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ADMINISTRATIVE LAW AND PROCEDURE—Voir Dire of Officers in Administrative Hearings. Board of Trustees, Laramie County School District No. 1 v. Spiegel, 549 P.2d 1161 (Wyo. 1976).

Sydney Spiegel, a teacher in the Cheyenne Public Schools for nineteen years, was dismissed after a hearing provided in accordance with Wyoming law.[1] The bases for termination were Spiegel's oral and published statements made in the course of his union activities, sharply criticizing the administration of his school and the schools in general, his "attitude," and his disregard of board and administration directives. Spiegel requested and was refused permission to voir dire the members of the board to determine whether they could sit in a fair and impartial manner. The Board found there was cause for recommendation of termination of Spiegel's employment contract; the district court reversed the Board's decision,[2] and the Board appealed to the Wyoming Supreme Court.[3]

The Wyoming Supreme Court was presented with the choice of strictly applying the "Rule of Necessity" and denying voir dire, or modifying the rule by the requirements of due process and authorizing the use of voir dire and dismissal of board members. Two members of the Court found the refusal to allow a party to inquire of individual board members as on voir dire to determine bias and prejudice was a denial of the constitutional right to a fair and impartial hearing.[4] This note will content itself with an examination of this aspect of the *Spiegel* decision.

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1. WYO. STAT. § 21.1-158 (Supp. 1975) provides that "a continuing contract teacher shall be entitled to a hearing before the board within thirty (30) days after receipt of notice of a recommendation of termination . . . ."
2. WYO. STAT. § 9-276.32(a) (Supp 1975) provides for judicial review by the district court in the county where the administrative action or inaction took place. Only a person aggrieved or adversely affected by the final decision is entitled to judicial review.
3. WYO. STAT. § 9-276.33 (Supp. 1975) allows an aggrieved party to appeal the final judgment of the district court to the supreme court.
4. Board of Trustees v. Spiegel, 549 P.2d 1161, 1170 (Wyo. 1976). It should be pointed out that the precedent value of *Spiegel* is not yet established as to voir dire of members of administrative boards. The composition of the Wyoming Supreme Court that decided the case is the reason for the present uncertainty. Judge Armstrong, who sat in place of Justice Raper, and Justice Rose definitely agreed that voir dire should be allowed; Chief Justice Guthrie strongly dissented on the point of voir dire, and Justice Thomas joined with him. Justice McClintock concurred in the result, but felt it was not necessary for the court to reach the voir dire question.

UNDERLYING CONCEPTS

The rule of necessity and the concept of voir dire as used in Wyoming are two underlying concepts that should be examined in order to understand the *Spiegel* decision.

Rule of Necessity: It is universally recognized that one is entitled to a fair and impartial hearing before an administrative tribunal that is not biased or prejudiced against the accused.[5] The rule of necessity is an exception to this general rule providing:

> [a]court or administrative agency will not be disqualified to determine factual issues before it on grounds of prejudice, bias or pre-judgment of issues when there is no statutory provision for change of venue or when no other court or agency has the power to act.[6]

Voir Dire in Wyoming: Voir dire is the process of questioning a party to determine if he can sit in a fair, impartial, and competent manner in judgment of the matter at hand. The opinion in *Spiegel* did not specifically define what voir dire means in the administrative hearing context. The opinion merely stated "it was a denial of [Spiegel's] right to a fair and impartial hearing for him to have been denied inquiry as on voir dire."[7] From the language used, one can reasonably infer the opinion was referring to the same process as used in criminal and civil trials to select jurors.[8]

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5. Emerson v. Hughes, 117 Vt. 270, 90 A.2d 910, 915 (1952).
6. Fed. Home Loan Bank Bd. v. Long Beach Fed. Sav. & Loan Ass'n., 295 F.2d 403, 408 (9th Cir. 1961),
   In essence, the rule of necessity allows a potentially biased and prejudiced hearing officer to sit in judgment because no one else has authority to hear the action. The rationale for the rule is that if the only agency with jurisdiction is disqualified, there can be no hearing at all and a complete failure of justice will result. In New Jersey State Bar Ass'n. v. New Jersey Ass'n of Realtors Bds., 118 N.J. Super. 203, 287 A.2d 14, 18 (1972), the court reasoned that it is better to have a hearing with biased and prejudiced members than to have no hearing at all.
7. Board of Trustees v. Spiegel, *supra* note 4, at 1170.
8. In Vivion v. Brittain, 510 P.2d 21, 24 (Wyo. 1973), the court indicated the purpose of voir dire, at least in civil and criminal trials, was to select a panel who would fairly and impartially hear the evidence and render a just verdict and to determine grounds for challenge.

