

1956

Nelson Clayton v. Hal S. Bennett et al : Brief of Respondents

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. R. Callister; Walter L. Budge; Attorneys for Respondents;

Recommended Citation

Brief of Respondent, *Clayton v. Bennett*, No. 8477 (Utah Supreme Court, 1956).
https://digitalcommons.law.byu.edu/uofu_sc1/2543

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

RECEIVED

MAY 5 1956

Supreme Court of the State of Utah

LAW LIBRARY
U. of U.

NELSON CLAYTON,
Plaintiff and Appellant,

vs.

HAL S. BENNETT, STEWART M.
HANSEN and DONALD HACKING,
as members of the Department of
Business Regulation of the State of
Utah; DEPARTMENT OF REGIS-
TRATION and FRANK E. LEES, as
Director of the Department of Reg-
istration,
Defendants and Respondents.

FILED

MAR 22 1956

Clerk, Supreme Court, Utah

Case No.
8477

BRIEF OF RESPONDENTS

E. R. CALLISTER,
Attorney General,

WALTER L. BUDGE,
Assistant Attorney General,
Attorneys for Respondents.

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	6
ARGUMENT	7
POINT I. THE RIGHT TO ENGAGE IN THE PROFESSION OF ARCHITECTURE IS A PROPERTY RIGHT WHICH APPELLANT IS ENTITLED TO PROTECT BY RECOURSE TO THE COURTS	7
POINT II. AN ADMINISTRATIVE AGENCY HAS NO POWER TO PASS ON THE CON- STITUTIONALITY OF A LEGISLATIVE ACT .	7
POINT III. THE DECLARATORY AND INJUNC- TIVE PROCEDURE IS A CORRECT PRO- CEDURE FOR CHALLENGING THE CON- STITUTIONALITY OF THE STATUTES IN QUESTION	8
POINT IV. SECTIONS 7 AND 13 OF CHAPTER 1, TITLE 58, UTAH CODE ANNOTATED, 1953, <i>DO NOT</i> CONSTITUTE AN UNCON- STITUTIONAL DELEGATION OF LEGISLA- TIVE POWER	8
POINT V. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS ORDINARILY A PREREQUI- SITE TO RECOURSE TO THE COURTS	18
CONCLUSION	19

AUTHORITIES CITED

53 C. J. S. 2d Sec. 15, p. 508, 509	15
11 Am. Jur. Constitutional Law, Sec. 242, p. 960, 962 .	13
54 A. L. R. 1104, 1114, Annotation	17

TABLE OF CONTENTS—Continued

CASES CITED	Page
Baker v. Dept. of Registration (1931), 78 Utah 424, 3 P. 2d 1082	11
City of Wewoka v. Rose Lawn Dairy (Okla.), 212 P. 2d 1056, 1059	18
Douglas v. Noble, 261 U. S. 165, 67 L. Ed. 590, 43 S. Ct. Rep. 303	17
J. W. Hampton & Co. v. United States, 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348	13
Heron v. City of Denver (1955), 283 P. 2d 647, 650 ..	19
Montejano v. Rayner, 33 Fed. Supp. 435	16
Moormeister v. Golding (1933), 84 Utah 324, 27 P. 2d 447	11
People v. Brown, 407 Ill. 565, 95 N. E. 2d 888, 893	7
People v. Hasbrouck (1895), 11 Utah 291, 39 P. 918 ..	10
Rowell v. State Bd. of Agriculture, 98 Utah 353, 99 P. 2d 1, 3	17
Ruckenbrod v. Mullins, 102 Utah 546, 133 P. 2d 325, 330	7
State ex rel. Hallen v. Utah State Bd. in Optometry (1910), 37 Utah 339, 108 P. 347	11
State v. Waldram (1924), 64 Utah 426, 231 P. 431 ...	11

CONSTITUTION CITED

United States Constitution, Fourteenth Amendment ..	9
Utah Constitution, Article I, Section 7	9

STATUTES CITED

Utah Code Annotated, 1953	
58-1-1	11
58-1-7	6, 8, 9, 11, 12, 14, 18
58-1-13	6, 8, 9, 10, 11, 12, 14, 18
58-1-16	19

In the
Supreme Court of the State of Utah

NELSON CLAYTON,
Plaintiff and Appellant,

vs.

