

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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No. 862 C.D. 1975

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COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

and

MARCELLA PHELPS HANSON,  
Intervening Appellee

v.

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THORP, REED & ARMSTRONG,  
Appellant

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SUPPLEMENTAL BRIEF  
FOR APPELLEE

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Appeal from the Order of the  
Pennsylvania Human Relations Commission at  
Docket No. E-8538

Katherine H. Fein  
Assistant General Counsel  
Attorney for Appellee  
PENNSYLVANIA HUMAN RELATIONS  
COMMISSION

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ARGUMENT FOR APPELLEE

I. APPELLANT WAS AFFORDED A FAIR HEARING BEFORE AN IMPARTIAL TRIBUNAL IN ACCORDANCE WITH DUE PROCESS OF LAW.

The procedures employed by the Pennsylvania Human Relations Commission (hereinafter "the Commission") in reaching its determination in this case were fully in accord with the requirements of due process, as enunciated by the Courts of this Commonwealth and of the United States.

The instant proceeding was commenced by the filing of a Complaint by Marcella Phelps Hanson against Thorp, Reed & Armstrong, alleging a violation of Section 5(d) of the Pennsylvania Human Relations Act, 43 P.S. 955(d) (hereinafter "the Act"). Pursuant to the procedures set forth in Section 9 of the Act, 43 P.S. 959, Commission staff made an investigation of the Complaint and determined probable cause to credit the allegations contained therein. Conciliation failing, a public hearing on the Complaint was conducted before a panel of three Commissioners. The case in support of the Complaint was prepared and presented by an assistant general counsel of the Commission, in accordance with Section 9 of the Act. Appellant appeared with counsel and presented evidence in its behalf, and the Complainant likewise appeared with counsel and presented testimony. The General Counsel of the Commission served as legal advisor to the hearing panel. On the basis of the evidence presented at hearing and upon

consideration of the parties' briefs, the three Commissioners made their recommendation to the full Commission which approved by majority vote the Findings of Fact, Conclusions of Law, Commission's Decision and Final Order, entered June 1, 1975.

This Honorable Court has recognized that the mere combination of investigative, prosecutorial and judicial functions within one administrative agency does not violate due process. Wasniewski v. State Civil Service Commission, 279 A.2d 676 (1973) Many agencies, including the Commission, fulfill a combination of functions while affording ample constitutional protection to persons charged. See, 2 Davis, Administrative Law Treatise § 13.02. On the other hand, particular circumstances may create an unacceptable risk of bias and are therefore constitutionally impermissible, even in the absence of a showing of actual bias. Schlesinger Appeal, 404 Pa. 584, 172 A.2d 835 (1961), Gardner v. Repasky, 434 Pa. 126, 252 A.2d 704 (1969) and Donnon v. Downingtown Civil Service Commission, 3 Pa.Cmwlth. 366, 283 A.2d 92 (1971) An examination of the pertinent case law demonstrates that the procedures utilized herein contained no risk of bias and amply protected the due process rights of Appellant to a fair adjudication.

In Pollock v. State Dental Council and Examining Board, 427 Pa. 264, 318 A.2d 910 (1974), the Supreme Court of Pennsylvania considered a combination of functions, wherein an assistant attorney general drew up the citation, prosecuted the case and aided the Board in

drafting its adjudication. The Court held that the investigatory, prosecutory and judicial functions were adequately separated within the administrative scheme so as to preserve due process.

It is not uncommon for large agencies to fulfill both the prosecutory and judicial functions (e.g., 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). 318 A.2d at 914.

The Court specifically distinguished Schlesinger Appeal, supra, Gardner v. Repasky, supra, and Donnon v. Downingtown Civil Service Commission, supra, where the same individual actually participated in both prosecutory and judicial roles.

This decision is certainly controlling in the instant case. The procedures employed by the Commission are virtually identical to those involved in Pollock. The proceeding was initiated by a third party complaint; agency staff investigated the complaint; staff counsel presented the case before an independent tribunal; the tribunal was aided in its adjudication by separate counsel who did not participate in the investigation or prosecution. The Court found no inherent risk of bias in the Administrative structure in Pollock, and the procedures employed by the Commission likewise withstand scrutiny.

The Supreme Court's recent opinion in Dussia v. Barger, No. 17 May Term, 1975 (Opinion filed, October 3, 1975) is fully consistent with Pollock, supra, and does not depart from the principles

enunciated therein. In Dussia, the Court invalidated on due process grounds State Police Field Regulation 3.03-E, which reposed in the Commissioner of the State Police sole authority for convening a disciplinary board and appointing a Court-Martial Board. The Commissioner was also vested with the obligation to determine guilt or innocence of the accused employee and determine the sanction to be imposed. The Court held that this procedure violates due process by creating an impermissible commingling of prosecutorial and judicial authority in a single individual. Similarly, in Horn v. Township of Hilltown, 337 A.2d 858 (1975), the Supreme Court invalidated a procedure whereby the same solicitor represented both the zoning hearing board and the township, which was opposing an application for a zoning variance. And in accordance with Horn, this Honorable Court recently held that due process was violated where the Commission's General Counsel prosecuted the case in support of a complaint at hearing while acting as an advisor to the Commission in its adjudication. Pennsylvania Human Relations Commission v. Feeser, No. 1574 C.D. 1975 (Opinion filed July 23, 1975).

