

Texas Board of Law Examiners

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July 2010 Multi-State Performance Test

1. **Test Materials**: The test materials include an assignment memorandum from Lawrence Barnes, the City Attorney for the City of Ontario, excerpts from the City of Ontario Liquor Control Ordinances, The City of Ontario's Notice of Liquor Control Violation, and the full text of three cases, *Thompson v. Franklin State Technical University (Thompson)*, *Lui v. Polk County Housing Board (Lui)* and *Trenton Nursing Home v. Franklin Department of Public Health (Trenton)*. The memorandum requests that the examinee draft an objective memorandum analyzing whether courts are likely to grant preclusive effect to decisions reached by City of Ontario's Liquor Control Commission (Commission). The assignment asks the examinee to set forth the requirements for preclusion (with applicable authorities), identify which procedures currently comply with the requirements for preclusion, which procedures do not comply, and to describe what changes are necessary to conform with those requirements. The examinee is further instructed to discuss the effect of the recommended changes on the City's goals of having cost-effective and expeditious procedures for handling Liquor Control Ordinance (LCO) violations.
2. **General observations**: The test can generally be divided into three primary parts: (a) identifying the requirements for preclusion under federal and state law; (b) analysis of whether the City of Ontario's ordinances and procedures comply with the preclusion requirements; (c) recommended changes in the ordinances and their effects. Most of the examinees followed the call of the question by setting forth the requirements for preclusion, analyzing whether the City's ordinances and procedures comply with these requirements, and identifying recommended changes and their effects.
3. **Requirements for Preclusion**: In order for an agency decision to be given preclusive effect, the agency's authority, action, and procedures must comply with the federal common law of

preclusion, which the Franklin Supreme Court adopted in *Thompson*. The requirements identified in *Thompson* include that (a) the agency must have the authority to adjudicate the dispute and must act in an adjudicative manner; and (b) its procedures must comply with the requirements of due process. The applicant should observe that, in an administrative setting, while due process does not require *all* the procedural protections available in a court, it does require, at a minimum, notice and a hearing before an independent tribunal. (*Thompson/Lui*)

Most examinees (citing *Thompson/Lui*) properly identified the legal standards for preclusion. Many examinees provided a detailed analysis of these standards and observed that notice must be sufficient to apprise the accused of the charges and give the accused sufficient information to defend himself or herself. *Lui*. Many discussed that the hearing must provide the accused with the opportunity to present evidence through witnesses and exhibits and to challenge the evidence presented by the other parties through cross-examination and objections. *Thompson*. The more complete responses, observed that, while the Franklin Supreme Court in *Thompson* noted that preclusion is more likely when an agency “acts like a court” (the indicia for which include the opportunity for representation by counsel and following basic rules of evidence), subsequent decisions held that preclusion can be found even when a party does not have counsel or when the Rules of Evidence are not strictly adhered to. *Trenton*.

4. Compliance with requirements for preclusion: After setting forth the specific legal standards, it was necessary for the examinee to analyze whether the City of Ontario’s ordinances and procedures complied with the preclusion requirements. More thorough responses observed that the Commission has the authority to conduct hearings, and, in fact, acts in an adjudicative manner in cases involving charges of liquor control violation.

While most examinees noted that the City of Ontario complies with the basic requirements of due process by providing notice and a hearing, some examinees did not discuss the more specific notice requirements in *Lui*. The stronger exams discussed that while the City ordinance requires that notice be sent to an accused violator, the form actually used by the City fails to comply with the *Lui* standards because the form fails to identify the specific conduct at issue and the general time frame at which time the alleged conduct occurred. Some examinees generally noted that the notice form fails to provide the accused the specific time (ten days) by which he or she is required to respond, and, thus, potentially prevents the accused from having a fair opportunity to be heard.

