



nerej

Kafkaesque Bureaucracy and the dubious morality of administrative law - by Roger Durkin

May 29, 2020 - Spotlights

Roger Durkin

What is a Kafkaesque¹ Bureaucracy? It is “a surreal world in which all your control patterns, all your plans, the whole way in which you have configured your own behavior, begins to fall to pieces, when you find yourself against a government force that does not lend itself to the way you perceive the world. You do not give up; you do not lie down and die. What you do is struggle against officialdom’s commands with all your ability, with whatever you have. But of course, you do not stand a chance. That is Kafkaesque².” Kafkaesque is a description of government oppressive behavior through official processes that result in absurdities, offensiveness, charades, shams, bureaucratic pretentiousness, deceit, trickery, and duplicity. It is in many ways a farce. It oppresses with red tape, official procedures, and regulatory authority by decree.

Officialdom is elected and unelected government who can command you to do or not do some action under penalties of law. Both federal and state government, have three separate, equal branches, the Legislature, Executive, and Judicial. Massachusetts has 160 Representatives and 40 Senators making laws. Under the Constitution, only the legislature can make laws. The Governor has the duty to implement the law. The Governor, under the constitution and statues, can issue executive orders that have the force of law so long as the³ order does not violate the Constitution. The Constitution protects our liberty in good times and bad and it explicitly provides for only very limited emergency power⁴. Governor Charles Duane Baker, Jr. declared a state of emergency on March 10, giving him more power respond to the Coronavirus Edicts proclaimed, stay at home, close all businesses, safe distancing, wear a mask at all times, fines, threats of arrest, and curfew. Then being, shunned by some friends and fearful believers. Massachusetts official statistics cite 4,792 people out of 6,800,000 have died of Covid19/Corona. 2,837 died in nursing homes, 85%. of all deaths were people over 70. The number of deaths of people under age 70 was 787 or .0006%. Who regulates nursing homes? The Governor and his agencies. The implementation of the Governor’s order is pure Kafkaesque.

However, I wanted to talk to you about Kafkaesque in agency regulations and the immorality of large parts of administrative law. The process of implementing legislative statutes involves delegation to a state agency to make 'regulations' to implement the law. In making regulations, the agency often broadly interprets the legislation. These regulations become legal commands forcing a citizen to do or not do some act, all subject to sanction including fines and loss of your license. The regulatory sanctions are punitive in that the sanctions punish the transgressor.

The Executive branch has no power under the Massachusetts and U.S. Constitution to make laws. However, the Executive branch makes tens of thousands of laws through state agencies' regulations, thus raising the ugly head of Kafkaesque activities. These 151 departments with over 700 independent boards make regulations which command a citizen to do or not do some act. The 151 agencies regulate everything from alcohol, boats, lottery, funerals, banks, libraries, and agriculture to professional licensure. These agencies are by statute required to operate and be governed by the Massachusetts Administrative Procedure Act (APA)⁵. Agencies are seldom challenged⁶.

An example of such an agency is the Division of Professional Licensure (DPL), which is an area of administrative law that Durkin Law practices. The DPL has 38 separate licensing boards regulating individuals and businesses in 167 trades and professions. The DPL has 299 employees costing \$20,930,000 per year at a salary range of \$65,000 to \$150,000 plus benefits.

Suppose you are a real estate appraiser and some broker, borrower, bank, or attorney files a complaint asserting that you did something wrong. You are upset but you think you did nothing wrong. That is what you think! You would receive a "Letter of Investigation" telling you to respond within 14 days or you will by default be found liable. Suppose you answer the letter of investigation. Anything you say or write can and will be used against you. The investigator does not determine that you violated USPAP or one or more DPL regulations. Rather the investigator sends your file including appraisal and workfile to the license board who passes it to a secret and often subcontracted review appraiser. If the appraisal report is a Fannie Mae type, undisclosed reviewer will find ten or twenty or more USPAP violations. The license board will then issue an Order to Show Cause listing your violations and ask you to answer why your license should not be sanctioned. Sanction means revoking your license, suspending your license for up to three years, a fine you up to \$10,000, probation for several years, and requires you to take 45 hours of uncredited classroom continuing education, all of which will cost you money, time and forever put a scarlet letter on your professional record.

Here is where Kafkaesque comes in and why there is dubious morality in administrative law. There is little due process. You have no right to confront the review appraiser. You have no right to discovery in the form of interrogatories or depositions of the review appraiser. The review appraiser by Board regulations is not required to follow USPAP.⁷ You are not allowed to confront your accuser, i.e. the reviewer who found all the alleged bugs in your report. You will be offered a hearing that is supposed to mirror due process. The hearing is best described as a farse. The hearing officer/judge is a lawyer-employee of the Board. Maybe last year the hearing officer was a prosecutor. Both are appointed by the Board. All have adjoining offices down the hall from each

other

Massachusetts Administrative law, unlike criminal law, has no substantive due process. The prosecutor's burden of proof is to show the violation as 51% more likely true and by stacking the charges, it is often more prudent to take a plea bargain than to try to fight the Kafkaesque tribunal. A bank robber has a better chance of defense and due process than a person charged with a regulatory violation by an administrative board. No body seems to care, like lemmings running over the cliff, the citizenry just goes along.

1 'Kafkaesque' is typically used in a way to denote something frustratingly and pointlessly bureaucratic, or a nightmarish kind of totalitarianism. On that definition, something like the Soviet Union, or Communist East Germany, or North Korea today, are Kafkaesque worlds.

2 Frederick R. Carl, author of an exhaustive critical biography of Franz Kafka Biography, first used the term Kafkaesque.

3 Drawing from www.skewsme.com/img/lemmings-cliff.jpg

4 It only allows the suspension of the ordinary judicial process in the event of war, invasion, or rebellion. First Amendment states Congress shall make no law prohibiting the free exercise of religion, or abridging the freedom of speech, or the right of the people peaceably to assemble.

5 Mass Gen. Laws, Ch 30A, Title III

6 MGL Ch. 39A §7 provides for judicial critique of agency regulation by a motion for declaratory relief.

7 264 CMR 12.03 Appraisal reviews performed by licensed or certified appraisers are exempt from the USPAP requirements regarding appraisal reviews when those reviews are conducted on behalf of the Board.

Roger Durkin is a Fellow of the American Society of Appraisers and an attorney with Durkin Law PC, Boston.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540