capable of judging a particular controversy fairly on the basis of its own circumstances." United States v. Morgan, 313 U.S. 409, 421, 85 L.Ed. 429, 61 S. Ct. 999 (1941).

Withrow, 421 U.S. at 55.

II. THE GENESIS OF THE PENNSYLVANIA RULE

A. "A fair trial in a fair tribunal;" Adoption of the "Possible Temptation" Standard.

1. In In Re Schlesinger, 404 Pa. 584, 172 A.2d 835 (1961), a Committee on Offenses of the Court of Common Pleas lodged a written complaint charging an attorney with professional misconduct; as a result of hearings on the complaint held before a Subcommittee of the Committee on Offenses, the Court of Common Pleas entered an order disbarring Schlesinger. In other words, the Committee filed a complaint, hearings were held before a Subcommittee, a recommendation by the Subcommittee was presented to the Committee, and a recommendation by the Committee was presented to the Court. In striking the procedure as being an unconstitutional violation of Schlesinger's right to a fair trial in a fair tribunal, the Supreme Court "set the stage" for the development of a full body of appellate law governing the limitation upon the dual roles of prosecutor and judge/adjudicator. Basic principles were recited:

   (a) The right to practice law is constitutionally protected as a property right; thus, due process applies to disbarment procedures.

   (b) Due process requires respondents to be afforded full, fair and impartial hearings.

   (c) Due process is violated when the functions of prosecutor, judge and jury are combined in one body.

   (d) The principles recited in In Re Murchison, were adopted verbatim:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires the absence of actual bias in the trial

> of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome * * * This court has said * * * that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, 444, 71 L.Ed. 749.
>
> In Re Schlesinger, 172 A.2d at 841.

(e) In a procedure where roles of prosecutor and judge are commingled, unfairness is, ipso facto, inherent; in such a procedure, a "possible temptation" not to hold the balance nice, clear, and true, is implicit in the proceeding.

B. **Is the Schlesinger Rule Limited to Judicial Proceedings?**

1. Whereas the Murchison rule involved purely a judicial-type procedure, Schlesinger did not; rather, the latter case involved an administrative-type of procedure within a judicial procedure.

2. Prior to Schlesinger, and for some time thereafter, the rule in Pennsylvania was that bias in the form of some types of predisposition was not a due process violation. In Pennsylvania Publications, Inc. v. Pennsylvania Public Utility Commission, 152 Pa. Super. 279, 32 A.2d 40 (1943), reversed on other grounds, 349 Pa. 185, 36 A.2d 777 (1944), the rule was stated as follows:

> A member of an administrative body or board, which acts as the agent or representative of the legislature in determining facts, may be required, as part of his duties, to function in a quasi-judicial capacity as well. The due process required in such proceedings, however, is not synonymous with judicial process. [Citation omitted]. The parties have a right to a fair hearing

> before an impartial board or body, and determination free of bias, hostility and prejudgment. But bias in the form of a firm belief in the objectives of a statute, which the official is given power to enforce, rather than in the form of personal hostility, is not such bias as disqualifies.

Pennsylvania Publications, 32 A.2d at 49.

III. EXTENSION OF THE RULE TO ADMINISTRATIVE AGENCIES

A. A Relatively Quiet Extension.

1. In Gardner v. Repasky, 434 Pa. 126, 252 A.2d 704 (1969), a Borough's "Fire Board" sent letters to the Borough's mayor complaining about the conduct of a police officer. A Borough Police Committee investigated the charges and recommended that the Borough Council suspend the individual. From the Borough Council's suspension, the police officer appealed to the Civil Service Commission of the Borough which affirmed the suspension. A commingling issue arose because one Repasky had been both a member of the Fire Board which lodged the original letter complaint, and a member of the Borough's Civil Service Commission which heard the appeal from the Borough Council's suspension. The Pennsylvania Supreme Court, without expressly considering whether administrative tribunals are to be treated differently than judicial tribunals (as was the case in Pennsylvania Publications), found that Schlesinger clearly controlled, and restated the principle that an individual cannot sit as a judge when that same individual is a member of a board which has brought the accusation -- thus, the strict prohibition against potential unfairness (Murchison) was extended to quasi-judicial administrative agencies in Pennsylvania:

> [A]ny tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias. [Citation omitted].

Gardner, 252 A.2d at 706.

2. At this point, it is appropriate to note the distinction between the requirement of a **fair tribunal, and** the separate but related requirement of a **fair trial.** The cases referred to thus far have focused upon the commingling of the roles of

the judge/adjudicator and prosecutor, and are generally considered to be "fair tribunal" cases. On the other hand, the commingling of the roles of prosecutor and advisor to the adjudicator (a subject which is discussed later in the program), are usually considered cases regarding a party's right to a "fair trial."

3. The nice distinction between fair tribunal and fair trial cases, however, is clouded by certain situations peculiar to the operations of various agencies. For example, in Donnon v. Civil Service Commission of the Borough of Downingtown, 3 Pa. Commonwealth Ct. 366, 283 A.2d 92 (1971), a Borough Solicitor who assisted in preferring charges against a police officer for disobedience (before the Borough's Civil Service Commission) presided over the evidentiary hearing. In finding that the procedure violated the respondent's due process, the Court found that the procedure's allowance of dual control over prosecutory and adjudicatory functions did not provide a reasonable safeguard of the respondent's right to a fair and unbiased adjudication. Thus, Donnon may be viewed as a "commingling-of-the-roles-of-the-decisionmaker" case, due to the particular commingling of the functions of hearing examiner and prosecutor.

