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# Due Process in Administrative Hearings in Pennsylvania: The Commingling of Functions Under *Feeser* and *Dussia*

Gerald Gornish\*

## I. INTRODUCTION

This article will examine the status of the law on due process in administrative hearings in Pennsylvania. Several developments in this area of the law have recently occurred. The Supreme Court of the United States, which had earlier hinted that the combining in one agency of both investigative and adjudicative functions might be constitutionally impermissible,<sup>1</sup> has more recently stated that this combination of functions does not, without more, create such a risk of bias as to constitute a due process violation.<sup>2</sup> Recent Pennsylvania decisions have mainly been concerned with the role of government counsel, such as a deputy or an assistant of the Attorney General<sup>3</sup> or a solicitor for a political subdivision.<sup>4</sup> The problem of the role of counsel is worthy of analysis and discussion for several reasons. First, given the proliferation of administrative agencies<sup>5</sup> and the increased right to due process hearings,<sup>6</sup> the need to assure that

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\* B.A., University of Pennsylvania (1958); LL.B., Harvard Law School (1961); Deputy Attorney General and Director of Office of Civil Law of the Pennsylvania Department of Justice. The views expressed herein are the author's alone. He recognizes that his position and participation in many of the cases cited are bound to color his views, but believes he has presented a fair view of the subject matter.

1. *Gibson v. Berryhill*, 411 U.S. 564, 579, n.17 (1973).

2. *Withrow v. Larkin*, 421 U.S. 35 (1975). See text accompanying notes 73-82 *infra*.

3. See, e.g., *Pennsylvania Human Relations Comm'n v. Feeser*, 364 A.2d 1324 (Pa. 1976), *on remand*, 371 A.2d 549 (Pa. Commw. Ct. 1977); *Pennsylvania Dep't of Ins. v. American Bankers Ins. Co.*, 26 Pa. Commw. Ct. 189, 363 A.2d 874 (1976).

4. See, e.g., *Horn v. Township of Hilltown*, 461 Pa. 745, 337 A.2d 858 (1975); *English v. North East Bd. of Educ.*, 22 Pa. Commw. Ct. 240, 348 A.2d 494 (1975); *Donnon v. Civil Serv. Comm'n*, 18 Chester Co. 260 (Pa. C.P. 1970), *reversed in part*, 3 Pa. Commw. Ct. 366, 283 A.2d 92 (1971).

5. For a listing of most of the state agencies, see *Administrative Code*, PA. STAT. ANN. tit. 71, §§ 61-63, 101 to 180-6 (Purdon 1962 & Supp. 1977-1978). The creation of the Commonwealth Court of Pennsylvania as a court of initial jurisdiction over these agencies is a reflection of this proliferation. See PA. CONST. art. V, § 4; PA. STAT. ANN. tit. 17, § 211.2 (Purdon Supp. 1977-1978); DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967-68, at 836, 858, 865-70, 873, 889-92.

6. See, e.g., *Dixon v. Love*, 97 S. Ct. 1723 (1977) (suspension of driver's license for re-

counsel acts properly has become an increasingly important issue. Second, the Commonwealth Court of Pennsylvania has viewed the role of counsel issue as related to cases involving the commingling of functions within an agency itself.<sup>7</sup> Finally, the commonwealth court asserts that the view of due process articulated by the Supreme Court of Pennsylvania is at variance with the due process standards expressed by the Supreme Court of the United States.<sup>8</sup> This conclusion requires analysis since it is fundamental for predicting the outcome of future due process cases in Pennsylvania related to the way an administrative agency functions.

The difference in approach between the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court on the role of counsel question is most clearly seen through an analysis of the case of *Pennsylvania Human Relations Commission v. Feeser*,<sup>9</sup> and this

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peated convictions of traffic offenses does not require prior hearing); *Perry v. Sindermann*, 408 U.S. 593 (1972) (right to a hearing established by de facto tenure policy); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (no right to a hearing unless liberty or property interest can be shown); *Bell v. Burson*, 402 U.S. 535 (1971) (state must provide for due process hearing before revocation of a driver's license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (hearing required before termination of welfare benefits); *Manna v. City of Erie*, 366 A.2d 615 (Pa. 1976) (landlord entitled to hearing before escrowing of rent pursuant to rent withholding ordinance); *Commonwealth ex rel. Rambeau v. Rundle*, 455 Pa. 8, 314 A.2d 842 (1974) (hearing required before parole revocation). See also *Amesbury v. Luzerne County Inst. Dist.*, 366 A.2d 631 (Pa. 1976) (nursing home employee not entitled to hearing before dismissal); *Mahoney v. Philadelphia Housing Auth.*, 13 Pa. Commw. Ct. 243, 320 A.2d 459 (1974) (housing authority employees not entitled to hearing before discharge).

An appreciation for the increase in agency activity and judicial intervention within the past ten years on the question of a right to a hearing may also be gained by a perusal of the cases noted in Purdon's Pennsylvania Statutes Annotated in those titles relating to state agencies, such as title 40 (Insurance) and title 63 (Professional and Occupational Licensing).

7. The courts have decided cases involving the commingling of functions within an agency itself, but no general principles or standards have emerged which may serve as a guide to future agency action. In *Mallon v. Township of Upper Moreland*, 461 Pa. 241, 336 A.2d 266 (1975), affirming 9 Pa. Commw. Ct. 618, 309 A.2d 273 (1973), the Pennsylvania Supreme Court split three-to-three in a case involving discipline of police officers by a township. In *Mallon*, one of the commissioners lodged the complaint, then sat with the other commissioners to cast the deciding vote regarding discipline. The three Justices voting to affirm stressed that the township commissioners imposed discipline in their executive capacity; the Justices voting to reverse stated that due process is required even at that level. See *Pennsylvania Prevailing Wage Appeals Bd. v. Steve Black, Inc.*, 365 A.2d 685 (Pa. Commw. Ct. 1976). See also *Dussia v. Barger*, 466 Pa. 152, 351 A.2d 667 (1975); *State Dental Council & Examining Bd. v. Pollock*, 457 Pa. 264, 269-72, 318 A.2d 910, 914-15 (1974); *Gardner v. Repasky*, 434 Pa. 126, 252 A.2d 704 (1969); *Schlesinger Appeal*, 404 Pa. 584, 172 A.2d 835 (1961). See generally 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.02 (1958).

8. Compare *English v. North East Bd. of Educ.*, 22 Pa. Commw. Ct. 240, 348 A.2d 494 (1975), with *Withrow v. Larkin*, 421 U.S. 35 (1975). See text accompanying notes 41-46 *infra*.

9. 364 A.2d 1324 (Pa. 1976).

will be the initial focus of the article. Cases decided on the basis of the commonwealth court's questionable holding in *Feeser* will then be reviewed. Finally, the article will suggest an appropriate harmonization of the recent decisions of the Supreme Court of Pennsylvania and the Supreme Court of the United States as a foundation for further Pennsylvania court decisions in this area.