OTHER MEANS OF PROTECTING AGAINST BIAS AND PREJUDICE IN ADMINISTRATIVE HEARINGS.

Although the opinion written by Mr. Justice Rose in *Spiegel* chose voir dire as the means to protect a party from possible bias and prejudice in an administrative hearing, other jurisdictions have sanctioned other means.

In *Federal Home Loan Bank Board v. Long Beach Federal Savings and Loan Association*,[9] an administrative hearing was held to determine if a savings association should be seized and a conservator appointed. The association attempted to produce evidence of bias and prejudice on the part of three members of the board by use of subpoenas compelling them to testify at the hearing. The board was the only agency with jurisdiction to hear the case so the allegations of bias and prejudice directed against the majority of the members had to give way to the necessity of the agency performing its functions. However, the court thought evidence of bias should be presented so the board could determine for itself the prejudice of its members and in this way a minority of the board could be disqualified from participation in the final decision.[10]

The only case before *Spiegel* that indicates that voir dire of an administrative board is, or might be, a proper means of determining bias or prejudice is *Duffield v. Charleston Area Medical Center*.[11] *Duffield* concerned a hospital board seeking to revoke Doctor Duffield's hospital privileges. Duffield felt the board was prejudiced and unqualified to hear his case; he requested and received permission before the hearing began to examine all members of the board as on voir dire.[12] The purpose there, as in *Spiegel*, was to determine whether the members could resolve the facts of the case in a fair and impartial manner, or if they had any prejudice or

9. Fed. Home Loan Bank Bd. v. Long Beach Fed. Sav. & Loan Ass'n, *supra* note 6, at 403.
10. Fed. Home Loan Bank Bd. v. Long Beach Fed. Sav. & Loan Ass'n, *supra* note 6, at 408-409. The *Federal Home* court does not explicitly set forth the manner or procedure by which the minority is to be disqualified.
11. 503 F.2d 512 (4th Cir. 1974).
12. *Id.* at 515.

had formed any conclusions in regard to the outcome of the case.[13] There were no restraints put on the doctor in his interrogation of the board members.

Another means of protecting against bias and prejudice in administrative hearings is a statute such as Section 9-276.-32(c)(v) of the Wyoming Statutes.[14] This type of statute is common and provides for judicial review of agency actions to determine if they are arbitrary, capricious or characterized by abuse of discretion.

Different jurisdictions have adopted different means of reaching the same end—insuring fair and impartial administrative hearings. *Duffield* is especially significant in the respect that it demonstrates that an administrative board has allowed, by its own initative, voir dire of its members. *Spiegel* seems to be the first judicial opinion recognizing that a party has a right to inquire of administrative board members for prejudice and bias as on voir dire.

Spiegel DECISION

Under the Wyoming Administrative Procedure Act,[15] administrative hearings are to be conducted in an "impartial manner."[16] Section 9-276.30(a)(3) of the Wyoming Statutes[17] recognizes the possibility of bias and prejudice or conflict of interest on the part of a hearing officer and allows the officer to disqualify himself. However, no provision is made in the statutes for the accused to challenge the qualifications of the hearing officer before the hearing takes place. Before *Spiegel,* one had to depend on the good conscience of the administrative officer to either act in a non-prejudiced

13. *Id.* at 515.
14. WYO. STAT. § 9-276.32(c)(v) (Supp. 1975) provides that the district court may review agency action to determine if it "is arbitrary, capricious or characterized by abuse of discretion."
15. WYO. STAT. § 9-276.19 to .33 (Supp. 1975).
16. WYO. STAT. § 9-276.30(a)(3) (Supp. 1975) provides the "functions of all those presiding in contested cases shall be conducted in an impartial manner."
17. WYO. STAT. § 9-276.30(a) (Supp. 1975); the statute continues: "Any such officer shall at any time withdraw if he deems himself disqualified, provided there are other qualified presiding officers available to act."

and fair manner or disqualify himself. If the accused felt the agency had acted in an arbitrary or capricious manner or abused its discretion, he was entitled to judicial review,[18] but only *after* the facts had been considered and a decision rendered. By authorizing the use of voir dire, the *Spiegel* opinion allows the accused to take an active role in protecting his constitutional rights by examining and eliminating those he feels may be prejudiced against him—*before* they sit in judgment.

When an administrative agency must perform investigative, prosecutorial, and adjudicative functions,[19] it is unavoidable that it will be affected in some way by these activities when sitting in judgment. In *Spiegel*, the teacher had sharply criticized the school and their administration. The Board disapproved of Spiegel's conduct as a teacher, his philosophies, and disobedience of administrative directives. There is no doubt that Spiegel had reason to be suspicious of prejudice and bias that might deny him the fair hearing that he was entitled to under both the United States[20] and Wyoming[21] Constitutions.

