

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BOARD OF NURSING HOME EXAMINERS

In the matter of Kenneth W. Steiger,
N.H.A.; License No. 00123

ORDER DENYING
RECONSIDERATION OF
ORDER DENYING
SUMMARY DISPOSITION

By Motion dated February 27, 1996, Complainant has requested reconsideration of the Order issued January 11, 1996 denying her previous Motion for Summary Disposition. The record closed on the reconsideration motion on March 19, 1996, upon receipt of the response from the licensee.

Penny Troolin, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, MN 55103, appeared on behalf of the Complainant, Julie M. Vikmanis, Executive Director of the Board of Examiners for Nursing Home Administrators. Kenneth Steiger, 4746 Country Shores S.W., Alexandria, MN 56308 (note change of address) the Respondent--Licensee, appeared on his own behalf, without benefit of counsel.

Based upon the Motion for Reconsideration, the written submissions of the parties and all the files and records herein, the Administrative Law Judge makes the following:

ORDER

The Motion is in all respects, DENIED.

Dated this 13th day of May, 1996.

HOWARD L. KAIBEL, JR.
Administrative Law Judge

MEMORANDUM

Motions for Reconsideration are always welcome, whenever a litigant believes there may be some misunderstanding implicit in a legal determination. They ensure that fundamental legislative limitations and the reasoning involved in their application are fully comprehended by the parties. This frequently facilitates settlement of disputes, because compromise is more likely when the parties understand sufficiently what those boundaries are.

Evidently the Memorandum accompanying the Order on Motion for Summary Disposition did not adequately communicate the rationale involved. The reconsideration request presents an opportunity to clear up the confusion.

Sanctions Versus Licensure

The Motion for Reconsideration fails to grasp the distinction between sanctions and license revocation actions. That distinction is fundamental to understanding why Respondent is entitled to his day in court on this dispute.

Sanctions imposed for citations for violations of agency rules are fines or penalties imposed to encourage the persons cited to be more vigorous in their efforts to comply with the governmental requirements. They are monetary forfeitures which increase the cost of continuing to engage in a particular business or profession. They are ordinarily uniform in amount for a given regulatory misstep, regardless of who the respondents are or how circumspect they have been in endeavors to avoid the error. These uniform levies are ordinarily exemplary in amount -- enough to get the respondent's attention and encourage greater efforts at future compliance, but not so onerous that the forfeiture would close the business down or terminate the respondent's continuing authorization to engage in that business.

There is an entirely separate and strikingly different procedure in the law for depriving occupational licensees of their legal authority to continue to ply their trades or to impose special personal occupational requirements on particular professionals. This relatively rare administrative licensure process is inherently non-uniform.

Licensure actions are intrinsically, quintessentially, personal. The licensee's individual dealings and subjective competence are key questions in deciding whether licensure action should be taken and if so, what that action should be. It is well settled, for example, that licensees with a spotless record of many years of exemplary contributions to a profession are entitled to credit for those achievements in deciding whether adverse action should be taken against their credentials. Conversely, it is equally well settled that a licensee's recent (although the appropriate period of recency is oft disputed) record of previous errors and misdeeds is equally relevant in deciding whether complained of conduct merits discipline and if so, how progressively severe that discipline should be.

In licensure adjudications, unlike penalty assessment prosecutions, the licensee's state of mind and measures taken to avoid mistakes are also key determinations. The most stringent discipline, such as revocation, is ordinarily reserved for intentional misconduct and outrageous or wanton disregard for professional obligations. Lesser interruptions of the licensee's right to make a living, such as suspensions or restrictions, are imposed for gross negligence. Minor disciplinary action, such as censure or probation are meted out for carelessness and inadvertent failures. Precautions taken to guard against expected and unexpected eventualities, which are generally irrelevant in penalty hearings, become crucial considerations in license appeals. Licensing decisions hinge on what action must be taken, if any, to properly

protect both the professional and the public. Both the public and the licensee consequently deserve the most careful assessment of the relevant probative evidence on such matters.

Likewise, evidence relating to mitigating or extenuating circumstances is not relevant in penalty assessment adjudications, but is essential to a fair hearing in a license review. Because evidence in mitigation does not constitute a justification or excuse for a violation, a summary judgment is appropriate to prevent consideration of that evidence in a penalty case. On the other hand, such evidence tends to reduce the degree of moral culpability of a licensee responsible for the occurrence of the violation, which makes it essential to consider it in a license discipline hearing.