## II. THE *Feeser* CASE

*Feeser* involved a complaint filed before the Pennsylvania Human Relations Commission (PHRC) relating to a refusal to sell a particular house to certain complainants because of their race. As required under law,<sup>10</sup> when the matter came before a panel of the Commission for hearing on the complaint, the case was presented by the general counsel for the PHRC. As far as the record showed, counsel simply presented the case before the Commission; he did not advise the Commission in any way regarding its rulings or decision. However, he did ultimately prepare the adjudication for the Commission after the Commission had reached its decision.

The respondents argued before the Commission that they were denied due process of law because of the inherent conflict in having counsel for the Commission present the case. The Commission denied the objection. On appeal, the commonwealth court reversed and held that there was a denial of due process.<sup>11</sup> The commonwealth court's opinion in *Feeser* was not helpful in ascertaining the basis of its conclusions. On the question of whether it violates due process when an attorney both represents the complainants before the hearing board and acts as counsel for the full commission, the court simply stated: "[W]e must sustain the position of appellants based on the recent decision of the Pennsylvania Supreme Court in *Horn v. Township of Hilltown* . . . . In that case, the decision of this court was reversed in a case less compelling than the instant case."<sup>12</sup> After quoting a portion of the *Horn* opinion,<sup>13</sup> the common-

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10. Pennsylvania Human Relations Act, PA. STAT. ANN. tit. 43, § 959 (Purdon Supp. 1977-1978).

11. 20 Pa. Commw. Ct. 406, 341 A.2d 584 (1975).

12. *Id.* at 408, 341 A.2d at 586 (citation omitted). In *Horn v. Township of Hilltown*, 461 Pa. 745, 337 A.2d 858 (1975), the solicitor of a township represented the township before its zoning board, served as the counsel for the board, conducted the hearing in the very case he was presenting, and advised the zoning board on the legal matters in the case. The Pennsyl-

wealth court remanded for a new hearing.

Significantly, the commonwealth court nowhere referred to the record to present the factual basis for the question of due process which it posed and purported to answer. Therefore, it is uncertain which of two possible factual patterns had been deemed violative of due process: whether the violation was that (1) counsel advised the panel and the Commission in this very case (which advice, therefore, should have appeared on the record); or (2) counsel not only represented complainants before the Commission in this case, but also gave legal advice generally to the Commission in other matters. If the court meant to disallow the first situation and there was something in the record to support its factual occurrence, then clearly under *Horn* a new hearing was required. But if the second circumstance was the foundation for the holding, the court was going far beyond *Horn*.

On appeal in *Feeser*, the Pennsylvania Supreme Court held that the commonwealth court had misapplied *Horn*. After thoroughly considering the record,<sup>14</sup> the court held that it contained no evidence to support the contention that PHRC's general counsel advised the hearing panel at the hearing or in the decisional process.<sup>15</sup> The court further stated that there was nothing in the record which indicated that the various determinations made by the hearing panel were made because the general counsel had advised it so to rule; each motion, according to the court, was denied by the panel in the exercise of independent judgment after hearing both arguments.<sup>16</sup> The supreme court therefore held that the limited, purely adversary role of PHRC's general counsel was distinguishable from the con-

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vania Supreme Court appropriately concluded that the *appearance* of a fair hearing was not met because the attorney opposing the applicant was also in effect deciding the case.

13. The court's opinion stated:

In the case at bar, while we are not faced with a tribunal that has allegedly denied due process to a litigant, we are presented with a governmental body charged with certain decision-making functions that must avoid the appearance of possible prejudice, be it from its members or from those who advise it or represent parties before it. In the instant case, the same solicitor represented both the zoning hearing board and the township, which was opposing appellants' application for a zoning variance. While no prejudice has been shown by this conflict of interest, it is our opinion that such a procedure is susceptible to prejudice and, therefore, must be prohibited.

461 Pa. at 748, 337 A.2d at 860.

14. See 364 A.2d at 1327-30.

15. *Id.* at 1327.

16. *Id.* at 1330.

duct condemned by the court in *Horn*.<sup>17</sup>

It is thus clear that a majority<sup>18</sup> of the Supreme Court of Pennsylvania, would allow an attorney for a state agency—or possibly a political subdivision<sup>19</sup>—to “prosecute” a case before that body even though the attorney is the general counsel or solicitor for that body, provided that the attorney gives no advice or makes no rulings in the particular case. Although the court has not afforded us a full analysis, and the holding is one which inherently is affected by factual variations, it would nevertheless appear that the supreme court has cast doubt on several of the rulings of the commonwealth court made in reliance upon its opinion in *Feeser*.

Upon a review of those cases, however, it is seen that the commonwealth court was strongly influenced by another decision of the Pennsylvania Supreme Court, *Dussia v. Barger*.<sup>20</sup> Therefore, before discussing the commonwealth court cases, a brief review of *Dussia* is in order.

### III. THE COMMONWEALTH COURT DECISIONS ON THE ROLE OF COUNSEL

#### A. *The Dussia Case*

In *Dussia*, the Pennsylvania Supreme Court enjoined the court-

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17. The supreme court observed:

It is clear that *Horn* describes a situation which is completely different from that encountered in this case. In *Horn* the attorney involved was: (1) making objections to the evidence offered by his opponent, and then ruling on his own objections; (2) offering evidence to which his opponent objected and then ruling on the objection to his proffered evidence; and (3) advising the hearing panel concerning the law during the post-hearing process of deciding the merits of his opponent's case. In this case, PHRC's general counsel argued the merits of motions made by his opponent and asked that they be denied. So far as the record shows, and it is clear the counsel for the Feesers would have objected had the record not accurately reflected what transpired at the hearing, there was no consultation between PHRC's counsel and the hearing panel. Each motion was decided by the panel on the basis of the arguments presented by both counsel in open session.

*Id.* at 1331.

The case was remanded to the commonwealth court. On remand, the court affirmed the decision of the Human Relations Commission in part, with modifications, and reversed in part. 371 A.2d 549 (Pa. Commw. Ct. 1977).

18. The decision was four-to-three, Chief Justice Jones and Justices Eagen and Pomeroy dissenting without opinion.

19. There is currently before the Pennsylvania Supreme Court that very issue on appeal from the commonwealth court in *Appeal of Feldman*, 21 Pa. Commw. Ct. 451, 346 A.2d 895 (1975).

20. 466 Pa. 152, 351 A.2d 667 (1975).

martial of a high official in the State Police because the Commissioner of the State Police performed both prosecutorial and adjudicative functions. The court concluded that the Commissioner was *statutorily* required to adjudicate a court-martial based on the recommendation of the board he appoints, but that his prosecutorial function of convening a disciplinary board for court-martials was imposed by regulation only. Accordingly, the regulation was invalid and had to be changed to avoid due process infirmity.<sup>21</sup>

*Dussia's* holding should be limited because of the unusual nature of the court-martial procedure. Moreover, *Dussia* concerned an employer-employee relationship in a military-like organization in which the authority to both "prosecute" and "adjudicate" was reposed in one individual. Once the head of an agency such as the State Police decides to convene a disciplinary board, it might seem rather clear to his subordinates who are to sit on the board that the head of the agency feels there is reason for disciplinary action against the employee. Having made the decision to "prosecute," the head of the agency more than likely will wish to "convict"; otherwise he would have dropped the matter. The board he appoints to hear the case and he, in adjudicating the case, will be so guided.

