3.6 PROSECUTORIAL DISCRETION AND SELECTIVE ENFORCEMENT

Agencies enjoy broad discretion both in determining whether to initiate enforcement proceedings and in deciding whom to prosecute. Factors that may weigh on an agency's decision to prosecute include cost-effectiveness and the need to make the best use of often scarce government resources.[1] Courts have historically been reluctant to review agency decisions to initiate administrative proceedings.[2] However, the tradition of prosecutorial discretion will not immunize from judicial scrutiny agency enforcement decisions motivated by improper factors or otherwise contrary to law.[3] In *United States v. Johnson*[4], the Fifth Circuit stated "in the rare situation where the decision to prosecute is so abusive of this discretion as to encroach on constitutionally protected rights, the judiciary must protect against unconstitutional deprivations."[5] If, for example, it is shown that government officers were motivated by intentional or purposeful discrimination in their enforcement of a statute or regulation resulting in unequal application to those entitled to equal treatment, a violation of the Equal Protection Clause will be found.[6] The showing of discrimination is not limited to factors such as race or religion, but also may include other improper motives that can be characterized as vindictive or abusive prosecution.[7]

Yet, there is a strong presumption that government decisions are undertaken in good faith and the burden of proving arbitrariness or discrimination is on the person challenging the governmental action.[8] The unequal application of a statute or regulation by state officers is not a denial of equal protection unless the challenging party shows by a clear preponderance of the evidence that there was intentional or purposeful discrimination.[9] An erroneous or mistaken performance of a statutory duty may constitute a violation of the statute but will not, without more, constitute a denial of equal protection.[10]

In *State v. Vadnais,* the Minnesota Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the intentional, discriminatory enforcement of municipal ordinances.[11] The court explained that a conscious exercise of some selectivity in enforcement, based on a rational exercise of police or prosecutorial discretion or mere

1 *See* 2 CHARLES H. KOCH, JR, ADMINISTRATIVE LAW AND PRACTICE § 5.30 (3d. ed. 2010).

2 FTC v. Standard Oil Co. of California, 449 U.S. 232, 238-39 (1980).

3 Marshall v. Jerrico, Inc., 446 U.S. 238, 249 (1980) (stating that the Due Process Clause may impose limits on the partisanship of administrative prosecutors.

4 577 F.2d 1304 (5th Cir. 1977).

5 *Id*. at 1307.

6 Snowden v. Hughes, 321 U.S. 1, 8, (1944); Yick Wo v. Hopkins, 118 U.S. 356, 374-75 (1886) (describing an laundry permitting that was neutral on its face but discriminatory in its application).

7 Cent. Airlines, Inc. v. United States, 138 F.3d 333, 334-35 (8th Cir. 1998); Olech v. Village of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998)); *Johnson*, 577 F.2d at 1307.

8 State by Humphrey v. Ri-Mel, Inc., 417 N.W.2d 102, 107 (Minn. Ct. App. 1987) (citing City of Moorhead v. Minn. Pub. Utils. Comm'n, 343 N.W.2d 843, 849 (Minn. 1984)).

9 Draganosky v. Minn. Bd. of Psychology, 367 N.W.2d 521, 526 n. 4 (Minn. 1985); *see also In re* Contest of General Election, 767 N.W.2d 453, 463-464 (Minn. 2009).

10 *Id.*; s*ee also* Birth Control Ctrs., Inc. v. Reizen, 743 F.2d 352, 359 (6th Cir. 1984); Friedlander v. Cimino, 520 F.2d 318, 319-20 (2d Cir. 1975).

11 295 Minn. 17, 19, 202 N.W.2d 657, 659 (1972).

laxity in enforcement, does not itself establish a constitutional violation.[12] However, an intentional or deliberate decision by public officials not to enforce penal regulations against a class of violators expressly included within the terms of the regulation does constitute a denial of the constitutional guarantee of equal protection under the laws.[13] In *Vadnais,* the defendant was convicted of parking his mobile home trailer on his land in violation of a township ordinance prohibiting the parking of trailers or "portable structures" outside of licensed trailer courts.[14] The Minnesota Supreme Court determined that township officials had enforced the ordinance in a discriminatory manner where people who parked camper trailers on their property, also in violation of the ordinance, were not prosecuted.[15] Township officials were precluded from prosecuting the defendant until such time as the town board could amend the ordinance or enforce it in a nondiscriminatory manner.[16]

In proving discriminatory enforcement, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of a constitutional right.[17] The defendant must prove discriminatory enforcement by a preponderance of the evidence.[18]

In *Northwestern College v. City of Arden Hills,* the Minnesota Supreme Court examined an equal protection challenge to a municipality's application of its zoning and building regulations. [19] In that case, a private college sought a declaratory judgment that the decision of the city denying its application for a special-use permit to build a fine arts center in a residential district was arbitrary, capricious, and void.[20] The Minnesota Supreme Court held that the denial of the special-use permit was discriminatory when similar permits had been granted previously to other private colleges and such a use was consistent with the municipality's zoning ordinance.[21] The court noted that the sole reason the permit was denied was because a neighborhood association expressed disfavor for the project. The court stated that while neighborhood sentiment may be taken into consideration in any zoning decision, it may not constitute the sole basis for granting or denying a given permit.[22] One applicant may not be preferred over another for reasons unexpressed or unrelated to the health, welfare, or safety of the community or any other permissible standard imposed by the relevant zoning ordinance.[23]

12 *Id*.

13 *Id*.

14 *Id*. at 18, 202 N.W.2d at 659.

15 *Id*. at 20-21, 202 N.W.2d at 660.

16 *Id*.

17 State v. Hyland, 431 N.W.2d 868, 872-73 (Minn. Ct. App. 1988) (citing State v. Russell, 343 N.W.2d 36, 37 (Minn. 1984)).

18 *Id*. at 873.

19 281 N.W.2d 865, 868 (Minn. 1979).

20 *Id*. at 866.

21 *Id*. at 868.

22 *Id*. at 869.

23 *Id*.

However, in *Draganosky v. Minnesota Board of Psychology,* the Minnesota Supreme Court rejected an equal protection challenge to the Board of Psychology's denial of a license application brought under the Board's variance procedure where the applicant failed to establish arbitrariness or discrimination on the part of the Board.[24] Specifically, the applicant made no comparative showing of other licensure approvals under the variance procedure and he failed to demonstrate that similarly situated applicants were treated differently.[25] The burden of proof to show that the Board applied its variance rule in a discriminatory manner is on the applicant.[26] The court held that the Board enjoys the presumption that it has abided by its procedures and, absent a showing of clear and intentional discrimination, a denial of equal protection claim will fail.[27]

Courts are even more wary of second-guessing an agency decision not to act. In *Heckler v. Chaney,* the U.S. Supreme Court determined that the decision by the Commissioner of the FDA not to examine whether a drug used to execute prisoners by lethal injection was "safe and effective" for that purpose was unreviewable.[28] The Court explained that, given the agency's expertise, the agency was "far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."[29] Furthermore, the Court noted that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect."[30]

24 Draganosky v. Minn. Bd. of Psychology, 367 N.W.2d 521, 526 n. 4 (Minn. 1985).
25 *Id.* at 525-56.
26 *Id.*
27 *Id.*
28 470 U.S. 821, 837-48 (1985).
29 *Id.* at 831-32.
30 *Id.* at 832.