In all license proceedings generally (and in nursing home administrator cases particularly, as noted in the Fair Rest Home decision cited in the initial Memorandum) the positive aspects of the licensee's overall job performance must be weighed against alleged negative aspects in order to reach a fair legal determination. Mr. Steiger was prevented from introducing evidence on the positive aspects of his performance in the penalty proceedings, because his overall occupational competence was not in issue in those cases. Occupational competence is, on the other hand, **the** issue in a license proceeding. The proposed summary judgment motion would preclude him from introducing evidence on that issue.

There is a suggestion in one Minnesota case that the standard of proof, which applies in deciding all such fact issues, should be somewhat more stringent in licensing proceedings than the standard applied in penalty citation cases. In both types of cases, the existence of the violation must be proven by a preponderance (50% plus) of the evidence. In proceedings to revoke licenses to continue to practice one's profession, it is frequently argued that the standard should be much higher, because of the stakes involved. As the California court noted in the Marek decision (cited by the Complainant in this Motion for Reconsideration): "It is well settled that the right to practice one's profession is a fundamental vested right. . . ." As a consequence, the courts in other states have increasingly applied a tougher "clear and convincing evidence" standard in professional license revocation proceedings. Ferris v. Turlington, 510 S.2d 292 (Fla. 1987) and Matter of Zar, 434 N.W.2d 598 (S.D. 1989).

The weight which should be assigned to the particular evidence in this case under the current state of Minnesota law is a matter which will have to be briefed by the parties. Suffice it to say quality of the evidence must be carefully scrutinized. A leading Minnesota Supreme Court case held years ago that in licensing cases revocation must be based only on evidence which has "heft".

There are also different procedural rules in professional licensing cases. Agencies are required to disclose all evidence in their possession in administrative proceedings involving professional licenses, including evidence which tends to support the licensee's position and evidence which calls into question the credibility of the agency witnesses. Smith v. Department of Registration and Education of State of

Illinois, 120 Ill. Dec. 360, 523 N.E.2d 1271, 170 Ill. App. 3d 40, appeal denied 530 N.E.2d 264 (Ill. App. 1 Dist. 1988).

Without belaboring, these are just a few of many basic legal and practical differences between penalty assessment proceedings against a nursing home for violations of Health Department rules versus license disciplinary proceedings questioning the certification of the home or its administrators to continue to offer their services to the public. The distinction should help to clarify the alleged "mistaken impression that the health department did not impose sanctions against Respondent's nursing home" posited in the reconsideration motion.

Nursing Home Sanctions Versus Licensure

Everyone remotely familiar with this case is aware that there were penalty assessments levied against Respondent's nursing home. These were the uniform fines imposed on the institution for failing to comply rigorously with Health Department rules. That's what the prior appeals, which went all the way to the Supreme Court, were all about.

Actually, to be more precise, the appeals were about whether Respondent should be denied a hearing on those fines. Health Department motions for summary judgment were granted on all of the citations that Respondent attempted to contest, preventing him from getting a hearing on any of them. The Administrative Law Judges decided in those cases (and the Courts agreed on appeal) that there was no genuine issue as to the only material fact question, i.e. whether the violations had taken place. Evidence on other issues, such as precautionary measures, was ruled irrelevant as a matter of law, because they would not affect the result or outcome.

Those appeals are over. The fines have been paid. The new question presented is whether summary judgment should now be allowed in this supplemental subsequent **license** disciplinary proceeding.

The Motion for Reconsideration in this case questions quoted language from the Memorandum attached to the Order Denying Summary Disposition, which noted that no disciplinary action has been taken against the **license** of Respondent's facility. Two of the quoted excerpts explicitly reference lack of disciplinary action against the **license** of the nursing home. The other excerpt occurs in the explanation of the operation of the nursing home **license** discipline statute.

The five penalty assessments are not disciplinary actions against the nursing home license. As the above discussion endeavors to explain, the distinction is more than semantic.

Summary Judgments are common in penalty assessment proceedings, to avoid protracted expensive litigation where the sole issue is whether the violation took place and there is no genuine dispute over what happened. Summary Judgments are virtually unheard of in professional license proceedings unless the statute makes some specific conduct a "per se" license matter prescribing an unequivocal automatic occupational

penalty or there has been a previous hearing on the issues, collaterally estopping the licensee from relitigating them.

