DISCOVERY IN ADVERSARY PROCEEDINGS BEFORE ADMINISTRATIVE AGENCIES OF THE COMMONWEALTH OF PENNSYLVANIA

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The words "[n]o person shall . . . be deprived of life, liberty, or property without due process of law"[1] have probably caused as much consternation to lawyers and courts as any other fifteen words in the English language. Our courts have distinguished between substantive due process and procedural due process. The issue whether discovery should be available in administrative hearings and if so, its scope, falls within the notion of procedural due process.

Procedural Due Process

In *Goldberg*,[2] the Supreme Court held that payments to recipients under the Aid to Families with Dependent Children Act ("AFDC") could not be denied prior to a trial-type hearing to determine eligibility for AFDC payments. Accordingly, at least a hearing was required before payments could be terminated. *But see Matthews*[3] (adopting a balancing test to determine if a post-deprivation hearing is adequate). In *Greene*,[4] Chief Justice Warren said:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken not only in criminal cases, . . . but also in all types of cases where administrative and regulatory actions were under scrutiny.

Accordingly, before *Goldberg* there was a tendency on the part of the Supreme Court of the United States to equate a hearing with a judicial-type trial. Since 1970, *Goldberg* has been used as a springboard to identify the following procedural safeguards with respect to any administrative hearing:

1. An unbiased tribunal.
2. Notice of the proposed action and the grounds asserted for it.
3. Opportunity to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to cross-examine adverse witnesses.
7. Decision based exclusively on the evidence presented.
8. Right to counsel.
9. Requirement that the tribunal prepare a record of the evidence presented.
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision.[5]

In Pennsylvania it is important to add an 11th safeguard: there can be no commingling of investigative, prosecutorial and adjudicative functions. *See also Dussia*;[6] *Lyness*;[7].

Discovery in Pennsylvania Administrative Proceedings

Despite the perception by the courts that there are procedural due process safeguards, there is no authority for discovery in either the Administrative Agency Law[8] or the General Rules of Administrative Practice and Procedure[9] promulgated pursuant thereto. Rather, administrative agencies are free to adopt regulations which provide for no discovery, exceedingly limited discovery or broad discovery. The spectrum is represented by administrative hearings where there

is no discovery such as before the Unemployment Compensation Board of Review, where discovery is severely restricted such as before the Insurance Department and where there is virtually complete discovery such as before the Public Utility Commission and the Environmental Hearing Board, where in the former instance there are liberal rules facilitating discovery[10] and in the latter instance, where the discovery provisions of the Pennsylvania Rules of Civil Procedure have been incorporated by reference.[11]

The Pennsylvania Code[12] sets forth the rules pertaining to administrative hearings. Subchapter B pertains to hearings and conferences. Section 35.112 provides for prehearing conferences to expedite the conduct and disposition of a hearing. Although it contemplates "the possibility of . . . the discovery or production of data,"[13] there is no rule to facilitate this form of discovery.

1 PA. CODE, Part II, Subchapter C, deals with evidence and witnesses. *See* 1 PA. CODE §§ 35.137-35.169. Sections 35.145 through 35.152 provide for depositions. However, these depositions are permitted only to obtain and preserve trial testimony of a witness who will not attend a hearing and are not for purposes of discovery. Although subpoenas are available, they may only be used to compel witnesses to appear and testify at a hearing or to preserve hearing testimony, not to obtain discovery.

An Example of Discovery Available in Administrative Proceedings Before One Agency of the Commonwealth, the Insurance Department

The author is most familiar with hearings conducted before the Insurance Department. The only form of discovery permitted in connection with Insurance Department hearings is by Request for Admission of Facts or Documents pursuant to 31 PA. CODE § 56.3. This extreme limitation on discovery is abusive to the insurance industry. A case in point is worthy of discussion.

In 1984, the Legislature repealed the No-Fault Act and adopted the Motor Vehicle Financial Responsibility Law ("MVFRL"). Loss costs under MVFRL were felt to be too high. The Legislature responded by amending MVFRL.[14] Act 6 was intended to accomplish several objectives including the reduction of loss costs in the automobile reparations system and to give motorists an option to elect either "limited tort" or "full tort" coverages. The Insurance Department had estimated for the Legislature the cost savings for all motorists under the proposed legislation and the additional savings for those motorists who opted for limited tort coverage. In reliance upon the Insurance Department's estimates of cost savings in the automobile reparations system under the proposed legislation, the legislature statutorily mandated rate rollbacks of ten percent (10%) for full tort coverage and twenty-two percent (22%) for limited tort coverage. Act 6 further provided that insurers could make rate filings for relief from the mandatory rate rollbacks if they could establish "extraordinary circumstances" ("EC"). The department disapproved almost all EC rate filings and EC hearings ensued.