In the ordinary administrative agency case, complaints reach the agency from various sources. The decision to "prosecute" does not involve the personal relationships involved in a court-martial. It is not the head of the agency whose interest is at stake, but the general public interest. There is not an agency position or reputation which is to be vindicated or preserved; the agency is merely a tribunal to adjudicate the matter even though, technically, it may also be the "prosecutor." Thus, the hearing posture of the agency is that of a court, sworn to enforce and uphold the law, but not predisposed to find the facts in favor of either side.

Another reason for limiting *Dussia* is that the supreme court equated the court-martial to a quasi-criminal proceeding. The court relied on the American Bar Association's Standards for Criminal Justice, which state that the decision to institute criminal proceedings should be the responsibility of the prosecutor.<sup>22</sup> Whatever

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21. *Id.* at 166, 351 A.2d at 674-75. In a petition for reargument, it was pointed out that §§ 205(4) and 711(b)(1) of the Administrative Code of 1929, PA. STAT. ANN. tit. 71, §§ 65 (e), 251(b)(1) (Purdon Supp. 1977-1978), appear to give the State Police Commissioner the prosecutorial function.

22. THE AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION

applicability these standards may have to a court-martial, they are not a precedent in the normal administrative agency case, which clearly is not a criminal proceeding.

The precedent cited in *Dussia* also limits the scope of the holding. The court cited *Wong Yang Sung v. McGrath*,<sup>23</sup> a United States Supreme Court decision that held that deportation proceedings had to conform to the requirements of the Administrative Procedure Act,<sup>24</sup> which did not permit cases to be decided by persons who prosecute cases of a similar nature. The court's reliance would appear to be misplaced, because *McGrath* was a statutory decision, not a constitutional holding. Although the Supreme Court in *McGrath* stated that the commingling of the functions of investigation and advocacy are "plainly undesirable,"<sup>25</sup> the Court said nothing about their being unconstitutional. Moreover, the actual holding of the case was rejected by Congress, which thereafter specifically exempted the Immigration and Naturalization Service from the separation of function requirements of the Administrative Procedure Act.<sup>26</sup> In a constitutional context, the Supreme Court of the United States later held that the commingling of functions in a deportation proceeding did not, in and of itself, violate due process.<sup>27</sup>

*Dussia* also cited *In re Murchison*,<sup>28</sup> where the United States Supreme Court struck down a statute which allowed a judge to act as a so-called "one man grand jury" by indicting a defendant, then acting as the defendant's trial judge. *In re Murchison's* impact, however, has been limited by the recent decision of *Withrow v. Larkin*.<sup>29</sup> In *Withrow*, the Supreme Court stated:

Plainly enough, *Murchison* has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings,

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AND DEFENSE FUNCTION 3.4 (approved draft 1971) provides: "(a) The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor."

23. 339 U.S. 33 (1950).

24. 5 U.S.C. §§ 551-559 (1970).

25. 339 U.S. at 44, quoting REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. Doc. No. 8, 77th Cong., 1st Sess. 56 (1941).

26. See 8 U.S.C. § 1252(b) (1970).

27. *Marcello v. Bonds*, 349 U.S. 302 (1955).

28. 349 U.S. 133 (1955).

29. 421 U.S. 35 (1975). See text accompanying notes 72-83 *infra*.



and then make the necessary adjudications. The court did not purport to question the *Cement Institute* case . . . or the Administrative Procedure Act and did not lay down any general principle that a judge before whom an alleged contempt is committed may not bring and preside over the ensuing contempt proceedings. The accepted rule is to the contrary.<sup>30</sup>

Finally, the Pennsylvania Supreme Court cited two Pennsylvania cases, *Schlesinger Appeal*,<sup>31</sup> and *Gardner v. Repasky*,<sup>32</sup> which condemned the commingling of prosecutorial and judicial functions. But in *State Dental Council & Examining Board v. Pollock*,<sup>33</sup> the court had discussed those very cases and held that so long as the functions are separated, due process is served:

*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. The cases cited by appellant such as *Schlesinger, supra*; *Gardner, supra*; and *Murchison, supra*, where the same individuals actually participated in both prosecutory and judicial roles are clearly distinguishable.<sup>34</sup>

The above analysis indicates that *Dussia* should be limited to situations where *one* individual is both prosecutor and adjudicator. This conclusion is supported by Justice Nix' application of those cases in *Dussia* which he distinguished in *Pollock*, and his observation that while the State Police Commissioner did not assume the entire prosecutorial role, the decision to institute the prosecution was solely his.<sup>35</sup> Thus, it would seem appropriate to limit *Dussia* to the kind of fact situation present in *Murchison*, *Schlesinger*, and *Gardner*, where the prosecutorial and judicial roles were combined. Significantly, as of the date of this writing, the supreme court has not cited *Dussia*—even in its opinion in the *Feeser* case.

The application of *Dussia* to cases involving the role of *counsel*, as opposed to the role of the ultimate adjudicator, is questionable.

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30. 421 U.S. at 53-54.

31. 404 Pa. 584, 172 A.2d 835 (1961).

32. 434 Pa. 126, 252 A.2d 704 (1969).

33. 457 Pa. 264, 318 A.2d 910 (1974).

34. *Id.* at 271-72, 318 A.2d at 915.

35. 466 Pa. at 164-65, 351 A.2d at 673-74.

Even where counsel properly participates in advising an agency regarding an adjudication, only counsel's legal advice is binding, not his or her recommendations regarding factual findings. Thus counsel is never the ultimate adjudicator.<sup>36</sup> Nevertheless, in *English v. North East Board of Education*,<sup>37</sup> the commonwealth court applied *Dussia*, in conjunction with *Horn*,<sup>38</sup> in an effort to show that Pennsylvania standards of due process as enunciated in those cases go far beyond those required by the Federal Constitution.

In *English*, a teacher was dismissed for unsatisfactory work after a hearing before the school board. Upon appeal, the common pleas court reversed the board on the basis that its adjudication was not supported by substantial evidence. The commonwealth court rejected this conclusion<sup>39</sup> and found the hearing violative of due process because the school board's solicitor had presided at the hearing, made evidentiary rulings, and acted as prosecutor.<sup>40</sup> By comparing *Withrow v. Larkin*<sup>41</sup> with *Dussia* (which was decided six months after *Withrow* and did not even cite that case), the commonwealth court became convinced that "our State Supreme Court, presumably as a matter of state law, is applying a more stringent standard to prevent a commingling of the judicial and prosecutorial functions than the United States Supreme Court is presently applying."<sup>42</sup> Thus, it determined that *Horn* was decided by the supreme court under state constitutional grounds.

