

Since Lyness, The Commonwealth Court Has Issued A Number Of Opinions Which Clarify And Refine Its Application.

1. Copeland v. Township of Newton, 147 Pa. Cmwlth. 463, 608 A.2d 601 (1992).

A township board of supervisors suspended a police officer for one day for neglect of duty. Where the Board issued the initial suspension as prosecutor and then sat as an allegedly impartial adjudicator, the procedure presented an appearance of impropriety, and violated the officer's due process rights. No showing of actual bias was required. But see Harmon, below.

2. Stone and Edwards Insurance Agency, Inc. v. Department of Insurance, (preliminary objections) 151 Pa. Cmwlth. 266, 616 A.2d 1060 (1992). This was an action brought in the original jurisdiction of the Commonwealth Court to enjoin the Insurance Department from proceeding with an administrative hearing on an Order to Show Cause why various licenses held by the agency and its employees should not be revoked. Stone & Edwards asserted that impermissible commingling of prosecutorial, investigative, and adjudicative functions on the part of the Insurance Commissioner, as evidenced by the language in the Unfair Insurance Practices Act, violated its constitutional right to due process. The agency was unsuccessful in its attempt to obtain a preliminary injunction. However, the Court overruled the preliminary objections of the Department, and the matter was ultimately resolved in Commonwealth Court on Motions for Summary Judgment, below.

3. Bunch v. State Board of Auctioneer Examiners, 152 Pa. Cmwlth. 616, 620 A. 2d 578 (1993), per Narick, J.

Improper commingling occurs where the Act gives the Board the authority to investigate, prosecute and adjudge an auctioneer who violated the Act. The statutory language improperly allows the commingling of the prosecutorial and adjudicatory roles in the Board.

Note the difference between this case and Stone and Edwards (below), where that statute gave the Insurance Commissioner what appears to be unconstitutionally commingled functions, but the record established that the functions were, in fact, segregated.

4. Cresco v. PaPUC, 154 Pa. Cmwlth. 27, 622 A.2d 997 (1993)

The PUC did not violate Cresco's constitutional right to due process by revoking the taxicab company's certificate of public convenience without holding a hearing, because Cresco did not avail itself of the several meaningful opportunities to be heard which the PUC procedures offered. Furthermore, "due process does not arise in a vacuum. For due process protections to apply, a person must have a substantial property interest in the subject matter of the action. Yet Cresco does not claim a property interest in the certificate of convenience." 622 A.2d at 1000.

5. Stone and Edwards Insurance Agency, Inc. v. Department of Insurance, 636 A.2d 293, 302 (Pa. Cmwlth. 1994) (en banc).

The Unfair Insurance Practices Act contains language authorizing activities that, if all undertaken by a single person [the Insurance Commissioner], would constitute commingling. However, if the hearing given by the Department actually comported with principles of due process, then there has been no violation of due process. There is no requirement that a statute establish a procedure that, on its face, ensures a fair and impartial hearing. The "walls of division" necessary to prevent commingling are satisfied where:

- a. Insurance Commissioner, who is the adjudicator, delegated all prosecutorial functions to the Deputy Commissioner for Enforcement, who is responsible for initiating prosecutions.
- b. No interaction occurs between the Enforcement Deputy and the Commissioner or the Office of Administrative Hearings, which conducts the due process hearing, regarding decision to prosecute.
- c. Prosecutorial functions performed by the Enforcement Deputy are outside the purview of the Insurance Commissioner.

In footnote 28, the Court reaffirmed the initial determination in Lyness that "[t]he threshold inquiry in any due process analysis is whether there exists any identifiable property or liberty interest at issue; for without such an interest, due process is not applicable."

**What is the best time in the process for Court interference to correct a possible due process violation?**

- A. 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.

- B. 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?
- C. If you file a 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?
- D. 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 Commission'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. Allocatur granted; decision reversed.

8. 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." 638 A.2d at 351.
  
9. 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.
  
10. Philadelphia Lodge No. 5, FOP v. Pennsylvania Lodge, FOP, 660 A.2d 192 (Pa. Cmwlth. 1995) -- The Lyness issue arose because the state lodge's bylaws direct that parties to any disciplinary hearing shall be afforded due process. After alleged misconduct on the part of members of the executive board of Lodge 5, the following procedural events occurred:
  1. An ad hoc panel of the members of the state lodge board of directors met informally as a special investigative committee and heard sworn testimony from several complainants regarding their allegations against the individual members of the Lodge 5 executive board.

2. As a result of testimony before the special investigative committee, the state lodge determined that there existed a sufficient basis to warrant the commencement of disciplinary proceedings.
3. The state lodge board of directors formally issued disciplinary charges against the said executive board members, over the signature of the state lodge president.
4. The state lodge president, with the consent of a majority of the state lodge board of directors, appointed a trial committee of five of its members to hear the matter. Three of the members had also been on the special investigative committee.
5. The trial committee served written copies of the charges and specifications upon the members of the Lodge 5 executive board.
6. The committee held a hearing and reported its findings to the state lodge board of directors.
7. The state lodge board announced the result of the committee's report and voted to impose discipline upon all the charged individuals.

On appeal from the partial grant/partial denial of a preliminary injunction in common pleas court, the Commonwealth Court, per DellaPorta, J., held that the three directors who were members of both committees had only "tangential involvement" in the matter, "which the Supreme Court determined in Lyness to not violate due process." 660 A.2d at 200.

