Question: *What Is the Best Time in the Process for Court Interference to Correct a Possible Due Process Violation?*

- After the adjudication in an appeal? Would give agency a chance to correct any mistakes, prevents delayed resolution of a matter, piecemeal litigation, and inefficient utilization of agency and judicial resources.

- Before the adjudication? Why require the regulated entity to go through the entire record-making process if the due process violation is clear on its face prior to the adjudication?

- If you file Motion for Summary Judgment or a Motion to Dismiss before the agency on the due process issue, and it is denied, should you request certification and take an immediate appeal?

- Note the possible relevance of the amended Rules of Civil Procedure re: Final and Appealable Orders.

6. George Clay Steam Fire Engine and Hose Co. v. Pennsylvania Human Relations Commission, 162 Pa. Cmwlth. 468, 639 A.2d 893 (1994).

   Where the language of the enabling legislation indicates that the Human Relations Commission plays an active role in every step of the enforcement process, but the Commission has adequately separated its prosecutory and adjudicative functions from each other both by **regulations** enacted under the statute **and in fact**, then the company has received its guaranteed due process.

7. Marich v. Pennsylvania Game Commission, 639 A.2d 1345 (Pa. Cmwlth. 1994).

   The Game Commission revoked Petitioner's hunting license for one year after he pled guilty to killing two ducks over the limit and paid a fine in the nature of a civil penalty. The Commissioner's Hearing Officer, who is a member of the Commission's Bureau of Law Enforcement, was the only Commonwealth employee present at the hearing, presented the Commonwealth's evidence, questioned the parties, and made the recommended findings of fact and conclusions of law to the Commission. [Note that he is wearing three hats here, not just two!] The Commission accepted his recommendations in toto. Although the hearing officer does not render the final adjudication under the Commission's regulations, his findings of fact are not subject to reversal, merely to a remand for additional findings. Under these circumstances, an unconstitutional commingling of prosecutorial and adjudicative functions occurred. Reversed and remanded. The 3-judge panel made no reference to or determination of whether Marich had a property or liberty interest in his hunting license.

Marich v. Pennsylvania Game Commission, petition for Allowance of Appeal granted Sept. 15, 1994.

— The Game Commission raised on appeal the question of whether due process attaches where there is no property or liberty interest in a hunting license. See R. v. Department of Public Welfare, 535 Pa. 440, 636 A.2d 142 (1994), wherein the Court said that "due process is required under the Fourteenth Amendment only if the state seeks to deprive a person of life, liberty or property interest. Significantly, the existence of a liberty or property interest is partly determined by reference to state law."

8. Pennsylvania Game Commission v. Marich, 666 A.2d 253 (Pa. 1995).

Due process is applicable only if the state seeks to deprive a person of a life, liberty or property interest.

The right to pursue a livelihood or profession is a protected property right triggering the protective mechanism of due process.

Don't look to the *weight* but to the *nature* of the interest at stake. See also Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570-71, 92 S. Ct. 2701, 2706, 33 L.Ed. 2d 548 (1972).

The recreational sport of hunting has not been recognized as a constitutionally protected liberty or property interest by state or federal law.

9. Lee Hospital v. Cambria County Board of Assessment Appeals, 162 Pa. Cmwlth. 38, 638 A.2d 344 (1994).

Attempt to apply Lyness standards to Cambria County Board of Commissioners. As permitted by Statute, the three members of the county board of assessment appeals were also the county commissioners. Lee argued that they therefore had a financial interest in the outcome of its appeal of the decision of the Commissioners to place Lee on the county tax roles. The Commonwealth Court, per Kelly, J., disagreed, distinguishing Lyness .

> To so analogize, we would be required to assign to the commissioners a prosecutorial function it (sic) does not now enjoy, as well as consider the board the ultimate factfinder/adjudicator. In contrast, what the Law does provide is for the board to charge the chief assessor with determining what properties warrant assessment for each tax year. Later, if necessary, an interested property owner may appeal to the

board for review. This scheme does not describe a commingling of prosecutorial and adjudicative functions which would sound the skeptical alarm of bias.

Lee Hospital at 351.

