

**STATE BAR COURT
REVIEW DEPARTMENT**

In the Matter of

RICHARD TREEN MUDGE

Applicant for Certification as a Probate, Estate Planning, and Trust Law Specialist

No. 92-S-12896

Filed September 15, 1993

SUMMARY

An applicant for certification as a probate, estate planning, and trust law specialist, who was a member in good standing of the State Bar but had a prior record of serious discipline, satisfied the experience and education requirements for certification, and passed the legal specialization examination. Relying solely on the applicant's past discipline record, the Board of Legal Specialization denied him certification without allowing him a hearing to answer questions and present his case. The applicant challenged this action in the State Bar Court, and the hearing judge affirmed the denial. (Hon. Carlos E. Velarde, Hearing Judge.)

Arguing that the hearing judge misinterpreted and misapplied the rules for certification as a legal specialist, the applicant sought review. The review department held that the rules did not permit summary denial of an application filed by a member of the State Bar in good standing solely on the basis of prior discipline. The review department also concluded that the Board of Legal Specialization had violated the applicant's common law right to fair procedure by denying him a meaningful opportunity to be heard in his defense. The review department reversed the hearing judge's decision and remanded the proceeding to the Board of Legal Specialization for further proceedings in which the applicant's discipline record could be considered, but would not pose an absolute bar to certification, and in which the applicant would have an opportunity to present evidence of his rehabilitation.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Applicant: Richard Treen Mudge, in pro. per.

HEADNOTES

- [1] **120 Procedure—Conduct of Trial**
 130 Procedure—Procedure on Review
 135 Procedure—Rules of Procedure
 139 Procedure—Miscellaneous
 2901 Legal Specialization Proceedings—Procedural Issues
Although Business and Professions Code section 6026.5(f) permits appeals from decisions of the Board of Legal Specialization to the Board of Governors of the State Bar to be treated as confidential, the Board of Governors, in delegating its authority to hear such appeals to the State Bar Court, did not expressly indicate whether it intended to preserve the confidentiality of such appeals. (Trans. Rules Proc. of State Bar, rule 225(a)(1).) Where a legal specialization proceeding was treated as public by the hearing judge, the parties were deemed to have waived any argument that the review department should treat the proceeding as confidential by their failure to raise a timely objection to such treatment.
- [2 a, b] **113 Procedure—Discovery**
 130 Procedure—Procedure on Review
 136 Procedure—Rules of Practice
 159 Evidence—Miscellaneous
 2990 Legal Specialization Proceedings—Miscellaneous
Where the record of a legal specialization proceeding contained no documents explaining the basis for the denial of specialist certification and where responses by the deputy trial counsel to interrogatories clarified the basis for the denial, augmentation of the record with the interrogatory responses was appropriate. (Prov. Rules of Practice, rule 1304.)
- [3] **130 Procedure—Procedure on Review**
 135 Procedure—Rules of Procedure
 166 Independent Review of Record
Due to the requirement that the review department undertake an independent review of the record, the review department cannot be bound by a stipulation by the parties attempting to limit the scope of review. Also, the review department has the authority to adopt findings, conclusions, and a decision or recommendation at variance with those of the hearing judge. (Trans. Rules Proc. of State Bar, rule 453(a).)
- [4 a-c] **2921 Legal Specialization Proceedings—Denial of Certification Reversed**
 2990 Legal Specialization Proceedings—Miscellaneous
The Board of Legal Specialization has not been given the authority to construe prior discipline as a threshold criterion for specialist certification. Prior discipline is a factor to be considered in examining an application for specialist certification, but does not constitute an absolute bar to certification.
- [5] **169 Standard of Proof or Review—Miscellaneous**
 192 Due Process/Procedural Rights
 2901 Legal Specialization Proceedings—Procedural Issues
 2990 Legal Specialization Proceedings—Miscellaneous
An administrative determination by the Board of Legal Specialization regarding an application for certification must comport with due process, and review by the State Bar Court exists in part to test whether due process was afforded.

