

August 15, 2000

Arthur Slattery, Chairperson
New Hampshire Real Estate Commission
25 Capitol St., Rm. 437
Concord, NH 03301-6312

Dear Chairperson Slattery:

This is in response to your inquiry to me, via Director Emmonds, on August 8, 2000 for my opinion as to whether the Real Estate Commission (“Commission”) has the authority to approve consent decrees¹ which resolve pending investigations into violations of RSA 331-A. Of particular interest is whether said consent decrees can include imposition of sanctions pursuant to RSA 331-A:28, I, on the licensee who is a party to the consent decree and whether there must be a hearing on the merits of the consent decree.

It is my understanding that the Commission’s current practice allows a licensee against whom a violation of RSA 331-A:26 (Prohibited Conduct) has been alleged, to enter into a consent decree with the Commission’s executive director or investigator and other parties as an alternative to litigated resolution. The Commission then considers the proposed consent decree in a publicly noticed meeting, to which the parties are invited but not required to attend, and determines whether to accept the consent decree as submitted, impose additional conditions, or reject the consent decree and proceed to hearing on the merits of the complaint. This procedure includes prior notice and an opportunity for a hearing, appears to comport with the practice of other licensing boards and, in my opinion, is well within the Commission’s lawful powers.

New Hampshire administrative agencies, including professional licensing boards², generally allow and encourage amicable resolution of disputes³. Administrative agencies

¹ For purposes of this opinion, the term “consent decree” is used synonymously with “settlement agreement” to mean the consensual resolution of a dispute alleging misconduct by a licensee. In fact, these terms have somewhat different connotations which this letter does not address.

² For example, The Board of Medicine, among others, utilizes consent decrees based on statutory language similar to that in Chapter 331-A. See, RSA 329:17, VI and VII.

have only those powers delegated to them by the legislature, and they must act within the scope of those delegated powers. Appeal of Granite State Electric, 121 N.H. 787, 792 (1981)(citation omitted). The New Hampshire General Court has delegated to state agencies the authority to informally dispose of contested cases by enacting the Administrative Procedures Act, RSA 541-A:31, V, which provides, in pertinent part:

- (a) Unless precluded by law, ***informal disposition may be made of any contested case, at any time prior to the entry of a final decision or order, by stipulation, agreed settlement, consent order or default.***
- (b) In order to facilitate proceedings and ***encourage informal disposition***, the presiding officer may . . . schedule one or more informal prehearing conferences. . . .
- (c) Prehearing conferences may include, but are not limited to, consideration of any one or more of the following:
 - (1) ***Offers of settlement.*** . . . (emphasis added).

As stated in paragraph RSA 541-A:31, V(a), these provisions apply to the Commission unless “otherwise precluded by law.” At issue, then, is whether consent decrees are otherwise precluded by law, specifically by RSA 331-A:28, I, which states, in pertinent part:

- ...If found guilty, after a hearing, of violating this chapter, the Commission may impose any one or more of the following sanctions:*
 - (a) *Suspend, revoke or deny a license or the renewal of such license.*
 - (b) *Levy a fine not to exceed \$2000 for each offence.*
 - (c) *Require the person to complete a course . . .*

and RSA 331-A:26 (Prohibited Conduct), which likewise provides that “any licensee found guilty after a hearing shall be subject to disciplinary action as provided in RSA 331-A:28.” (emphasis added).

In my opinion, these provisions do not limit the settlement authority bestowed pursuant to RSA 541-A. Rather, they are clearly intended to protect the licensee in a contested proceeding from being sanctioned without due process. If the affected parties waive any right they may have to a hearing, and if there are no factual issues in dispute, a hearing would be meaningless.