HAL S. BENNETT, STEWART M.
HANSEN and DONALD HACKING,
as members of the Department of
Business Regulation of the State of
Utah; DEPARTMENT OF REGIS-
TRATION and FRANK E. LEES, as
Director of the Department of Reg-
istration,
Defendants and Respondents.

Case No.
8477

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Plaintiff and appellant brought this action in the Third Judicial District Court in and for Salt Lake County, State of Utah, seeking a declaratory judgment. The original complaint was served upon the defendants on the 10th day of June, 1953, and judgment of the court below was,

at long last, entered in favor of these defendants and respondents on the 7th day of December, 1955. The cause is now, all in due time, properly before this Court.

The issues were submitted to the court below on stipulation of the facts, as follows:

“1. It is stipulated that Nelson Clayton is a duly licensed and registered professional engineer; that he is engaged in the engineering business in connection with the construction of buildings and other structures in the State of Utah; that he is a graduate engineer and architect with degrees in said professions from the University of Utah.

“2. That Chapter 1 of Title 58, Utah Code Annotated, 1953, among other things, provides that within the Department of Business Regulation of the State of Utah there shall be a department known as the Department of Registration which shall be charged with administering the law relating to professions, trades and occupations, including the professions of architecture and engineering; that it is provided in said chapter that said Department of Registration shall exercise its functions—including the determination of the qualifications of applicants for a license to practice—by and through a director of registration under the Commission’s supervision and in collaboration with the representative committees of the several professions, trades and occupations mentioned in said chapter, including the professions of engineering and architecture.

“3. That by said chapter it is provided that the director of registration shall designate, upon recommendation of members of the profession of architecture, a committee of three members, each of whom shall have been licensed to practice as an architect in Utah for a period of five years immed-

ately prior to the appointment, and that the names of the members of said committee so designated shall be submitted to the Governor for his confirmation or rejection, and that such committee was so appointed and at all times herein mentioned acted as such.

“4. That plaintiff applied for and on November 27, 28, 29, and 30, 1951, was given an examination by the Department of Registration, in order to secure a license to practice as an architect in the State of Utah. That said committee, exercising the power and pursuant to the authority conferred upon it by said Chapter 1, Title 58, Utah Code Annotated, 1953, held and decided that under the standard of qualifications fixed by said committee plaintiff had failed to pass such examination and plaintiff was refused a license to practice as an architect in the State of Utah.

“5. The parties stipulate that Section 58-1-7, U. C. A., 1953, provides as is alleged in paragraph 5 of plaintiff's complaint.

“6. The parties stipulate that Section 58-1-13, U. C. A., 1953, provides as is alleged in paragraph 6 of plaintiff's complaint.

“7. The parties stipulate that Section 58-1-17, U. C. A., 1953, provides as is alleged in paragraph 7 of plaintiff's complaint.

“8. Said act further provides that it shall be unlawful for any person to practice or engage in or attempt to practice or engage in any profession, trade or occupation that may be subject to the Department of Registration without authority so to do as in said title provided; and said act lists among the professions, trades and occupations as subject to the control of the Department of Registration, architects and engineers.

"9. The parties stipulate and agree that the allegations of paragraphs 9, 10 and 11 of the complaint are conclusions of law and by entering into this stipulation plaintiff does not waive the contention that said paragraphs correctly allege the law and the defendants do not waive their contention and denial that said allegations correctly allege the law, and said issues of law are herewith submitted to the court for decision.

"10. That plaintiff desires and intends to engage in architectural work in the State of Utah without the procurement of a license; that the defendants have threatened to take criminal action against the plaintiff if he does so engage in architectural work without a license and without complying with the provisions of the above mentioned statutes; that plaintiff must either comply with the terms of the statute or engage in architectural work without regard to said statute and run the risk that the statute may be held constitutional; that if plaintiff engages in architectural work without a license, plaintiff will be subjected to a multiplicity of suits and criminal prosecution.

"11. That the plaintiff was examined by the Department of Registration of the State of Utah, on the 27th, 28th, 29th and 30th days of November, 1951, in a manner and procedure provided by law; that the said plaintiff failed to pass the said examination but that thereafter, upon the petition of the said plaintiff and upon hearing said petition, the Business Regulation Commission, sitting and acting as Director of the Department of Registration, State Capitol, Salt Lake City, Utah, did find that the hereinabove referred to Architects Representative Committee did violate a portion of the rules of the Architects Examining Committee in that:

"(a) it failed to complete the inspection of

the answers submitted by applicants within ten days after the close of the examination;

“(b) the examination given was conducted under adverse conditions in that materials and supplies were not ready at the beginning of the architectural composition problem;

“(c) proper preparations were not made prior to the conducting of said examination;

“(d) and that the applicants were not afforded the allotted time to solve the architectural composition problem; and that, therefore, said Business Regulation Committee did order plaintiff’s re-examination.