- [6 a, b] **2990 Legal Specialization Proceedings—Miscellaneous**
 The State Bar rule which provides that imposition of attorney discipline constitutes cause for the denial, suspension, or revocation of certification or recertification as a specialist applies only to certificate holders, not to applicants for certification.
- [7 a, b] **141 Evidence—Relevance**
2990 Legal Specialization Proceedings—Miscellaneous
 An attorney's record of prior discipline is a factor to be considered by the Board of Legal Specialization in determining whether the attorney initially meets the standards for specialist certification, and, in appropriate circumstances, may justify a decision to deny initial certification.
- [8 a, b] **167 Abuse of Discretion**
192 Due Process/Procedural Rights
2921 Legal Specialization Proceedings—Denial of Certification Reversed
2990 Legal Specialization Proceedings—Miscellaneous
 No decision denying specialist certification is permissible unless the applicant for certification receives some meaningful opportunity to be heard in his or her own defense. Where an attorney in good standing applied for certification as a legal specialist 14 years after committing misconduct, 11 years after the resulting suspension order, and 8 years after the completion of the suspension, the Board of Legal Specialization was required to allow the attorney an opportunity to be heard on the attorney's current qualifications.
- [9] **192 Due Process/Procedural Rights**
2990 Legal Specialization Proceedings—Miscellaneous
 By controlling specialist certification, the Board of Legal Specialization substantially affects not only the professional status of an attorney, but also an important economic interest which is worthy of due process protection.
- [10 a-d] **167 Abuse of Discretion**
192 Due Process/Procedural Rights
2921 Legal Specialization Proceedings—Denial of Certification Reversed
2990 Legal Specialization Proceedings—Miscellaneous
 Where the Board of Legal Specialization summarily denied an application for legal specialist certification solely on the basis of applicant's prior serious discipline, without considering any evidence or permitting a hearing on applicant's recent conduct and present qualifications, the Board violated its own rules and applicant's common law right to fair procedure. The Board's indication that it might reconsider the denial at a later date, without any enumerated criteria as to when it would do so, underscored the arbitrariness of its position.
- [11] **192 Due Process/Procedural Rights**
2990 Legal Specialization Proceedings—Miscellaneous
 California courts have long recognized a common law right to fair procedure protecting individuals from arbitrary exclusion or expulsion from private organizations which have the practical power to affect substantially an important economic interest. A basic and indispensable ingredient of the fair procedure required under the common law is that an individual who will be adversely affected by a decision be afforded some meaningful opportunity to be heard in the individual's defense.

- [12] **141 Evidence—Relevance**
 167 Abuse of Discretion
 192 Due Process/Procedural Rights
 2990 Legal Specialization Proceedings—Miscellaneous

Within due process limits, the Board of Legal Specialization has broad discretion in certifying specialists. It may consider any competent evidence rebutting an applicant's showing and may weigh and balance evidence in an appropriate manner. An applicant's prior discipline for very serious misconduct is clearly evidence that should be considered in this process.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P.J.:

We review the decision by a hearing judge of the State Bar Court to affirm the summary denial by the Board of Legal Specialization ("BLS") of an application for certification as a probate, estate planning, and trust law specialist by Richard Treen Mudge ("applicant").¹ [1 - see fn. 1] The BLS had denied Mudge's application solely on the basis of Mudge's prior discipline without permitting any evidence of rehabilitation or a hearing on his present qualifications. At oral argument, counsel for the BLS took the position that the BLS in effect has made lack of prior discipline an additional condition precedent to legal certification on its own initiative—i.e., without express authorization of the Legislature, the Board of Governors of the State Bar ("Board of Governors") or the Supreme Court which retains inherent authority over the regulation of members of the State Bar. We understand the BLS's concern about the very serious misconduct committed by applicant but it has been more than ten years since his discipline was imposed and no opportunity was given him to address the issue of his rehabilitation. Even disbarred attorneys can seek reinstatement on an equal footing with other lawyers five years after they are disbarred.