This view of the *Horn* decision is questionable and is not mandated by *Dussia* or *Feeser*; neither case holds specifically that *Horn* was decided on state grounds. And, by negative implication, the lack of such a specific holding in *Feeser* may be regarded as an indication that the supreme court does not agree with the commonwealth court.<sup>43</sup> Nor does the *Horn* case, the progenitor of *Feeser*,

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36. *But see* *Donnon v. Downtown Civil Serv. Comm'n*, 3 Pa. Commw. Ct. 366, 283 A.2d 92 (1971). See text accompanying notes 65-69 *infra*.

37. 22 Pa. Commw. Ct. 240, 348 A.2d 494 (1975).

38. See notes 12 & 13 *supra*.

39. 22 Pa. Commw. Ct. at 242, 348 A.2d at 495.

40. *Id.* at 244, 348 A.2d at 496.

41. 421 U.S. 35 (1975). Interestingly enough, the commonwealth court had previously relied on *Withrow* to reject due process challenges in *Rayne v. Edgewood School Dist.*, 19 Pa. Commw. Ct. 353, 339 A.2d 151 (1975) (school district) and *Barr v. Pine Township Bd. of Supervisors*, 20 Pa. Commw. Ct. 255, 341 A.2d 581 (1975) (township supervisors).

42. 22 Pa. Commw. Ct. at 244, 348 A.2d at 496.

43. The *Dussia* case and the commonwealth court's view of its holding were raised in the briefs before the supreme court in *Feeser*.

indicate a more stringent view of due process standards in Pennsylvania. The many roles assumed by the attorney in *Horn*<sup>44</sup> make that case analogous to the *Murchison* case,<sup>45</sup> on which it in part relied,<sup>46</sup> a case decided under federal standards. It seems, therefore, that *Dussia* should be regarded as unique because of the peculiar nature of court-martial procedures and the reposing of the prosecutorial and adjudicative roles in one person in a quasi-criminal proceeding. *Dussia* does not appear to be a signal that the Supreme Court of Pennsylvania is going beyond the standards of the United States Constitution.

### B. Other Commonwealth Court Cases

The commonwealth court has considered several cases involving the role of counsel where a dismissed school employee seeks review before the school board. In *In re Feldman*,<sup>47</sup> a school district solicitor tried the case in support of dismissal, after which he either prepared or assisted in the preparation of the school board's adjudication.<sup>48</sup> The president of the school board had announced at the outset of the hearing that the board would not be represented by counsel and that the solicitor would simply serve to present the case. The commonwealth court, nevertheless, following its opinion in *Feeser*, held that there was an appearance of possible prejudice, and remanded for a new hearing.<sup>49</sup> In view of the supreme court's decision in *Feeser*, this decision is questionable.<sup>50</sup>

*Feldman* should be contrasted with *English v. North East Board of Education*,<sup>51</sup> where the commonwealth court was again faced with a dismissed school employee. In *English*, the solicitor apparently

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44. See note 13 *supra*.

45. See text accompanying notes 28 & 29 *supra*. Furthermore, the facts in *Dussia* are similar to those in *In re Murchison*.

46. See 461 Pa. at 748, 337 A.2d at 860.

47. 2 Pa. Commw. Ct. 451, 346 A.2d 895 (1975).

48. The preparation of an adjudication by counsel who prosecuted a case before an administrative agency after the agency has reached its decision was specifically upheld in *State Dental Council & Examining Bd. v. Pollock*, 457 Pa. 264, 270-73, 318 A.2d 910, 914-15 (1974). *Accord*, *Commonwealth v. Chairman*, 377 A.2d 1022 (Pa. Commw. Ct. 1977).

49. 21 Pa. Commw. Ct. at 452-53, 346 A.2d at 896.

50. The Pennsylvania Supreme Court has granted allocatur in *Feldman* and, since the author has submitted an amicus brief on behalf of the Attorney General on the side of the school board, it would be inappropriate to comment further on this case.

51. 22 Pa. Commw. Ct. 240, 348 A.2d 494 (1975). See text accompanying notes 37-42 *supra*.

acted in the dual role of judge and prosecutor; he presided at the hearing, made several evidentiary rulings, and, at the same time, presented the testimony to show the unsatisfactory ratings of the teacher. In this case, the commonwealth court held, quite properly, that there was a denial of due process. While its reliance on *Feeser* to reach this holding was misplaced, the case would certainly fall under *Horn* in view of the solicitor's activities, which went far beyond that which took place in either *Feeser* or *Feldman*.

In *State Board of Medical Education & Licensure v. Grumbles*,<sup>52</sup> the commonwealth court communicated the breadth of its holding in *Feeser*. In *Grumbles*, an attorney assigned to a state agency had "prosecuted" the case before the board. After the board decided the case, a different attorney who worked in the Department of Justice—but not in the particular state agency in question—drafted the adjudication for the Board. The court stated: "If this dual role of the Board's counsel is not a violation of due process, it comes perilously close to being so."<sup>53</sup> Yet in *State Dental Council & Examining Board v. Pollock*,<sup>54</sup> the Pennsylvania Supreme Court had specifically sanctioned the drafting of an adjudication to embody the Board's decision by the attorney who had "prosecuted" the case. If the conduct in *Pollock* was not a violation of due process, *a fortiori*, the drafting of the adjudication by an attorney from *another* agency should not be a violation. Indeed, the action in *Grumbles* conformed with the suggestion of the supreme court in *Pollock* that it is better to have the adjudication prepared by an attorney in another agency.<sup>55</sup>

In *Grumbles*, the commonwealth court also conveyed by way of dicta its belief that the hearing was possibly invalid under *Dussia*. The dicta suggests that even where different attorneys from different agencies carry out the distinct prosecutorial and advisory functions, due process is denied.<sup>56</sup> The only basis for such a conclusion

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52. 22 Pa. Commw. Ct. 74, 347 A.2d 782 (1975).

53. *Id.* at 79, 347 A.2d at 785.

54. See note 48 *supra*.

55. The court concluded that

[w]hile it would be a better practice to have review of adjudications conducted by an individual who did not participate in the prosecutorial role, we can find no prejudice here where the Board reached its decision independent of and prior to any assistance from the representative of the Department of Justice.

457 Pa. at 272-73, 318 A.2d at 915.

56. The court stated:

is that both attorneys are under the control of the Attorney General. Such a conclusion would completely stymie the operation of state government because all attorneys are appointed by the Attorney General,<sup>57</sup> who has the duty both to advise and represent the various state agencies.<sup>58</sup> If the only way to avoid this alleged conflict would be to obtain outside counsel to handle one of the roles, a most unsatisfactory resolution of this problem would be reached.<sup>59</sup>

In *Pennsylvania Human Relations Commission v. Thorp, Reed & Armstrong*<sup>60</sup> and *Pennsylvania Department of Insurance v. American Bankers Insurance Co.*,<sup>61</sup> the commonwealth court again confronted the problem of the role of counsel. In the former case, the court was faced with a change of procedure by the PHRC from that which had been scrutinized in *Feeser*. In *Thorp*, one PHRC attorney presented the charges while another attorney, PHRC's general counsel, served as the legal advisor to the PHRC. After examining the previously discussed cases, the court noted that it was not dealing with the constitutionally impermissible circumstances where prosecutorial and adjudicatory functions are commingled in the same individual.<sup>62</sup> The court then stated: "Instead, we have two individuals who are both within the same branch of an administrative entity, one handling a prosecutorial function and the other

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We feel compelled to allude to what may be an additional infirmity in the proceedings. It is clear that the State Board of Medical Education and Licensure, as under the statute it was required to do, acted in both a prosecutorial and adjudicative capacity. In the recent case of *Dussia v. Barger* . . . , our Supreme Court struck down regulations of the Commissioner of the Pennsylvania State Police providing for a Disciplinary Board appointed by the Commissioner to investigate complaints against members and to make recommendations to the Commissioner as to whether he should convene a court martial, whose recommendations would in turn be reviewed and accepted or disapproved by the Commissioner.

