ANITA LaFORME,	:	IN THE COURT OF COMMON PLEAS OF
Appellant	:	LYCOMING COUNTY, PENNSYLVANIA
	:	
vs.	:	NO. 04-01,225
	:	
MONTGOMERY,	:	
Appellee	:	LOCAL AGENCY APPEAL

Date: July 12, 2005

OPINION and ORDER

Before the court for determination is the local agency appeal of Appellant Anita LaForme (hereafter "LaForme") filed August 2, 2004. The court will grant the appeal because it finds that LaForme was denied her due process rights. The matter will be remanded so that a hearing can be held in compliance with due process requirements.

Background

A. Procedural History

On July 1, 2004, the Montgomery Area School District Board of School Directors (hereafter "the Board") issued its adjudication following a hearing held June 1, 2004. The Board voted to affirm its November 18, 2003 decision to terminate LaForme. On August 2, 2004, LaForme filed an appeal of the Board's July 1, 2004 adjudication.

On December 8, 2004, the court held a case flow conference to determine whether a de novo hearing would be required. LaForme argued that the record was incomplete as would relate to the issue of bias on the part of the Board due to it possessing documents that were not introduced into evidence at the June 1, 2004 hearing. On February 2, 2005, the court issued an opinion determining that the record was incomplete on the issue of the Board's bias. The court remanded the matter to the Board. The court ordered the Board to: (1) identify all documents

the members reviewed as would relate to LaForme's termination; (2) provide LaForme with copies of those documents if they had not already been provided; and (3) provide LaForme with verified statements from every member indicating what documents the member reviewed and to what extent the member relied upon the particular document in making the determination to terminate LaForme. The court also ordered a hearing to be held before the Board so that LaForme could have an opportunity to inquire of the Board members as to what documents they reviewed and to what extent they relied on those documents in making their determination. LaForme would also have the opportunity at that hearing to present contrary evidence to that which was contained in any documents not introduced at the June 1, 2004 hearing.

On April 15, 2005, the court issued an order directing a de novo evidentiary hearing to be held On May 2, 2005 regarding LaForme's appeal. On April 26, 2005, the court issued an order granting reconsideration of the April 15, 2005 order. The court determined that the evidentiary hearing held before the Board on February 2, 2005 completed the record and made de novo review in appropriate. On May 27, 2005, the Court held argument on LaForme's appeal.

B. Facts of the Case

On June 1, 2004, the Board gathered to decide the fate of LaForme. The purpose of the meeting was to conduct a hearing to determine if it was appropriate to terminate LaForme from her position as instructional aid with the Montgomery Area School District (hereafter "the School District"). Testimony was to be presented concerning the facts that lead to her deficient performance evaluation of November 11, 2003. During the testimony of Daphne Ross, the then

principal of the Montgomery Area middle and high schools, LaForme's counsel, Jeffrey C. Dohrman, Esquire, cross examined her regarding the allegation that LaForme had requested detention be withdrawn for two students. Notes of Testimony, 34-35 (6/1/04). Toward the tail end of that inquiry, the following exchange took place:

> Mr. Dohrman: I would love it if you would show me a detention slip where Mrs. LaForme marked that it should not be served or it should be withdrawn.
>
> Mr. Engelman: November 10th, 2003.
>
> Mr. Dohrman: Excuse me?
>
> Mr. Engelman: November 10th, 2003.
>
> Mr. Dohrman: I don't have any detention slip marked November 10th, 2003.
>
> Mr. Engelman: Oh, a detention slip?
>
> Mrs. Ross: That would be –
>
> Mr. Engelman: Do we have these slips?
>
> Mrs. Ross: It would be what Mr. Pearson put in writing as far as the incident.
>
> Mr. Dohrman: And I will show you what was mentioned as November 10, 2003. Is that your recollection of what was placed in writing?
>
> Mrs. Ross: Yes. That's Mr. Pearson's writing.

Ibid.

At the close of his cross-examination of Ross, Dohrman raised the following objection:

> I have no further questions. However, I have a concern that I'd like to raise on the record. During the questioning of the witness, Mr. Engelman, a board member, apparently has in his possession a stack of notes that were provided to me in discovery. I believe that it is entirely improper for those notes to be reviewed or considered in any way, shape of form in this case, except to the extent that

> they are brought properly into evidence in the case and discussed. And I have a concern also that they have already been provided to the board members and already have been preliminarily reviewed.