We conclude that the rules for certification as a legal specialist do not permit summary denial of an application filed by a member of the Bar in current good standing solely on the basis of prior discipline and also conclude that the BLS violated applicant's common law right to fair procedure by denying him a meaningful opportunity to be heard in his defense. Thus, we reverse the hearing judge's decision and remand the proceeding to the BLS for consideration of Mudge's application pursuant to the independent inquiry and review process regarding his current

qualifications as required by the rules for legal specialization.

I. FACTS AND PROCEDURAL HISTORY

Applicant was admitted to the State Bar in 1959. He practiced law without misconduct until 1974. During the next four and one-half years, he misappropriated approximately \$387,200 from two estates. He also filed a false document with a probate court to avoid the discovery of his misappropriations. Because of extensive mitigating circumstances, he was not disbarred. Instead, his discipline consisted of five years stayed suspension, five years probation, and three years actual suspension. (*In re Mudge* (1982) 33 Cal.3d 152, 154-157.) Currently, applicant is a member in good standing of the State Bar of California.

The BLS has the exclusive authority to certify a California attorney as a specialist in probate, estate planning, and trust law. In June 1989, applicant applied to the BLS for a certificate of specialization in the area of probate, estate planning, and trust law. In addition to satisfying the tasks and experience requirements and the special education requirements for certification, he passed the legal specialization examination. The process of independent inquiry and review concerning his application then began: questionnaires were sent to his references, and his name was published in *California Lawyer*. The process, however, was not completed. No independent inquiry and review committee considered the application; nor was applicant allowed any hearing to answer questions and present his case. Solely on the basis of applicant's record of prior discipline, the BLS's advisory commission recommended that applicant not be certified. Like the advisory commission, the BLS did not allow applicant a hearing. Acting on the purported authority of section 7.b.v of the State

1. [1] Although Business and Professions Code section 6026.5 (f) permits appeals from decisions of the BLS to the Board of Governors of the State Bar to be treated as confidential, when the Board of Governors delegated its authority to hear such appeals to the State Bar Court it did not expressly indicate whether it intended to preserve the confidentiality of such hearings. Under rule 225(a)(1) of the Transitional Rules of Procedure of the State Bar, only moral character proceedings

and inactive enrollment proceedings under Business and Professions Code section 6007 (b) are expressly designated as confidential. This proceeding was treated as a public proceeding by the hearing judge and by order of this court dated June 17, 1993, the parties were deemed to have waived any argument that the proceedings should now be confidential by failure to raise timely objection thereto.

Bar of California Program for Certifying Legal Specialists ("Program"),² the BLS summarily denied certification.

In April 1992, applicant requested a hearing before the State Bar Court pursuant to section VIII.C of the Rules and Regulations of the Program ("Rules and Regulations"). In October 1992, the parties filed a stipulation (1) that no issues of fact were to be decided; (2) that the sole issue of law was whether section 7.b.v of the Program authorized the BLS to deny specialist certification solely on the basis of a prior disciplinary record; and (3) that if section 7.b.v conferred no such authority, the matter was to be remanded to the BLS with instructions to vacate the denial and to remand the matter to the advisory commission for the conclusion of the independent inquiry and review process. The proceeding was submitted on the pleadings to the hearing judge, who filed a public decision affirming the BLS's summary denial of certification. Pursuant to section IX of the Rules and Regulations and to rule 450 of the Transitional Rules of Procedure of the State Bar, applicant sought review on the ground that the hearing judge misinterpreted and misapplied section 7.b.v.