22 Pa. Commw. Ct. at 79, 347 A.2d at 785.

57. PA. STAT. ANN. tit. 71, §§ 192, 296 (Purdon Supp. 1977-1978).

58. *Id.* §§ 192, 292-93 (Purdon 1962 & Supp. 1977-1978).

59. See text accompanying notes 90-92 *infra*. Such a resolution would also appear to conflict with the court's holding in *City of Philadelphia v. Hays*, 13 Pa. Commw. Ct. 621, 320 A.2d 406 (1974). In *Hays*, the court held that the appointment by the city solicitor of counsel to the Police Department and the Civil Service Commission did not thereby prevent policemen from receiving due process in hearings before the Commission.

60. 25 Pa. Commw. Ct. 295, 361 A.2d 497 (1976). The role of counsel issue arose in *Thorp* when a female associate of a Pittsburgh law firm filed a complaint with the PHRC alleging discrimination in employment because of age and sex.

61. 26 Pa. Commw. Ct. 189, 363 A.2d 874 (1976). In *American Bankers*, the state Insurance Commissioner found an insurance company in violation of certain insurance regulations.

62. 25 Pa. Commw. Ct. at 302, 361 A.2d at 501.

separately handling an adjudicatory function. These circumstances place us at the interface between a constitutionally permissible and a constitutionally impermissible commingling of prosecutorial and adjudicatory functions."<sup>63</sup>

In *American Bankers*, the interface was crossed. In this case, the state agency also used two attorneys; one prosecuted the case, and one sat as a hearing examiner for the agency head. The attorney acting as a hearing examiner was associate chief counsel of the department. Because the counsel who prosecuted the case was the direct subordinate of the hearing examiner, the court held that the line separating constitutionally permissible conduct from impermissible action had been crossed.<sup>64</sup> The court so concluded even though in *Thorp*, where general counsel had advised the hearing panel, the fact situation was practically the same. The only distinguishing factor in this case was that the superior was acting as a hearing examiner rather than as a legal advisor. This distinction should have made no substantial difference; the role of a hearing examiner is to make legal determinations during the course of a hearing and to submit a recommended decision to the head of an agency. An attorney advising a hearing panel carries out basically the same function, except that he does not determine facts, but merely advises the hearing panel on the application of the law.

Two further decisions of the commonwealth court should be mentioned, one involving a borough and the other, a school district. In *Donnon v. Downingtown Civil Service Commission*,<sup>65</sup> a case that predated both *Feeser* and *Horn*, a borough solicitor advised the civil service commission regarding charges preferred by the borough against a borough police officer. Although the borough retained outside counsel to represent it, the solicitor had previously assisted in preparing the charges against the officer.<sup>66</sup> The solicitor had pre-

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63. *Id.* *Thorp* was cited with approval and followed in *Boehm v. Board of Educ.*, 373 A.2d 1372 (Pa. Commw. Ct. 1977) (assistant solicitor prosecuted and board solicitor advised board in professional employee dismissal hearing).

64. 26 Pa. Commw. Ct. at 192, 363 A.2d at 876. The decision was four-to-one, with President Judge Bowman dissenting. A petition for allowance of appeal was granted by the supreme court and argument is scheduled for the October, 1977 term of the court.

65. 3 Pa. Commw. Ct. 366, 283 A.2d 92 (1971), *affirming in part* 18 Chester Co. 260 (Pa. C.P. 1970).

66. 3 Pa. Commw. Ct. at 370, 283 A.2d at 94; 18 Chester Co. at 262. The lower court questioned why the borough had assigned its own counsel to represent the Commission and suggested that had outside counsel been retained to represent the commission and had the solicitor been allowed to represent the borough, due process would have been afforded. The

sided over the hearing, made legal rulings, and advised the commission. The commonwealth court held that the procedural rights of the officer to a fair and unbiased hearing had been violated by allowing the solicitor to exercise control over both the prosecutory and adjudicatory operations.<sup>67</sup> *Donnon* is not as extreme a factual situation as *Horn* since there were two attorneys in *Donnon*, each carrying out a different function. But if the solicitor had first helped the borough prefer charges and then had advised the commission, the *Horn* rationale could have been applied, especially if factual rather than legal issues had been predominant.<sup>68</sup>

Both courts acknowledged in *Donnon* the financial burden which political subdivisions would incur retaining outside counsel in such cases. In fact, Judge Kurtz of the common pleas court apparently foresaw the *Horn* ruling by suggesting the retention of outside counsel for agencies such as zoning boards whenever a municipality is a party or has an interest in the outcome.<sup>69</sup> Of course, if such boards have sufficient legal expertise, it might be possible to have no counsel appointed for them, as in the *Feeser* or *Feldman* cases. One might question how *Donnon* and *Feldman* can stand together. If in *Feldman* counsel for a political subdivision merely did what the court in *Donnon* said he should do—prosecute—and not offer advice, what difference does it make that there was no counsel to advise the board?

In *Department of Education v. Oxford Area School District*,<sup>70</sup> the commonwealth court sustained a decision of the Secretary of Education which held that due process was denied where a superintendent of a school district testified against a teacher before the

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commonwealth court agreed: "We believe that the Borough should have assigned independent Commission counsel thus allowing the solicitor to proceed unfettered to pursue the civil prosecution on the basis of his investigation and complaint." 3 Pa. Commw. Ct. at 370, 283 A.2d at 94. The fact that the borough retained outside counsel was not set forth in the opinion of the lower court. *Id.* at 367, 283 A.2d at 93.

67. 3 Pa. Commw. Ct. at 370-71, 283 A.2d at 94. Whereas the lower court had simply reversed the dismissal, 18 Chester Co. at 262, the commonwealth court held that a new hearing should be held. 3 Pa. Commw. Ct. at 367, 283 A.2d at 93.

68. Subsequent cases of the court have stressed the coalescing of the prosecutory and adjudicatory function in one individual as the rationale of *Donnon*. This perspective overlooks the retention of outside counsel, but makes the holding of *Donnon* consistent with *Horn*. See *City of Philadelphia v. Hays*, 13 Pa. Commw. Ct. 621, 629, 320 A.2d 406, 411 (1974); *Wasniewski v. Civil Serv. Comm'n*, 7 Pa. Commw. Ct. 166, 170-71, 299 A.2d 676, 678 (1973); *Ironstone Corp. v. Zoning Hearing Bd.*, 5 Pa. Commw. Ct. 420, 423, 291 A.2d 310, 312 (1972).