Id. at 41-42. The solicitor for the School District and prosecutor of the case against LaForme, Garth D. Everett, Esquire, indicated that the documents would not be introduced into evidence and that the Board would have had access to them in the regular course of exercising its functions because the documents were part of the school records. Id. at 42. Furthermore, Everett stated that the Board had been presented with documentary packages when it made its initial decision to terminate on November 18, 2003. Ibid. Dohrman then asked that a cautionary instruction be given to the Board advising it that evidence not presented at the hearing should not be considered or relied upon. Id. at 43. Later, Dohrman restated his objection to the Board relying upon anything that was not placed into evidence at the hearing. He argued that it would defeat the purpose of the hearing to allow the Board to rely on outside evidence. Id. at 44-45.

The documents admitted into evidence were as follows. The School District's exhibits (identified as Administration's Exhibit) 1 through 8 were admitted into evidence. N.T., 81 (6/1/04). They were: the July 15, 2003 Board adjudication (Administration Exhibit 1), the staff improvement plan for LaForme (Administration Exhibit 2); the Montgomery Area High School study hall rules (Administration Exhibit 3); LaForme performance evaluation of November 11, 2003 (Administration Exhibit 4); LaForme performance evaluation of June 6, 2003 (Administration Exhibit 5); Ross November 19, 2003 letter notifying LaForme of termination (Administration Exhibit 6); Everett December 4, 2003 letter regarding hearing before the Board (Administration Exhibit 7); Everett May 5, 2004 letter regarding hearing before the Board

(Administration Exhibit 8). LaForme's exhibits 1 through 3 were admitted into evidence. They included: a November 10, 2003 Note of Michael Pearson regarding the alleged detention rescission request (Appellant Exhibit 1); an October 29, 2003 letter to parents form the District Superintendent David L. Price regarding students unruly and disrespectful behavior toward staff (Appellant Exhibit 2); chart demonstrating the number of students assigned to each study hall period for the 2003-2004 school year at Montgomery Area High School (Appellant 3). Also admitted into evidence was Board Exhibit 1. Id. at 125. It was a note of Pearson dated September 23, 2003 regarding student conduct observed in the study hall under LaForme's supervision.

However, the Board members possessed documents in addition to those exhibits admitted into evidence at the June 1, 2004 hearing. Two packets of documents have been identified as "A" and "B." Packet A consists of LaForme's personnel file covering her employment with the School District. Packet B consists mainly of notes by LaForme and Pearson. The Board had in its possession and had reviewed the documents in packets A and B prior to making its decision to affirm the termination of LaForme.

Bonnie Taylor, Board president, testified that the Board had in its possession packets A and B the night of the hearing and that she had reviewed both packets prior to voting. N.T., 33, 34, 35, 37 (3/22/05). She testified that the documents had no bearing on her decision; instead her determination was based on the evidence presented at the hearing. Id. at 36. Lori Onufrak testified that she reviewed the documents in packets A and B prior to voting. Id. at 19. With regards to the documents, she testified that relied upon the evaluation in packet A in making her decision, but nothing in packet B carried much weight. Id. at 19, 20. Douglas N.

Engelman, Esquire testified that he had reviewed documents in both packets A and B prior to making his determination. N.T., 10, 11 (3/31/05). Lonny J. Harding testified that he reviewed the documents in packet A prior to voting. N.T., 23 (3/22/05). Harding stated that his decision was based upon the testimony he heard at the hearing and on the performance evaluations contained in packet A. Id. at 24. Michael Wright testified that the Board had packets A and B prior to voting. Id. at 44, 42, 43. Denise L. Jarrett testified that she did review the documents in packet A and glanced at packet B prior to making her decision. Id. at 12. She further testified that of all the documents in packet A she relied most heavily upon the performance evaluations. Id. at 12-13. However, she testified that she did not rely on anything in packet B in forming her decision. Id. at 13.