10. Lower Merion School District v. Montgomery County Board of Assessment Appeals, 642 A.2d 1142 (Pa. Cmwlth. 1994).

The chairman of the county board of assessment appeals investigated reports of spot reassessments and issued several reports concluding that there had, indeed, been illegal spot reassessments. However, when those matters came before the board of assessment appeals, the Chair recused himself. The other two members took no part in the preparation of the reports, and this fact pattern "does not lead to the conclusion that the other board members had predetermined policies regarding spot assessments and were unable to render a fair adjudication of the tax appeals." 642 A.2d at 1148.

The board therefore did not improperly commingle prosecutorial and adjudicative functions, and the trial court improperly granted a petition for writs of prohibition and mandamus and declaratory and equitable relief.

11. Harmon v. Mifflin County School District, 651 A.2d 681 (Pa Cmwlth., 1994).

Court split four ways — only a plurality decision [Pellegrini, Colins, Newman].

Harmon, a school custodian was suspended without pay, and then terminated based upon the recommendation of the Director of Buildings and Grounds, after a meeting at which the school district's solicitor was present. The termination letter was signed by the secretary and president of the School Board. Harmon challenged his termination and requested a hearing before the school board. The school district solicitor prosecuted the case on behalf of the school district administration. Harmon's counsel challenged the solicitor's participation in the hearing as "impermissible commingling."

The Commonwealth Court plurality opinion concluded that there was no violation of due process or of Lyness because the school board was acting pursuant to statutory provisions solely as an employer. In Lyness, by contrast, the State Board of Medicine was operating as a licensing authority in disciplining a physician. "[T]he interests involved in the employment relationship are totally different than...independent agency actions regulating individuals." To the extent that the Court held otherwise in Copeland, the plurality would reject the decision.

The tenor of this opinion was anticipated in both in Lee Hospital v. Cambria County, supra, and Gwendolyn Lassiter-Holmes v. Public School Employees' Retirement

Board, (No. 1374 C.D. 1884, filed May 18, 1993, an unreported panel opinion by Kelton, J.). Ms. Lassiter-Holmes appealed from an order of the Board denying her request for multiple service membership in the retirement system. The Court affirmed the Board, but rejected the application of Lyness.

> We also note that Petitioner relies on Lyness v. State Board of Medicine, 529 Pa. 535, 605 A.2d 1204 (1992). We believe that Lyness is distinguishable. There an adjudicatory Board instituted proceedings in the nature of a prosecution and thereafter sat in judgement in the same case. Here, Petitioner brought the action and there is no evidence that the Board intervened as a litigant.

Slip Opinion at p. 2, n. 2.

Not only is the Court beginning to distinguish between prosecutory and non-prosecutory functions, but also between the proprietary and non-proprietary functions of government.

Commonwealth Court Has, Where Necessary, Permitted Adjudication By Less Than a Full Board, and Ultimately Less than a Quorum, To Preserve Due Process Rights.

1. Cooper v. State Board of Medicine, 154 Pa. Cmwlth. 234, 623 A.2d 433 (1993)

   No impermissible commingling occurred where the Board of Medicine authorized a formal disciplinary action upon recommendation of a prosecuting attorney, and a quorum of Board members who did not participate in the decision to authorize formal disciplinary action were available to adjudicate the matter.

   Sub-entities of administrative agencies may perform prosecutorial and adjudicatory functions without commingling those functions, in compliance with Lyness. The Board is not required to have a completely separate body render the final adjudication, as long as the Boar properly excludes, in the final states of the proceedings, the members who performed prosecutorial functions.

2. Batoff v. State Board of Psychology, 158 Pa. Cmwlth. 267, 631 A.2d 781 (1993). Very similar initial procedural posture to Lyness.

   A separate panel of Board members can adjudicate the merits of a case even where the Board lacked an untainted quorum of board members to do so, where other Board members had previously issued an Order to Show Cause.

3. Jabbour v. State Board of Medicine, 162 Pa. Cmwlth. 164, 638 A.2d 406 (1994).

   Follows Cooper and Batoff in holding that the board is not required to have a completely separate body render the final adjudication in a case as long as the board members who render that decision were not involved in prosecuting the matter.

4. Merchant v. State Board of Medicine, 162 Pa. Cmwlth. 332, 638 A.2d 484 (1994) (original jurisdiction).

   As long as there is one untainted member of the Board available to conduct the formal hearing, that person may adjudicate the charges brought against Merchant by the remaining members of the Board.

5. Lower Merion School District v. Montgomery County Board of Assessment Appeals, 642 A.2d 1142 (Pa. Cmwlth. 1994), supra.