69. See 18 Chester Co. at 260.

70. 24 Pa. Commw. Ct. 421, 356 A.2d 857 (1976).

school board in a dismissal case, and then assisted the board in reaching its decision by answering questions of the board at a private session. In *Oxford*, the court did not cite *Feeser*. It relied instead on *Horn* and *Donnon*. The court emphasized that the superintendent's role as an adverse witness was crucial in the case. The fact that he had initially investigated the incident which gave rise to the dismissal and had recommended a hearing was not, in the view of the court, sufficient to indicate any bias that would render his participation in the adjudicatory phase constitutionally objectionable.<sup>71</sup>

Similarly, the relationship between counsel should not be a determining factor so long as the two lawyers' functions are separated in a particular case. If the functions are separated, it should be immaterial that an assistant chief counsel carries out one function and his subordinate the other, as in *American Bankers*, or even that one of the attorneys is chief counsel, as in *Thorp*. Where a subordinate attorney investigates a case and prosecutes, the fact that he or she is generally subject to review by the attorney who advises the agency in the particular case does not deny due process where the superior has not participated in the investigation and prosecution of the particular case.

### III. HARMONIZING CASES FOR FUTURE REFERENCE

#### A. *Withrow v. Larkin*

It is apparent from the foregoing analyses that no dogma inherent in the holdings of the Pennsylvania Supreme Court or compelling logic in the decisions of the Commonwealth Court of Pennsylvania require the supreme court to reject the standards enunciated by the Supreme Court of the United States in *Withrow v. Larkin*.<sup>72</sup> *Withrow* sets forth flexible and realistic standards of due process which give due weight to the practicalities faced by various administrative agencies, yet meet the dictates of fairness which the Pennsylvania Supreme Court has sought to assert in *Horn* and *Dussia*.<sup>73</sup>

In *Withrow*, a licensing board held an investigative hearing to determine whether a doctor had engaged in proscribed acts. Based on the evidence presented at that hearing, the board would decide

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71. *Id.* at 426-27, 356 A.2d at 861.

72. 421 U.S. 35 (1975).

73. See *The Supreme Court, 1974*, 89 HARV. L. REV. 47, 76-77 (1975).



whether to warn or reprimand the doctor, institute actions to revoke his license, or dismiss the case. The investigative hearing was held and the board decided to hold a formal hearing to determine whether the physician's license should be suspended. In response, the doctor brought an action against the board for injunctive relief and a temporary restraining order. The doctor charged that he would be denied due process by such a formal hearing since the same board had already investigated the charges against him. A three-judge court agreed and enjoined the holding of a hearing.<sup>74</sup> The Supreme Court unanimously reversed, holding that there was no denial of due process and that the board could proceed with its formal hearing.

The Court held that the combination of investigative and adjudicative functions does not, by itself, overcome the presumption of integrity in public officials, nor does it create such a psychological risk of prejudgment that there is an unconstitutional risk of bias.<sup>75</sup> Merely because a board receives facts prior to a hearing does not prevent it, legally or practically, from rendering a fair decision after a hearing at which the facts are actually introduced.<sup>76</sup> The Supreme Court noted that the great variety of administrative agencies and their complex tasks make it impossible to lay down one hard and fast rule.<sup>77</sup>

Recognizing that a particular fact situation might foreclose an agency from a fair and effective consideration at the adversary hearing,<sup>78</sup> the Court looked carefully at how the board had operated in the particular case.<sup>79</sup> The initial decision to investigate was simply a preliminary step. Thereafter, in determining that a formal hearing should be held, the board had anticipated an adjudication would result; but there was no reason to believe that the adjudication would necessarily be against the doctor.<sup>80</sup> The fact that the board had investigated and decided to hold a hearing did not mean that

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74. 368 F. Supp. 793 (E.D. Wis. 1973).

75. 421 U.S. at 47-52.

76. *Id.* at 54-57.

77. "The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle." *Id.* at 52.

78. *Id.* at 58.

79. *Id.* at 54-55.

80. The Court stated: "[T]here was no more evidence of bias or the risk of bias or prejudgment than inhered in the very fact that the Board had investigated and would now adjudicate." *Id.* at 54.

it could not fairly adjudicate on the basis of the evidence to be presented. The mere exposure to investigative evidence is insufficient to impugn the fairness of board members at a later adversary hearing.<sup>81</sup> Additionally, the Supreme Court held that even though the board had turned over formal findings to the District Attorney and had suggested both criminal action and action to revoke the doctor's license, the board was still capable of judging the case fairly.<sup>82</sup>

The Supreme Court's analysis in *Withrow* responds to many of the concerns raised by the commonwealth court concerning the commingling of functions by agencies and their counsel.<sup>83</sup> A broad-based limitation on the right of counsel to function—as announced by the commonwealth court but rejected by the Supreme Court in *Feeser*—is not mandated by *Withrow*. Accordingly, there is no inconsistency between *Withrow* and the holdings of the Pennsylvania Supreme Court.

Our inquiry can not now end, however; we must go on to examine the appropriateness of the standard enunciated by the Pennsylvania Supreme Court in *Horn* which the commonwealth court attempted to apply in *Feeser*. Our focus will be on the question whether *Horn* supports a desirable constitutional goal even if it seems to have led the commonwealth court astray. Upon the obvious affirmative re-

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81. The Court concluded:

The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute.

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.

*Id.* at 57-58.

82. *Id.* at 55-57, 58-59 n.26.

83. In *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Assoc.*, 426 U.S. 482 (1976), the Court applied its teachings in *Withrow* to a school board hearing. The board, which was negotiating a teachers' collective bargaining contract, conducted disciplinary hearings after the teachers illegally went on strike, then terminated the teachers' employment. In a six-to-three vote, the Court held that the facts obtained by the board did not disqualify it as a decision-maker or remove its objectivity.

sponse, we must inquire why the commonwealth court had difficulty in applying that standard in *Feeser*.

### B. *The Appropriateness of the Horn Standard*

*Horn* held that, in finding a due process violation, neither actual prejudice nor harm is necessary; it is the "appearance of possible prejudice" which is the key.<sup>84</sup> In *Horn*, the court found no actual prejudice, but the procedure, involving various roles by counsel, was "susceptible to prejudice."<sup>85</sup> The broad proscription to avoid even the "appearance of prejudice" does not really help counsel for a state agency or political subdivision to determine what is and what is not proper. Neither was it helpful to the commonwealth court when in *Feeser* it determined that it "appeared" prejudicial to allow the general counsel to an agency, whose usual role is to advise and represent the agency, to represent a complainant before the agency. It is thus necessary to look more closely at the role of government counsel in order to be able to define more exactly which "appearances" are legally permissible and which are not.<sup>86</sup>

Under state law, the Department of Justice has the power and duty "to supervise, direct and control all of the legal business"<sup>87</sup> of substantially the entire executive branch of state government. Included in these functions are representation in litigation and the rendering of binding legal advice.<sup>88</sup> These two duties to advise and to represent are, on occasion, antithetical. For example, in hearings before state agencies, a Commonwealth attorney normally presents a case to the agency and the agency requires legal advice as to its responsibilities. Even before *Horn*, the Department of Justice took the position that the same attorney could not perform both of these duties at the same time.<sup>89</sup>

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84. See note 13 *supra*.