The story leading up to the June 1, 2004 hearing is rather straightforward. The School District employed LaForme as an instructional aid in the high school. In this capacity, LaForme's duties required her to supervise the high school students during the study hall period. The School District became dissatisfied with LaForme's performance of her duties. LaForme received an unfavorable performance evaluation for the 2002-2003 school year. Administration Exhibit 5. In a July 15, 2003 decision, the Board upheld LaForme's suspension, but determined that termination was not appropriate. Administration Exhibit 1. The Board placed LaForme on probationary status for the 2004-2004 school year and directed that performance evaluations be conducted every sixty days. Ibid.

At the beginning of the 2003-2004 school year, LaForme met with Daphne Ross, the principal of the Montgomery Area middle and high schools, to review an improvement plan and the study hall rules. N.T., 10 (6/1/04). The improvement plan set forth the duties LaForme

would be expected to perform as study hall monitor. Administration Exhibit 2. In compliance with the Board's July 15, 2003 decision, Ross did a performance evaluation on LaForme on November 11, 2003. The evaluation covered the period of August 25, 2003 to November 11, 2003. LaForme received another unfavorable performance evaluation. Administration Exhibit 4. The gist of the evaluation was that LaForme could not to control the behavior of the students in the study hall.

In a November 19, 2003 letter, Ross informed LaForme that the Board had voted at its meeting on November 18, 2003 to terminate her employment. Administration Exhibit 6. The letter stated that the termination was based upon her recent unsatisfactory performance evaluation of November 11, 2003. The letter further advised LaForme of her right to request a hearing before the Board to challenge its decision.

Issues

In her appeal, LaForme raises three issues. The first is that the Board deprived her of her due process rights because it commingled the prosecutorial and adjudicative functions by reviewing and relying on documents not introduced into evidence at the June 1, 2004 hearing. The second issue is that the Board denied her due process rights by not providing her with a hearing prior to her termination. The third issue is that the determination that her conduct as would relate to the monitoring of the study hall constituted incompetence and neglect of duty is not supported by substantial evidence. For the reasons that will be discussed below, the court finds that there was a commingling of the prosecutorial and adjudicative functions. The resolution of this issue renders the others moot; therefore, the court will not address them.

Discussion

The standard of review that will guide the resolution of this appeal is as follows. A school district is deemed to be a local agency for purposes of judicial review**.** ***J.S. v. Bethlehem Area Sch. Dist.***, 807 A.2d 847, 878 (Pa. 2002); *see also*, ***Kearns v. Lower Merion Sch Dist.***, 346 A.2d 875, 878 (Pa. Cmwlth. 1975). "Any person aggrieved by an adjudication of a local agency who had a direct interest in such adjudication shall have the right to appeal there from to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure)." 2 Pa.C.S.A. §752. A court of common pleas has jurisdiction to hear an appeal from an adjudication of a local agency. 42 Pa.C.S.A. §933(a)(2); ***Quinn v. Southeastern Pennsylvania Transp. Auth.***, 659 A.2d 613, 616 (Pa. Cmwlth. 1995). If no additional testimony is taken by the court, it is limited to determining whether there has been a constitutional error, whether there has been an error of law, whether a procedural irregularity exists, or whether the necessary findings of fact are unsupported by substantial evidence. 2 Pa.C.S.A. §754(b); ***Callahan v. Mid Valley Sch. Dist.***, 720 A.2d 815, 817 n.2 (Pa. Cmwlth. 1998), *app. denied*, 739 A.2d 545 (Pa. 1999); ***Coyle v. Middle Bucks Area Vocational Technical School***, 654 A.2d 15, 16 (Pa. Cmwlth. 1994), *app. denied*, 663 A.2d 695 (Pa. 1995).

A. Commingling and Due Process

The court finds that the Board denied LaForme her procedural due process rights. The Board had in its possession and reviewed evidence that was not admitted at the June 1, 2004 hearing. By reviewing such evidence, the Board impermissibly commingled prosecutorial and adjudicative functions thereby depriving LaForme of a fair and impartial tribunal.

