does not provide the accused with sufficient information to defend themselves. There is no explanation of the actions that violated the code or any account of when the violations occurred. Therefore, the notice must be changed to provide the licensee with sufficient information to defend themselves as a subsequent hearing. Providing information on when there was a violation and what action constituted that violation will help fulfill this requirement.

*Fair Hearing Requirement*

First, it is likely that the mayor has too much overlap with his functions. Here, the Mayor serves as investigator, enforcer and decision-maker. The Court has struck down cases where the adjudicator had access to the investigator's files outside a hearing and where the agency's legal counsel both prosecuted the case on behalf of the agency and advised the agency's hearing officer on the law (*Lui*). Here, the Mayor serves all of those functions. The tribunal must be impartial in order to satisfy the requirements for preclusion; it is critical that the person acting in the judicial capacity be independent of those prosecuting the matter. Therefore, in order for due process to be served, the Mayor must not be the only person in every role. The Mayor may continue his prosecutor or investigator roles as long as another outside member performs the judicial functions. Other members of the Commission could perform the decision-making functions provided they do not also perform the investigating and prosecuting as well.

However, the Commission could be forced to find an outside member if it is determined that the council has too much of a personal, institutional or financial interest in the outcome; or if the adjudicator is under institutional pressure to reach a particular result (*Lui*). Therefore, the Commission must serve different functions and be adequately

separated in order to protect against actual prejudice. The bottom line is, the Commission and the licensee must be assured that the hearing officers are sufficiently independent that they will issue decisions based on the evidence and not other factors (*Lui*).

Second, with regards to the rules of evidence, the mere fact that the Commission does not follow the rules of evidence does not prohibit them from achieving preclusion (*Trenton*). However, the evidence as a whole must be evaluated. While, the Commission

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does not have to follow every rule of evidence in order to be effective, they do need to set some standards for admissibility of evidence or consider each piece of evidence on its own within the case. Therefore, for example, the Commission may allow hearsay evidence but may not allow any and all evidence before the Commission. Once again, the procedure must attempt to mirror a procedure in court as much as possible given the constraints and differences of an agency and the court.

Third, the Commission is not required to provide counsel to the licensee (*Trenton*). However, any step that makes the commission appear more like a court will help it achieve preclusion. Additionally, providing prehearing discovery would provide further proof of a fair opportunity to be heard (*Thompson*).

How Changes Affect the City's Goals of Cost and Time-Effectiveness

In all likelihood, the changes would have little effect on the cost and time-effectiveness of the city's procedures. First, preclusion would prevent the city from having to defend their case in court at a later date. Second, the reduction in the duties of the mayor will reduce his workload. Any additional work may be completed by the rest of the city council. As stated, the adjudicator does not have to be completely independent; therefore, other members of the council could provide the investigative tasks while the mayor served as the adjudicator. However, there is the potential for increased costs when implementing further due process requirement. Even if an independent hearing officer was required or additional safeguards were placed within the process, the council could finance the cost of their fair hearing from filing fees or from the fees issued for the license itself.

Conclusion

In just a few steps, the Commission could achieve preclusion. Essentially, the Commission must comply with the requirements of due process. However, the due process analysis does not require a list of things one must check-off. Rather, one must consider all the factors together in deciding whether the aggrieved party had a full and fair opportunity to be heard. Most importantly, the aggrieved party must be given better notice of the charge and must be presented with a truly independent decision-maker. If those steps are taken the Commission will be able to preclude further litigation on their decisions.