How Many Judges Equal Due Process?

One.

But...

Hetman v. State Civil Service Commission (Berks County Children and Youth) 714 A.2d 532, (Pa. Cmwlth. 1998).

In a hearing before the State Civil Service Commission due process is satisfied if a hearing is held before one commissioner, with the other members subsequently reviewing the testimony before preparing their adjudication.

--The adjudication STATED that "all members reviewed the notes of testimony including all exhibits introduced at the hearing"

And...

--Credibility can be determined from reading a transcript.

Procedural Issues — Waived By Failure to Raise at Appropriate Time

1. McGrath v. State Board of Dentistry, 159 Pa. Cmwlth. 159, 632 A.2d 1027 (1993).

On appeal from a license suspension where the hearing and post-hearing briefs pre-dated the Supreme Court decision in Lyness, but the adjudication postdated it by some nine months, McGrath raised as an issue, in paragraph 6 of his Petition for Review:

> 6. The decision and proceeding of the Respondent Board was in direct violation of the mandate of the Supreme Court of Pennsylvania as articulated in the case of Lyness v. Commonwealth of Pennsylvania State Board of Medicine, [529] Pa. [535], 605 A.2d 1204, (1992 in that the Board, by commingling the prosecutorial and adjudicatory functions of this proceeding violated Petitioner's due process rights under the Constitution of the Commonwealth of Pennsylvania. (Emphasis added.)

In his brief McGrath argued that the statute governing the State Board of Dentistry is unconstitutional. In its opinion, the Commonwealth Court noted that

> Based on this language [the language in the Petition for Review], the SBOD contends that McGrath never specifically challenged the facial unconstitutionality of the statute in his petition, but rather addresses that issue for the first time in his brief to this court. The SBOD maintains that whether the Dental Law is unconstitutionally void on its face is not a subsidiary question fairly comprised within McGrath's stated objection that the procedures utilized by the SBOD in the proceeding against him violated the mandate of Lyness and, thus, McGrath has lost the opportunity to raise it. We agree.

McGrath at 1030.

The Court concluded that McGrath had waived his opportunity to raise the issue. Judge Friedman determined that Lyness never dealt with the facial invalidity of the medical board's enabling statute (only its regulations), so the question of whether the applicable **statute** was facially unconstitutionally was not specifically raised until McGrath's brief.

2. Singer v. Bureau of Professional & Occupational Affairs, 159 Pa. Cmwlth. 385, 633 A.2d 246 (1993), per Palladino, J.

Singer did not raise the issue of whether the Board's procedures impermissibly commingled its prosecutory and adjudicative functions until appeal. His failure to raise the issue of impermissible commingling before the Board, when it could have raised been raised through the exercise of due diligence at that level, constitutes a waiver of the issue. Further, his filing of a companion case in federal court in the interim clearly points to his awareness of the issue. This case is similar to McGrath, in that the Order to Show Cause and the hearing pre-dated Lyness, but the adjudication post-dated Lyness.

See also, Dowler v. Public School Employes' Retirement Board, 153 Pa. Cmwlth. 109, 620 A.2d 649 (1992); Gwendolyn Lassiter-Holmes v. Public School Employes' Retirement Board, No. 1374 C.D. 1884, filed May 18, 1993, panel opinion by Kelton, J. not reported, supra; Cresco v. PaPUC, 154 Pa. Cmwlth. 27, 622 A.2d 997 (1993), supra.

The Supreme Court Has Also Clarified Lyness

3. Stone & Edwards Insurance Agency v. Department of Insurance, 648 A.2d 304 (Pa. 1994).

On appeal from the Commonwealth Court, the Supreme Court affirmed the lower court decision, supra, rejecting the Appellants' argument that the statutory language vesting investigative, prosecutory and adjudicative functions in the Commissioner embodies a potential for impermissible commingling which inevitably results in an unconstitutional deprivation of due process. The Supreme Court, per Cappy, J., opined that

> [g]iven the nature and constraints of our various governmental bodies, the question of due process reasonably involves an inquiry into the nature of the process actually provided... The Insurance Commissioner does undoubtedly continue to possess ultimate authority pursuant to [the Unfair Insurance Practices Act] to investigate and prosecute insurance law violations. However, as a practical matter, the manner of delegation of these functions has sufficiently isolated the Insurance Commissioner from the investigatory and prosecutorial function, and the Deputy Insurance Commissioner-Enforcement from the function of adjudication.

