

VOLUME NO. 43

OPINION NO. 33

ADMINISTRATIVE LAW AND PROCEDURE - Authority of state licensing board to reconsider decision of predecessor;

JURISDICTION - Authority of state licensing board to reconsider decision of predecessor;

LICENSES, PROFESSIONAL AND OCCUPATIONAL - Authority of state licensing board to reconsider decision of predecessor;

STATE AGENCIES - Authority of state licensing board to reconsider decision of predecessor;

ADMINISTRATIVE RULES OF MONTANA - Sections 8.17.301, 8.17.803;

MONTANA CODE ANNOTATED - Sections 2-15-102(10), 2-15-135, 37-1-131, 37-29-201, 37-29-311;

OPINIONS OF THE ATTORNEY GENERAL - 33 Op. Att'y Gen. No. 15 (1969).

HELD: The Board of Dentistry, having succeeded to the functions of the Board of Denturistry, may not reconsider a prior decision of the Board of Denturistry to issue a denturist's license.

September 12, 1989

Robert B. Cotner, D.D.S.
President, Board of Dentistry
Division of Business Regulation
Department of Commerce
1424 Ninth Avenue
Helena MT 59620

Dear Dr. Cotner:

You have requested my opinion on the following question:

Is a state licensing board which succeeds to the functions of a predecessor board bound by the decisions of the predecessor?

Your inquiry recites that the Board of Dentistry was created in January 1985, for the purpose of licensing denturists and supervising the profession of dentistry in Montana. In accordance with chapter 548, 1985 Mont. Laws, the Legislative Audit Committee conducted a Sunset Performance Audit of the Board of Dentistry and found that the Board had licensed fewer than 30 denturists between January 1985 and October 1986. Accordingly, the Committee introduced a bill to merge the Board of Dentistry with the Board of Dentistry. The two boards were merged effective July 1, 1987, pursuant to chapter 524, 1985 Mont. Laws.

The legislative audit concluded that of the 18 denturists licensed by the Board of Dentistry, five did not meet all required criteria for licensure because of a failure to serve a required internship or a lack of formal training. The Board of Dentistry has been asked to investigate the qualifications of these five individuals. Your question is whether the Board has the authority to undertake such an investigation, or whether it must adhere to the decision of the Board of Dentistry to issue the licenses in the first place. I agree with the Board of Dentistry that the Board is bound by the initial licensing decisions of its predecessor, the Board of Dentistry, for the reasons stated hereafter.

Under section 2-15-135, MCA, decisions made by the Board of Dentistry prior to July 1, 1987, remain in effect following the transfer of functions, and the Board of Dentistry succeeds to all rights, duties, and functions of its predecessor. By operation of law, the Board of Dentistry possesses the same authority previously held by the Board of Dentistry. Accordingly, the Board of Dentistry has the authority to reconsider the licensure of the five individuals if, but only if, the Board of Dentistry had been so authorized. Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 217 (1929) (powers and duties of person holding office are impersonal and unaffected by change in person holding such office).

In order to answer your request, I must consider whether, as a licensing board within the Department of Commerce, the Board of Dentistry would have the power on its own motion to reconsider the issuance of a license some three to four years after it has been granted.

There are conflicting lines of authority as to the power of an administrative agency or board to reconsider its own decisions. Under federal law, and under the laws of some states, administrative agencies are cloaked with certain implied or inherent powers, including the "inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." Trujillo v. General Electric Co., 621 F.2d 1084, 1086 (10th Cir. 1980). Accord Dawson v. Merit System Prod. Bd.,

712 F.2d 264, 267 (7th Cir. 1983); Trap Rock Industries, Inc. v. Sagner, 133 N.J. Super. 99, 335 A.2d 574 (1975), aff'd, 69 N.J. 599, 355 A.2d 636 (1976) (per curiam); In re Fain, 65 Cal. App. 3d 376, 135 Cal. Rptr. 543, 550 (1976). Other courts hold that an administrative agency does not have the power to reopen or reconsider its decision in the absence of statutory authority. Caldwell v. Nolan, 167 Ill. App. 3d 1057, 522 N.E.2d 175, 179 (1988); Rosenberger v. City of Casper Board of Adjustment, 765 P.2d 367, 369 (Wyo. 1988); Hupp v. Employment Sec. Comm'n, 715 P.2d 223, 225 (Wyo. 1984); Yamada v. Natural Disaster Claims Comm'n, 54 Hawaii 621, 513 P.2d 1001, reh'g denied, 55 Hawaii 126, 516 P.2d 336 (1973); Koehn v. State Board of Equalization, 166 Cal. App. 2d 109, 333 P.2d 125, 128 (1959); Suryan v. Alaska Industrial Board, 12 Alaska 571, 573 (1950).

Some jurisdictions recognize an exception or take an intermediate approach, concluding that reconsideration is appropriate to correct obvious mistakes where that can be achieved fairly and promptly, Hall v. City of Seattle, 24 Wash. App. 357, 602 P.2d 366, 369 (1979), or to correct fraud, illegality or irregularity in vital matters, Geiger v. Mississippi State Board of Cosmetology, 246 Miss. 542, 151 So. 2d 189, 191 (1963). Distinction is frequently drawn between decisions which are legislative or ministerial in nature and decisions which are judicial in nature. Siegel v. Mangan, 258 App. Div. 443, 16 N.Y.S.2d 1000, aff'd per curiam, 283 N.Y. 557, 27 N.E.2d 280 (1940). If the former, reconsideration is permissible. *Id.*, 16 N.Y.S.2d at 1002. If the latter, reconsideration may not be had absent statutory basis therefor. Yamada, 513 P.2d at 1005. Further, authorities allowing reconsideration require that the power be exercised with reasonable diligence. Duvin v. State, Department of Treasury, 76 N.J. 203, 386 A.2d 842, 844 (1978); Hall, 602 P.2d at 369; Anchor Casualty Co. v. Bongards Cooperative Creamery Ass'n, 253 Minn. 101, 91 N.W.2d 122 (1958).