The notion that an insurance company must establish "extraordinary circumstances" to have the opportunity to earn the cost of equity capital is particularly noxious under the United States Constitution. Under the Fifth and Fourteenth Amendments, states may not deprive a regulated entity of the opportunity to earn a fair and reasonable rate of return, which is defined as the cost of equity capital.[15] Accordingly, the Legislature was in error in requiring insurers to prove extraordinary circumstances in order to be entitled to rate relief from the mandatory rate rollbacks.

Numerous insurance companies exercised their right to make EC rate filings. Most were disapproved and proceeded to hearings. At the EC hearings, the companies were faced with a dilemma: they had the burden of proving the accuracy of their estimates of cost savings created by Act 6 as reflected in their rate filings, but could not prepare to challenge the Insurance Department's estimates used by the Legislature to mandate the 10% and 22% rate rollbacks. Obviously, the insurers were convinced that the Insurance Department had made either a material error of fact or an error in its analysis, but could not conduct discovery to aid themselves in proving either. The Insurance Department had already "made up its mind" with respect to the estimated savings in loss costs which Act 6 would produce. The insurers put on their evidence. The Insurance Department put on its evidence. Insurers were ill prepared to cross-examine Insurance Department actuaries. The Commissioner found that there was substantial evidence in the record to affirm the determination of the governmental unit and denied rate relief. Accordingly, the EC hearings turned out to be useless.

Even in this case of constitutional proportions, where there is a screaming need to discover the facts upon which a regulator has based a judgment and to discover a regulator's analysis of the facts, there was no vehicle for discovery.

Precedent for Denying Discovery of an Agency's Decision Making Process

The rationale for denying discovery of an agency's decision making process is found in the tetrad cases, *Morgan*, *infra.* In *Morgan I*[16] the Secretary of Agriculture had issued an Order fixing maximum rates to be charged by market agencies for buying and selling livestock. The Plaintiffs were aggrieved by and challenged the Order of the District Court striking certain allegations from the Complaint regarding the manner in which the secretary had treated the evidence. The Supreme Court remanded the case to the United States District Court for, *inter alia,* a ruling on whether or not to permit the Plaintiffs to depose the Secretary of Agriculture. The Court held that it was error to strike these allegations from the Complaint, that the Defendant should be required to answer them and that the question of whether the Plaintiffs had a proper hearing should be determined.

On remand, interrogatories were directed to the Secretary of Agriculture which were answered; he also testified at the hearing on remand. The trial court received the evidence which had been introduced at the previous hearing together with additional testimony bearing on the nature of the hearing accorded by the Secretary and the Secretary's testimony. The District Court held that the hearing was adequate on the merits and that the Secretary's Order was lawful. Plaintiffs again appealed.

Again, the case went up to the Supreme Court in *Morgan II*.[17] Once more, the Supreme Court reversed and remanded, finding that the hearing, which had been accorded at the administrative level, was woefully inadequate. In *dicta*, the Court observed:

> In the light of [the Secretary's] testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree with the Government's contention that it was not the function of the Court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required.[18]

Morgan ended up in the Supreme Court on a fourth occasion.[19] In its Opinion in *Morgan IV*, Mr. Justice Frankfurter stated:

> The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order urged considerations favorable to the market agencies. <u>But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding</u>." *Morgan v. United States*, 298 U.S. 468, 480. <u>Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary</u>." 304 U.S. 1, 18.[20] (emphasis added)

The sentinel case in Pennsylvania in accord with *Morgan II* and *Morgan IV* is *Smith*.[21] The *Smith* Court considered an alleged due process violation resulting from the fact that the P.U.C. considered a Commission staff report without providing Smith the opportunity to review the report. The court affirmed the Order even though Smith was not afforded the opportunity to examine the staff report. The court stated:

> The requirement that everyone involved in a proceeding be apprised of the claims against him includes notice of specific charges or complaints, but does not include notice of the considerations involved in the decisional process of the administrative agency. The second *Morgan* case specifically held that it would be improper to probe the mental processes of the agency in reaching its conclusions. This portion of the case was reaffirmed in the fourth *Morgan* case.[22]

In 1975, the Commonwealth Court of Pennsylvania had the opportunity to consider the issue. In *Commonwealth v. Pa. P.U.C.*,[23] President Judge Crumlish stated:

> We must recognize and respect the pronouncement that the decisional process of an administrative agency must be free from public or private inquisition either by the investigative or the appellate device. This is the law and absent judicially authoritative direction otherwise we are bound.[24]

In *Morgan II*, although the Court almost parenthetically observed that "it was not the function of the Court to probe the mental processes of the Secretary in reaching his conclusions <u>if he gave the hearing which the law required</u>" (304 U.S. 1, 18, *supra*), the Court found that he did not give the hearing which the law required and the Court reversed. Accordingly, the observation in *Morgan II* is *dictum*. The malignant spread of the *dictum of Morgan II and IV* into Pennsylvania's law is unwise where a regulated person does not have the opportunity to discover either facts or the analysis of facts upon which the administrative agency bases a recommendation to the Legislature, an internal guideline, a policy or other operative action by which substantive rights of the regulated are adversely and materially affected.

