

State of Washington

BOARD OF CHIROPRACTIC EXAMINERS

(name of governing body)

(agency name, if applicable)

Resolution No. _____

Administrative Order No. PL 349

(1) Be it resolved by the WASHINGTON BOARD OF CHIROPRACTIC EXAMINERS
acting at Red Lion Inn Sea Tac; Seattle, Washington

(place)

that it does promulgate and adopted the annexed rules relating to:

NEW SECTION WAC 114-12-121. Examinations -- National Board; NEW SECTION WAC 114-12-131. Chiropractic Examination -- Limitation; and REPEALER WAC 114-12-120 Examinations -- National Board, and WAC 114-12-130 Chiropractic Examination -- Limitation.

(2) ALTERNATIVE A. Use only for Adoption of Permanent Rules.

This action is taken pursuant to Notice No. _____ filed with the code reviser on _____ Such rules shall take effect:

pursuant to RCW 34.04.040(2),
at a later date, such date being _____.

(2) ALTERNATIVE B. Use only for Adoption of Emergency Rules.

We, Washington State Board of Chiropractic Examiners, find that an emergency exists and that the foregoing order is necessary for the preservation of the public health, safety, or general welfare and that observance of the requirements of notice and opportunity to present views on the proposed action would be contrary to public interest. A statement of the facts constituting such emergency is: the statute, RCW 18.25.015, under which the members of the Chiropractic Examining Board are appointed was declared unconstitutional by the state Supreme Court. The legislature, by Chapter 51, Laws of 1980, regular session, amended RCW 18.25.015 to remedy the unconstitutionality found by the Supreme Court. A new Board of Chiropractic

Such rules are therefore adopted as emergency rules to take effect upon filing with the code reviser. (over)

(3) Pursuant to the requirements of RCW 34.04.____ (1977 c 19 § 2)¹ that "every agency shall incorporate the most specific, but in no case omit all, of the following language alternatives when adopting or amending rules" (fill in statement (a), (b), or (c) as appropriate):

(a) This rule is promulgated pursuant to RCW _____ and is intended to administratively implement that statute.

(b) This rule is promulgated pursuant to RCW _____ which directs that the

(agency)

has authority to implement the provisions of

(name of act or RCW citation)

(c) This rule is promulgated under the general rule making authority of the

Washington State Board of Chiropractic Examiners

(agency)

as authorized in RCW 18.25.017

(4) The undersigned hereby declares that he has complied with the provisions of the Open Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act (chapter 34.04 RCW) or the Higher Education Administrative Procedure Act (chapter 28B.19 RCW), as appropriate, and the State Register Act (chapter 34.08 RCW).

(5) This order after being first recorded in the order register of this governing body is herewith transmitted to the Code Reviser for filing pursuant to chapter 34.04 RCW and chapter 1-12 WAC.

STATE OF WASHINGTON ADOPTED June 25, 19 80

FILED

JUN 26 1980

By James C. Burkett
JAMES C. BURKETT, D.C.
Chairman

Title

[Form CR-8: Effective 12/1/77]

CODE REVISER'S OFFICE

WSR 80-09-037

STATE OF WASHINGTON
CHIROPRACTIC EXAMINING BOARD

Administrative Order No. PL 349

STATEMENT OF PURPOSE AND IMPLEMENTATION

I. NAME OF AGENCY: WASHINGTON STATE CHIROPRACTIC EXAMINERS

II. PURPOSE AND STATUTORY AUTHORITY OF RULE:

These rules implement examinations requirements for licensing as a chiropractor. The statutory authority for these rules is RCW 18.25.017.

III. SUMMARY OF RULE AND STATEMENT OF REASONS SUPPORTING ITS ADOPTION:

WAC 114-12-121 provides that the requirement for basic sciences examination may be satisfied in a number of ways including successfully completing part 1 on the examination conducted by the National Board of Chiropractic Examiners. Subsection 2 provides that an applicant who successfully completes part 2 of the examination conducted by the National Board of Chiropractic Examiners will be considered as having met the examination requirements of RCW 18.25.030 except that each such applicant shall be required to appear before the board and be examined on principles of chiropractic x-ray and adjustive technique.