“12. That the educational qualifications of the plaintiff were, prior to the time of the filing of this complaint, admitted and accepted by the Department of Business Regulation of the State of Utah.

“13. That the question of whether the plaintiff was arbitrarily or capriciously denied a passing grade is not raised as an issue herein.

“14. That plaintiff was, under the provisions of 58-1-16, granted an opportunity for re-examination, but that the said plaintiff refused and does now continue to refuse to avail himself of said opportunity.

“15. That the legal effect of the failure of the plaintiff to submit to further examination is left for the court for decision.”

It was ordered, adjudged and decreed by the court below:

“That the plaintiff take nothing by this action; that the defendants have judgment.”

STATEMENT OF POINTS

POINT I

THE RIGHT TO ENGAGE IN THE PROFESSION OF ARCHITECTURE IS A PROPERTY RIGHT WHICH APPELLANT IS ENTITLED TO PROTECT BY RECOURSE TO THE COURTS.

POINT II

AN ADMINISTRATIVE AGENCY HAS NO POWER TO PASS ON THE CONSTITUTIONALITY OF A LEGISLATIVE ACT.

POINT III

THE DECLARATORY AND INJUNCTIVE PROCEDURE IS A CORRECT PROCEDURE FOR CHALLENGING THE CONSTITUTIONALITY OF THE STATUTES IN QUESTION.

POINT IV

SECTIONS 7 AND 13 OF CHAPTER 1, TITLE 58, UTAH CODE ANNOTATED, 1953, *DO NOT* CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

POINT V

EXHAUSTION OF ADMINISTRATIVE REMEDIES IS ORDINARILY A PREREQUISITE TO RECOURSE TO THE COURTS.

ARGUMENT

POINT I

THE RIGHT TO ENGAGE IN THE PROFESSION OF ARCHITECTURE IS A PROPERTY RIGHT WHICH APPELLANT IS ENTITLED TO PROTECT BY RECOURSE TO THE COURTS.

Respondents heartily adopt this Point I contended for by appellant. In fact, we would go so far as to accept this proposition as it is stated in *People v. Brown*, 407 Ill. 565, 95 N. E. 2d 888, 893. That court had this to say:

“A person’s business, profession, trade, occupation, labor, and the avails from each constitute ‘property’ envisioned in constitutional provisions that all men have certain inherent and inalienable rights, such as the rights to life, liberty, and pursuit of happiness, and that such rights plus the right of ‘property’ shall not be taken from a person except by due process of law.”

See also *Ruckenbrod v. Mullins*, 102 Utah 546, 133 P. 2d 325, 330.

POINT II

AN ADMINISTRATIVE AGENCY HAS NO POWER TO PASS ON THE CONSTITUTIONALITY OF A LEGISLATIVE ACT.

This Point II, as propounded by appellant, is most certainly sound in law. The argument presented thereunder by appellant appears, at first blush, also to be sound; but,

closely examined, such an argument fails in merit as to the issues in the case at bar.

Appellant complained in the court below of the statutes of the State of Utah as such statutory enactments affect his right as an architect to follow this profession and calling. Appellant did not seek, in this cause, a trial de novo on the issue of whether appellant failed or passed the examination given by the Department of Business Regulation of the State of Utah. There is nothing in the record to indicate that the said Department of Registration has, at any time, endeavored to rule on the constitutionality of any of the statutes from whence life springs for the functions of that department.

POINT III

THE DECLARATORY AND INJUNCTIVE PROCEDURE IS A CORRECT PROCEDURE FOR CHALLENGING THE CONSTITUTIONALITY OF THE STATUTES IN QUESTION.

Here again appellant states what respondents think is a proper interpretation of the law. Declaratory and injunctive relief, as well as prohibitive procedures, have long, if in fact not at all times, been available to litigants in the courts of this State to test constitutional issues. We need cite no further authority than that of appellant for this proposition.

POINT IV

SECTIONS 7 AND 13 OF CHAPTER 1, TITLE 58, UTAH CODE ANNOTATED, 1953, *DO NOT*

CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

Respondents and appellant here and at this point, come to a parting of the ways.