4. Subsequent to Gardner, the Commonwealth Court viewed the Pennsylvania rule (under the Pennsylvania Constitution) as providing a more stringent standard regarding the commingling of judicial and prosecutorial functions, than the United States Supreme Court was to apply in Withrow. See, Donnon; see also English v. Northeast Board of Education, 22 Pa. Commonwealth Ct. 240, 348 A.2d 494 (1975).

B. **Application of the Rule to Administrative Proceedings Other Than Those Involving Loss of Livelihood.**

1. **Civil Penalties.** In Department of Insurance v. American Bankers Insurance Company of Florida, 26 Pa. Commonwealth Ct. 189, 363 A.2d 874 (1976), aff'd 478 Pa. 532, 387 A.2d 449 (1978), the appellate courts reviewed an order of the Insurance Commissioner which found the company in violation of the statute and imposed a civil penalty of $5,500. In the proceeding, an associate Chief Counsel had been appointed as a Deputy Insurance Commissioner for purposes of acting as a hearing examiner; thus, the associate counsel who prosecuted the case was a direct subordinate of the hearing examiner who had to act in a quasi-judicial capacity. In finding that the matter was controlled by Gardner, the Commonwealth Court noted that the Pennsylvania standard for due process, which prohibited the mere appearance of bias, was more stringent than the requirements under federal law, which required a party to establish more than the mere appearance of bias in order to prevail in a due process challenge.[2]

2. **Zoning Proceedings.** In Horn v. Township of Hilltown, 461 Pa. 745, 337 A.2d 858 (1975), where the same attorney who represented both a zoning hearing board and the township which had opposed a request for a variance, and where the same attorney conducted a hearing, made objections to evidence, and ruled on those objections as a hearing officer, a due process violation was found. As stated by the Court, it was "presented with a governmental body charged with certain decision-making functions that must avoid the appearance of possible prejudice, be it from members or from those who advise it or represent parties before it." Horn, 337 A.2d at 860. In spite of the fact that actual prejudice was not established, because the procedure was susceptible to prejudice, it was prohibited.

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[2] In affirming the Commonwealth Court, the Supreme Court found that the mere act of signing a citation, when coupled with the act of presiding over the hearing, constituted an impermissible commingling. Interestingly, in dissenting from the Supreme Court's affirmance of the Commonwealth Court, Justice Roberts expressed his view that the matter should have been controlled by Withrow, and not by what he viewed to be dictum in Gardner; and Justice Nix agreed with Justice Roberts' view that Withrow was the law, although he concurred in the result reached.

IV. APPLICATION OF GARDNER: POLLOCK, DUSSIA, AND BRUTEYN

The Supreme Court in Gardner stated clearly that it is impermissible to combine the functions of prosecutor and judge in a quasi-judicial proceeding, thereby holding for the first time in Pennsylvania that the same due process standard applicable to judicial proceedings applies to administrative agency proceedings. The Gardner court left it to subsequent cases, however, to determine how the rule would apply in the varied structures presented by state and local administrative agencies. In applying Gardner, the key issue that the courts addressed was the degree of permissible commingling of the prosecutory and adjudicative functions where those functions are vested in a single agency. As the law evolved, the Supreme Court's decisions were less than clear as to the degree of permissible commingling, leaving the Commonwealth Court free to embrace the pragmatic "actual bias" standard adopted by the United States Supreme Court as a matter of federal constitutional law in Withrow v. Larkin, 421 U.S. 35 (1975).

A. Recognition that Administrative Agencies Wear Several Hats.

In applying Gardner, the Commonwealth Court in Donnon v. Civil Service Commission of Borough of Downingtown, 3 Pa. Commonwealth Ct. 366, 283 A.2d 92 (1971) candidly acknowledged that the avoidance of bias or the appearance of bias likely is more difficult in an administrative agency context than in a judicial tribunal:

> In our governmental system, frequently one of its units or agencies functions as investigator, complainant, prosecutor and judge. Inevitably, such a situation must give rise to the question of just how far that unit or agency can go in permitting any member of the agency, or member or group of its staff to become involved in conflicting phases of this procedure.

3 Pa. Commonwealth Ct. at ___, 283 A.2d at 93. The Court in Donnon went on to hold that the action of a Borough Solicitor in assisting in preferring disciplinary charges against a Civil Service employee, advising the Civil Service Commission, and presiding over the hearing, violated the employee's right to due process. The Court held that the Borough should have assigned independent counsel to advise the Commission, leaving the Borough Solicitor to prosecute the complaint. By allowing the Borough Solicitor to control both prosecutory and adjudicatory operations, the Borough did not reasonably safeguard the employee's right to a fair and unbiased adjudication.