WAC 114-12-131 provides that a passing score in an examination administered by the board may be carried forward except for the examinations given in x-ray and adjustive technique.

WAC 114-12-120 and WAC 114-12-130 are both repealed.

The repealer of WAC 114-12-120 and WAC 114-12-130 and their replacement by WAC 114-12-121 and WAC 114-12-131 was made necessary by the fact that the board which previously had adopted rules regarding examinations was found to be appointed under an unconstitutional statute. The legislature has since changed the statute and a new board has been appointed. These rules are hence reenacted to cure any possible invalidity in them arising from the legal status of the previous board. The rules were adopted in emergency form because the examinations to which they refer must be given before permanent rule making could be completed.

IV. AGENCY PERSONNEL RESPONSIBLE FOR DRAFTING, IMPLEMENTING AND ENFORCING THE RULE:

<u>NAME/TITLE</u>	<u>ADDRESS</u>	<u>TELEPHONE</u>
Joanne Redmond Assistant Administrator Division of Professional Licensing	Third Floor Highways-Licenses Bldg. 12th & Washington Olympia, WA 98504	753-2205 (Commercial) 234-2205 (Scan)

V. NAME OF PERSON OR ORGANIZATION PROPOSING THE RULE:

These rule amendments were proposed by the Washington State Board of Chiropractic Examiners.

VI. AGENCY COMMENTS:

These rules are necessary to carry out the board's responsibility in administering examinations for licensure of chiropractors.

- VII. These rule amendments were made necessary as a result of the decision of the state Supreme Court in United Chiropractors v. State, 90 Wn.2d 1 578 P.2d 38 (1978), copy attached, which held that the Board of Chiropractic Examiners was appointed pursuant to an unconstitutional procedure. After the statute authorizing appointment was amended by the legislature to cure this defect, the rules which had been promulgated by the previous board had to be repromulgated to remove questions regarding their validity.

SUBMITTED in accordance with Chapter 186, Laws of 1980 and RCW 34.04.045 this 25th day of June, 1980.



JAMES C. BURKETT, Chairman
Board of Chiropractic Examiners

NEW SECTION

WAC 114-12-121. EXAMINATIONS -- NATIONAL BOARD. (1) Any applicant presenting evidence of having successfully completed Part I of the examination conducted by the National Board of Chiropractic Examiners, or presenting a basic science certificate, or successfully completing an examination conducted by the Board of Chiropractic Examiners, will be considered to have satisfied the requirement for basic sciences examination and such shall be waived

(2) Any applicant presenting evidence of having successfully completed Part II of the examination conducted by the National Board of Chiropractic Examiners will be considered as having met the examination requirements as outlined in RCW 18.25.030, except that each such applicant, shall be required to appear before the Washington State Board of Chiropractic Examiners to be examined in the subjects of: Principles of Chiropractic; x-ray; and Adjustive Technique.

NEW SECTION

WAC 114-12-131. CHIROPRACTIC EXAMINATION -- LIMITATION. A passing score in the examination administered by the board in principles of chiropractic may be carried forward. A passing score in the written and practical board administered examinations in x-ray and adjustive technique will not be carried forward and must be taken each time an applicant is examined by the board.

REPEALER

The following sections of the Washington Administrative Code are repealed:

- WAC 114-12-120 EXAMINATIONS -- NATIONAL BOARD.
- WAC 114-12-130 CHIROPRACTIC EXAMINATION -- LIMITATION.

CASES DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 45045. En Banc. April 27, 1978.]

UNITED CHIROPRACTORS OF WASHINGTON, INC., *Appellant*,
v. THE STATE OF WASHINGTON, ET AL,
Respondents.

- [1] **Statutes — Validity — Delegation of Powers — Constitutional Requisites — Private Agency.** A delegation of legislative power to a private agency or association is invalid unless accompanied by standards or guidelines which generally define what is to be done and by whom, and by procedural safeguards to control arbitrary action or abuse of discretion.
- [2] **Physicians and Surgeons — Chiropractors — Regulatory Boards — Selection — Statutory Provisions — Validity.** RCW 18.25.015 and 18.26.040, which effectively delegate the selection of members of the chiropractors' regulatory boards to certain private chiropractic associations, contain inadequate procedural safeguards and constitute an invalid delegation of legislative authority.