You inquire whether these provisions implicitly require that in order for the Commission to impose in a consent decree any of the sanctions prescribed in RSA 331-A:28, I, it must fully litigate the complaint through the hearing process and expressly find the licensee guilty of violating Paragraph 26. Such an interpretation has been referred to as an

³ This conforms with federal practice. The Federal Administrative Procedure Act, which is followed by many states, provides, in § 554 (c): “The agency shall give all interested parties opportunity for...the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit...”

obsolete ‘misfit’ in the law. See, Davis, *Administrative Law Treatise* (2nd Ed. 1980), § 10:8. A requirement of a hearing generally means a trial “if needs be,” to address *disputed* adjudicative facts, not a trial whether or not it serves any useful purpose⁴. See, Davis, *Administrative Law Treatise* (2nd Ed. 1980), §12.1. It has long been settled that the public interest is not advanced by having unnecessary hearings. See, Davis, *Administrative Law Treatise* (2nd Ed. 1980), Vol. 3 § 14:9 (Settlements). The legislative history of the federal APA reflects this policy:

...parties must be afforded opportunity for the settlement of cases...The settlement by consent provision is extremely important because agencies ought not engage in formal proceedings where the parties are perfectly willing to consent to judgments or adjust situations informally. Id., quoting Sen. Doc. No. 248, 79th Cong., 2d Sess., 360-61 (1964).

Regarding the requirement of a finding of guilt, the Commission’s sanctions imposed in consent decrees are enforceable whether or not there is an express finding of guilt. See, *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961)(consent orders without admissions of fact are enforceable). Thus, such orders have the effect of an admission, with an implicit finding of guilt. There is nothing, however, to prevent the Commission from expressly finding guilt in its consent decrees.

RSA 331-A:29, I provides further support for consensual disposition of disputes.

Consistent with RSA 541-A:31, V (encouragement of informal disposition), the Legislature enacted RSA 331-A:29, I, providing for the “executive director to meet with the complainant and the licensee to attempt to reconcile their differences.” You inquire whether this section extends only to cases where the settlement discussions result in the withdrawal of the complaint thereby precluding the need to impose sanctions. This interpretation is nonsensical. The unambiguous meaning of §29,I is to encourage rather than limit settlements. Also, the Commission lacks jurisdiction over civil disputes between the parties. The Commission has authority under Chapter 331-A only to ensure that licensees comply with their licensure requirements, including the code of conduct prescribed in paragraph 26, and to impose the specified sanctions when violations occur. It would be absurd to argue that §29, I, applies only to matters over which the Commission has no jurisdiction.

Commission practice is indicative of legislative intent

Even if the statutes at issue were ambiguous as to Commission authority to consider consent decrees, the Commission’s long-term practice of granting consent decrees has not drawn a legislative response. The Commission has been approving consent decrees in a consistent manner pursuant to RSA 331-A:29 and RSA 541-A: 31 for nearly seven years

⁴ It is well established that a statute will not be interpreted so as to lead to an absurd result. *State v. Slayton*, 116 N.H. 613, 615 (1976).

without legislative response, indicating that the Commission practice conforms with legislative intent. In Re: PSNH, 141 N.H. 13, 22 (1996). Here, the Legislature, as late as the 1999-2000 session, declined to make express the Real Estate Commission's authority to consider consent decrees which impose sanctions, presumably because the Commission already had said authority⁵. Significantly, the Legislature deleted from the proposed bill a limitation on the ability of the Commission to approve consent decrees without the complainant's concurrence⁶. Such a limitation would have made the Commission unique among licensing boards in not being able to resolve amicably and efficiently matters on its own motion⁷, a result that would serve no discernable public purpose. Had the Legislature intended to change the Commission's historic treatment of consent decrees, it would have done so expressly rather than leaving the operable language unchanged.

Conclusion

Accordingly, on consideration of the express wording of the applicable statutes, the statutory framework as a whole and the underlying policies favoring administrative efficiency and amicable resolution of disputes, it is my opinion that the Commission's practice of imposing sanctions via consent decrees is within its lawful authority. The matter of how the Commission can enhance this authority is a matter that I would be pleased to discuss with you at your convenience.

Sincerely,

Wynn E. Arnold
Senior Assistant Attorney General
Civil Bureau

WEA:sb
Attachments

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⁵ See, Attachment A hereto consisting of SB 226 as originally submitted and as finally approved for effect January 1, 2001. See, ¶23 regarding, inter alia, consent decrees requiring complainant's concurrence.

⁶ Id.

⁷ See, e.g., RSA 329:18, VIII (Medical Board may settle allegations against licensee without consent of Complainant). There is also common law support for an agency being able on its own initiative to terminate a proceeding at any stage if it acts equitably. See, e.g., Pennsylvania Gas & Water v FPC, 463 F.2d 1242 (D.C. Cir. 1972) and Davis, *Administrative Law Treatise* (2nd Ed. 1980), §14.9.