II. AUGMENTATION OF THE RECORD

[2a] The record contains no letters or other documents from the BLS to applicant attesting to its denial of his application for certification. In July 1992, however, the deputy trial counsel signed and served verified responses to interrogatories about the BLS's position. Among other things, these responses clarify the following: (1) the BLS contends that the application should be denied solely on the basis of applicant's prior misconduct, regardless of his current competence; (2) the BLS relies solely upon

section 7.b.v of the Program in making this contention; (3) the BLS contends that no independent inquiry and review of the application is necessary, because applicant's prior misconduct makes denial of certification appropriate; (4) the BLS contends that applicant's prior misconduct is a per se bar to certification and that it makes no difference with regard to certification whether applicant is completely rehabilitated; (5) the BLS contends that an applicant for certification as a specialist is held to a higher ethical standard than other members of the bar; and (6) the BLS considers the difference between the two standards is the absence of any discipline for serious criminal and/or ethical misconduct involving the area of law in which an applicant seeks certification.

[2b] In May 1993, applicant requested us to take judicial notice of the preceding information. The deputy trial counsel opposed the request on the grounds that it constituted an improper request for augmentation of the record and that applicant had not shown how the record was incomplete or incorrect. At oral argument, however, the deputy trial counsel stated that she had no objection to the augmentation of the record with the specified information from the interrogatories and responses if such information was necessary to clarify the basis for the BLS's denial of certification. Pursuant to rule 1304 of the Provisional Rules of Practice of the State Bar Court, we grant applicant's request for augmentation.

III. DISCUSSION

[3] Because the law requires us to undertake an independent review of the record (Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of McCray* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 373,

2. Section 7 of the Program states: "SECTION 7. DENIAL, SUSPENSION AND REVOCATION OF CERTIFICATION OR RECERTIFICATION [¶] a. Certification or recertification may be denied, suspended or revoked by the [BLS] if the program for certification in that field is terminated. [¶] b. The certificate may be denied, suspended or revoked by the [BLS], pursuant to procedures adopted by the [BLS], for any of the causes set forth below: [¶] i. The lawyer does not meet or ceases to meet the standards for certification or recertification as a legal specialist; or [¶] ii. The certificate was issued

contrary to the rules and regulations of the [BLS]; or [¶] iii. The certificate was issued to a lawyer who was not eligible to receive a certificate, or who made any material false representation or misstatement of material fact to the [BLS]; or [¶] iv. The certificate holder has failed to abide by the Rules and Regulations of the [BLS] as amended from time to time; or [¶] v. The certificate holder has been disciplined pursuant to the State Bar Act; or [¶] vi. The certificate holder has failed to pay any fee established by the Board of Governors of the State Bar."

382), we cannot be bound by the parties' stipulation attempting to limit our review of the legal issue raised by the record to an interpretation of section 7.b.v of the Program. We also have the authority to adopt conclusions and a decision or recommendation at variance with those of the hearing judge. (*Ibid.*)

A. The BLS Lacks Authority to Make Prior
Discipline a Threshold Criterion for
Specialist Certification

[4a] At oral argument, the deputy trial counsel raised the argument that prior discipline is a "threshold criterion" for specialist certification. According to her, section 7 of the Program allows the BLS to construe prior discipline as such a criterion.

[4b] We disagree. As the hearing judge recognized, prior discipline is a factor to be considered in examining an application for specialist certification, but does not constitute an absolute bar to certification. (Decision, p. 11, fn. 5.) Neither the Supreme Court, which retains the inherent authority to regulate attorneys, nor the Legislature has indicated that prior discipline is such a bar. (Cf. Bus. & Prof. Code, §§ 6079.1 (b)(2) [appointment as judge of the State Bar Court precluded by any record of discipline], 6079.5 (b)(1) [appointment as Chief Trial Counsel of the State Bar precluded by commission of any disciplinary offenses].)