In the past, aggrieved individuals have attempted to procure broader, more comprehensive discovery at the administrative level; these endeavors have been unavailing. *Norwood*[25] serves to highlight this limitation. The *Norwood* Court stated:

> [w]hatever the practice may be regarding formal depositions in ordinary civil cases, it seems clear that as long as an administrative agency provides a fair opportunity for notice and cross-examination, and makes no effort to conceal or suppress evidence favorable to the defendant, it has satisfied the minimum requirements of due process in this particular.[26]

In *Eastern Pa. Psychiatric Inst., Dept. of Public Welfare*,[27] a group of furloughed employees ("employees") asserted that various procedural defects in their case resulted in a violation of their right to procedural due process. Specifically, the employees maintained that they were denied the right to pretrial discovery. The Court held:

> [e]mployees' contention that they were entitled to a broader form of discovery has not been substantiated by any case law suggesting that such a right exists in administrative hearings. In the absence of such a right, the fact that some adequate form of discovery was allowed is sufficient to show that no violation of due process rights occurred.[28]

Judge Doyle reasoned that since the employees' counsel was permitted to "adequately examine" documents prior to the hearing, no deprivation of due process rights ensued.

The Case for Broader Discovery at the Administrative Level

There are many reasons advanced to justify stepping on a regulated person's constitutional right to procedural due process: the sheer number of cases to be adjudicated; the burden discovery would impose upon the agency's personnel; and cost. The real problem is that under the current status of the law, substantive rights of major corporations and, in fac,t an entire industry may be sacrificed by restricting or prohibiting discovery. Are the rights of a regulated company or indeed a regulated industry any less important as a matter of public policy than the rights of parties to a personal injury action where the broadest forms of discovery are available?

Practice Tip!

There is a solution if all parties to an adversarial administrative proceeding agree. Experienced administrative law practitioners are often successful in stipulating to conduct discovery in accordance with the Pennsylvania Rules of Civil Procedure even though the agency's rules do not so provide. When counsel are so fortunate as to be able to obtain such a stipulation, it should be reduced to writing and approved by the presiding officer. It is the presiding officer who will have to resolve discovery disputes if they arise. Often the presiding officers feel insecure or threatened by having to resolve disputes where the officer has no first hand practical experience with a substantial amount of judicial gloss. Accordingly, even where the parties agree this result may not be achieved.

Endnotes

1. U.S. CONST. amend. V.
2. *Goldberg v. Kelly*, 397 U.S. 254 (1970).
3. *Matthews v. Eldridge,* 424 U.S. 319 (1976).
4. *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959).
5. Kenneth Culp Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW § 9.5, at 47 (3d ed. 1994).
6. *Dussia v. Barger*, 351 A.2d 667 (1975).
7. *Lyness v. State Bd. of Med*., 605 A.2d 1204 (1992).
8. 2 PA. CONS. STAT. ANN. §§ 101 *et seq.* (West 1995).
9. 1 PA. CODE §§ 31.1 *et seq*. (1999) ("1 PA. CODE, Part II").
10. 52 PA. CODE §§ 5.322 *et seq*. (1999).
11. 25 PA. CODE § 1021.111 (1999).
12. 1 PA. CODE, Part II.
13. 1 PA. CODE § 35.112 (1999).
14. Act of February 7, 1990, P.L.11, No. 6, effective July 1, 1990 (Act 6).
15. U.S. CONST. amends. V and XIV.
16. *Morgan v. United States* 298 U.S. 468 (1936).
17. *Morgan v. United States*, 304 U.S. 1 (1938).
18. *Id.* at 18.
19. *Morgan v. United States*, 313 U.S. 409 (1941) ("*Morgan IV*").
20. *Id.* at 422.
21. *Smith v. Pa. P.U.C.*, 162 A.2d 80 (1960).
22. *Id.* at 85.
23. *Commonwealth v. Pa. P.U.C.*, 331 A2d. 598 (1975).
24. *Id.* at 601.
25. *Norwood v. Pa. State Horse Racing Comm'n*, 328 A.2d 198 (1974).
26. *Id.* at 202.

27. *Eastern Pa. Psychiatric Inst., Dept. of Public Welfare v. Russel,* 465 A.2d 1313 (1983).

28. *Id.* at 1319.