B. **Recognition that Due Process can be Achieved by Separating the Prosecutor from the Adjudicator Within the Same Agency: Pollock.**

In State Dental Council and Examining Board v. Pollock, 457 Pa. 264, 318 A.2d 910 (1974), the Pennsylvania Supreme Court was required to apply Gardner to a dental board disciplinary action involving license suspension. The Dental Board received a complaint concerning Dr. Pollock, a licensed dentist, referred the complaint for investigation to an assistant attorney general (who was assigned to the legal office of the Commission of Professional and Occupational Affairs, a separate entity from the Dental Board), received a citation against Pollock drafted by the assistant attorney general, held a hearing on the citation, and decided on the basis of the hearing to suspend Pollock's license.

1. Pollock's holding: The issue presented in Pollock was whether the Dental Board had combined prosecutory and adjudicatory functions where the Board received the complaint against Pollock, investigated it, issued a citation, and then held a hearing. The Court held that the prosecutory and adjudicatory functions were not commingled because one distinct administrative entity, the Commission of Professional and Occupational Affairs, had investigated the complaint and initiated the prosecution, while another distinct administrative entity, the Dental Board, had adjudicated the case. Accordingly, the Court held that the principles enunciated in Gardner, Schlesinger and Murchison were not violated, because in those cases the same individuals actually participated in both prosecutory and judicial roles, whereas in Pollock's case the functions were performed by separate entities.

2. Pollock's dictum: In arriving at its holding in Pollock, the Supreme Court addressed, perhaps unnecessarily, the application of Gardner to administrative agencies that fulfill both prosecutory and judicial functions. In so doing, the Court stated that the co-existence of prosecutory and judicial functions within the same agency is appropriate so long as the functions are "separated adequately":

> It is not uncommon for large agencies to fulfill both the prosecutory and judicial functions (e.g., the Federal Trade Commission and the Public Utilities Commission). So long as the functions are separated adequately, Due Process is preserved. See generally, Pangburn

v. C. A. B., 311 F.2d 349, 356 (1st Cir. 1962) and cases cited therein. A fortiori, there is no Due Process violation in the administrative structure employed here, where both functions were handled by distinct administrative entities with no direct affiliation to one another. 457 Pa. at ___, 318 A.2d at 914-15.

3. Did Pollock represent a retreat from Gardner? The narrow question before the Court in Pollock was whether due process was violated when distinct administrative entities under the general jurisdiction of the Pennsylvania Department of State commenced a prosecution and also adjudicated the case. The Court resolved the question easily by pointing out that no commingling occurred at all because the prosecutory and judicial functions were handled by distinct administrative entities that were not directly affiliated with one another. In its dictum, however, the Court suggested that an agency that has both prosecutory and adjudicative functions would have no difficulty preserving due process so long as the agency kept those functions "separated adequately." Thus, like the Commonwealth Court in Donnon, the Supreme Court in Pollock was acknowledging the difference between administrative agencies and courts, recognizing that certain agencies fulfilled both prosecutory and judicial functions, and observing that due process would be afforded so long as adequate separations (which the Court did not specify) were maintained. Thus, to the extent that Gardner incorporated into Pennsylvania administrative law the judicial concept of due process that a prosecutor and judge may not be combined in one body, Pollock tempered Gardner with a realistic view of the statutory structure of administrative agencies and the suggestion that an agency could both initiate a prosecution and adjudicate it within the bounds of due process.

C. **What Constitutes Adequate Separation? Dussia.**

1. In Dussia v. Barger, 466 Pa. 152, 351 A.2d 667 (1975), the Supreme Court was confronted with a challenge to the Pennsylvania State Police's court-martial process. Under the statutory scheme, the State Police Commissioner had the obligation to determine the guilt or innocence of an accused employee and to determine the sanction to be imposed. Under a State Police regulation then in effect, the Commissioner also had ultimate responsibility to make the factual determination whether, in light of the findings of a disciplinary

board, a court-martial proceeding should be initiated. Dussia, a State Police Lieutenant Colonel who faced a court-martial, sought permanent injunctive relief from the pending court-martial on grounds that the statute, as implemented by the State Police regulation, created an unconstitutional commingling of functions in the Commissioner. The Commonwealth Court denied permanent injunctive relief but the Supreme Court reversed and granted it, holding that the Commissioner, as the individual charged with the responsibility of making the ultimate determination of guilt or innocence in the court-martial, could not also make the decision to initiate the court-martial proceeding.

In arriving at this conclusion, the Court reviewed Murchison, Schlesinger and Gardner, focusing on the fact that due process was violated in each of those cases because each case presented a situation in which the adjudicator had also acted as prosecutor. The Court then invalidated the State Police scheme, reasoning as follows:

> While in the instant case the Commissioner did not in fact have the responsibility of the entire prosecutorial role, we do not believe that this fact alone is sufficient basis for distinguishing the instant case from the authorities cited Supra. The decision to institute a prosecution is such a fundamental prosecutorial function that it alone justifies concluding a dual capacity where the individual also was charged with the responsibility of making the ultimate determination of guilt or innocence. Moreover, it is a decision which requires a judgment as to the weight of the evidence against the accused, a judgment which is incompatible with the judicial function of providing an impartial forum for resolution of the issues presented. We therefore conclude that [the statute as implemented by the regulation] creates an impermissible commingling of functions which is constitutionally prohibited.

