

# MAINE STATE LEGISLATURE

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# STATE OF MAINE

Inter-Departmental Memorandum Date November 4, 1974

To Governor Kenneth M. Curtis

Dept. Executive

From Jon A. Lund, Attorney General

Dept. Attorney General

Subject Board of Commissioners of the Profession of Pharmacy

In answer to your memo under date of September 23, 1974, submitted to this Office, please be advised that no conflict of interest exists because of the fact that the Board of Commissioners of Pharmacy consists entirely of pharmacists, all of whom must be residents of this State and actively engaged in the practice of their profession. (32 M.R.S.A. § 2851)

In Maine, as in other states, the majority of licensing boards are composed entirely, or in large part, of active members of the profession being licensed. The principle that membership in the regulated occupation does not constitute disqualifying bias is so well established as to require little elaboration. Lucas v. State, 229 Ind. 633, 99 N.E.2d 419 (1951); State ex rel Beddall v. Lonctot, 62 Wash.2d 845, 384 P.2d 877 (1963), 97 A.L.R.2d 1201; Kachian v. Optometry Board, 44 Wis.2d 1, 170 N.W.2d 743 (1969).

The Lonctot case cited above is typical of the various Court decisions which uphold membership of licensees on administrative agencies, even when said agencies act as hearing tribunals, with the power to suspend and revoke licenses.

"Permitting beauty shop owners who considered shop owners as a group to be competing with commercial beauty culture schools, to sit on hearing committee in proceeding to revoke licenses issued to owner and operator of a school, would not deprive school owner and operator of due process." State ex rel Beddall v. Lonctot, 62 Wash.2d 845, 384 P.2d 877, 97 A.L.R.2d (1963).

The Washington Court in the Lonctot case further stated that the pecuniary interest of beauty shop owners in the outcome of a license hearing as to any one of them, was indirect and speculative. The Lonctot case is not particularly germane to administrative law in Maine, but it clearly is illustrative of the judicially established principle that members of a given profession may not only have a voice in determining right of entry into said profession, but, in addition, may also act in a quasi-judicial capacity to suspend or revoke licenses. In Maine, the Board of Commissioners of Pharmacy has no such power, although this option is available to the Legislature.

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In the Kachian case cited above, an optometrist challenged the constitutionality of the Wisconsin Optometry licensing law which required that all members of the Board be registered optometrists. The challenge was based upon the contention that there was an "inbuilt, inescapable even if indirect, financial interest involved when an optometrist board member sits in judgment on a fellow-optometrist." The Supreme Court of Wisconsin summarily dismissed said contention and held that:

"It cannot be held as a matter of law that a member of a certain profession or occupation is disqualified by that fact from serving on an administrative board dealing with such profession or occupation." Kachian v. Optometry Board, 44 Wis.2d 1, 170 N.W.2d 743 (1969).

In discussing the advantages and disadvantages of having licensees serve on regulatory licensing agencies, the Wisconsin Court posed the following inquiries and answers thereto:

"If the indirect interest deriving from membership in the profession or occupation being regulated disqualifies an individual from serving on a regulatory board, the result would be dentists could not examine dentists, attorneys could not serve on bar examiner boards, pharmacists could not give pharmacy examinations. Would it be preferable, or even workable, to have the dentists giving bar examinations and optometrists giving pharmacy tests? The gain in presumed purity would be matched by a loss in knowledge and experience in drafting and administering professional and occupational rules and regulations. In any event, the question of public policy involved in the composition of administrative agencies is for the legislature to debate and decide, short of constitutional requirements." (emphasis supplied)  
Kachian case supra.

As to matters of discipline relating to professional conduct, it should be emphasized again that the "Pharmacy Board" in the State of Maine has no authority to suspend or revoke licenses. When complaints are filed against pharmacists in this State, although an investigation is usually undertaken under the direction of the Board of Pharmacy, any administrative action in regard to suspension or revocation of license, is conducted before the Administrative Court, a tribunal independent

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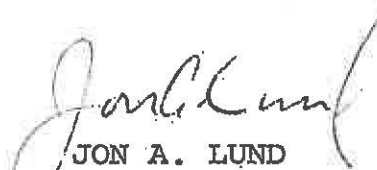
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of all licensing agencies. Complaints against pharmacists relating to possible violations of any criminal laws of the State are, of course, disposed of either at the District Court or Superior Court, depending upon the gravity of the alleged offense.

As far as the age-old problem of policing one's own profession is concerned, I would not be opposed to the placement of a non-pharmacist on the Board of Pharmacy, any more than I would not be adverse to the placement of a non-dentist on the Board of Dental Examiners or a non-physician on the Board of Registration in Medicine. As noted above, however, this is a matter for legislative determination.

I make the above observation not from any fear that a licensing agency cannot faithfully carry out its police power so as to properly protect the health and welfare of the public, when the constituency of its membership is entirely composed of licensees, but rather, it seems to me that the placement of non-licensees on regulatory licensing agencies might at least have the salutary effect of immunizing the various licensing agencies from becoming over-protective of their own economic interests, to the eventual detriment of the general public.

  
JON A. LUND  
Attorney General

JAL/jwp