85. 461 Pa. at 748, 337 A.2d at 860.

86. Because of a plethora of statutes involving political subdivisions and the functions of their counsel, the following discussion will be limited to the functions of the Attorney General of Pennsylvania and attorneys under his jurisdiction.

87. PA. STAT. ANN. tit. 71, § 292(b) (Purdon Supp. 1977-1978).

88. *Id.* §§ 192, 292(a), 293 (Purdon 1962 & Supp. 1977-1978).

89. No formal directive was issued, but the chief counsels of the state agencies were so advised orally, as were the attorneys who prosecuted cases before the agencies. This separation of functions is reflected in *State Dental Council & Examining Bd. v. Pollock*, 457 Pa. 264, 318 A.2d 910 (1974), and *State Board of Medical Educ. & Licensure v. Grumbles*, 22 Pa. Commw. Ct. 74, 347 A.2d 782 (1975). The variations in size of the legal staffs in the agencies

Because of the way the "legal office" of the Commonwealth is organized, it is generally impossible to separate attorneys by the functions they perform into "representation" attorneys and "advice" attorneys. The Attorney General appoints to each Commonwealth agency a cadre of attorneys who are under the direction and supervision of various divisions of the Office of Civil Law of the Pennsylvania Department of Justice.<sup>90</sup> The size of the legal offices of each of these agencies varies and ranges from one attorney to over sixty, depending on the amount of legal work required by the agency. The attorneys for the agencies carry on the daily legal affairs of those agencies, including the rendering of legal advice, agency representation, and the handling of administrative hearings before the agencies.

Many of the agencies are required to conduct hearings regarding such matters as license and permit approvals, rate approvals, and compliance by regulated parties with state law. Often these cases arise as a result of an agency investigation, a third-party complaint, or both. The attorneys who "prosecute" these cases before the state agency normally have other legal duties in addition to their prosecutorial duties. To preclude them from prosecuting because they also render legal advice to the agency would lead to undesirable and impractical alternatives, detrimental to the ability of the Commonwealth to carry on its responsibilities under state regulatory law. An alternative would be to require attorneys to do nothing but prosecute; but this would be totally impractical in a small agency or one which does not have many hearings, and might deprive the Commonwealth of the expertise of its best attorneys who would normally advise and represent state agencies. A similar problem would arise from appointing attorneys from other agencies to "prosecute." Not only would this deny the Commonwealth the acquired expertise of an attorney in a particular area, it would also disrupt the legal departments of the other state agencies. A final alternative would be to bring in outside attorneys. This would not only be expensive, it would also frustrate the ability of an agency to have a policy presented by those most expert in the field. Moreover, it would

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make completely separate and internalized functions, as required for federal agencies by the Administrative Procedure Act, 5 U.S.C. § 500 (1970), and as endorsed by 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 13.11 (1958), virtually impossible.

90. See 4 PA. CODE § 9.31 at 43.33 for the structure of these offices. The charts of other state agencies show their liaison with the Department of Justice. *Id.* at 43.24-.52.

constitute an abrogation of the Department of Justice's functions under the Administrative Code.<sup>91</sup> This was, however, the solution proposed by the commonwealth court in *Donnon v. Downingtown Civil Service Commission*,<sup>92</sup> where the court required that outside counsel be used as the advisor rather than the prosecutor, at least where the agency's counsel has participated in the plans to prosecute.

As suggested earlier, *Donnon* is an appropriate decision on its facts, but should not be read either always to require an attorney to advise the agency or to mandate that the agency be advised by "outside" counsel.<sup>93</sup> The *Thorp*<sup>94</sup> decision is an indication that the court agrees with this conclusion. The Department of Justice should have the flexibility to make such arrangements as may be practical and necessary to prevent an improper commingling. In those agencies with sufficient legal personnel, this may be accomplished by the use of different counsel within the agency to function in the distinct roles. In those instances where, because of the small size of the legal staff of an agency, or the closeness of the working relationship, or the lack of experienced counsel in the agency to carry on separately the functions of advocate and advisor, the Justice Department should be free to continue its practice of assigning an attorney from its own staff to carry on one of these functions. Such an action should not be regarded as "perilously close" to a due process violation.<sup>95</sup>

There are certainly possibilities for prejudice where counsel carries on too many functions. The difficulty in commingling functions expressed in *Dussia* is that if the same person prosecutes and adjudicates, there is an intolerable suspicion that the ultimate decision will be based on the determination to prosecute. Nevertheless, in *Withrow*, the Supreme Court of the United States observed that in most cases<sup>96</sup> psychological suspicion is not significant enough to upset the administrative process.

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91. See PA. STAT. ANN. tit. 71, §§ 192, 292 (Purdon Supp. 1977-1978).

92. See text accompanying notes 65-69 *supra*.

93. See text accompanying notes 67 & 68 *supra*.

94. 25 Pa. Commw. Ct. 295, 361 A.2d 497 (1976). See text accompanying notes 62 & 63 *supra*.

95. See *State Bd. of Medical Educ. & Licensure v. Grumbles*, 22 Pa. Commw. Ct. 74, 79, 347 A.2d 782, 785 (1975).

96. The court-martial situation in *Dussia* might be regarded as one of the exceptions contemplated by the Court where a fair hearing is "foreclosed." 421 U.S. at 58.

When dealing with the role of counsel, however, there are slightly different concerns. Once counsel participates in the decision to "prosecute" or actually does "prosecute," the expectation is that counsel would like to "win" the case. There is also the risk that counsel will attempt to influence the ultimate decision to coincide with the original advice he or she gave.<sup>97</sup> Accordingly, counsel who prosecutes should ordinarily not render legal advice to the agency on its decision in the case. But, even here, counsel's role as legal advisor requires that if he or she concludes after prosecution that the facts are not sufficient to sustain a violation, or that the law must be construed in a manner different than originally supposed, then counsel should advise either the agency or the attorney-advisor to the agency in the particular matter.

On the other hand, where counsel has merely given general legal advice on the issue, it would not be inappropriate for him or her to prosecute.<sup>98</sup> Just as a litigant before a court cannot claim a denial of due process because the court has previously resolved the legal issue in the case contrary to the litigant, there is no denial of due process where an agency follows the previous legal advice of its counsel. Indeed, it may even be argued that it is *not* a denial of due process for counsel to give formal legal advice in the very case at issue because that advice is subject, in any event, to judicial review. Thus, it may not matter whether the advice was given before or after the case arises; the risk of prejudice is reduced since counsel will have to defend any such advice in argument before the court on appeal.

### C. *Suggested Harmonization*

By considering four of the typical situations which occur in administrative proceedings, and articulating what appear to be proper and improper actions, perhaps the best summary of this discussion can be developed.