Note: Compare Soja.

11. Sherman v. Kaiser, 664 A.2d 221 (Pa. Cmwlth. 1995, filed August 29, 1995).

After a departmental investigation of certain insurance practices, then-Insurance Commissioner Maleski issued a press release stating that "the evidence of MetLife agents' rampant misrepresentations to the public and the company's tacit approval of such tactics is indisputable." When the Insurance Department subsequently issued an Order to Show Cause why MetLife agent Joel Sherman's license should not be revoked, he filed an action in Commonwealth Court seeking injunctive relief, asserting that he had been prejudged and that the actions of the Insurance Department violated his right to due process. The Commissioner recused herself and delegated her adjudicative responsibilities in the matter to a deputy.

The Commonwealth Court, per Pellegrini, J., ultimately ruled that the Insurance Commissioner may delegate her adjudicative responsibilities (Stone & Edwards had addressed only the delegation of her investigative and prosecutorial responsibilities) under the Administrative Code. The Court also concluded that even if there is bias in the entire Department, the Rule of Necessity would require that someone in the Department

adjudicate the case, since it is statutorily given jurisdiction over these proceedings.

**Some Cases In Which The Commonwealth Court Has Held that  
Lyness Does Not Apply**

The Commonwealth Court has begun to distinguish both between the prosecutory and non-prosecutory functions of administrative agencies, and the proprietary and non-proprietary functions of government in applying Lyness. In looking at these cases, be aware that there is a line of cases stating that school districts are agencies of the state.

1. Harmon v. Mifflin County School District, Court split four ways -- only a plurality decision [Pellegrini, Colins, Newman]. (876 C.D. 1993, filed 12/15/94). 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.

2. Krupinski v. Vocational-Technical School of Northampton County, 486 C.D. 1994, filed 12/16/94) -- unreported opinion. Krupinski was a reading specialist who was suspended, pursuant to 24 P.S. §11-1124 of the Public School Code, as a result of a "curtailment or alteration of educational programs" in the district. On appeal she asserted that the Vo-Tech failed to comply with the requirements of §1124, and that she had not received due process, since the Vo-Tech operating committee impermissibly commingled its functions by making the initial decision to suspend her and then hearing her challenge to the suspension. The Commonwealth Court



followed Harmon, and held that there was no violation of due process "where the Department [of Education]'s approval of the proposed job elimination is a significant buffer and where the decision is essentially an administrative and economic decision, not-regulatory and devoid of any accusation of wrongdoing."

Note: The Supreme Court granted allocatur on the limited issue of the application of Lyness [659 A.2d 982], and the case was argued before the Pa. Supreme Court on January 24, 1996.

3. Coyle v. Middle Bucks Area Vocational Technical School, 654 A.2d 15 (Pa. Cmwlth. 1995). Coyle was a teacher who was furloughed pursuant to 24 P.S. §11-1124 when her course was eliminated due to low enrollment. On appeal she asserted that the school failed to comply with the requirements of §1124, and that she had not received due process, since the Executive Council impermissibly commingled its functions by making the initial decision to suspend her and then deciding her local agency appeal. The Commonwealth Court cited Lyness and Harmon, and reasoned that: (1) the Executive Council is empowered by law to determine which programs are to be curtailed; (2) that decision must be approved by the Department of Education; and (3) the action of the council is not prosecutorial in nature. Therefore, there was no violation of due process. Allocatur was sought and denied.

The exclusion of teachers from the due process protections afforded other persons with a property interest in continued employment is apparently based partially upon interpretations of the School Code in cases that pre-date Lyness, and partially upon the contention that there is a distinction between a Lyness-type adjudication by a regulatory agency and an adjudication by a governmental employer.

The tenor of these opinions 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 judgment 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.

See also, Wyland v. PSERB, \_\_\_ A.2d \_\_\_, 1996 Pa. Cmwlth. Lexis 10 (filed January 8, 1996), in which the Court held that there was no commingling of functions in the procedures used by the Public School Employees' Retirement System without discussing the non-prosecutory function issue.

**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 Board properly excludes, in the final stages 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*.

**The Commonwealth Court Has Also Examined Procedural Issues In the Context of Lyness, and Has Concluded That Those Issues Have Been Waived By Failure To Raise Them at the 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.

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 unconstitutional 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

1. Stone & Edwards Insurance Agency v. Department of Insurance, 538 Pa. 276, 648 A.2d 304 (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 received .... 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.

2. R. v. Department of Public Welfare, 535 Pa. 440, 636 A.2d 142 (1994).  
The Pennsylvania Supreme Court adopted Matthews methodology in assessing a due process claim, noting that "due process is required under the Fourteenth Amendment only if the state seeks to deprive a person of a life, liberty or property interest. Significantly, the existence of a liberty or property interest is partly determined by reference to state law." "In Roth, [Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972)] the Court found that the employee did not have a sufficient property interest to receive a hearing because neither his contract nor any statute or rule secured his interest in any reemployment." 636 A.2d at 148.
  
3. Pennsylvania Game Commission v. Marich, 666 A.2d 253 (Pa. 1995). See Commonwealth Court case, supra. The Game Commission appealed the question of whether due process attaches where there is no property or liberty interest in a hunting license. The Supreme Court reversed the Commonwealth Court, and held that Lyness-type due process does not apply to the confiscation of a hunting license specifically because neither a property interest nor a liberty interest is at stake.