Even though Spiegel was not entitled to a "full-blown trial,"[22] the opinion had no difficulty finding that a person before an administrative agency, adjudicating his rights and interests, was entitled to the protection of due process of law.

Relying on *Fallon v. Wyoming State Board of Medical Examiners*,[23] the *Spiegel* opinion observed that the principles of justice and fair play required that a person be given an opportunity to be heard, defend and protect his rights before a competent and impartial tribunal that operated under procedures consistent with the essentials of a fair trial and fundamental rights.[24] The opinion sought to make this consti-

18. WYO. STAT. § 9-276.32(a), (c)(v) (Supp. 1975). *See* text accompanying note 2, *supra*, for the provisions of § 9-276.32(a). *See* text of note 14, *supra*, for the provisions of § 9-276.32(c)(v).
19. Withrow v. Larkin, 421 U.S. 35 (1975).
20. U.S. CONST. amend. XIV, § 1.
21. WYO. CONST. art. 1, § 6.
22. Klinge v. Lutheran Charities Ass'n., 523 F.2d 56, 60 (8th Cir. 1975).
23. 441 P.2d 322 (Wyo. 1968).
24. Board of Trustees v. Spiegel, *supra* note 4, at 1165-1166.

tutional right to a fair hearing more meaningful and to provide a practical manner in which to actively protect it. The opinion recognized the need of the accused to have a means of determining whether the individual members of the administrative tribunal were prejudiced and biased, and the means to be utilized in Wyoming was "inquiry as on voir dire."[25] In reaching this decision, the opinion reasoned:

> How can it be determined that the members of an administrative board are not prejudiced against an accused unless his or her attorney is permitted to inquire into the question?[26]

The Board in *Spiegel* contended that the rule of necessity applied, so voir dire should not be allowed because it would be of no avail.[27] The Board also contended that when the rule of necessity applied, the requirements of due process must succumb.[28]

In response to these arguments, the *Spiegel* opinion took the position that the rule of necessity, a qualification of the right to a non-prejudiced hearing, would be enforced only when "strict and imperious necessity [could] be shown."[29] Justice Rose stated, "[T]hat whenever possible the fair hearing rights should be preserved even if the rule of necessity must make room for due process guarantees."[30]

In spite of the desire to protect due process guarantees, the opinion reasoned that, given the Board's exclusive jurisdiction of the teachers' claim, a bare majority of the Board had to remain to hear the case. The Board could not be *completely disqualified* even if the remaining majority was also prejudiced.[31]

25. *Id.* at 1170.
26. *Id.* at 1166.
27. Under WYO. STAT. § 21.1-158 (Supp. 1975), *supra* note 1, the school board had exclusive jurisdiction to hear the case against the teacher.
28. Board of Trustees v. Spiegel, *supra* note 4, at 1167-68.
29. *Id.* at 1168.
30. *Id.* at 1169.
31. With this authorization a modified rule of necessity came into being in Wyoming.
WYO. STAT. § 21.1-21 (Supp. 1975) provides in part:
> A majority of the number of members of the board of trustees shall constitute a quorum for the transaction of business at any meeting of the board of trustees. No action of the board of trustees

ANALYSIS OF *Spiegel* DECISION

The *Spiegel* decision authorizing voir dire in administrative hearings, addresses itself to the elimination of personal bias, as opposed to institutional bias.[32] There are other effective means available to check institutional bias without enlisting the aid of voir dire. Judicial review of agency decisions plays an important role in restraining institutional bias. The members of agencies that must answer to the voting public must act in a manner consistent with public interests if they desire re-election. This restraint is not present when referring to personal bias. Allowing voir dire is valuable in ascertaining the presence of personal bias and in providing an opportunity to eliminate it before the hearing begins.

There are several advantages that come from allowing voir dire in the administrative situation. A party can now exercise voir dire and actively protect his own constitutional right to a fair and impartial hearing. He can screen those who sit in judgment for personal bias *before* the hearing takes place and possibly alleviate the necessity of an appeal based on personal bias and prejudice. When vior dire is allowed and the decision is later appealed, the voir dire record may be of assistance to the reviewing court in determining if there was prejudice and bias that unduly influenced the decision.

In theory, voir dire may also serve the purpose of stifling any inclination toward prejudice that is not definite

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[including suspension or dismissal of a teacher] shall be valid unless the action shall receive the approval of a majority of the members.

Under § 21.1-21 a majority of the board can give a binding decision; there is no statutory requirement that the whole board join in the action. Because of the statutory framework that exists in Wyoming, the Court did not have to reach an "either-or" decision, i.e., either deny the protection of due process or abolish the rule of necessity.