There was no mandatory automatic adverse licensing action required in this case against this facility's certification. In fact, as the denial order memorandum pointed out, no action was ultimately taken against that license at all. A disciplinary review was **initiated**, as was arguably required by the statute, as pointed out in the quoted excerpt from the memorandum. The Department subsequently decided not to go ahead with the statutorily required hearing and imposed no disciplinary sanction whatsoever against the license -- not so much as probation with specific conditions for improvement of operations or even a public censure.

No criticism of the Department was intended, in the least, in making this observation. On the contrary, as the Memorandum pointed out, the violations had all been corrected and the Department quite properly exercised its discretion to drop the action against the home's certification under the circumstances.

The observation was made to illustrate the operation of the nursing home licensing statute. Although **initiation** of a license review may be mandated by particular events or by a complaint or for whatever reason, the licensing agency has the full discretion at any point to terminate that review, without taking any official adverse action of any kind against the licensee. This same observation can be made about the operation of the nursing home **administrator** licensing statute.

Administrator Sanctions Versus Licensure

At the risk of redundancy, it is important to understand that Respondent also has already been penalized pursuant to the Health Department citations under Minn. Stat. § 144A.04, subd. 6 (a) (2) as a matter of law, without any action being taken or required by the Board of Nursing Home Examiners. That section of the statute provides that no nursing home in Minnesota can employ a nursing home administrator for two years following receipt of four or more uncorrected violations in the four highest fine categories. This legislative sanction or penalty is imposed uniformly on all similarly situated nursing home administrators, automatically, without any action of any kind by the Board of Nursing Home Examiners. The hiring restriction was enacted by lawmakers and it is executed by nursing home employers.

This hiring restriction has the same effect as a two year license suspension. However, there are no lengthy, expensive hearings and there is no room for discretionary judgment calls of any sort. Legislators have decided and it has been duly enacted into law that two years of interrupted employment should be the uniform sanction applied to administrators who allow this level of uncorrected violations to occur on their watch.

Given this universal, self-executing, statutory punishment; issues which the Board must address in this proceeding include the jurisdiction for and the reasonableness of proceeding with an additional licensure disciplinary action.

It has not been alleged and it does not appear that the Board of Examiners has authority to diminish or eliminate this two year de facto suspension. Query: to what extent does it have the authority to vary the sentence in the other direction, by imposing some further restrictions on Respondent's license or by revoking it?

If the Board decides that it does have the legal jurisdiction to vary the statute through initiation of a licensure proceeding, it must then weigh evidence bearing on whether such a variation would be reasonable. That would require some evidence contrasting this Respondent's record with the records of other respondents with four or more violations. Is Respondent so extraordinarily more or less iniquitous than these other licensees, that some deviation from the statutory standard is merited?

Legal Precedents

The legal cases and arguments provided in the memorandum attached to the MOTION FOR RECONSIDERATION have all been carefully reviewed. Further research was also undertaken.

Apparently the legal precedents are susceptible of more than one interpretation. The analysis proposed in Complainant's memorandum is unpersuasive.

The citation to the Leisure Hills Court of Appeals decision in the beginning of the Caselaw Supports Summary Disposition in Licensure Cases section of the Memorandum is a good example. That decision did not deal with whether summary

judgments are proper to deny hearings in **licensure** cases. It wasn't a licensure case. As discussed earlier at some length, that decision involved appeals from summary judgments in penalty assessment proceedings. The propriety of issuing summary judgments in contested licensure discipline matters involving subjective facts, was never presented. On the contrary, the case upheld the conclusion of the Administrative Law Judge that summary judgment was appropriate in such penalty cases precisely because the material issues did not include such subjective questions, preventing Respondent from raising licensure matters such as competence, motives, intentions, good faith efforts or knowledge.

Complainant's memorandum goes on to assert that the Court upheld the penalties, "notwithstanding the fact that they triggered the mandatory revocation or suspension of Leisure Hills' license." There is nothing in the language of the Court of Appeals' decision suggesting it misunderstood the consequences of its holding in this fashion. As explained in the original Order Denying the Motion for Summary Judgment and again earlier in this Memorandum, the penalties did **not** trigger any mandatory suspension or revocation of the nursing home's license. In fact, it is clear that no suspension or revocation or disciplinary restrictions of any kind will be imposed against that license.

Most of the other cases cited, such as the Administrative Law Judge decisions (including Subotnik where the licensee was trying to voluntarily surrender his license and Quiram where both sides stipulated that there were no factual disputes) involved statutory requirements of automatic license revocation for specified criminal convictions. Summary Judgment is appropriate there, because the sole material fact is whether there was a conviction. As noted in the original denial order, there is a similar provision in the nursing home licensing statute (Minn. Stat. § 144A.11, subd. 3a) requiring automatic mandatory revocation of nursing home licenses for felony or gross misdemeanor convictions related to patient safety. Licensees have had their full day in court in such cases, including the presumption of innocence and the most rigorous standard of proof: "beyond a reasonable doubt".