Stone & Edwards Insurance Agency at 307-308.

Narrowing of Lyness

Control

1. Jackson v. Indiana University of Pennsylvania 695 A.2d 980, (Pa. Cmwlth. 1997).

This en banc decision of the Commonwealth Court further narrows Lyness by requiring control of the litigation for there to be a violation. In Jackson, a student was charged with violating the student code. After consideration of the evidence, the Residence Hall Judicial Board (Hearing Board) found the student in violation. The appeal from the Hearing Board is to the Director of Housing. The student alleged on appeal that her due process rights were violated because of the direct relationship between the Hearing Board and the Director. However, the Court held no Lyness violation because the Director did not retain any *control* over the prosecutorial function.

The Court also found that the failure to raise an issue for appeal means that the issue is not preserved for that appeal. See also Pa. R.A.P. 1551(a).

Inapplicable to Attorneys

2. Office of Disciplinary Counsel v. Duffield, 644 A.2d 1186, 537 Pa. 485 (1994).

This interesting matter involves an attorney who had disciplinary charges filed against him as a result of his failure to inform his client of court decisions surrounding his client's case. In his defense Duffield alleged that the attorney disciplinary procedure denied him due process by the improper commingling of the prosecutorial and adjudicative functions by the Disciplinary Board.

The Supreme Court held that there was no commingling within the lawyer disciplinary system.

Although Duffield is an attempt to incorporate Lyness into the legal disciplinary realm, it appears that as a legal principle, as of 1994, Lyness appeared to be applicable only to the administrative professional setting. –At least until the next Duffield.

Applicable to Government Contractors

3. Pennsylvania Institutional Health Services Inc. v. Commonwealth of Pennsylvania, Department of Corrections, 649 A.2d 190, (Pa. Cmwlth. 1994).

This is an attempt at a further extension of the Lyness principle to the government contracting arena and the reasonableness of due process for contractors. While the potential for commingling existed, the Commonwealth Court held that there are sufficient 'walls of division' present to protect the due process rights of PIHS.

While Duffield was unsuccessful in his attempt at a Lyness extension as applicable to attorneys, PIHS was successful in its extension of a principle to government contractors. Even Judge Smith's dissenting opinion acknowledges a protectable property interest in a government contract (and finding that no walls of division exist within this context).

> The Majority apparently disregards PIHS' argument that the procedures for suspension set forth in the Management Directive, as well as the procedures for debarment, are constitutionally infirm under Lyness. Pursuant to Management Directive 215.9, the "suspending official" both notifies the contractor that it has been suspended for an initial period of three months and makes the determination, after reviewing information submitted by the contractor, whether the suspension shall be continued, terminated, or debarment proceedings initiated. As the Directive only permits the contractor to submit information in opposition to the suspension, there is no due process hearing mandated upon suspension. Similarly, under the debarment provisions of the Directive, the agency head or designated deputy who imposes debarment provides notice to a contractor that debarment is being considered and ultimately decides whether debarment shall be imposed. In either case, the designated official is the same individual acting in a dual capacity and deciding whether to bring the action and what the final outcome will be, in clear contravention of Lyness.

PIHS at 197.

Commingling Must Be Actual, Not Merely Alleged

1. Pennsylvania Human Relations Commission v. School District of Philadelphia 667 A. 2d 1173 (Pa. Cmwlth. 1995).
The subject matters before the Court involve the renewed motion of the School District of Philadelphia to join the Commonwealth of Pennsylvania and Governor Ridge and the renewed motion of the Intervenor to join the Commonwealth and Governor and the City of Philadelphia and Mayor Edward Rendell for purposes of assessing liability for additional funding claimed by the School District to be necessary for it to comply with the Court's remedial order entered in this school desegregation case.

The Court directed the Commonwealth, the Governor, the City and Mayor to appear and show cause why they should not be joined as defendants in this proceeding. The Governor in turn filed an application for recusal of the presiding judge.

The application sought recusal on two stated premises:

- The impartiality of the Court might be reasonably questioned because of the judge's prior services as a Commissioner on the Pennsylvania Human Relations Commission through gubernatorial appointment and,

- An appearance of bias from the alleged commingling of prosecutorial functions of the Commission and the adjudicatory and appellate functions of the Court that deprives the Governor of due process of law.