The rule of necessity still applies in Wyoming—an agency with exclusive jurisdiction must act to satisfy legislative intent and to prevent a complete failure of justice. However, it is modified in the sense that where state statutes allow a board to transact business by a majority of its membership, voir dire can be exercised and a number less than the majority can be disqualified for bias and prejudice.

32. Institutional bias can be defined as an attitude toward the subject of the administrative agency's expertise which naturally exists because of the nature and function of the agency.

enough to warrant disqualification. The voir dire process may make the administrative officer aware of his prejudice and encourage him to make a conscious effort to act in a fair and impartial manner. In practical application, voir dire may have the opposite effect. Human nature being what it is, subjecting a person to voir dire may insult him and create a personal bias that did not previously exist. Fellow agency members may also be adversely affected by the voir dire of one of their co-members. This danger would necessarily require an attorney to accurately assess the situation in deciding whether or not to exercise voir dire. In exercising voir dire, it would be imperative to do so in a cautious manner.

Spiegel follows the trend of imposing on administrative hearings, procedures and concepts that have traditionally been applied in judicial actions. The rules of discovery that are commonly used in civil actions are applied in administrative hearings by virtue of a statute directly incorporating them into the Wyoming Administrative Procedure Act.[33] The right to cross-examine witnesses[34] and have counsel present[35] are also provided by the statutes. Res judicata was recently said to apply to administrative hearings, although not as rigidly as with courts.[36]

Allowing voir dire is another step in the direction of making administrative hearings more judicial in nature. Voir dire, itself, would make the administrative hearing only slightly longer as the inquiry process would take only a nominal amount of time. However, the potential for abuse of voir dire is present. Voir dire is another ground for requesting judicial review and could become a tool for delay without proper guidance from the head administrative hearing officer.

In the aggregate, allowing voir dire, creating another opportunity for judicial review, and incorporating traditionally judicial concepts into the administrative setting may

33. WYO. STAT. § 9-276.25(g)(i) (Supp. 1975).
34. WYO. STAT. § 9-276.26(c) (Supp. 1975).
35. WYO. STAT. § 9-276.25(j) (Supp. 1975).
36. Hines v. Weinberger, 395 F. Supp. 1215, 1217 (Wyo. 1975).

have additional implications. This trend may have the far-reaching effect of further burdening administrative hearings with more procedures, destroying their informality, efficiency, and speed in reaching decisions. As procedures become more important, technical expertise that is characteristic of administrative boards may be reduced to secondary importance.

Voir dire will not completely eliminate the need for judicial review of administrative hearings based on prejudice and bias on the part of the members. The *Spiegel* opinion only recognized the right of the accused to inquire as on voir dire to determine if board members are prejudiced and biased. No guidelines were given by the opinion as to how and when disqualification will be accomplished in the administrative hearing situation. Another important consideration was left unanswered by the decision: What will occur when the entire agency is prejudiced, but a bare majority must remain to hear the case because the agency has exclusive jurisdiction?

The Court's absence of specific guidelines for exercising voir dire can be interpreted as a plea to the legislature to take action to establish independent hearing examiners. This would separate the investigative and prosecutorial roles from the adjudicative function; administrative agencies in Wyoming must now perform all three functions.

Section 9-276.32(c)(v) of the Wyoming Statutes[37] provides a very important protection against bias and prejudice. This statute authorizes appeal from an administrative decision if there is evidence that the agency's action was "arbitrary, capricious or characterized by abuse of discretion."[38] While this is a valuable due process safeguard, it has the disadvantage of being available only *after* a judgment has been rendered. It is also extremely difficult for the accused to meet the burden of proving an agency's actions were arbitrary, capricious, or characterized by abuse of discretion.

37. WYO. STAT. § 9-276.32(c)(v) (Supp. 1975). *See* text accompanying note 14, *supra.*

38. WYO. STAT. § 9-276.32(c)(v) (Supp. 1975).

This remedy would still be available after voir dire was exercised and a minority of the board dismissed, to challenge the actions of the majority that had remained and rendered a decision.

CONCLUSION

If it ratifies the opinion in *Board of Trustees, Laramie County School District No. 1 v. Spiegel*,[39] the Wyoming Supreme Court will open a new path in the area of protecting constitutional rights in administrative hearings by giving a party the right to voir dire members of the administrative board. The *Spiegel* decision is a step forward in affording protection to the constitutional right to a fair and impartial administrative hearing. This is especially true when the rule of necessity applies, i.e., the administrative agency has exclusive jurisdiction over the claim. The *Spiegel* decision can be viewed as Wyoming's own practical and convenient means of insuring that a party will receive a fair and impartial hearing. By allowing voir dire of members of administrative boards, due process in the area of administrative hearings has grown and expanded.

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39. Board of Trustees v. Spiegel, *supra* note 4.