466 Pa. at ___, 351 A.2d at 674-75 (footnotes omitted).

2. In deciding Dussia, the Supreme Court obviously concluded that the State Police court-martial system did not separate adequately the functions of prosecutor and adjudicator. The Court made no

reference, however, to its dictum in Pollock that it is "not uncommon for large agencies to fulfill both the prosecutory and judicial functions" and that due process is preserved so long as those functions are "separated adequately." Indeed, the Court did not even refer to Pollock, notwithstanding the fact that Justice Nix authored both Pollock and Dussia.

3. Following Dussia, the State Police Commissioner adopted new regulations that require the Commissioner to commence a court-martial proceeding upon the affirmative recommendation of a disciplinary board, thereby removing the discretion to prosecute. The Commonwealth Court reviewed these new procedures in Berman v. Commonwealth, ___ Pa. Commonwealth Ct. ___, 391 A.2d 715 (1978), and found them to be sufficient. The Commonwealth Court observed that the Commissioner's new role in the prosecution of allegations of misconduct is reduced to "an administrative one in which he is required only to appoint individuals to the various positions implementing the disciplinary procedures." The Court went on to find that the State Police's new procedures compared favorably to the procedures approved by the Supreme Court in Pollock for adequately separating prosecutorial and adjudicatory functions.

In Soja v. Pennsylvania State Police, 500 Pa. 188, 455 A.2d 613 (1982), a plurality of the Pennsylvania Supreme Court again reviewed State Police court-martial procedures and found that the State Police practice of providing the Commissioner with all preliminary investigations, reports and recommendations in a court-martial proceeding incident to the Commissioner's role as adjudicator violated due process because it provided the Commissioner with information which may not have been contained in the record compiled at the court-martial proceeding, and thereby deprived the accused trooper of a meaningful right of confrontation and adequate review.

D. **Is Dussia's "Adequate Separation" Prescription Limited to Situations in Which a Single Individual Combines Prosecutory and Adjudicative Functions? Bruteyn and its Progeny.**

1. In Bruteyn v. State Dental Council & Examining Board, 32 Pa. Commonwealth Ct. 541, 380 A.2d 497 (1977), the Commonwealth Court was presented with a challenge to the procedure used by the Dental Board in revoking Dr. Bruteyn's license to practice

dentistry. The Board had received a complaint concerning alleged violations by Bruteyn, held an informal meeting with Bruteyn, ordered an investigation into the allegations, issued a citation against him (thereby initiating prosecution), held a hearing on the allegations contained in the citation, and thereafter decided to revoke Bruteyn's license. In holding that the Board's action in initiating prosecution and conducting the adjudication did not constitute impermissible commingling, the Commonwealth Court reviewed the applicable law, including Pollock, Dussia and the federal standard as enunciated in Withrow v. Larkin, 421 U.S. 35 (1975). The Court reasoned as follows:

> Whereas we feel the Board may indeed have participated in the initial decision to prosecute, and may have supervised the initial probable cause investigation, this does not render its adjudication invalid per se. The procedures followed here by the Board comport favorably with those expressly sanctioned in State Dental Council and Examining Board v. Pollock, 457 Pa. 264, 318 A.2d 910 (1974), which recognized that a State administrative agency in performing its statutorily authorized dual function of complainant and adjudicator of the complaint is not an unfair tribunal so long as these two functions are adequately separated. . . . We do not mean by this holding to minimize the potential dangers arising when those who investigate also adjudicate. We are simply recognizing that inquiries into probable cause do not raise an unconstitutionally high risk of bias or prejudgment so as to invalidate ipso facto a decision, after a contested hearing, that there has been a violation of statute. See generally Withrow v. Larkin, supra; 2 K. Davis, Administrative Law 175 (1958). Some finding of actual bias is required. . . . . We by no means intend to compromise prior decisional law condemning procedures which conjoin in an individual the prosecutorial and judicial functions. See Dussia v. Barger, 466 Pa. 152, 351 A.2d 667 (1975); Horn v. Township of Hilltown, 461 Pa. 745, 337 A.2d 858 (1975); English v. Northeast Board of Education, 22 Pa. Commonwealth 240, 348 A.2d 494 (1975).

32 Pa. Commonwealth Ct. at ___, 380 A.2d 500-501.

Judge Crumlish dissented in Bruteyn, arguing that impermissible commingling had occurred, and that the Board's actions in Bruteyn were indistinguishable from those condemned in Gardner and Dussia.

(a) The following should be noted concerning the majority opinion in Bruteyn:

(i) it properly relied on Pollock for the general proposition that an administrative agency may permissibly combine the prosecutory and adjudicatory functions so long as they are separated adequately;

(ii) it improperly relied on Pollock for the proposition that the Supreme Court previously had approved in that case the procedure followed in Bruteyn -- it was clear, as pointed out by the dissent in Bruteyn, that the Board in Pollock did not make the decision to prosecute, whereas the Board in Bruteyn did;

(iii) Notwithstanding previous pronouncements by the Commonwealth Court that the Supreme Court's holding in Dussia had taken a more expansive approach to due process and the prohibition against commingling than the standard applied by the United States Supreme Court in Withrow, see English v. Northeast Board of Education, 22 Pa. Commonwealth Ct. 240, 348 A.2d 494 (1975); Department of Insurance v. American Bankers Insurance Company of Florida, 26 Pa. Commonwealth Ct. 189, 363 A.2d 874 (1976), aff'd 478 Pa. 532, 387 A.2d 449 (1978), the Bruteyn majority nonetheless specifically applied the Withrow approach to evaluating the significance of an agency's "probable cause" determinations. By referencing Withrow in this context, the Commonwealth Court appeared to be embracing the following rationale adopted by the United States Supreme Court in Withrow:

> The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a

> later adversary hearing. . . . . The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation. Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised. But in our view, that is not this case.