Adjudicative hearings involving substantial property rights require that procedural due process rights be afforded. ***Katruska v. Bethlehem Ctr. Sch. Dist.***, 767 A.2d 1051, 1056 (Pa. 2001); ***Lyness v. Commonwealth, State Bd. of Med.***, 605 A.2d. 1204, 1207 (Pa. 1992). Substantial property rights encompass the right of an individual to pursue a livelihood or profession. ***Katruska***, 767 A.2d at 1056; ***Lyness***, 605 A.2d at 1207. The guarantee of due process of law emanates from Article I, Sections 1, 9, and 11 of the Pennsylvania Constitution. ***Katruska***, 767 A.2d at 1056; ***Lyness***, 605 A.2d at 1207. The basic elements of procedural due process under the Pennsylvania Constitution are adequate notice, an opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction of the case. ***Krupinski v. Vocational Technical Sch.***, 674 A.2d 683, 685 (Pa. 1996); ***Lyness***, 605 A.2d at 1207. " '[M]inimum requirements of due process demand that a litigant have, at some stage of a proceeding, a neutral factfinder.'" ***Katruska***, 767 A.2d at 1055 (quoting ***Belasco v. Bd. of Pub. Ed.***, 510 A.2d 337, 342 (Pa. 1986)).

It is a violation of procedural due process for an administrative body to commingle the prosecutorial and adjudicatory functions. ***Lyness***, 605 A.2d 1204. The commingling of the two functions raises the question of whether the party has been given a fair hearing before a fair tribunal and goes to the heart of one of the basic elements of procedural due process. ***Pittsburgh Bd. of Pub. Ed. v. MJN***, 524 A.2d 1385, 1389 (Pa. Cmwlth. 1987), *app. denied*, 541 A.2d 1392 (Pa. 1988). Actual bias resulting from the commingling is not required to establish a violation of procedural due process. ***Lyness***, 605 A.2d at 1210. The potential for bias and the appearance of non-objectivity created by the commingling is sufficient to establish a fatal defect under the Pennsylvania Constitution. ***Ibid***. The commingling or the

prosecutorial and adjudicatory functions is an "… anathema to the notion of due process in Pennsylvania, where citizens rightly presume that the same individual does not wear the mantel of zealous prosecutor and impartial judge." ***Id***. at 1208. But, there must actually be a commingling of functions for there to be a violation of procedural due process. ***Stone and Edwards Ins. Agency, Inc. v. Commonwealth, Dep't of Ins.***, 648 A.2d 304, 308 (Pa. 1994). Therefore, the issue of commingling requires an inquiry into the nature of the process actually provided. ***Id***. at 307.

To do this, the characteristics of the prosecutorial function must be established so that the conduct of the Board may be compared. Part of the prosecutorial function involves the instituting and carrying on of a suit to obtain some right or to redress and punish some wrong. ***Krupinski v. Vocational Technical School***, 674 A.2d 683, 686 (Pa. 1996). The job of the prosecutor is to fashion a strong as possible case against the accused based upon the evidence. ***Georgia-Pac. Corp. v. Reading Comm'n on Human Relations***, 585 A.2d 1166, 1170 (Pa. Cmwlth. 1991). In order to carry out such action and building a case against the accused, the prosecutor must gather evidence, evaluate it, and decide whether it is relevant to the issue at hand.

The Board engaged in the prosecutorial function by reviewing the documents that were not introduced into evidence at the June 1, 2004 hearing. The Board reviewed the documents in packets A and B, processed the information, and then determined what, if anything, was relevant to the issue of the appropriateness of LaForme's termination. This constituted an act of a prosecutor, not a judge, who is to decide the case on the evidence presented by the advocates, not himself. The Board's action was impermissible because " '[w]hen the

prosecutor as an individual is permitted in some manner to fulfill the role of the fact-finder one of the necessary elements of a fair trial is lacking.'" ***Georgia-Pac***, 585 A.2d at 1170 (quoting ***Bruteyn Appeal***, 380 A.2d 497, 501 (Pa. Cmwlth. 1977)).

Accordingly, the court finds that the Board denied LaForme her procedural due process rights.

B. The School District's Arguments

The School District advances two arguments as to why LaForme's due process rights have not been violated. The first is that LaForme's commingling argument has been waived. The School District argues that LaForme was required to raise the commingling argument before the Board. The School District asserts that the record does not contain an objection by LaForme to preserve this issue. Therefore, the School District argues that LaForme is precluded from raising the issue for the first time on appeal.

