

Hallinan
LEGISLATION
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Question 1

In 1992, the State of Ames enacted a statute for the licensing of contractors and others engaged in the installation, maintenance, and repair of heating, ventilation, and air conditioning (HVAC) systems. Prior to the enactment, the state had a licensing scheme for home improvement contractors, which was administered by the Home Improvements Commission (HIC). The HIC statute provided, among other things, that in issuing licenses the Commission was to take into account "information about the applicant's character, experience, and financial capacity." In addition, the HIC statute permitted denial of a license if the applicant "has been convicted of any felony."

As originally proposed, the HVAC statute would have been part of the HIC statute, and applicants for HVAC licenses would have been regulated by the HIC and would have been subject to much the same qualifications as HIC licensees. The bill passed the Ames House of Representatives as originally proposed.

The Ames Senate, however, substituted an entirely new text. The sponsor of the substitute said that its provisions were modeled on the provisions of the Ames Business Code regulating plumbers and electricians. In her statement, the sponsor said, "The Home Improvement Act is the wrong model. It does not permit the Board to examine the applicant's skill or competence, since a home improvement license is a license to do business, not a certification that the licensee is particularly skilled." The Senate's approach was assented to by the House and the bill was enacted and signed by the governor in the Senate's form.

The enacted statute establishes a Heating, Ventilation, and Air Conditioning Board which is responsible for licensing HVAC contractors and specialists. No license is required for a person engaged in HVAC work if the person is employed by a licensed HVAC contractor. In addition, the act exempts from licensing those with a plumber's, electrician's, or engineer's license, as well as those regularly employed by the owner of property (such as an apartment complex) to perform maintenance and repairs on existing systems.

The statute's preamble includes the following statement of its purpose:

The purpose of this title is to establish a licensing program for individuals who provide or assist in providing heating, ventilation, air-conditioning, and refrigeration services to: (1) protect the public; (2) provide and maintain efficient and safe systems; (3) promote high professional standards; and (4) ensure that qualified individuals carry out these objective.

Section 9A-310 of the Act establishes the authority of the HVAC Board regarding license denials and revocations. It provides:

The Board may deny a license to any applicant, reprimand any licensee, or suspend or revoke a license after a public hearing conducted in accordance with the provisions of 9A-311 of this title, if the Board finds that the individual:

(1) obtained a license by false or fraudulent

representation;

(2) transferred the authority granted by the license to another person;

(3) willfully or deliberately disregarded and violated the code established by the Board under this title;

(4) willfully or deliberately disregarded and violated building codes, electrical codes, or laws of the State or of any municipality, city, or county of the State;

(5) aided or abetted a person to evade a provision of this title by allowing a license to be used by an unlicensed person, firm, or corporation;

(6) willfully or deliberately disregarded disciplinary action taken by a municipality, city, or county against the individual in connection with providing heating, ventilation, air-conditioning, or refrigeration services;

(7) abandoned or failed to perform, without justification, any contract or project to provide heating, ventilation, air-conditioning, or refrigeration services;

(8) performed work under a heating, ventilation, air-conditioning, or refrigeration services contract or project that is inadequate or incomplete;

(9) directly or indirectly published any advertisement relating to the providing of heating, ventilation, ah-conditioning, or refrigeration

services that contained an insertion, representation, or statement of fact that is false, deceptive, or misleading;

(10) made any material misrepresentation in the procurement of a heating, ventilation, air-conditioning, or refrigeration services contract or project; or

(11) failed in any material respect to comply with the provisions of this title.

The provisions of § 9A-310 closely track the provisions of the Business Code regarding denial of electrician's licenses, substituting references to heating, ventilation, and air conditioning in place of the electrician statute's references to electrical work. The corresponding section of the Business Code regarding denial of plumber's licenses is the same except that the provision that parallels division (4) reads: "(4) is guilty of violating the State Plumbing Code or applicable local plumbing code while providing services or assisting in providing plumbing services.

In February, 1997, Bill Mansfield applied to the Board for a "master's" HVAC license. Mansfield is forty years old and works for a heating-and-air-conditioning company owned by his parents. On his application, Mansfield disclosed that in 1982 he had been convicted of aggravated theft (a felony) following his theft of a \$5,000 watch from a jewelry store. He was sentenced to five years imprisonment, with all but twelve months of that term suspended, and to a period of five years probation.