In this nursing home administrator case, the statute does not require an automatic revocation for having managed a facility with penalty citations. (Instead, it requires the automatic self-executing two year employment interruption, discussed above.) This Respondent has never had "his day in court", because of summary judgment motions repeatedly granted to the Department of Health on those citations. Granting this summary disposition motion would deny him an opportunity to be heard once again, this time on the much more far reaching question of whether he should be allowed to continue practicing his chosen profession.

Another example of the proposed interpretation of the legal precedents which is unpersuasive, to one who has carefully read the decision, is Complainant's description of the Marek case. It states that discipline was imposed against Respondent in that case "without an evidentiary hearing on the merits." In fact, the licensee in that proceeding was accorded an exhaustive hearing, presenting numerous witnesses who testified on the subjective issues involved, including: opinions regarding his

professional competence, his reputation for truth and veracity, the quality of his patient recordkeeping and his history of pro bono community service. The reviewing court relied on this evidentiary hearing in holding that the Board Order (rejecting the recommendation of the Administrative Law Judge) was not an abuse of the Board's broad discretion. Perhaps Complainant's representation is based on a further holding in that case that the Board did not need to re-evaluate evidence relating to a prior disciplinary proceeding by another licensing board in a different state. Suffice it to say that the decision is not case law supporting summary disposition in licensing proceedings.

Complainant's subsequent discussion of the Fair Rest Home decision is another illustrative example of an unpersuasive proposed interpretation of the precedents. The legal principles it stands for are in nearly every respect "on point" with the issues presented in this case.

First, Complainant dismisses it as "a case where the licensing agency revoked a nursing home license without any due process." Actually, there was more due process in that case than there has been in ours, because the nursing home was at least accorded a full hearing on the citations for uncorrected deficiencies encountered during the re-inspection, before the agency that issued them (which under Pennsylvania law was the Industrial Board) prior to the attempt by the Health Department to revoke its license without a further hearing. In contrast, it is **this** case where this summary judgment motion would allow for revoking a nursing home administrator's license without any due process hearing whatsoever. Unlike the Fair Rest Home proceeding, Respondent in our case was repeatedly denied any hearing on the citations for uncorrected deficiencies before the Health Department which issued them when the Department moved for summary judgment. If Complainant's motion for summary judgment is also granted in this proceeding before the Board of Nursing Home Examiners, it would also deprive Respondent of any hearing on his continued licensure.

Complainant's memorandum goes on to state that Fair Rest Home "did not address the issue of whether summary disposition satisfied due process". On the contrary, the central holding of that case was that a state agency cannot summarily revoke a nursing home license without a hearing, when the proposed revocation is based solely on citations for uncorrected deficiencies issued previously by another state agency:

The clear language of the statute dictates that no adjudication shall be valid without first there having been given **an opportunity to be heard**. Revocation of a nursing home license is not mandatory. The Department **lapses when in a revocation proceeding it does not give careful consideration to its statutory mandated responsibility to hear testimony**. The concerns of the Department, including but not limited to **consideration of mitigating factors**, differing as they might from the sister agency, **require full exposition** before the final authority **or due process is not met**. (emphasis added)

It is difficult to imagine how the court could have addressed "the issue of whether summary disposition satisfied due process" any more directly. The court addressed that issue within a context which is indistinguishable from the facts and law applicable to this proceeding. The attempt to discipline the licensee was based solely on citations for uncorrected deficiencies previously issued by another state agency. The statute provided for a vast array of potential disciplinary actions. Revocation was not mandatory. The agency attempted to impose revocation summarily, without a hearing. The court overturned that attempt stating unequivocally, in the language just quoted, that due process required a full hearing, including testimony on subjective licensure issues such as mitigating factors, that would not have been relevant in the previous penalty citation proceedings. Granting the requested Motion for Summary Judgment in this case would verily beg for a similar ruling from the Minnesota courts on appeal.