Section 753 of the Local Agency Law addresses the reviewability of issues on appeal from adjudications of local agencies. In pertinent part, it provides that if a full and complete record of the proceedings before the agency has been made a party may not raise upon appeal any issue not raised before the agency unless allowed by the court upon due cause shown. 2. Pa.C.S.A. §753(a).[1]

The court finds that LaForme did not waive the commingling argument. The record does not contain an explicit statement where LaForme says that she is objecting to the Board's

[1] The complete text of 2 Pa.C.S.A. §753(a) reads as follows: "A party who proceeded before a local agency under the terms of a particular statute, home rule charter, or local ordinance or resolution shall not be precluded from questioning the validity of the statute, home rule charter or local ordinance or resolution in the appeal, but if a full and complete record of the proceedings before the agency was made such party may not raise upon appeal any other question not raised before the agency (notwithstanding the fact that the agency may not be competent to resolve such question) unless allowed by the court upon due cause shown."

improper commingling of prosecutorial and adjudicative functions. However, the record does reflect that the commingling argument was sufficiently raised before the Board.

The record reflects the following objections raised by LaForme's counsel at the June 1, 2004 hearing:

> I have no further questions. However, I have a concern that I'd like to raise on the record. During the questioning of the witness, Mr. Engleman, a board member, apparently has in his possession a stack of notes that were provided to me in discovery. **I believe that it is entirely improper for those notes to be reviewed or considered in any way, shape or form in this case, except to the extent that they are properly brought into evidence in the case and discussed. And I have a concern also that they have already been provided to the board members and already have been preliminarily reviewed**.

N.T, 42 (6/1/04) 9emphasis added).

> **I think there should be a cautionary instruction to the board members that they should not be considering anything which is not presented as evidence at this hearing**. **They should not be considering relying upon those notes or memos or anything that they have that wasn't presented at the hearing.**

Id. at 43 (emphasis added).

> And secondly, I would just restate my position and **my objection to the board relying upon anything that is not placed into evidence properly in these proceeding**. (sic) **Otherwise it defeats the whole purpose of the hearing, to allow the board to rely on whatever it wants to outside of the evidence**.

Id. at 44-45 (emphasis added).

LaForme objected to the Board commingling the prosecutorial and adjudicative functions. As stated before, reviewing documents not introduced into evidence constitutes an exercise of the prosecutorial function. LaForme objected to the Board having in its possession documents not introduced into evidence at the hearing and the possibility that the Board had or

would review those documents. Accordingly, LaForme preserved the commingling issue for review by raising it before the Board.

The second argument advanced by the School District is that LaForme did not suffer a deprivation of her due process rights since there was no commingling of functions. The School District argues that alleged due process violations in disciplinary actions are viewed differently then in non-disciplinary actions. The School District asserts that Pennsylvania courts have not found due process violations to exist in non-disciplinary actions. The School District argues that the June 1, 2004 hearing was non-disciplinary in nature. Therefore, the Board's viewing and considering of packets A and B was not prosecutorial in nature. As such, there can be no commingling of prosecutorial and adjudicative functions.

The School District is correct that due process rights have been interpreted differently in non-disciplinary cases. ***Callahan***, 720 A.2d at 817. The School District is also correct in that each of the cases it cited, ***Krupinski***, ***Callahan***, and ***Coyle***, involved a non-disciplinary situation and the courts determined that no due process violation had occurred. In ***Krupinski***, a reading specialist was suspended because the program was being curtailed. 674 A.2d at 684. In ***Callahan***, an industrial arts teacher was suspended because the program was curtailed due to declining enrollment. 720 A.2d at 816. In ***Coyle***, an instructor in the airline travel and recreational program was suspended because the subject she taught was being curtailed due to declining enrollment. 654 A.2d at 16. In each case, the court determined that there was no violation of due process because there was no commingling of prosecutorial and adjudicative functions. The administrative body in each case was acting administratively in determining how to deal with curtailed programs. In these cases, the administrative body did not act in a

prosecutorial capacity, so there was no commingling of functions. ***Krupinski***, 674 A.2d at 686; ***Callahan***, 720 A.2d at 818; ***Coyle***, 654 A.2d at 19.