Mansfield also disclosed on his application that in 1991, he had been charged with breaking-and-entering at a neighbor's garage. He claimed that he was simply attempting to retrieve a lawn mower that he had lent to the neighbor

(who was out of town). The charges were reduced to disorderly conduct and he was fined \$50 and ordered to pay the costs of repairing the garage door. Finally, he disclosed that he had failed to pay city income taxes for the period 1989 through 1994. No charges were filed, but he is still in the process of paying off the arrearage.

There is no question regarding Mansfield's competence or experience at HVAC work. He has passed the Board's written and practical exams with flying colors. With the exception of his time in jail, he has worked for the family company consistently since before he graduated from high school. In that capacity he regularly visits homes and makes repairs while unsupervised.

The Board has denied Mansfield's application for a license. In its "Statement of Reasons, the Board said: "While applicant's conviction of theft was not based on conduct occurring while he was at work, it remains evidence of unsound character. Together with his other legal difficulties, the conviction persuades the Board that the application should be denied for the protection of the public and due to applicant's admitted violation of municipal and state law. See Business Code, § 9A-310(4).

Mansfield has sought judicial review of the denial on the ground that it is not in accord with law. Assume that under Ames law, a licensing board has no authority to deny a license except as specifically provided by statute. Should Mansfield prevail in his action to overturn the license denial? Why or why not?

Question 2

The Ames Racing Commission is charged by statute with regulating the operation of race tracks in the state of Ames. Races involving thoroughbred horses, standardbred

horses (harness racing), and dogs, together with wagering on the outcomes of the races, are all legal if conducted at facilities licensed by the Racing Commission.

In 1994, the Ames Racing Code was amended to add a provision designed (according to its preamble) "to prevent the proliferation of race tracks in crowded areas and to secure the competitiveness and profitability of licensed race tracks. " As introduced in the Ames legislature, the amendment (section 432 of the Racing Code) provided as follows:

A racing permit may be issued by the racing commission to conduct running horse races, harness horse races, or dog races only if the races will not be conducted at a location within one hundred miles road travel of another location for which a permit has been issued and a racing plant located.

The bill passed the house. The engrossing clerk, however, miscopied the text so that it read as follows:

A racing permit may be issued by the racing commission to conduct running horse races, harness horse races, or dog races only if the races will be conducted at a location within one miles road travel of another location for which a permit has been issued and a racing plant located.

The clerk, that is, inadvertently deleted the "not" in the second line of the original bill and changed "one hundred miles" to "one miles." The Senate made other modifications to the bill containing the amendment but made no change to the part of the text mistranscribed by the

clerk. The Senate returned its version to the House, which approved the bill (still containing the clerk's version), and the whole was signed by the governor.

The Racing Commission is authorized by the Racing Code to promulgate rules and regulations "which regulations shall have the force and effect of law, provided that no such regulation shall be valid if it is inconsistent with the Racing Code.

Following enactment of new section 432, the Commission promulgated a regulation regarding license applications. The regulation provided in pertinent part:

Notwithstanding the provisions of section 432, a racing permit may be granted for a racing plant only if the permit is for a racing plant more than one hundred miles by road travel from any other racing plant of the same type. A racing plant of one type (for example, dog-racing) may be located within one hundred miles of a plant of another type (thoroughbred or harness racing).

In a "comment" published with the regulation, the Commission said: "Taken literally the amended statute would require any license to be issued only if the track in question was located within a mile of another track. That result cannot have been what was intended. In the Commission's view, the clear legislative intent was to prohibit the establishment of racing plants within one hundred miles of one another. In addition, the Commission believes that the legislative intent is adequately served by prohibiting the establishment of racing plants only within one hundred miles of plants of the same kind."

Pursuant to its regulation, the Commission recently

approved an application by the Gotham Kennel to establish a dog-racing track at its facilities in Gotham. Metropolis Downs is a licensed operator of a harness racing track in Metropolis, a city located fifty miles by road from the proposed site of the Gotham Kennel track. Metropolis Downs has filed an action seeking to enjoin Gotham Kennel from operating its track and to enjoin the Racing Commission from permitting dog racing at Gotham's track. Should Metropolis Downs prevail? Why or why not?

Question 3

Section 23 of the Government Code of the State of Ames, enacted in 1874, provides:

No new law shall be construed to repeal a former law, as to any act done, or any right accrued, or claim arising under the former law, or in any way whatever to affect any act done, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding.