The Court found that the appearance of bias proscribed by Lyness must be one which arises from an *actual* environment of commingled functions. Here, the Governor failed to sustain his burden of alleged commingling because he cited no evidence of commingling. –Interestingly, the Governor's memorandum of law states that he does not question the integrity of the judge!

2. Wyland v. Public School Employes' Retirement Board 669 A.2d 1098 (Pa. Cmwlth. 1996).

Wyland further refines the theory of an actual showing of commingling for there to be a Lyness violation:

> In the modern world of sprawling governmental entities akin to corporations it would be both unrealistic and counterproductive to insist that administrative agencies

be forbidden from handling both prosecutorial and adjudicatory functions, where such roles are parceled out and divided among distinct departments or boards.

Wyland at 1104.

Milestone In Lyness—The 'Two Pronged' Approach

1. Marchionni v. Southeastern Pennsylvania Transportation Authority 715 A.2d. 559 (Pa. Cmwlth 1998).

   Attorneys employed by the same agency can work on both sides of the courtroom on the same matter. A two-pronged test must be examined in these instances.

   - "Appearance of impropriety"
   - Proof of the commingling is necessary (there must be some showing that there are no 'walls of division' between those performing a prosecutorial function and those performing an adjudicative function).

Burden Of Proof -- Disciplinary v. Non-Disciplinary Proceeding

The Non-Disciplinary Proceeding

1. Callahan v. Mid-Valley School District 720 A.2d 815 (Pa. Cmwlth. 1998).

   An Industrial Arts teacher was suspended as a result of curtailment of an educational program. The teacher requested a hearing. Private counsel represented the teacher. School Board counsel and the hearing examiner assigned to the matter work in the same firm. The record is devoid of evidence establishing the existence of a supervisory relationship between the two attorneys. Hence the Court concluded that the teacher's due process rights were not violated.

2. See also Krupinski v. Vocational Technical School, Eastern Northampton County, 544 Pa. 58, 674 A. 2d 683 (1996); Coyle v. Middle Bucks Area Vocational Technical School, 654 A.2d 15 (Pa. Cmwlth. 1994), petition for allowance of appeal denied, 541 Pa. 644, 663 A.2d 695 (1995); Harris v. School District of Philadelphia 155 Pa. Cmwlth. 169, 624 A.2d 784 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 538 Pa. 616, 645 A.2d 1319 (1994).

Fine-Tuning 'Commingling'

1. In November 1998, the Commonwealth Court handed down Sentra, Inc. v. Pennsylvania State Board of Vehicle Manufacturers, Dealers & Salespersons, 720 A.2d 857 (Pa. Cwmlth. 1998).

   The Motor-Vehicle Board rejected a Consent Agreement entered into by the Prosecuting Attorney and the Dealer. Upon an attempt to renegotiate the Consent Agreement, the Prosecuting Attorney indicated that the Board communicated to him that given the information as outlined in the Agreement, the Board viewed revocation (of the Dealer's license) as the appropriate resolution. In doing so, the Board acknowledges that while it did not instruct the Prosecuting Attorney that revocation of Sentra's license was the *only* acceptable mode of discipline, it did indicate that the facts, as stipulated to in the Consent Agreement, would warrant the revocation of a license.

   Commonwealth Court vacated the Board's order and remanded the case for the appointment of a neutral hearing examiner to preside over a formal hearing and render a decision.

Marital Relationship Is "Red Flag" To Bias
De Novo Review Does Not Cure Due Process Violation

1. Katruska v. Department of Education, 727 A.2d 612 (Pa. Cmwlth. 1999)

   The Commonwealth Court held that although there was no actual evidence of a bias, the appearance of bias does exist because of the very nature of the inherent and implied sense of intimacy that exists in the marital relationship. Thus, the red flag of "appearance of impropriety" seems to be extended now to a personal as well as working relationship. Furthermore, legally (as well as factually in this instance) a de novo review does not cure the appearance of bias.

Muddying The Waters?

1. Boulis v. State Board of Chiropractic, 729 A.2d 645 (Pa. Cmwlth., 1999).

   In Boulis, a Chiropractor appealed the automatic suspension of his chiropractic license because he alleged the Board commingled its adjudicatory and prosecutorial functions by allowing the person who

represented the Board in a remand application to then sit on the Board as well as act as hearing examiner.

Commonwealth Court held that counsel may work *for* the Board but because Board counsel is *not* a member of the Board, there is no Lyness violation.