These cases are characterized by factors not present in Pollock, nor in the instant case, and are thus distinguishable. Here, no single individual performed both the prosecutory and judicial roles. On the contrary, these functions were completely separated within the Commission's administrative structure. Due process does not prohibit members of the same agency from performing different functions.



In City of Philadelphia v. Hays, 320 A.2d 406 (1974), the City Solicitor appointed attorneys to represent both the Commission hearing the claim and the appointing authority, which was opposing a claim for disability benefits. This Honorable Court upheld the procedure.

(E)very factual situation calls for a separate determination, and here, unlike the situation in Donnon v. Downingtown Civil Service Commission, supra, one lawyer did not represent both the Commission and the appointing authority and separate counsel were assigned. Moreover, there was sufficient insulation between the participating attorneys in this case, even though they were admittedly appointed by the same official, to prevent any appearance of bias. 320 A.2d at 411

See, Gabauer v. Civil Service Commission, 297 A.2d 507 (1972);

Wasniewski v. State Civil Service Commission, supra.

Clearly, the procedures utilized by the Commission in this case conformed to the requirements set forth in the case law and contained no inherent risk of bias such as occurs where the same individual is charged with conflicting functions. Appellant's due process right to a fair adjudication was fully preserved.

The issue of the Commission's participation in the finding of probable cause suggested by Dussia and raised by this Honorable Court at oral argument may be easily disposed of. It is true that the Commission, including the three Commissioners before whom public hearing was conducted, approved the finding of probable cause in the instant case. Indeed, the Commission regularly and customarily approves findings of probable cause upon staff recommendation.

The Commission's participation in the finding of probable cause does not constitute an impermissible commingling of prosecutory and adjudicatory functions. In Withrow v. Larkin, 95 S.Ct. 1456, 43 L.E.2d 712 (1975), the United States Supreme Court rejected a due process challenge to the procedures of the Wisconsin state medical examining board. The board was empowered to hold investigatory hearings to determine probable cause and to issue warnings, reprimands or suspend the licenses of physicians who engage in professional misconduct. The Court held that neither the board's prior participation in an investigatory hearing nor its issuance of findings of fact and conclusions of law created any due process impediment to the board's capacity to render a final adjudication. The Court's opinion clearly sets forth the precedents and considerations that required the result obtained. These precedents and considerations require the same result in the instant case.

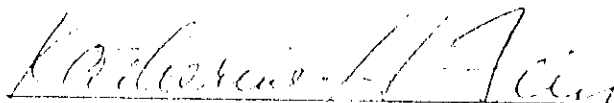
This Honorable Court has upheld similar combinations of functions in light of Withrow, supra. See, Rayne v. Edgewood School District, 339 A.2d 151 (1975); Barr v. Pine Twp. Board of Supervisors, 321 A.2d 581 (1975). In the instant case, the Commission approved a finding of probable cause on the basis of a recommendation from staff setting forth the elements of the Complaint. The Commission's consideration was limited to the Summary of the Case contained in its meeting agenda. Appendix "A". Such minimal participation in the finding of probable cause creates no risk of prejudgment or bias. The

presumption of honesty and integrity in those serving as adjudicators is not overcome by the Commission's prior consideration at the probable cause stage. Withrow, supra is squarely on point, and compels the conclusion that due process was not violated by the procedures employed in the instant case.

CONCLUSION

The Commission's adjudication in this case fully complied with the requirements of due process. The Supreme Court's opinion in Dussia, supra, in no way suggests that due process is violated by the procedures employed herein. The rationale and holding in Withrow, supra, Pollock, supra, and the cases in accord therewith provide clear and controlling authority as to propriety of the Commission's proceedings. For these reasons, the Commission respectfully urges this Honorable Court to affirm the Final Order, entered June 1, 1975.

Respectfully submitted:



Katherine H. Fein  
Assistant General Counsel  
Pennsylvania Human Relations Commission

I. Cases recommended to the Commission for a finding..... Page 21  
of probable cause and approval of a Public Hearing  
and/or other Commission action (9)

E-8538

3/13/75

Marcella Phelps  
Hanson; Pittsburgh  
vs. Thorp, Reed and  
Armstrong; Pittsburgh

Sex/Female,  
Age/49,  
Retaliation.

The complainant alleges, in part, that upon notice to the respondent that she had filed a complaint against the respondent firm with the Pennsylvania Human Relations Commission, at Docket No. E-8283PD, alleging unlawful discrimination on the basis of sex and age, in violation of the Pennsylvania Human Relations Act, Section 5(a) and in direct and specific response to said complaint, the respondent engaged in discriminatory acts against the complainant, designed and intended to retaliate against the complainant and to cause personal and professional harm to her.... Conciliation effort are underway. Assistant Counsel Fein has reviewed this case.

Recommendation: Request a finding of probable cause and approval of a Public Hearing.

Appendix "A"