Whether the present licensing laws for architects in the State of Utah have or have not caused a great deal of dissatisfaction is not here an issue. Future legislators, in their collective wisdoms, will meet and assemble to make the laws that will control that situation. Appellant's argument to that proposition is both interesting and enlightening, but not pertinent here.

The issues squarely put and for decision here are "do Sections 7 and 13 of Chapter 1, Title 58, Utah Code Annotated, 1953, offend against the constitutional guarantees of due process of law—Article I, Section 7, Constitution of Utah and the Fourteenth Amendment to the Constitution of the United States of America. Respondents think not.

Section 58-1-7, Utah Code Annotated, 1953, when appellant commenced this action, provided:

"It shall be the duty of the several representative committees to submit to the director standards of qualification for their respective professions, trades or occupations requisite in applicants for license, and methods of examination of applicants. They shall conduct examinations at the request of the director to ascertain the qualifications and fitness of applicants to practice the profession, trade or occupation for which the examination may be held, shall pass upon the qualifications of applicants for licenses, certificates or permits and shall submit in writing their findings and conclusions to the director."

And, Section 58-1-13, Utah Code Annotated, 1953, reads as follows:

“The following functions and duties shall be exercised or performed by the department of registration but only upon the action and report in writing of the appropriate representative committee:

“(1) Defining for the respective professions, trades and occupations what shall constitute a school, college, university, department of university or other institution of learning as reputable and in good standing.

“(2) Establishing a standard of preliminary education deemed requisite to admission to any school, college or university.

“(3) Prescribing the standard of qualification requisite in applicants for licenses before license shall issue.

“(4) Prescribing rules governing applications for licenses, certificates of registration, permits, student cards or apprentice cards.

“(5) Providing for a fair and wholly impartial method of examination of applicants to determine their qualifications to exercise the respective professions, trades or occupations.

“(6) Defining unprofessional conduct, except as herein otherwise provided.”

Both sections were amended by the 1955 Legislature and, as amended, enlarge upon the authority of the so-called “representative committees.” These amendments are not in issue in this cause.

The constitutionality of the licensing acts of the State of Utah has many times been adjudicated. *People v. Has-*

brouck, (1895), 11 Utah 291, 39 P. 918; *State v. Waldram* (1924), 64 Utah 426, 231 P. 431; *George W. Baker v. Department of Registration* (1931), 78 Utah 424, 3 P. 2d 1082; *Moormeister v. Golding* (1933), 84 Utah 324, 27 P. 2d 447; *State ex rel. Hallen v. Utah State Board in Optometry* (1910), 37 Utah 339, 108 P. 347. It has been consistently held that the statutes are constitutional and within the police power of the State.

Now that the wheat has been separated from the chaff, we have remaining this question: Does the power vested by statutes, 58-1-7 and/or 58-1-13, U. C. A. 1953, in the "representative committees" violate the limitation imposed upon the Legislature by the Constitutions of the State and Nation in the delegation of administrative authority? Appellant contends that the statutes are so violative because:

"1st. The director or regulation can only make provision for the qualification [examination] of architects if a board created from practicing architects first acts.

"2nd. The licensing power is delegated to an administrative agency without any standards having been prescribed.

"3rd. Neither the director nor the architects' representative committee are required to give each applicant uniform and equal protection."

Will appellant's contentions bear close scrutiny?

Section 58-1-1, U. C. A., 1953, provides:

"There shall be a department of the state government within the department of business regulation known as the 'Department of Registration,'

which shall be charged with administering the laws regulating professions, trades and occupations as in this title provided.”

Under this authority and in the manner prescribed by 58-1-7 and/or 58-1-13, U. C. A., 1953, the department functions in the licensing of:

- Accountants
- Architects
- Barbers
- Chiropodists
- Dentists
- Engineers and Land Surveyors
- Funeral Directors
- Beauticians
- Physicians and Surgeons
- Naturopaths
- Nurses
- Osteopaths
- Optometrists
- Pharmacists
- Veterinarians
- Plumbers
- Sanatarians

Lawyers have to satisfy the Bar Examiners as to their educational and moral qualifications.

The policy of the law favors the placing of detailed responsibility in administrative officers. The Supreme Court of the United States has held that in the determination of what the Legislature may do in seeking assistance from administrative officers, the extent and character of that assistance, must be fixed according to common sense and the inherent necessities of governmental co-ordination.