Complainant finally avers that the Board "has taken no action against Respondent's license, and, in fact, has initiated this contested case proceeding for the sole purpose of affording Respondent full due process." Presumably the contested case was actually initiated and the Motion for Summary Disposition was filed because there is a dispute between Complainant and Respondent regarding whether some disciplinary action should be taken against the license in addition to the two year interruption of employment that is imposed automatically under the statute. If there were no such dispute, the matter would have been dismissed with a consent order. Therefore, assuming the existence of such a dispute, Complainant is attempting to do in this case precisely what the court rejected in Fair Rest Home: impose discipline against Respondent's license summarily, without a due process hearing.

Next, the reconsideration memorandum discusses the Tegnazian case, characterizing it as being "not on point", asserting that because the five year suspension of the nursing home administrator's license was overturned by the court solely because it "was not supported by substantial evidence." That characterization suggests that the court's mandate to weigh the positive aspects of a licensee's performance was meaningless verbiage or dicta. A closer look at the court's opinion reveals that the description of the case in Complainant's memorandum leaves out four crucial words. The decision states that the revocation was "not based on substantial evidence and was plainly unwarranted." (500 A. 2d 398 at 403) A careful reading of the case and its history confirms that it is very much "on point," holding that a legal and "fair determination" in a nursing home administrator license revocation proceeding requires examination of the positive aspects of the licensee's "overall job performance." In our case there is nothing in the record regarding that performance, so an evidentiary hearing will be essential to a legal and fair decision.

The Administrative Law Judge serves as the fact finder in this proceeding on behalf of the members of the Board of Nursing Home Examiners. If the summary judgment motion were granted and Respondent were denied an opportunity to introduce evidence on the positive aspects of his job performance over the last 23 years, the proceeding would probably be needlessly prolonged. In the interests of judicial economy it is better to make the record now, as the Board (which will be advised by separate independent legal counsel) or the courts on appeal are very likely to remand

the case back to the Judge to hear the evidence on that performance prior to reaching a decision, as a matter of law and fairness.

The reconsideration motion goes on to discuss the Poskanzer decision, stating that "a license holder" objected to a proposed hearing. Actually, there were 63 nursing home operators in that case who were served with revocation notices and the appeal was from a permanent injunction prohibiting the acting Commissioner of Health from proceeding with those disciplinary actions because of the Supreme Court's conclusion that the licensing official was "infected with prejudice." The Appellate Division decision discharging the injunction is based on the explicitly stated assurance that "operating certificates of a nursing home may not be revoked, suspended, limited or annulled without a hearing." The case does stand for the proposition cited: a hearing "is essential to upholding the exceedingly broad discretion which the legislature has delegated to licensing agencies." In fact, in that case, the hearing guarantee allowed upholding of such discretion even where the licensing staff was demonstrably less than fair and objective in exercising that discretion.

It would needlessly prolong this already lengthy memorandum to continue this case by case discussion. Suffice it to say that the cases and legal questions raised in the Motion to Reconsider have all been carefully reviewed. That review reinforces the conclusions and rationale in the original Order on Motion for Summary Disposition.

However, because Respondent refers to it in his response to the Motion for Reconsideration, a word is in order regarding the Koelbl v. Whalen case. This was the case where New York Health Commissioner Robert Whalen (the same licensing official that the Supreme Court called "infested with prejudice" in Poskanzer) admitted that his attorney called the attorney for the nursing home operators demanding they sign a stipulation admitting to the violations and surrender their appeal rights in return for a promise that Commissioner Whalen would not revoke their license. The Court specifically cites this admission in holding that "a penalty imposed as a result of bias or in retribution for an assertion of rights would be an abuse of discretion."

In his reply to the Motion for Reconsideration Respondent asserts that he was also similarly threatened with the license revocation proposed in this proceeding, if he exercised his rights to contest the earlier Health Department penalty assessments. There has not yet been any response to this accusation from Complainant and Respondent may be entitled to a hearing to clarify the situation. It could be an innocent misunderstanding.

Perhaps, for example, Respondent was unrepresented at the time and mistook a good faith offer of settlement for an attempt at coercion. Respondent must understand that nearly every offer to peacefully resolve or compromise a legal dispute involves an agreement not to pursue any further appeals.

Both parties have been repeatedly encouraged to exhaust efforts to settle this licensing dispute. A letter outlining the procedures that the Office of Administrative Hearings could provide to assist them in discontinuing further hostilities, including

mediation or a settlement conference, was mailed to both sides, when the file was opened. It is never too late to resolve a case informally. Sometimes combatants even find a way to mutually terminate litigation after the hearing is complete, before a decision is announced, once they have heard all of the other side's evidence and arguments. Of course, it is always preferable to reach some accommodation as early as possible, to avoid the expense and travail of further legal conflict. It is unfortunately true that the more time, money and emotions the parties have invested in "winning" the battle, the less inclined they become to make peace. Frequently a fresh look at the arguments by an outside non-combatant, plus a few candid observations, can work wonders with seemingly irreconcilable conflicts. It never hurts to try.