Nature of Action: An association of chiropractors brought this action challenging the validity of state statutes which place the selection of the state boards governing the licensing and discipline of chiropractors in the control of two other private chiropractic associations (RCW 18.25.015, 18.26.040).

Superior Court: The Superior Court for Thurston County, No. 54540, Frank E. Baker, J., on November 1, 1976, denied the plaintiff's motion for summary judgment

and entered summary judgment in favor of the defendants upholding the statutes.

Supreme Court: The judgment is *reversed*. The court holds that the statutes contain inadequate procedural safeguards to prevent arbitrary administrative action and thus constitute an invalid delegation of legislative authority.

Davis, Pearson, Anderson, Seinfeld, Gadbow, Hayes & Johnson, by *John C. Kouklis*, for appellant.

Slade Gorton, Attorney General, and *John H. Keith, Assistant*, for respondents.

[As amended by order of the Supreme Court June 28, 1978.]

UTTER, J.—The United Chiropractors of Washington brought a declaratory action to have the methods of appointment found in the two statutes, RCW 18.25.015 and RCW 18.26.040, found unconstitutional. The Superior Court rejected appellant's challenge and held that the statutes are constitutional. We reverse that ruling.

The chiropractors of this state do not belong to a unified, single society. There are approximately 500 chiropractors in the state. One hundred belong to the Chiropractor Society of Washington (CSW) and 170 belong to the Washington Chiropractic Association (WCA). Some of the balance belong to the recently-formed appellant organization, while many belong to no organization at all.

RCW 18.25.015¹ gives to the WCA "and/or" the CSW the authority to submit five names to the Governor from

¹ "There is hereby created a state board of chiropractic examiners consisting of three practicing chiropractors to conduct examinations and perform duties as provided in this chapter.

"Members of the board shall be appointed by the governor from a list of five or more names submitted by the Washington Chiropractors Association, Inc. and/or the Chiropractic Society of Washington. At the time of their appointment, and during their tenure of office, the members of the board must be actual residents of Washington, licensed to practice chiropractic in this state, and must be citizens of the United States.

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which the Governor must appoint the 3-member State Board of Chiropractic Examiners. RCW 18.26.040² provides that the 7-member Washington State Disciplinary Board for Chiropractors is to be composed of three members appointed by the WCA, three by the CSW, and one member who shall be the Director of the Department of Motor Vehicles or his designee. No provision is made for any governmental officer's review or approval of the selections made by either organization. Actual appointments have been limited to members of the CSW and WCA, although the statutes do not prohibit appointment of nonmembers.

Although there are differences in the methods of appointment established by RCW 18.25.015 and 18.26.040, we find no legal distinction on the basis of these differences. RCW 18.26.040 provides for direct appointment by

"In order that the term of one member shall expire each year, first members appointed shall serve one for a term of three years, one for a term of two years, and one for a term of one year; thereafter appointments shall be for a term of three years. Vacancies shall be filled by the governor as in the case of original appointment, such appointee to hold office for the remainder of the unexpired term." RCW 18.25.015.

² "There is hereby created the Washington state chiropractic disciplinary board to be composed of three members to be named by the Washington Chiropractors Association, Incorporated and three members to be named by the Chiropractic Society of Washington and one additional member who shall be the director of the department of motor vehicles or his designee from the department of motor vehicles. Initial members shall be named within thirty days after the effective date of this chapter, whose names and addresses shall be promptly sent to the director of motor vehicles, and such board shall meet and organize at a time and place to be determined by the director of the department of motor vehicles within sixty days after the effective date of this chapter and after written notice to the named members of such date and place.

"The director of the department of motor vehicles or his designee shall designate the terms of the initial members of the disciplinary board. For terms beginning January 1, 1975, one initial member from each of the two groups, the Washington Chiropractors Association, Incorporated, and the Chiropractic Society of Washington, shall be designated for a one-year term, one member from each group shall be designated for a two-year term, and one member from each group shall be designated for a three-year term.