[4c] The Board of Governors adopted the Program and established the BLS, but did not confer any authority on the BLS to alter the Program. As discussed below, in appropriate circumstances, section 7.b.i of the Program permits the BLS to deny, suspend, or revoke the certification or recertification of an attorney because of discipline. Section 7, however, does not grant such permission regardless of the circumstances. Section 7 does not make discipline a threshold criterion or absolute bar. Nor, as we

shall discuss, does section 7 allow the BLS to bypass the common law requirements of fair procedure or the express provisions of the Rules and Regulations. [5] Indeed, section G of the Policies Governing the State Bar of California Program for Certifying Legal Specialists ("Policies Governing the Program") recognizes both that the BLS's administrative determination must comport with required due process and that the State Bar Court review process exists in part to test whether required due process was afforded.³

B. Interpretation of Section 7 of the Program

[6a] Section 7.b of the Program lists causes which may justify the denial, suspension, and revocation of certification or recertification as a specialist. Section 7.b.i provides: "The lawyer does not meet or ceases to meet the standards for certification or recertification" Section 7.b.v provides: "The *certificate holder* has been disciplined pursuant to the State Bar Act" (Emphasis added.)

The deputy trial counsel claims that although section 7.b.v refers only to the "certificate holder," it must also apply to an attorney seeking initial certification as a specialist because section 7 of the Program generally concerns the denial, as well as the suspension and revocation, of specialist certification. Applicant argues that by its specific terms section 7.b.v can apply only to an attorney who is already certified as a specialist and that if the Board of Governors of the State Bar had intended section 7.b.v to encompass an attorney seeking initial certification as a specialist, the term "lawyer" would have been used, as in section 7.b.i, rather than the term "certificate holder."

The hearing judge rejected applicant's argument on the grounds that it would create an inconsistency in the treatment of attorneys. The

3. Section G of the Policies Governing the Program provides in pertinent part: "G. Denial, suspension or revocation [¶] In making its administrative determination whether to grant, deny, suspend or revoke certification or recertification as a legal specialist, the California Board of Legal Specialization shall afford the individual due process required by law, in accordance with rules and regulations to be adopted by the

board. [¶] . . . [¶] A decision of the Board of Legal Specialization to deny, suspend or revoke certification or recertification shall be subject to review by the State Bar Court, at the request of the applicant, *to satisfy applicable requirements of due process and to determine that substantial evidence exists to support the determination.*" (Emphasis added.)

hearing judge observed that discipline is relevant to both certification and recertification. According to the hearing judge, no differentiation between an applicant and a certificate holder was intended in section 7.b.v.

Applicant does not disagree with the deputy trial counsel and the hearing judge on the issue whether discipline is relevant to initial specialist certification, as well as to recertification and suspension of certification. He has consistently recognized that his disciplinary record may properly be considered by the BLS in determining whether he meets the qualifications for specialist certification. He argues only that summary denial of an application on that basis is not authorized by section 7.b.v.⁴

[6b] Indeed, in their stipulation, the parties exclusively focused on the proper interpretation of the provisions of section 7.b.v. of the Program. We conclude that applicant is correct that section 7.b.v is limited to certificate holders⁵ and is thus inapplicable to initial applications for certification. [7a] While discipline is a factor to be considered by the BLS in determining whether a lawyer initially meets the standards for specialist certification, the applicable section is section 7.b.i, not 7.b.v.

[7b] In appropriate circumstances, section 7.b.i may justify a decision by the BLS to deny the initial certification of an attorney because he has been the subject of discipline. [8a] No such decision, however, is permissible unless the attorney receives some meaningful opportunity to be heard in his own defense. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 545, 555, 561.) The deputy trial counsel has not brought to our attention any legal authority supporting the contention that

prior misconduct by itself necessarily precludes specialist certification regardless of evidence that might be offered of rehabilitation since the events in question.

[8b] Here, it has been 14 years since applicant's misconduct. A disbarred attorney can obtain reinstatement in a proceeding commencing 5 years after disbarment if sustained exemplary conduct is demonstrated. (*Tardiff v. State Bar* (1981) 27 Cal.3d 395, 403.) No rule categorically precludes reinstated attorneys from seeking certification as a legal specialist. Applicant is in a better position. He is an attorney in current good standing, who due to compelling mitigation demonstrated in 1982, was not disbarred, but instead endured lengthy suspension. It is now 11 years after his suspension was ordered and 8 years after it was completed and his unfettered right to practice was restored. As discussed below, we conclude that the BLS is required by law to allow applicant an opportunity to be heard on his current qualifications.