Section 541 of the Education Code, enacted in 1954, provides that no permanent teacher in the state's primary or secondary schools may be dismissed except on grounds specifically established by the statute. Among the grounds listed in section 541 is the following:

(6) that the teacher has been convicted of a felony or a crime involving moral turpitude as that term is defined in the Criminal Code.

Section 541 also provides that a permanent teacher may appeal a dismissal to the Superior Court, with further appeals to the Court of Appeals and the Supreme Court. Pending an appeal, the statute provides, the teacher may be reassigned to duties outside the classroom, but no dismissal is effective until the later of the expiration of the time for appeal and the date upon which all appeals have been exhausted.

Section 121 of the Criminal Code, as enacted in 1927, defined "crime involving moral turpitude" as "criminal behavior that gravely violates moral sentiment or accepted moral standards of the community and that is generally recognized as wrong without regard to its legality."

Prior to 1963, various judicial decisions had established that violations of the Controlled Substances Act based on possession or use (as opposed to sale) of illegal drugs were generally not to be regarded as "crimes involving moral turpitude." None of these decisions, however, had arisen in the specific context of dismissal of a permanent teacher. In any event, in 1963 section 121 was amended to define "crime involving moral turpitude" as "criminal behavior that gravely violates moral sentiment or accepted moral standards of the community and that is generally recognized as wrong without regard to its legality; the phrase includes any offense of violence and any criminal violation of the Controlled Substances Act. "

Otto Hetzel is (and has been since 1978) a permanent teacher employed by the St. Clair County School District. In March, 1993, Hetzel was charged with violating the Controlled Substances Act for having in his possession a small amount of marijuana which was indisputably intended for his personal use and not for sale. Under Ames law at the time, possession of such an amount for personal use was a misdemeanor. In August, 1994, he pleaded guilty to the

charge as part of a plea bargain; he was convicted on the plea and sentenced to one year of probation and fifty hours of community service.

Two weeks after the conviction, the St. Clair County School District notified Hetzel that he would be dismissed from his position as a permanent teacher on the basis of the conviction. Hetzel was accorded an administrative hearing, following which the District adhered to its decision to dismiss him as of the end of the school year.

After his dismissal, Hetzel timely filed (in October, 1995) a statutory appeal to the Superior Court seeking to reverse the board's decision and obtain reinstatement. Following a trial, the court concluded in July, 1996 that the District had acted properly and that Hetzel was not entitled to reinstatement. Hetzel filed a timely appeal to the Court of Appeals in August, 1996.

In September, 1996, the Ames legislature enacted a comprehensive revision of its statutes dealing with marijuana. The enactment amended the Criminal Code to make possession of manluana for personal use a minor misdemeanor (approximately equivalent in gravity to violating a speed limit). In addition, the enactment required the destruction of any public records regarding arrests and convictions for marijuana possession two years after the date of the arrest or conviction. The 1996 enactment also amended the Government Code to provide as follows:

No public agency shall alter, amend, condition, deny, limit, postpone, qualify, revoke, surcharge, or suspend any certificate, franchise, incident, interest, license, opportunity, permit, privilege, right, or title of any person because of an arrest or conviction for [possession of marijuana for

personal use] or because of the facts or events leading to such an arrest or conviction, on or after the date the records of such arrest or conviction are required to be destroyed, or two years from the date of such conviction or arrest with respect to arrests and convictions occurring prior to September 1, 1976. As used in this subdivision, "public agency" includes, but is not limited to, any state, county, city and county, city, public or constitutional corporation or entity, district, local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency thereof.

The 1996 enactment made no express reference either to section 541 of the Education Code or to section 121 of the Criminal Code. The enactment stated that "this Act shall become law and go into effect on September 1, 1996.

The legislative committee reports accompanying the 1996 enactment stated that reform of the marijuana laws was important because under prior law persons convicted of relatively minor marijuana offenses were subjected to disproportionately severe sanctions, both criminal And civil; the report said that "prime examples of the problem included dismissal from employment and the loss of professional credentials.

Hetzel's appeal is now pending before the Court of Appeals. He argues, solely on statutory grounds, that Board is not authorized to dismiss him from his position as a permanent teacher. Should he prevail? Why or why not?

END OF EXAMINATION