"Thereafter, each of said groups shall, annually, designate the members of the board who shall succeed to said position upon the expiration of said initial term. Such subsequent designations shall be for a term of three years, except the director or his designee from the department of motor vehicles." RCW 18.26.040.

private organizations without action by any elected official, while 18.25.015 requires the Governor's action to select from among a larger group nominated by the private organizations. The Governor *must*, however, select only those persons receiving the approval of the organizations. Thus, in legal effect, the private bodies make the appointments under the procedure established in RCW 18.25.015 just as clearly as—though perhaps less directly than—they do under RCW 18.26.040. The two statutes may therefore be evaluated under the same analysis, without distinguishing between them on the basis of the appointment differences. Several grounds are urged in support of appellant's contention that these statutory provisions are invalid, but we address only appellant's claim that these statutes unconstitutionally delegate governmental power to private bodies, as this issue is dispositive.

[1] This court has previously held unconstitutional the legislature's delegation of authority to a private association to control licensing of physicians through granting or refusing accreditation to schools of medicine. *State ex rel. Kirschner v. Urquhart*, 50 Wn.2d 131, 310 P.2d 261 (1957). That decision rested upon the court's conclusion that "[l]egislative power is nondelegable." *Kirschner*, at 135. Since that time, however, we have recognized that this rule unreasonably restricts the alternatives available to the legislature in approaching a problem or issue. In place of the rule that legislative power is nondelegable, we have substituted a rule that delegation is permissible when (1) the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretion. *Barry & Barry, Inc. v. Department of Motor Vehicles*, 81 Wn.2d 155, 500 P.2d 540 (1972). See also *Spokane v. Spokane Police Guild*, 87 Wn.2d 457, 553 P.2d 1316 (1976); *Lindsay v. Seattle*, 86 Wn.2d 698, 548 P.2d 320 (1976); *Yakima County Clean Air Authority v. Glas-cam Builders, Inc.*, 85 Wn.2d 255, 534 P.2d 33 (1975).

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These cases have demonstrated a movement somewhat in the direction of the approach advocated by Kenneth Culp Davis. See K. Davis, *Administrative Law Treatise* § 2.00-2.17 (1958, Supp. 1970); K. Davis, *Administrative Law of the Seventies* § 2.00-2.17 (Supp. 1976). However, this court has not had occasion since adopting this new standard to consider its applicability to legislation involving delegation to private parties.

Delegation to a private organization raises concerns not present in the ordinary delegation of authority to a governmental administrative agency. The courts of other states have found a violation of the basic governmental framework in such delegations. In *Hetherington v. McHale*, 458 Pa. 479, 329 A.2d 250 (1974), the Pennsylvania Supreme Court invalidated a legislative act in which the legislature had provided for allocation of certain funds collected pursuant to a harness racing act by a committee including some members designated by a private organization. The court observed, at page 484:

A fundamental precept of the democratic form of government imbedded in our Constitution is that the people are to be governed only by their elected representatives.

In fact, the people of this Commonwealth, through their duly elected representatives, have no voice in the appointments of those selected by these three private groups. No opportunity is provided for the public interest to assert itself. Instead, private groups responsive only to the interests of their membership choose those charged with performing governmental functions.

We are equally concerned with the preservation of the "essential concepts of a democratic society" when the power delegated is the authority to make appointments to a committee exercising governmental functions. The power to select those who make public decisions is too vital a part of our scheme of government to be delegated to private groups.

In *Commonwealth ex rel. Kane v. McKechnie*, 467 Pa. 430, 433, 358 A.2d 419 (1976), the Pennsylvania court expanded its earlier decision. In invalidating a statutory

provision mandating that the elected president of the State Dental Society was automatically a member of the State Dental Council and Examining Board, the court noted:

The decision in *Hetherington* was not limited to the governmental function of expending funds, but encompassed all governmental functions. The Board exercises significant governmental functions, including among other things, the establishment of educational standards for dentists, investigation and approval of dental schools, licensing of dentists and dental hygienists, conducting of state dental examinations prior to licensing, and to investigate, prosecute, and discipline those guilty of illegal dental practices.