*Situation one: an agency and its counsel receive information which gives rise to a determination to conduct a formal hearing.*

Although this only tangentially involves the role of counsel, it

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97. See *Donnon v. Downingtown Civil Serv. Comm'n*, 3 Pa. Commw. Ct. 366, 283 A.2d 92 (1971).

98. See *Pennsylvania Human Relations Comm'n v. Feeser*, 364 A.2d 1324 (Pa. 1976).

does involve a problem which administrative agencies face daily of needing some basis upon which to make a preliminary determination to act. *Withrow v. Larkin* is wholly applicable to this situation.<sup>99</sup> The involvement of prosecuting or adjudicatory counsel in receiving information does not constitute unfair treatment of the respondent. Whatever facts are to be the basis of the adjudication must be found in the record. The agency will have to make its determination based on such facts and the respondent will have his rights to cross-examine and to introduce testimony.<sup>100</sup>

*Situation two: counsel advises the agency and prosecutes before the agency.*

This basically is the issue confronted by the supreme court in *Feeser*. For an agency to function properly, it is necessary to have an attorney who can give it general legal advice applicable in appropriate cases. It is not inherently wrong for an attorney to advise an agency that certain actions constitute a violation of state law, then to prosecute a specific case before the agency. In fact, it would be ridiculous to lose the benefit of having the most knowledgeable attorney handle the case because he or she gave the agency initial legal advice on the question. Any suspicions that the attorney's desire to win will give rise to unfairness are obviated by the fact that his or her legal opinion, if erroneous, will be reversed on appeal. Untrammelled zeal is thus balanced by a strong desire to avoid the embarrassment of having rendered a wrong legal opinion.

*Situation three: counsel advises the agency during the proceedings.*

The problems raised here are more subtle. Substantively, it might be argued that the rendering of legal advice by the prosecuting attorney should be no different than the giving of advice before the hearing has begun. Why should it matter that a particular issue has been raised before or after the hearing commences? However, if the

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99. The commonwealth court seems to have independently allowed this in *Wasniewski v. Civil Serv. Comm'n*, 7 Pa. Commw. Ct. 166, 299 A.2d 676 (1973); see *State Dental Council & Examining Bd. v. Pollock*, 457 Pa. 264, 318 A.2d 910 (1974).

100. See, e.g., *Schuman's Village Square Drugs, Inc. v. Pennsylvania State Bd. of Pharmacy*, 13 Pa. Commw. Ct. 456, 320 A.2d 377 (1974).

101. *Commonwealth v. Chairman*, 377 A.2d 1022 (Pa. Commw. Ct. 1977).

agency is bound to follow the advice of the attorney with respect to legal matters, there is an appearance that it will also follow the attorney's advice with respect to factual matters. Indeed, the agency itself may not perceive the distinction.<sup>101</sup> Accordingly, conferring legal advice and influencing findings of fact must be differentiated.<sup>102</sup> If the prosecuting attorney could advise the agency on factual determinations, it is likely that he or she would wish to have the facts found in favor of the prosecution.<sup>103</sup> Since factual issues are generally reviewable only under the substantial evidence rule,<sup>104</sup> the agency's findings would in most cases be upheld by the reviewing court. Thus, there is a tangible distinction between an attorney's advice on facts and an attorney's advice on law; factual advice is not as strictly reviewable as legal opinions. The giving of any advice by the attorney prosecuting the case is therefore properly precluded under the unfairness doctrine enunciated in *Horn*.<sup>105</sup>

*Situation four: preparation of an adjudication by prosecuting counsel.*

The mere embodiment of the determination of the agency into a legal adjudication has been held to be a proper function of the prosecuting attorney.<sup>106</sup> In this regard, counsel who is familiar with the case is simply performing a ministerial function for the agency he or she serves. The efficiency of having an attorney familiar with the case prepare the adjudication would seem to outweigh any predilection by the attorney to prepare an unduly harsh adjudication. Moreover, the adjudication must be reviewed and approved by the agency itself to see whether it accurately expresses its findings. And, perhaps more importantly, from the attorney's viewpoint, the adju-

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102. See *Pennsylvania Human Relations Comm'n v. Thorp, Reed & Armstrong*, 25 Pa. Commw. Ct. 295, 302-03, 361 A.2d 497, 501-02 (1976).

103. See *Donnon v. Downingtown Civil Serv. Comm'n*, 3 Pa. Commw. Ct. 366, 283 A.2d 92 (1971).

104. PA. STAT. ANN. tit. 71, § 1710.44 (Purdon 1962). See, e.g., *A.P. Weaver & Sons v. Sanitary Water Bd.*, 3 Pa. Commw. Ct. 499, 284 A.2d 515 (1971).

105. *But see H.A. Steen Indus., Inc. v. Cavanaugh*, 430 Pa. 10, 241 A.2d 771 (1968), where the City Solicitor of Philadelphia gave legal advice on an issue after it had been argued before and decided by a city agency in a manner contrary to the City Solicitor's view of the law. Although no due process issue was raised in the case, the propriety of such action was sustained by the court without question and the propriety of the advice reviewed on the merits.

106. See note 48 *supra*.



dication will have to be defended on appeal. Nevertheless, the agency should normally obtain independent review of the adjudication by another attorney.<sup>107</sup>

#### IV. CONCLUSION

If the courts recognize the legal duties of government counsel and allow for the flexibility encouraged by *Withrow*, they will be able to enunciate appropriate standards for counsel to govern themselves. The key issue is whether participation of counsel prejudices the facts found or penalty imposed, as compared to legal conclusions, which are fully reviewable. The participation in legal issues, the every day task of a government lawyer, does not create the kind of inherent bias which renders unfair any hearing he or she participates in.

This is not to say that procedures utilized in Pennsylvania are optimal, or that merely because a due process violation charge is rejected by a slim majority, as in *Feeser*, the state agencies should sit back and assume no changes are necessary. The problem of commingling of functions arises generally because of the need to advise the agency of the law, to decide whether sufficient evidence has been introduced to sustain certain factual findings, and to make evidentiary rulings during the process of a hearing. If the hearing and factual function were assumed by an independent professional hearing examiner, much of the problem would be eliminated. It is for this reason that there has been prepared legislation to erect a hearing examiner office in the Commonwealth.<sup>108</sup> If due process does not mandate it, due regard for fairness does. Until such an office is instituted, it is hoped that this article may assist in explaining the requirements of due process imposed by the Pennsylvania and United States Constitutions.<sup>109</sup>

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107. Section 36 of the Administrative Agency Law requires the Department of Justice to pass upon any proposed action. PA. STAT. ANN. tit. 71, § 1710.36 (Purdon 1962). This function is normally carried out by approving a proposed adjudication, which is far more significant than a proposed citation.

108. See Cokin & Mallamud, *Hearing Officers in Pennsylvania: Recommendation for an Independent Central Office*, 15 DUQ. L. REV. 605 (1977).

109. Compare 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.11 (1958), with K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.13 (Supp. 1970). It is submitted that *Withrow v. Larkin*, 421 U.S. 35 (1975) is the noteworthy case Professor Davis was awaiting.