421 U.S. at 55, 58.

By adopting this standard of review as articulated in Withrow, the Commonwealth Court was in effect justifying existing administrative agency structures that, as a matter of statute, permitted the agencies to both initiate and adjudicate a complaint. As the Court observed:

> [I]t must be noted that a not insignificant number of our State administrative agencies, The Dental Board included, are authorized under their operative statutes to investigate possible violations of the law, to act as complainant in enforcement proceedings and to adjudicate enforcement proceedings, including those initiated by the agency as complainant.

Bruteyn, 32 Pa. Commonwealth at ___, 380 A.2d at 500. In other words, the majority of the Commonwealth Court in Bruteyn embraced the reasoning of Withrow that members of an administrative board could conduct a preliminary investigation, make a finding of probable cause, and still render a fair adjudication, so long as the record in a particular case did not demonstrate that the board members were "committed" to the

facts that formed the basis for the probable cause determination.

(b) By contrast, the dissent in Bruteyn focused exclusively on the Dussia teaching that the decision to prosecute constitutes a predetermination of guilt that cannot be forgotten once the prosecutor becomes the adjudicator.

2. Following Bruteyn, the Supreme Court had only one occasion in which to address the Commonwealth Court's adoption of the Withrow analysis. Unfortunately, the case in which the Supreme Court addressed the issue was argued six weeks before the Commonwealth Court's decision in Bruteyn was entered, and the Supreme Court failed to address the issues that the Commonwealth Court wrestled with in Bruteyn. In Department of Insurance v. American Bankers Insurance Company of Florida, 478 Pa. 532, 387 A.2d 449 (1978), the Supreme Court, in a two paragraph per curium opinion, affirmed a Commonwealth Court decision finding impermissible commingling in a case involving an insurance department complaint proceeding. The commingling charge in that case involved the respective roles of two insurance department lawyers. One lawyer acted as prosecutor. The other lawyer, who supervised the prosecutor, acted as hearing examiner. Citing Dussia, the Commonwealth Court found that the procedure followed by the Insurance Department, in which it tolerated a situation in which the prosecutor was the direct subordinate of the hearing examiner, was even more susceptible of prejudice than the procedures invalidated by the Supreme Court in Dussia where the State Police Commissioner both initiated the prosecution and decided the case.

In affirming the Commonwealth Court, the Supreme Court relied on Dussia, but framed the issue concerning the offensive conduct differently. That is, the Supreme Court focused on the role of the hearing examiner, and concluded that before that individual had been appointed hearing examiner he had supervised the individual who had conducted the prosecution, such that the hearing examiner himself had been both prosecutor and adjudicator in the same case. As mentioned previously above, the mere acts of signing a citation and presiding over a hearing constituted an impermissible commingling,

regardless of the presence of any actual bias or commitment to the facts.

Justice Roberts vigorously dissented to the majority opinion in American Bankers, relying heavily on the Withrow approach to due process, and positioning the Withrow analysis squarely within the development of Pennsylvania decisional law on administrative due process. As Justice Roberts observed:

> Thus, our cases indicate clearly that a concrete showing of direct participation in prosecutorial and adjudicatory functions giving rise to inherent unfairness, as found in Dussia, Schlesinger and Horn, is necessary to establish actual bias. Mere appearance of commingling between these functions, without more, will not render invalid agency adjudications. Here, Giffen supervised the division of the Department of Insurance before he was appointed hearing examiner in the case against American Bankers. The record does not show that his adjudication was influenced in any way by his general association with that division . . . in the circumstances, the conclusion that Giffen prejudged the case is simply speculation; American Bankers has not demonstrated specific facts concerning the hearing either as administered or structured establishing that Giffen's earlier supervisory responsibilities created a "great possibility" of actual bias in his role as hearing examiner.

478 Pa. at ___, 387 A.2d at 455.

In a concurring opinion, Justice Nix, the author of Pollock and Dussia, accepted Justice Robert's premise that "mere tangential involvement" of an adjudicator in the decision to initiate prosecution proceedings is not alone sufficient to establish that the proceedings are violative of due process. In so observing, Justice Nix also relied on the reasoning of Withrow.

Apparently, therefore, as of the filing of its opinion in American Bankers in 1978, a majority of the Supreme Court disagreed with the Commonwealth Court's reasoning in Bruteyn that embraced the Withrow approach to administrative due process. Because of the manner in which the Court resolved American Bankers, however -- that is, through a two-paragraph per curium opinion that failed to

discuss the issues raised by the dissent and the concurrence, the Supreme Court's position on the issue remained unclear.