J. W. Hampton & Co. v. United States, 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348. What better sense could be exercised than to have applicants for license in the professions and trades examined as to their qualifications by persons learned in the calling?

It is said in 11 Am. Jur., Constitutional Law, page 960, Sec. 242, that:

“There are no constitutional objections arising out of the doctrine of the separation of the powers of government to the creation of administrative boards empowered within certain limits to adopt rules and regulations and authorized to see that the legislative will expressed in statutory form is carried out by the persons or corporations over whom such board may be given administrative power. Boards and commissions of this character do not exercise any of the powers delegated to the legislature. They do not make any laws. They merely find the existence of certain facts, and to these findings of fact the law enacted by the legislature is applied and enforced.”

And, at page 962:

“An administrative board is not necessarily using judicial powers if it exercises discretion. For example, the ascertainment and determination of qualifications to practice medicine by a board of medical examiners appointed for that purpose do not constitute the exercise of a power which exclusively belongs to the judicial department of the government. The same principle sanctions statutes vesting state administrative boards with supervisory powers over various professions and businesses, such as the power to revoke the licenses to practice of those engaged in such businesses or professions, for both general and specific reasons.”

We now have the general rule.

Appellant says, "Neither the director nor the architects Representative Committee are required to give each applicant uniform and equal protection." Section 58-1-7, U. C. A., 1953, provides:

"It shall be the duty of the several representative committees to submit to the director standards of qualification for their respective professions, trades or occupations requisite in applicants for license, and methods of examination of applicants. They shall conduct examinations at the request of the director to ascertain the qualifications and fitness of applicants to practice the profession, trade or occupation for which the examination may be held, shall pass upon the qualifications of applicants for licenses, certificates or permits and shall submit in writing their findings and conclusions to the director."

The omission of the Legislature of which appellant complains, is the lack of an admonishment to the "representative committee" by the Legislature "to give each applicant *uniform and equal protection*." We must presume, however, that administrative boards will act in good faith within the scope and power of their authority; and if they fail to do so, there are remedies for their control. Appellant to the contrary notwithstanding, the Legislature did provide for each applicant "uniform and equal protection." Section 58-1-13, U. C. A., 1953, in part provides:

"(5) Providing for a *fair and wholly impartial* method of examination of applicants to determine their qualifications to exercise the respective professions, trades or occupations." (Emphasis added.)

Secondly, appellant complains of the statutes claiming that the licensing power is delegated to an administrative agency without standards having been prescribed. Appellant cites 53 C. J. S. 2d, Section 15, page 508, and concludes with:

“* * * Where discretion is to be exercised by administrative officials, proper guides for the use of such discretion *may* and, *as a general rule*, *must* be established by the enactment. * * *”
(Emphasis added.)

The same authority has this to say further and immediately subsequent to the quotation of appellant:

“* * * *In prescribing guides for administrative action, the enactment need not cover every detail, and it need not fix all the conditions on which a license may be granted by an official where it would be impracticable to lay down a comprehensive rule or where the enactment relates to the administration of a police regulation and is necessary for the protection of the public.* In some instances a regulatory measure vesting an absolute discretion in an administrative body to grant or refuse a license has been held valid, and it has been held to be no objection to a licensing ordinance, vesting the power in a city council to grant or refuse licenses, that it does not prescribe any standards to guide the council in the exercise of this function.” (53 C. J. S. 2d 509, emphasis added.)

In an action similar to this and where a declaratory judgment was also sought, the United States District Court for Idaho had, in part, this to say:

“The general principle granting authority to the legislature under the police power is that trades

or professions can be regulated where they effect the health, comfort and safety of the public * * *.

“The legislature may also authorize a board of examiners to prescribe and determine the qualifications required * * * unless such qualifications exceed constitutional limitations and are unreasonable * * *. If the Board prescribe fair and reasonable qualifications appropriate to the calling intended to be regulated and operating generally upon all in like situations their acts would be valid. The principles thus stated are in accord with the weight of authority.”

Montejano v. Rayner, 33 Fed. Supp. 435.