Characteristic of the prosecutorial function is the instituting and carrying on of a suit to obtain some right or to redress and punish some wrong. ***Krupinski***, 674 A.2d at 686. In a disciplinary situation, the focus is on some action or inaction by the individual. ***Ibid***. In this situation, the prosecutorial function may be exercised because there exists a wrong to redress and punish. In a non-disciplinary situation, the conduct of the individual is not an issue. Consequently, the danger of the prosecutorial function being exercised does not exist since there is nothing to prosecute.

The present case is a disciplinary situation. The focus is on LaForme's conduct. Specifically, the focus is on her allegedly deficient supervision of the study hall. The deficient job performance is something that may be redressed. Accordingly, the prosecutorial function may be exercised in this situation to redress this alleged deficient conduct. As such, there is a danger of commingling the functions, and this danger was realized as expressed earlier in this opinion.

C. Harmon v. Mifflin County School District

While not addressed by LaForme or the School District, the court came upon the case of ***Harmon v. Mifflin County School District***, 621 A.2d 681 (Pa. Cmwlth. 1994), *app. after remand, rev'd*, 713 A.2d 620 (Pa. 1998), during its research. The court must address the lead opinion in the case because of its possible application to the case before us. Harmon was a custodian at a middle school. He was suspended and later terminated for violating school rules by conspiring with and providing money to another employee to purchase marijuana.

Harmon, 651 A.2d at 683. The school board decided to terminate Harmon based upon the recommendation of the administration. ***Ibid***. The school board notified Harmon by letter of its decision. Harmon then requested a hearing before the school board. The school board voted to affirm the termination. ***Ibid***. On appeal, the trial court reversed the termination after determining that Harmon was denied due process because of the commingling of the prosecutorial and adjudicative functions.

One of the appeal issues in ***Harmon*** was whether the school board impermissibly commingled the prosecutory and adjudicative functions by making the initial decision to terminate Harmon and then hearing his challenge to the termination. The Commonwealth Court vacated the order of the trial court and remanded the case for the trial court to determine if the termination was supported by substantial evidence. ***Harmon***, 651 A.2d at 687.

The lead opinion was written by the Honorable Dan Pellegrini. The lead opinion holds that the school board did not commingle the prosecutorial and adjudicative functions by making the initial decision to terminate and then sit to hear the appeal of that termination. Judge Pellegrini stated that ***Lyness*** was inapplicable to the case. ***Harmon***, 651 A.2d at 685. He reasoned that ***Lyness***'s prohibition against commingling of the prosecutorial and adjudicative functions does not apply to the employer-employee relationship. In an employer–employee relationship, the employer is charged with the responsibility of determining if and when an employee should be prosecuted for his conduct. Judge Pellegrini asserted that an employee being disciplined by his employer has no right to expect that the employer had no role in the decision to prosecute him. ***Id***. at 686. In essence, it is acknowledged that the employer is both judge and jury when it comes to termination of an employee.

Similarly, Judge Pellegrini contends that it has been long recognized and accepted that school boards perform the dual functions of prosecutor and judge. Judge Pellegrini recognized that the potential for bias in this situation has long been recognized. ***Harmon***, 651 A.2d at 686. It was understood that school boards would be involved with the initial determination regarding charges against its employees and would have knowledge of the facts supporting those charges. ***Ibid***. Despite such knowledge, it was believed that the school boards could hear the appeals and make determinations regarding terminations based upon the evidence that was presented at the hearing and not be influenced by prior impressions. ***Id***. at 686-87. It was this faith in the school board members and the opportunity to present evidence at a hearing before the school board that would guard against the risk of arbitrary actions and protect the individual's due process rights. ***Id***. at 686. Therefore, any commingling of the prosecutorial and adjudicative functions by the school board would not violate the due process rights of the non-professional employee.

This court does not find Judge Pellegrini's opinion in ***Harmon*** to be controlling in this case. The conclusion and reasoning supporting the inapplicability of ***Lyness*** to the school board–non-professional employee relationship was not supported by a majority of the Commonwealth Court. Only three members of the court supported the lead opinion (Judges Pellegrini, Collins, and Newman). Judge Smith concurred in the result only. Justice Doyle wrote a concurring opinion that was joined in by Judge Kelly that concurred in the result of vacating the trial courts order and remanding the matter to the trial court to determine the substantial evidence issue, but did not adopt the rational that supported the inapplicability of

Lyness. Judge Friedman wrote a dissenting opinion which agreed that ***Lyness*** did not apply, but not for the reasons expressed in the lead opinion.