C. Denial of Fair Procedure

Due to the narrow stipulation presented by the parties, the hearing judge did not consider whether the BLS complied with the requirements of fair procedure in summarily denying certification without letting applicant be heard in his own defense. Nor did the parties address this issue in their initial briefs on review. On May 12, 1993, we directed the clerk's office to send a letter to counsel for the parties asking them to be prepared at oral argument to address the applicability, if any, of *Pinsker v. Pacific Coast Society of Orthodontists*, *supra*, 12 Cal.3d 541 and the cases following *Pinsker* regarding the requirements of fair procedure.

4. In his opening brief on review, applicant argued that section 7.b.v of the Program authorized the summary suspension and revocation of specialist certification, but not the summary denial of specialist certification in the first instance. At oral argument, applicant abandoned this argument. He indicated that under *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, a meaningful opportunity to be heard is also required before the suspension or revocation of specialist certification. In any event, this issue is not presented by the case before us.

5. Although the Program does not define either "lawyer" or "certificate holder" as used in section 7.b of the Program, implementing Rules and Regulations of the bar's Program define "certified specialist" as an "attorney who has been designated a certified specialist by the [BLS], who is an active member of the State Bar, and whose certificate has not been suspended, revoked or lapsed." (State Bar Rules & Regs. Certif. Legal Specialists, Definitions.)

In *Pinsker*, three orthodontist societies denied a dentist's application for membership without affording the dentist an opportunity to present his position about an alleged violation of one of the societies' ethical principles. Although the trial court ruled against the dentist, the Supreme Court concluded that the societies failed to comply with the minimal requirements of fair procedure established by common law principles. (*Pinsker, supra*, 12 Cal.3d at pp. 545, 555, 561.)

On May 17, 1993, applicant filed a reply brief to the State Bar's review brief. This reply brief, which was signed on May 3, 1993, did not address *Pinsker* and its progeny, but applicant did claim that he never received an opportunity for an oral interview under section VI.G.4 of the Rules and Regulations. Section VI.G.4 requires an independent inquiry and review committee to request an interview with an applicant if the committee is considering a recommendation to the BLS that the applicant is not qualified. The purpose of the interview is to provide the applicant with a reasonable opportunity to respond to adverse information and to present any additional information which may show that the applicant is qualified. Applicant argued that his rights to due process were violated by the advisory commission and the BLS because he was not afforded the opportunity of a hearing before either of them. Based on the absence of citations to any constitutional sources, we construe his argument as invoking due process in a common law sense rather than a constitutional sense. (See *Pinsker, supra*, 12 Cal.3d at p. 550, fn. 7.)

In a response brief filed June 7, 1993, the deputy trial counsel addressed *Pinsker*. She stressed the Supreme Court's holding that if a professional society has refused membership to a person through the application of a reasonable standard, judicial inquiry should end. (*Id.* at p. 558.)⁶ [9 - see fn. 6] According to assertions of the deputy trial counsel at oral argument which were undocumented in the record before

this court, the BLS followed a procedure which would be deemed fair under *Pinsker* because of the following alleged facts: (1) applicant was notified in writing of the BLS's proposed denial of his application and the reasons for the proposed denial; and (2) applicant was afforded, and took, the opportunity to request in writing a reconsideration of the BLS's decision pursuant to section VIII.A of the Rules and Regulations. We do not need to consider whether it would be appropriate to augment the record to obtain such documentation because at oral argument, the deputy trial counsel also reiterated that [10a] the BLS's denial of specialist certification of applicant rested solely on his prior disciplinary record without considering any evidence of his conduct for more than a decade since his suspension was ordered.