The Supreme Court of the United States (1923) said this of the issue here:

“* * * a statute providing that any person of good moral character, having a diploma from a dental college in good standing, and desiring to practice dentistry, should make application for examination with the dental board, and that all persons successfully passing such examination should be registered as licensed dentists, *was upheld against the objection that it failed to prescribe the scope and character of the examination*, the court saying: ‘The general standard of fitness and the character and scope of the examination are clearly indicated. Whether the applicant possesses the qualifications inherent in that standard is a question of fact. * * * The decision of that fact involves ordinarily the determination of two subsidiary questions of fact. The first, what the knowledge and skill are which fit one to practice the profession. The second, whether the applicant possesses that knowledge and skill. The latter finding is necessarily an individual one. The former is ordinarily one of general application.

Hence, it can be embodied in rules. The legislature itself may make this finding of the facts of general application, and, by embodying it in the statute, make it law. When it does so, the function of the examining board is limited to determining whether the applicant complies with the requirements so declared. But the legislature need not make this general finding. To determine the subjects of which one must have knowledge in order to be fit to practice dentistry; the extent of knowledge in each subject; the degree of skill required; and the procedure to be followed in conducting the examination,—these are matters appropriately committed to an administrative board.’” (Emphasis added.)

Douglas v. Noble, 261 U. S. 165, 67 L. Ed. 590, 43 S. Ct. Rep. 303 [54 A. L. R. 1104, 1114, Annotation].

Respondents think this to be the declared law in this State; this Court said, in *Rowell v. State Board of Agriculture*, 98 Utah 353, 99 P. 2d 1, 3:

“That the legislature may not surrender or delegate its legislative power is elemental.

“It may, however, provide for the execution through administrative agencies of its legislative policy, and may confer upon such administrative officers certain powers and the duty of determining the question of the existence of certain facts upon which the effect or execution of its legislative policy may be dependent. *McGrew v. Industrial Commission*, 96 Utah 203, 85 P. 2d 608; *Morgan v. United States*, 304 U. S. 1, 58 S. Ct. 773, 999, 82 L. Ed. 1129. Said the New York Court in *Elite Dairy Products v. Ten Eyck*, 271 N. Y. 488, 3 N. E. 2d 606, 609: ‘The Legislature may properly authorize an administrative officer to * * * determine questions of

fact. Any discretion there left to the administrative officer is confined to a designated field, and within that field rests, not upon unfettered choice, but upon the application of rules of reason to facts proven or found.' ”

The “representative committees,” the duties of which are set forth in 58-1-7, U. C. A., 1953, are the “fact finders” and the delegation of that authority is in no wise repugnant to the Constitution in so-called “police power legislation.”

Finally, your appellant complains of the provision of the statute that “expressly provides that the director may fix the qualifications and do the other things enumerated in Section 58-1-13 *only upon the action and report in writing of the appropriate representative committee*. So, as appellant says, “If the board of architects takes no action at all, the director could not prescribe any qualifications.” The complete answer to that is that the board of architects did and have acted; that it must be presumed that a public official will perform his duties; and, that where there is a failure of performance or even where there is an arbitrary exercise of discretion or judgment by an officer, a writ of mandamus may issue to require the performance of his duty. *City of Wewoka v. Rose Lawn Dairy*, (Okla.), 212 P. 2d 1056, 1059.

POINT V

EXHAUSTION OF ADMINISTRATIVE REMEDIES IS ORDINARILY A PREREQUISITE TO RECOURSE TO THE COURTS.

The court below found:

“That the plaintiff has failed, neglected and refused to exhaust his administrative remedies.”

Section 58-1-16 of the act provides:

“Whenever the director is satisfied that substantial justice has not been done in an examination, he may order a reexamination either before the same committee or another committee appointed for that purpose.”

Appellant made application for re-examination under this provision of the statute. The ruling was in appellant's favor and a further examination [as to those sections which appellant had failed] was ordered; appellant declined and chose to seek relief through the courts. Respondents think that the exhaustion of administrative remedies is ordinarily a prerequisite to recourse to the courts. We cite the Colorado case of *Heron v. City of Denver* (1955), 283 P. 2d 647, 650, wherein that court said:

“* * * Where administrative remedies are provided, this policy of orderly procedure should be followed, particularly when the matter of which complaint is made, or by which the party is aggrieved, is such as is within the province of the administrative authority to correct. Unless the administrative remedies are exhausted it never can be known but what a correction would ensue if the authorities were given full opportunity to pass upon the matter.”

CONCLUSION

Appellant should go hence and with naught; respondents should have their costs.

Respectfully submitted,

E. R. CALLISTER,

Attorney General,

WALTER L. BUDGE,

Assistant Attorney General,

Attorneys for Respondents.