3. In Appeal of Redo, 42 Pa. Commonwealth Ct. 468, 401 A.2d 394 (1979), the Commonwealth Court was presented with a challenge to the procedure used in disciplining a township policeman. In Redo, a policeman was suspended, terminated, and then afforded a hearing. One township supervisor signed the letter of suspension, and another township supervisor signed a letter advising Redo of his dismissal "after careful consideration" of the charges against him. Thereafter, the same township supervisors held a hearing on the substantive charges and upheld their previous action. Redo then argued on appeal that the board of supervisors had improperly commingled prosecutory with adjudicative functions and prejudged the case. In finding that no impermissible commingling occurred, the Commonwealth Court applied its holding in Bruteyn, and reasoned as follows:

> In thus being authorized to wear different hats at different stages of a proceeding, the Board functions in a manner akin to the way a number of our state agencies operate under their respective enabling statutes. . . . Analogous due process cases dealing with adjudications rendered by such state agencies have considered the problem that those kinds of administrative structures can too easily encroach on the impermissible zone of apparent, as opposed to actual, bias. A general rule has emerged that a decision made by a tribunal after a formal adversarial hearing, where that tribunal has previously generally supervised an investigation into the same matter or made a pre-hearing determination of probable cause, is not per se an adjudication rendered by a biased tribunal, as long as the prosecutorial and investigatory aspects of the matter are adequately separated from the adjudicatory function. Bruteyn Appeal, 32 Pa. Commonwealth Ct. 541, 380 A.2d 497 (1977); see also, State Dental Council and Examining Board v. Pollock, 457 Pa. 264, 318 A.2d 910 (1974).

42 Pa. Commonwealth Ct. at ___, 401 A.2d at 396.

Proceeding on this premise, the Commonwealth Court then found that the supervisors who signed the letters of suspension and termination inquired into

the matter at that pre-hearing phase only generally and only enough so that their signatures indicated a determination in the nature of probable cause. Based on that determination, the Commonwealth Court concluded that no due process violation had occurred.

4. In Fumo v. Insurance Department, 58 Pa. Commonwealth Ct. 392, 427 A.2d 1259 (1981), the Court applied a similar analysis. In that case, the Insurance Department issued an order to Fumo to show cause why his insurance license should not be revoked in light of a guilty plea that Fumo had entered several years earlier. Thereafter, the Insurance Commissioner held an evidentiary hearing and revoked Fumo's licenses to act as an insurance agent and broker. Although conceding that the case seemed similar to Dussia because, as in Dussia, a single individual (the Insurance Commissioner) had initiated the proceedings against Fumo and was also the individual who had the ultimate responsibility for deciding the case on the merits, the Court nonetheless found no impermissible commingling, relying on the analysis in Bruteyn. As the Commonwealth Court held:

> There has been no allegation here that the conduct of the hearing itself involved an impermissible commingling of functions and we must hold, as did this Court in Bruteyn appeal, 32 Pa. Commonwealth 541, 380 A.2d 497 (1977), that, in the absence of a showing of actual bias, the preliminary inquiries necessary to determine whether or not sufficient probable cause existed to justify a regulatory hearing do not raise such a risk of prejudice as to taint the decision issued after the adversarial hearing.

58 Pa. Commonwealth Ct. at ___, 427 A.2d at ___.

The Court in Fumo also found persuasive the fact that the commingling of functions is much more threatening when it can affect the fact-finding role of the adjudicator, and that no such threat existed in this case because the facts concerning Fumo's guilty plea were undisputed, such that the issues centered upon the application of law subject to the reviewing Court's review. (In so observing, the Court relied on a holding to similar effect in the earlier case of Pennsylvania Human Relations Commission v. Thorp, Reed & Armstrong, 25 Pa. Commonwealth Ct. 295, 361 A.2d 497 (1976).

5. In Oppenheim v. Department of State, 74 Pa. Commonwealth Ct. 200, 459 A.2d 1308 (1983), the Commonwealth Court again addressed a challenge to a discipline action by the Dental Board on commingling grounds. In Oppenheim, the Dental Board received a complaint concerning the conduct of two dentists, conducted an informal hearing to consider the allegations, voted to convene a formal hearing and issued a citation, held a hearing, and voted to suspend the dentists' licenses after hearing. Several of the Dental Board members both participated in the decision of the Board to prosecute and participated in the adjudicative determination of guilt. In considering the dentists' challenge, the Commonwealth Court applied the essence of its holding in Bruteyn, reasoning as follows:

> Following the Pennsylvania Supreme Court's lead, our Court has recognized a fundamental distinction between the danger of cojoining prosecutorial and adjudicative functions in a single individual, and the danger of commingling such functions in an administrative structure statutorily designed. Thus, as a general rule, a decision made by a tribunal after a formal adversarial hearing, where that tribunal has generally supervised an investigation into the same matter previously, or made a prehearing determination of probable cause, is not per se an adjudication rendered by a biased tribunal, as long as the prosecutorial and investigatory aspects of the matter are adequately separated from the adjudicatory function. . . . In such cases, a party claiming due process violations must show actual bias. . . . The Dussia standard applies only when a single individual commingles prosecutorial and judicial functions; in such cases, the mere appearance of possible prejudice renders the adjudication unconstitutional. . . .As Pollock, Redo and Bruteyn demonstrate, we cannot reverse the Board's order merely because Drs. Miller, Penzur and Vaughters made the initial decision to proceed to final hearing and then sat as members of the formal hearing tribunal.