Montana adheres to the principle that "[a]dministrative agencies enjoy only those powers specifically conferred upon them by the legislature." Bick v. State, Department of Justice, 43 St. Rptr. 2331, 2332, 730 P.2d 418, 420 (1986). They possess no common law powers, and may not exceed the authority conferred on them by statute. State ex rel. Anderson v. State Board of Equalization, 133 Mont. 8, 17, 319 P.2d 221, 226-27 (1958); Bell v. Department of Licensing, 182 Mont. 21, 22-23, 594 P.2d 331, 332-33 (1979). Implied powers are limited to "those necessary for the effective exercise and discharge of the powers and duties expressly conferred." State ex rel. Dragstedt v. State Board of Education, 103 Mont. 336, 338, 62 P.2d 330, 332 (1936).

Although the Supreme Court of Montana has not decided whether an administrative agency has inherent power to reconsider its decision to issue a license, see generally Matter of Authority to Conduct Savings and Loan Activities, 182 Mont. 361, 367, 597 P.2d 84, 88 (1979), the court's strict interpretation of agency authority (as noted in the cases cited above) is

consistent with the view that agencies do not possess such inherent power. The Court's decision in Bradco Supply Co. v. Larsen, 183 Mont. 97, 598 P.2d 596 (1979), indicates that an agency may not reconsider a final decision unless it has promulgated rules providing for rehearing. Additionally, the issuance of licenses is considered a quasi-judicial function under Montana law, § 2-15-102(10), MCA, lending further support to the conclusion that the power to reconsider such issuance is not inherent. Although an earlier Opinion of the Attorney General did conclude that an administrative board could under some circumstances rescind or modify the action taken by a previous board, that opinion was issued prior to adoption of the Montana Administrative Procedure Act and did not consider Montana's narrow interpretation of agency authority. 33 Op. Att'y Gen. No. 15 at 36 (1969). Further, it recognized that resolution of the question "turns on the nature of the specific circumstances surrounding the case." *Id.* at 36. Accordingly, it becomes necessary to look to the applicable statutory and regulatory scheme to determine whether the power of reconsideration is expressed or necessarily implied therein.

Each board within the Department of Commerce is authorized to set and enforce standards and rules governing licensing of the members of the profession within its jurisdiction, and to sit in judgment in hearings for the suspension, revocation, or denial of a license within its jurisdiction. § 37-1-131, MCA. The specific powers and duties of the Board of Dentistry, now the Board of Dentistry, as set forth in section 37-29-201, MCA, are these:

- (1) [D]etermination of the qualifications of applicants for licensure under this chapter;
- (2) administration of examinations for licensure under this chapter;
- (3) collection of fees and charges prescribed in this chapter;
- (4) issuance, suspension, and revocation of licenses for the practice of dentistry under the conditions prescribed in this chapter; and
- (5) to adopt, amend, and repeal rules necessary for the implementation, continuation, and enforcement of this chapter, including but not limited to license applications, form and display of licenses, license examination format, criteria and grading of examinations, disciplinary standards for licensees, inspection of dentistry premises and facilities, and investigation of complaints.

Suspension or revocation of a dentist's license is governed by section 37-29-311, MCA, which lists specific grounds therefor, including "unprofessional conduct as defined by rule of the board." § 37-29-311(1)(f), MCA.

Unprofessional conduct is defined at § 8.17.801, ARM. Additional regulations have been promulgated setting forth grounds for denial of a license, § 8.17.803, ARM.

There is no provision either in the controlling legislation or in the applicable regulations for reconsideration of the issuance of a license. Further, although failure initially to meet the minimum statutory requirements is ground for denial of a license, § 8.17.803(1), ARM, such failure is not ground for revocation of a license already issued. Certainly, if any of the five individuals at issue engaged in fraud, misrepresentation or deceit in obtaining a license, the Board would be within its authority in instigating revocation or suspension proceedings, subject to the Administrative Procedure Act and to other pertinent provisions of law. See, e.g., § 2-4-631, MCA. Absent such misrepresentation or other unprofessional conduct, however, there is no provision for *sua sponte* review of a licensee's qualifications.

Finally, there is the consideration of timeliness. Under the standards developed by the courts, as discussed above, the Board has not acted with reasonable diligence in pursuing any reconsideration. Without express statutory or regulatory authority, any powers of reconsideration the Board may enjoy cannot be exercised three to four years after the licenses have been issued. A contrary determination would endow the Board with unbridled power to reopen the licensing proceeding at any time and for any reason with no safeguards to protect the licensees.

THEREFORE, IT IS MY OPINION:

The Board of Dentistry, having succeeded to the functions of the Board of Dentistry, may not reconsider a prior decision of the Board of Dentistry to issue a dentist's license.

Sincerely,

MARC RACICOT
Attorney General