[10b] In response to questioning from the court, the deputy trial counsel indicated that although the BLS currently considers applicant's prior discipline a threshold barrier to his certification, the BLS would not necessarily consider applicant's prior discipline a lifetime ban on certification. She found a lifetime ban not to be defensible, arguing that at some unspecified time in the future the magnitude of applicant's prior misconduct might dissipate "in their minds," and that the BLS may then find it easier to endorse him. Yet the deputy trial counsel conceded that none of the criteria which the BLS might use to lift the absolute bar which they have erected to certification of an applicant with a prior record of misconduct are enumerated anywhere and that she was hard pressed to say when applicant might be allowed by the BLS to have a hearing if left solely to the initiative of the BLS.

[10c] The nebulousness of the deputy trial counsel's articulation of her client's position underscores the arbitrariness of that position. [11] California courts have long recognized a common law right to fair procedure protecting individuals from arbitrary exclusion or expulsion from private organizations

6. [9] At oral argument the deputy trial counsel alternatively asserted the inapplicability of *Pinsker*, arguing that because applicant can do probate, estate planning, and trust work without certification as a specialist, the BLS's denial of certification did not deprive him of any identifiable economic interest. To the contrary, by controlling specialist certifica-

tion, the BLS substantially affects not only the attorney's professional status, but also an important economic interest—the exact same type of interest recognized as worthy of protection in *Pinsker*. Indeed, in all likelihood the due process language in section G of the Policies Governing the Program was included in an effort to comply with the *Pinsker* decision.

which control important economic interests. (*Pinsker, supra*, 12 Cal.3d at pp. 552-554; *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 656, and cases cited therein.) Monopoly power is not necessary; instead, courts have focused on the practical power of an entity to affect substantially an important economic interest. (*Ezekial v. Winkley* (1977) 20 Cal.3d 267, 277; *Warfield v. Peninsula Golf & Country Club* (1989) 214 Cal.App.3d 646, 659.) A “basic ingredient of the ‘fair procedure’ required under the common law is that an individual who will be adversely affected by a decision be afforded some meaningful opportunity to be heard in his defense. Every one of the numerous common law precedents in the area establishes that this element is indispensable to a fair procedure.” (*Pinsker, supra*, 12 Cal.3d at p. 555; see also *Hackethal v. California Medical Assn.* (1982) 138 Cal.App.3d 435, 442.) As we noted, *ante*, the State Bar’s Policies Governing the Program affirmatively stress the requirement of compliance with due process.

As discussed above, the BLS’s action in this instance is unauthorized and contrary to the Board of Governors’ rules and the Supreme Court’s historic allowance of reinstatement of a disbarred attorney upon a proper showing after five years. Full privileges are restored to reinstated attorneys—no matter how serious the offense which caused the attorney’s disbarment. Just as an applicant for reinstatement after disbarment is entitled to a fair hearing to assess whether he or she has made the required showing of sustained exemplary conduct for reinstatement so too is applicant entitled to a fair hearing to give him an opportunity to show his good conduct since returning to practice after completing his lengthy suspension and conditions of probation. To that end,

we again note the policies of the State Bar’s Program which direct the Program to “Provide broad access to practitioners in the specialty field” and to “Not be arbitrary in the amount or nature of the requirements set.” (Policies Governing the Program, §§ D.(1), D.(3).) [12] At the same time, within due process requirements, the BLS has broad discretion in certifying specialists and it is free to consider any competent evidence rebutting applicant’s showing and to weigh and balance the respective showings in an appropriate manner under applicable Program principles and rules. His prior discipline for very serious misconduct is clearly evidence that should be considered in such process.

IV. CONCLUSION

[10d] Upon our independent review of the record, we conclude that the BLS violated its own rules and applicant’s common law right to fair procedure by summarily rejecting his application and denying him a meaningful right to be heard in his defense. Thus, we reverse the hearing judge’s decision and remand the current proceeding to the BLS. We instruct the BLS to vacate its prior denial of applicant’s certification and to submit his application to the BLS’s advisory commission for the completion of the independent inquiry and review process which its governing rules require and for further action consistent with the Rules and Regulations and the governing law. Nothing contained herein is intended to express any opinion as to the outcome of such process.

We concur:

NORIAN, J.
STOVITZ, J.