A majority of examinees properly concluded that the City’s hearing procedures potentially violate the due process fair hearing requirement for an independent and impartial tribunal because of the Mayor’s involvement in the separate roles of investigation, prosecution, and adjudication. These examinees identified the Mayor’s involvement in approving applications, investigating violations, issuing notices, conducting hearings, and levying penalties. The stronger responses recognized that the case law does not necessarily require complete separation of these functions (*Liu*), but suggested that the mayor should not be involved in each of the investigation, prosecution, and adjudicative roles. Most examinees generally stated that the Mayor’s functions are improperly commingled, and that the Mayor should not be involved, for example, in entering premises of the accused or authorizing law enforcement to do so (an investigative function), issuing notice (a prosecutorial function), and conducting the hearing (an adjudicative function). Some examinees specifically concluded that the Mayor should not have access to the files or information related to the offense before the hearing. Some examinees also noted that, because of the Mayor’s political

position and by virtue of his power to both conduct hearings and impose fines, he may be biased and susceptible to potential institutional pressure to issue rulings that maximize revenue to the City, and thus may not be an independent hearing officer.

Many examinees analyzed the City's hearing procedures and noted that the accused is permitted to cross-examine witnesses and present evidence. Most examinees noted that the City Ordinance provides that the Franklin Rules of Evidence (FRE) do not apply in these hearings; some also noted that due process does not require strict adherence to the FRE, according to *Trenton*. Some identified admission of hearsay evidence as a potential issue, and observed that the ordinance provided "that the Mayor will admit into evidence any report by police or other investigative authority relevant to the charges". The more thorough responses cited the *Trenton* opinion holding that although there is no *per se* rule that the use of hearsay evidence violates due process, such evidence must still meet the criteria of "sufficient assurance of its truthfulness".

5. Recommendations and effects: The examinees were called upon to make recommendations as to how the City's procedures should be changed, and to comment on how such proposed recommendations would affect the City's goals of having cost-effective and expeditious procedures for handling Liquor Control Ordinance (LCO) violations.

Many examinees properly suggested that the City's notice of LCO violation should be changed to identify the conduct that allegedly constitutes a violation of the Liquor Control Ordinances and the approximate times when the accused engaged in such conduct. These examinees often concluded that this change would have only a minor effect on the time and cost effectiveness of the procedures.

Most examinees suggested that the Mayor's responsibilities be limited to one of the three functions, and that if the Mayor were to only perform either an investigative, or prosecutorial function, that an impartial adjudicator be employed to act as the hearing officer. Some examinees suggested that a neutral third party adjudicator be hired to oversee the hearings. Others suggested that the hearing officer be a city employee that is shielded, prior to the hearing, from the investigation. These examinees generally stated that re-assigning the hearing tasks to another city employee would not cost much money. Those examinees that suggested hiring a neutral third party hearing officer often acknowledged that this may cost the City more money in the short term, but added that such costs are necessary and may be recovered in the form of filing or licensing fees, as suggested by the court in *Liu*. Some of these answers also often suggested that the increased costs would be offset by the reduction in costs of litigating cases in court that would be incurred if the agency's decisions were not given preclusive effect.

Citing *Trenton*, some examinees properly suggested that the ordinance should be changed to provide either that the Franklin Rules of Evidence should be applied to the ordinance to regulate hearsay evidence, or that any evidence relied upon by the hearing officer must be sufficiently reliable, and that "third hand accounts" from "unnamed sources", the "accuracy of which" cannot be evaluated, should be specifically excluded from consideration, and that such a change would not require much additional time or cost to the City.

Many examinees recommended that, although not necessarily required, the accused should be permitted to engage counsel, and that pre-hearing discovery should be allowed. Many of these

acknowledged that such measures could cause slight delays in the hearings, but would strengthen the likelihood for meeting requirements for preclusion

Regardless of the recommendation(s) made, most examinees commented that the recommended change(s) would help ensure that the agency decision would have preclusive effect, and prevent re-litigation and, thus, save the City time and money in the long term.

6. Miscellaneous: As this was intended to be a memorandum brief to the City Attorney, the more complete answers were supported with case law and statutory authority. A number of examinees did not cite any authority regarding the applicable legal standards. Since the examinees were requested to write the brief to the City Attorney, the examinees were expected to support their analysis and recommendations with applicable authority.

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