74 Pa. Commonwealth Ct. at ___, 459 A.2d at 1316.

6. Following Oppenheim, the Commonwealth Court reached similar decisions in reliance on the Bruteyn/Withrow rationale. See Lyness v. State

Board of Medicine, 127 Pa. Commonwealth Ct. 225, 561 A.2d 362 (1989), reversed and remanded, 529 Pa. 535, 605 A.2d 1204 (1992); Foose v. State Board of Vehicle Manufacturers, Dealers and Sales Persons, 135 Pa. Commonwealth Ct. 62, 578 A.2d 1355 (1990).

7. Finally, in Shah v. State Board of Medicine, 139 Pa. Commonwealth Ct. 94, 589 A.2d 783 (1991), alloc. denied, ___ Pa. ___, 600 A.2d 197 (1991), the Commonwealth Court re-explored and re-affirmed the Bruteyn/Withrow analysis in the context of a Bureau of Professional and Occupational Affairs licensing matter. In Shah, Doctor Perper, Vice Chairman of the Medical Board, acted for the Board in suspending Dr. Shah's license based on allegations of sexual misconduct with patients. Thereafter, Dr. Perper reversed a hearing examiner's decision that a prima facie case had not been made against Dr. Shah and reinstated the previously imposed suspension. Thereafter, Dr. Perper presided over hearings in the matter and voted with the Board to revoke Dr. Shah's license to practice medicine. Rejecting Dr. Shah's contentions that Dr. Perper's actions demonstrated a prejudgment of the issues and bias toward him, evidencing improper commingling, the Commonwealth Court reasoned as follows:

> Commingling or bias, however, is not established merely because the agency or one of its members performs a number of roles in the process. The Supreme Court has routinely held that an agency is permitted to both investigate and subsequently adjudicate matters that come before it. In Withrow v. Larkin, the United States Supreme Court held that it is not a violation of due process for "members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. . . ." Thus, under Withrow and Bruteyn, Dr. Perper's actions in presiding over the temporary suspension hearing, reversing the Hearing Examiner and then presiding over the Formal Hearing, were well within what is permitted by procedural due process rights.

139 Pa. Commonwealth Ct. at ___, 589 A.2d at 792-793.

8. In applying Gardner, Pollock and Dussia, the Commonwealth Court from 1977 through 1991

consistently focused on the degree of commitment to the facts evidenced by administrative decisionmakers who both issued citations and conducted hearings on those citations. As explained by Withrow, if the agency or individual decisionmaker merely inquired into the matter generally in order to determine that some basis existed for issuance of the citation, mere signing of the citation or issuance of the citation, in conjunction with serving as adjudicator in the matter, did not constitute impermissible commingling. On the other hand, a commitment to the facts evidenced by some affirmative act of prejudgment would result in the "actual bias" needed for a finding of commingling.

Chapter Four

Lyness and its Progeny

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Entry of the Impermissible Commingling of Functions Doctrine into Pennsylvania Jurisprudence

In re Schlesinger Appeal, 404 Pa. 584, 598, 172 A.2d 835, 841 (1961).

Impermissible commingling occurred when a member of the bar was charged with unprofessional conduct by a committee, and the charges were heard by a subcommittee composed of three committee members acting as the adjudicator. "[A] predilection to favor one side over the other is not required in order to vitiate a judicial proceeding as being violative of due process. Merely 'a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true' is sufficient."

Milestones Leading up to Lyness and Worth Repeating Briefly

1. Dussia v. Barger, 466 Pa. 152, 165, 351 A.2d 667, 674 (1975).

   The operative regulation vested power in the State Police Commissioner to both initiate court martial proceedings [the prosecutory function] and to review the decision of the court martial, i.e. to act as the ultimate adjudicator [the adjudicative function]. Even though he did not have responsibility for the entire prosecutory role, the commissioner's decision to commence prosecution was such a fundamental prosecutorial function that it alone justifies a conclusion of commingling of functions. The initiation of such a prosecution "is a decision which requires a judgment as to the weight of the evidence against the accused, a judgment which is incompatible with the judicial function of providing an impartial forum."

2. Department of Insurance v. American Bankers Insurance Company of Florida, Pa. Cmwlth. 189, 363 A.2d 874 (1976) aff'd, 478 Pa. 532, 387 A.2d 449 (1978).

   Due process rights were violated where an attorney acting as hearing examiner issued citations and was the direct supervisor of counsel for the Department of Insurance, even without a showing of actual bias or prejudice.

3. The Administrative Agency Law, 2 Pa. C. S. Sections 101 et seq., provided the due process framework for state agencies that our entire administrative process now rests upon. As more thoroughly explained elsewhere in these materials, the adjudicative administrative process in

Pennsylvania law provides greater procedural due process safeguards than does the federal administrative system.

The concept of administrative due process developed in the context of the tension between:

(a) the public demand for a hearing process that was more streamlined than the judicial process but would also permit flexible and rapid expert policy developments, and

(b) the conflicting demand that the process follow judicial concepts.

The current trend is toward the development of a process that mimics the judicial process. Unfortunately, this is a zero–sum problem. The more we accommodate one side of the balance, the less we can accommodate the other.