Both parties are again encouraged to reconsider whether some effort should be made to at least discuss potential settlement with a third party. Look carefully at what will be involved in fully litigating all the issues involved, including potential appeals. Unlike judicial proceedings, the Administrative Rules of Procedure do not yet require compulsory alternative dispute resolution unless one of the parties requests it. Both parties are strongly advised to consider making such a request.

Collateral Estoppel Versus Summary Judgment

It appears from the memorandum attached to the reconsideration motion that there may be some confusion between collateral estoppel and summary judgment. That confusion in turn has led to some needless misapprehension over the practical effect of the denial of the request for summary disposition.

At several points the State's memorandum cites to and relies upon collateral estoppel arguments. For example, the Hoeckle Administrative Law Judge decision which is cited in and attached to the memorandum contains an extensive discussion of the Falgren and Nevins decisions of the Minnesota Court of Appeals that are highlighted with a yellow marker. Both of those decisions were collateral estoppel cases. (Note that the Falgren case was recently reversed by the Minnesota Supreme Court. Finance & Commerce April 5, 1996. The decision directs Administrative Law Judges to hear evidence in the future, even in collateral estoppel licensure cases, which would bear on mitigation and the licensee's current fitness to practice. The Court held that such evidence is relevant to a proper decision on whether revocation or some lesser penalty should be imposed.)

The last section of Complainant's Memorandum argues explicitly that ". . . collateral estoppel bars relitigation of these penalty assessments. . . . to grant a hearing now on assessments issued by the Health Department four years ago would be an extravagant and unconscionable waste of resources." That is unquestionably correct. The penalty assessments will not be relitigated in this proceeding.

Collateral estoppel is the doctrine that no party can be forced to go through a second hearing on the same issue in a subsequent proceeding. In the first place, as discussed earlier, Respondent did not have any hearing at all on the previous penalty assessment proceedings, due to summary judgment motions. Secondly, as discussed

at much greater length earlier, the issues in this licensure proceeding are entirely different from the issues in the previous penalty cases.

Even if there had been a previous hearing on the penalty assessments, the Judge would not have allowed Respondent to introduce evidence there on the issues that are vital in this proceeding. This hearing will be about Respondent's occupational abilities and competence. Evidence on that subject would have been irrelevant in a hearing on whether Health Department citations should be affirmed.

For example, one of the penalty assessments was for failure to meet a minimum patient to staff ratio during a given time period. The only material fact issue in that citation appeal would have been whether there were X staff on duty, per Y patients, during Z hours. Any attempt to introduce evidence about the administrator's general record of performance or his competence and ability would have been firmly refused. Even evidence of herculean professional precautionary measures and mitigating circumstances, such as evidence that Respondent's on-call reserve staff levels exceeded the practices of every other administrator in the State, would probably not have been relevant. On the other hand, this is precisely the kind of evidence which must be closely examined in a license discipline hearing.

Collateral estoppel is consequently distinctly not pertinent to the facts here. No one would seriously contend that Respondent should be collaterally estopped from being heard on licensure, by asserting that the issues he would raise have already been fully litigated in an earlier hearing.

Lest Respondent be under the same misapprehension as Complainant, both parties should clearly understand that this licensure hearing will not be a rehearing on the validity of the previous Health Department citations. The penalties for those violations have been assessed, affirmed on appeal and paid. Evidence will not be entertained in this hearing, for example, on whether there were X staff for Y patients on Z days. Evidence will be fully and fairly heard on Respondent's competency and his record as a licensed professional. To the extent that either side can show that licensee's efforts to anticipate and avoid the citations were vocationally prudent or inordinately imprudent, such evidence will be carefully considered and weighed. Likewise, the evidence on the positive aspects of Respondent's performance, which he alleged the Health Department inspectors refused to consider, will most assuredly be fully heard in this proceeding. There are no allegations in the Order for Hearing of any negative aspects of Respondent's performance, other than the citations. If there had been, they would also have been fully examined in formulating recommendations. In short, although Respondent is legally entitled to a full and fair hearing on his fitness to continue practicing nursing home administration, it must be further understood that the validity of the Health Department citations will not be re-examined.

HLK