State ex rel. James v. Schorr, 45 Del. 18, 65 A.2d 810 (1948) and *Opinion of the Justices*, 337 Mass. 777, 150 N.E.2d 693 (1958) reflect similar concerns.

The decisions in the above cases hold delegation to a private party unconstitutional without identifying particular constitutional provisions which have been violated, or by citing provisions relating generally to separation of state governmental powers, and to powers of appointment or legislation. In essence, these courts have set forth a generalized, structural objection to delegations to private parties. There is a need to be more specific in this case.

[2] The basic test which this court has adopted with respect to delegation in general can be applied to private delegation, at least under the facts here. The second component of the test set forth in *Barry & Barry, Inc. v. Department of Motor Vehicles*, *supra*, is applicable here and this delegation violates the constitutional due process rights of those chiropractors who do not belong to the legislatively favored organizations. The procedural safeguards which exist in this scheme are inadequate to control arbitrary administrative action and abuse of discretion in licensing and disciplining of chiropractors not belonging to the favored groups. As stated in *Group Health Ins. v. Howell*, 40 N.J. 436, 445, 193 A.2d 103 (1963), wherein the New Jersey Supreme Court invalidated a delegation of power to the State Medical Society to approve the trustees

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of medical service corporations, "We think such a power to determine who shall have the right to engage in an otherwise lawful enterprise may not validly be delegated by the Legislature to a private body which, unlike a public official, is not subject to public accountability, at least where the exercise of such power is not accompanied by adequate legislative standards or safeguards whereby an applicant may be protected against arbitrary or self-motivated action on the part of such private body."

Our due process objections to these particular statutes is based on several factors. One such factor is the nature of the appointive power itself. The private organizations to which the appointment power is delegated are subject to few standards in selecting the members of the two boards. As a result, each legislatively favored organization may make its selections based solely upon its potential appointees' ability and inclination to advance that group's private interests and reflect only that group's opinions and beliefs regarding chiropractic practice. This may be accomplished without any effective power of elected officials to veto or disallow the selections made, and without providing non-member chiropractors any means of objecting to or challenging the appointees who will govern their profession. Important also is the nature of the power exercised by the board once the private organizations have made the appointments. The statutes vest the boards with the power to make individualized, quasi-judicial decisions, rather than limiting their role to a generalized supervisory or advisory capacity. Appeals from the decisions of the boards are either not provided for (RCW 18.25) or provided for under general administrative review standards (RCW 18.26), thus restricting judicial control and supervision of the boards. The boards may, without significant interference, advance the pecuniary interests of the members of the favored groups through their licensing and disciplinary practices and standards. In sum, the appointment powers of the favored groups, coupled with the power of the boards once appointments are made, constitute due process defects

in the statutory procedures. See Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 Ind. L.J. 650, 717-18 (1975). The fact that neither the CSW nor the WCA has ever selected as a board member any person not a member of the appointing group certainly underscores the potential for entrenchment and self-serving domination by the favored groups, even if it falls short of establishing this result in fact.

As stated in *Blumenthal v. Board of Medical Examiners*, 57 Cal. 2d 228, 236, 368 P.2d 101, 18 Cal. Rptr. 501 (1962), wherein the California Supreme Court struck down a law allowing already-licensed dispensing opticians to control licensing of new opticians, "Delegated power must be accompanied by suitable safeguards to guide its use and to protect against its misuse." The statutes under attack here, as they relate to methods of appointment, violate this principle and offend both federal and state constitutional due process standards.

Our decision regarding delegation renders unnecessary decisions on appellant's other contentions; we do not reach claims based upon privileges and immunities provisions of the state and federal constitutions and claims based upon equal protection grounds. Appellant's claim that the statutes under attack here violate equal protection because they favor some chiropractors over others would pose a particularly difficult question for resolution. The fact that appellant was not in existence at the time this legislation was passed, and that the legislature in establishing the statutory scheme included all organized groups existing at that time, presents the strongest argument in opposition to that claim.

Reversed.

WRIGHT, C.J., and ROSELLINI, HAMILTON, STAFFORD,
BRACHTENBACH, HOROWITZ, DOLLIVER, and HICKS, JJ.,
concur.

Reconsideration denied October 27, 1978.