Because there was no clear majority, the question regarding the applicability of ***Lyness*** to the employer–employee relationship, as well as the school board–non-professional employee relationship, is left unresolved. However, the court finds guidance in the case of ***Copeland v. Township of Newtown***, 608 A.2d 601 (Pa. Cmwlth. 1992). In ***Copeland***, a police officer had failed to follow up interviewing witnesses to an assault. 608 A.2d at 601. The police chief recommended to the township manager that the officer be disciplined. The officer received notice that the township board of supervisors had decided to suspend him for two days based upon the recommendation of the police chief. ***Id***. at 602. The police officer appealed and a hearing was held before the board of supervisors. The board of supervisors voted to affirm the suspension, but reduced it to one day. ***Ibid***. The police officer appealed and the trial court affirmed the board's determination.

On appeal, the police officer argued that the board denied him his due process rights because actual or apparent bias existed on the part of the board. ***Copeland***, 608 A.2d at 602. The Commonwealth Court agreed and reversed the trial court. It found that there was a commingling of the prosecutorial and adjudicative functions on the part of the board when it issued the initial suspension and then sat as the tribunal on the appeal of the suspension. ***Ibid***.

Under ***Copeland***, ***Lyness*** is applicable to the employer-employee relationship. Until otherwise determined, ***Copeland*** controls.[2]

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[2] In a footnote, the lead opinion in ***Harmon*** states, "Insofar as our decision in ***Copeland v. Township of Newton***, 147 Pa. Commonwealth Ct. 463, 608 A.2d 601 (1991) applies ***Lyness*** in an employment relationship to find a violation of due process because a township board of supervisors both initiated the prosecution and acted as

But even if ***Harmon*** was controlling, the court would still find a violation of LaForme's due process rights. According to Judge Pellegrini's lead opinion, the exercise of both the prosecutorial and adjudicative functions by the school board will occur because the school board is an employer. However, the non-professional employee's due process rights are protected in this scheme by the hearing before the board at which the non-professional employee may present evidence to an impartial fact finder to demonstrate that the termination was incorrect.

But, what happens if this great bastion of due process falls? When that happens there is nothing left. The non-professional employee has no mechanism by which to receive a fair and impartial fact finder. Appellate review is available to the non-professional employee, but it is of limited review. 2 Pa.C.S.A. §7549b); ***Callahan***, 720 A.2d at 817; ***Coyle***, 654 A.2d at 16. if the hearing before the school board is to be the last refuge of the non-professional employee to guard against arbitrary actions, then it must be a fair and impartial hearing. The hearing granted LaForme was not fair and impartial because the school board reviewed evidence not admitted at the June 1, 2004 hearing. The Board members possessing evidence not admitted at the hearing prevented appropriate cross examination and a chance to present contradictory or mitigating evidence.

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jurists in the adjudication, we specifically reject it." ***Harmon***, 651 A.2d at 686, n.7. As noted above, since the lead opinion did not garner a majority of support the rejection of ***Copeland*** is not controlling upon this court.

Conclusion

LaForme's appeal of the Board's July1, 2004 adjudication is granted. The case will be remanded back to the Board to conduct a hearing consistent with this opinion.[3]

ORDER

It is hereby ORDERED that the local agency appeal of Appellant Anita LaForme filed August 2, 2004 is GRANTED.

The case is REMANDED to the Montgomery Area School Board to conduct a hearing regarding LaForme's termination from her position as an instructional aid. The hearing shall be consistent with the accompanying opinion and the requirements of due process.

The hearing shall be held within sixty (60) days of notice of this Order.

BY THE COURT:

William S. Kieser, Judge

cc: Robin B. Snyder, Esquire
Jeffrey C. Dohrmann, Esquire
Garth D. Everett, Esquire
Darryl R. Wishard, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)

[3] The remedy available after a determination that there was a commingling of prosecutorial and adjudicative functions is to remand the case to the administrative body to hold a hearing consistent with the requirements of due process. ***Pittsburgh Bd. of Pub. Ed.***, 524 A.2d at 1390.