Because presiding officers define the issues, collect and structure the evidence, justify the decision and propose the administrative remedy, they set the boundaries for review. Appellate review cannot provide due process; it must be achieved on the level at which the record is made. Due process is the function of the fact finder. The rights to notice, hearing, counsel, a transcript, and to calling and cross–examining witnesses all relate directly to the accuracy of the adjudicative process. These procedural safeguards are of no real value, however, if the decision–maker bases his findings on factors other than his assessment of the evidence before him. Among the factors that can skew the impartiality of the decision are:

a. financial bias – i.e. the adjudicator has a financial stake in the outcome;
b. personal bias – i.e. the adjudicator has a personal interest in the position of one or the other party, or
c. factual bias – i.e. the adjudicator may be predisposed toward a certain position that a party is advocating in a case.

The question of whether there is a dispute of fact at the adjudicative level may be dispositive of the issue of impermissible commingling. If there is no factual dispute, there is little likelihood that the Court will conclude that constitutional rights have been violated.

Note: A bias that we as lawyers actually seek is the predisposition toward the **legal** position we are advocating in a case.

For the most part, commingling cases do not deal with financial or personal bias — they deal with the third category — predisposition to rule in a particular fashion based upon a factual bias. Often that predisposition has been demonstrated by previous action in the same case — i.e. a State Police Commissioner who already approved a prosecution based upon facts presented by a prosecutor later sits as the ultimate adjudicator. While the U.S. Supreme Court has not held that prior exposure to the material facts taints the adjudicator, the Pennsylvania Supreme Court has.

Furthermore, it can be argued that until Lyness, there was no clear line between when actual bias must be shown, and when an appearance of bias or appearance of possible prejudice was adequate to establish a violation of constitutional rights. However, the Lyness court said:

> Whether or not any actual bias existed as a result of the Board acting as both prosecutor and judge is inconsequential; the potential for bias and the appearance of non–objectivity is sufficient to create a fatal defect under the Pennsylvania Constitution.

529 Pa. at 548, 605 A.2d at 1210.

The Supreme Court clarified this language in Stone & Edwards, however, noting that the form of impermissible appearance of bias and partiality proscribed in Lyness must clearly be one that arises from an actual environment of comingled functions.

4. Soja v. Pennsylvania State Police, 500 Pa. 188, 455 A.2d 613 (1982) (opinion by Nix, C.J., with two justices concurring, one concurring in the result, and three concurring separately) held that due process is violated where the police commissioner receives preliminary investigative reports before the institution of court martial proceedings. He is the ultimate administrative arbiter, and his impartiality in that role may be influenced by facts which may have been contained in the preliminary reports, but were not facts of record in the proceedings.

5. Lyness in the Commonwealth Court — 127 Pa. Cmwlth. 225, 561 A.2d 362 (1989); reversed on appeal.

6. Shah v. State Board of Medicine, 139 Pa. Cmwlth. 94, 589 A.2d 783 (1991).

   This opinion was issued by the Commonwealth Court **after** its Lyness decision, but prior to the Supreme Court's reversal of Lyness. Shah never appealed this decision to the Supreme Court. The continuing validity of the Shah decision has been questioned in later cases.

There was no impermissible commingling of the prosecutory and adjudicative roles in a single person where the same presiding officer
(1) issued an Immediate Temporary Suspension Order,
(2) reversed the hearing examiner's decision to lift the suspension, and then
(3) presided over the formal hearing which revoked the doctor's license.

There was no impermissible commingling of the attorney's prosecutory and advisory roles where counsel filed briefs and argued orally against the granting of a supersedeas of the Board's order before the Commonwealth Court, and then advised the Board at the hearing, since the procedural posture — appeal of a supersedeas of a temporary suspension order based upon a prima facie case — does not lend itself to pre-judging the facts or the issues. Since only a prima facie case was involved, and at the prima facie stage the weight and credibility of the evidence are not contested factors, the Board did not have the opportunity to pre-judge the facts.

How does this comport with Soja?

And Then The Pennsylvania Supreme Court Issued Lyness.

Lyness v. State Board of Medicine, 529 Pa. 535, 605 A.2d 1204 (1992).

Noting that "due process is fully applicable to adjudicative hearings involving substantial property rights," and that "such property rights perforce include the right of an individual to pursue a livelihood or a profession," the Pennsylvania Supreme Court held that impermissible commingling occurred where three members of the State Board of Medicine (a body composed of eleven members) who participated in the decision to prosecute a physician, later participated in the Board's de novo review of the adjudication issued by a hearing examiner. However, as a general rule, no impermissible commingling occurs if more than one function takes place in a single administrative entity where "walls of division" are constructed which eliminate the threat or appearance of bias.

> As in [Dussia v. Barger, 466 Pa. 152, 351 A.2d 667 (1975)], we do not here declare any statute enacted by the legislature unconstitutional. Dussia, 466 Pa. at 166, 351 A.2d at 675. Rather, the fatal defect here lies in the administrative regulations, and the loose interpretation afforded those regulations by the [State Board of Medicine]; which defect can be readily cured by placing the prosecutorial functions in a group of individuals, or entity, distinct from the Board which renders the ultimate adjudication.

529 Pa. at 549, 605 A.2d at 1211 (1992).

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 in 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.

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 a life, liberty or property interest.

Significantly, the existence of a liberty or property interest is partly determined by reference to state law."

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. Harmon v. Mifflin County School District, Court split four ways — only a plurality decision [Pellegrini, Colins, Newman]. 651 A.2d 681 (Pa. Cmwlth. 1994)

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 Employes' 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.

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 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

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 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."