



IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM FASANO,)	
)	No. 481, 2025
Appellant-Below,)	
Appellant,)	
)	
v.)	Case Below: The Superior
)	Court of the State of Delaware,
DELAWARE DEPARTMENT OF)	C.A. No. N2A-04-002
NATURAL RESOURCES AND)	
ENVIRONMENTAL CONTROL,)	
INSURANCE,)	
)	
Appellees Below,)	
Appellees.)	

**APPELLEE STATE OF DELAWARE MERIT EMPLOYEE
RELATIONS BOARD'S ANSWERING BRIEF**

Dated: February 12, 2026

**STATE OF DELAWARE
DEPARTMENT OF JUSTICE**

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NATURE OF PROCEEDINGS

Appellant William Fasano (“Fasano”) is a former employee of the Delaware Department of Natural Resources and Environmental Control (the “Department” or “DNREC”). DNREC terminated Fasano effective April 8, 2021. A263.¹ Fasano appealed filed a grievance appealing his termination with the Merit Employee Relations Board (the “MERB” or “Board”). B001.

On November 24, 2021, DNREC filed a Motion to Dismiss based on lack of jurisdiction, arguing that the grievance was untimely. A232. On February 3, 2022, the Board heard oral argument on the Motion to Dismiss, and ultimately voted to deny the Motion. B004–20. On February 28, 2022, the Board issued its written decision denying the Motion to Dismiss without prejudice and scheduled a hearing on the merits for June 16, 2022. BB021–29. At June 16, 2022 hearing, after presenting its evidence, DNREC renewed its request for dismissal, and the Board deliberated and voted to grant DNREC’s renewed Motion to Dismiss. A182. Following the hearing, the Board issued its written decision granting the renewed Motion to Dismiss on July 26, 2022. B035–40.

Fasano appealed the Board’s July 26, 2022 decision on the renewed Motion to Dismiss, and the Superior Court reversed and remanded. B041–47. On May 15,

¹ Hereinafter, all references to Fasano’s Appendix accompanying his Opening Brief will be annotated as “A____.”

2024, the Board held a hearing on remand (the “May 2024 Hearing”). A185–A219. At the conclusion of the hearing, the Board deliberated and voted to deny Fasano’s grievance. A219. On March 6, 2025, the Board issued its written decision. A220–31.

On June 10, 2025, Fasano appealed the Board’s decision to Superior Court. The Superior Court affirmed the Board’s decision on March 6, 2025. *See Op. Br.* at 37. This appeal followed,² and on January 13, 2026, Fasano filed his Opening Brief. This is the Board’s Answering Brief.

² Plaintiff did not list the Board as a party on appeal but raised issues on appeal directed at the Board. Therefore, the Board has filed this Answering Brief.

SUMMARY OF ARGUMENT

1–4. The Board takes no position on Fasano’s arguments concerning the underlying merits of his employment with and termination from DNREC because the Board, acting in a quasi-judicial capacity during the underlying administrative proceedings that lead to this appeal, has no cognizable interest in seeking to have its rulings sustained. *Wilmington Trust Co. v. Barron*, 470 A.2d 257, 261 (Del. 1983).

5. *Denied.* Fasano’s argument that the Board, through the Deputy Attorney General who served as counsel at the May 2024 Hearing, violated his due process rights lacks merit and should not be considered by this Court. First, the Superior Court correctly applied *Blinder* when finding the record is devoid of any facts sufficient to overcome the presumption of honesty and integrity in the members of the Board, which made the ultimate decision to deny Fasano’s grievance. *Blinder Robinson & Co., Inc. v. Bruton*, 552 A.2d 466 (Del. 1989). Additionally, DAG Sweeney’s alleged conflict of interest does not amount to a due process violation as she was not the trier of fact or decision-maker in the proceedings before the Board. Finally, Fasano did not *fairly* present any question of procedural fairness to the Superior Court for review because he failed to raise his concern before the Board, and therefore, this argument is waived. *Wilmington Trust Co. v. Conner*, 415 A.2d 773 (Del. 1980); Supr. Ct. R. 8.

STATEMENT OF FACTS³

In May 2021, Fasano filed his grievance with the Board, challenging his termination. B001. By way of email dated November 24, 2021, Deputy Attorney General (“DAG”) Victoria Sweeney, on behalf of DNREC, filed a Motion to Dismiss the grievance as untimely. A232–37; B002. The only fact pertaining to Mr. Fasano’s employment with DNREC or termination within the Motion was that “[o]n April 8, 2021, Mr. Fasano was terminated from his position and was notified via email.” A233. The Motion did not address the underlying facts or merit of Mr. Fasano’s grievance in any way. A232–37. In the transmittal email DAG Sweeney sent to the Board, DAG Devera Scott entered her appearance on behalf of DNREC, who served as counsel for DNREC for the entirety of these proceedings, including on appeal in this Court. B002. DAG Sweeney did not argue the Motion before the Board and was not involved with the case again until May 2024.

When DAG Scott initially presented DNREC’s Motion to Dismiss to the Board on February 3, 2022, DAG Ilona Kirshon represented the Board, and a quorum of the Board, which included W. Michael Tupman, Esq.; Jacqueline Jenkins,

³ The Board defers to DNREC and Fasano’s Statement of Facts as they pertain to the merits of his employment and termination. The Board issued its Findings of Facts in its written decisions and has no cognizable interest in seeking to have its findings sustained. *Barron*, 470 A.2d at 261. The Facts included in the Board’s Answering Brief pertain to Fasano’s allegations against the Board and its legal counsel.

Ed.D.; Victoria Cairns, and Paul Houck,⁴ heard argument on the Motion. B004–20. After hearing argument, Board deliberated and voted to deny the Motion without prejudice.

After the Board scheduled a hearing on the merits, the Board, through DAG Allison McCowan who served as counsel to the Board at that time, held a pre-hearing conference in which the parties discussed their pre-marked exhibits and proposed witnesses. B030–34. Based on the pre-hearing, DAG McCowan made recommendations to the Board Chair as to the admissibility of documentary evidence and proposed witness testimony. *Id.* On June 16, 2022, W. Michael Tupman, Esq., who at the time served as the Board Chair, approved the recommendations as modified. *Id.*

At the June 16, 2022 hearing on the merits, DAG McCowan continued to represent the Board, and a quorum of the Board, which included Mr. Tupman, Ms. Cairns, and Mr. Houck, heard evidence from DNREC, who continued to be represented by DAG Scott. A123. By that time, Fasano’s current legal counsel had entered her appearance and represented Fasano at the hearing. *Id.* DAG Scott renewed DNREC’s Motion to Dismiss, which the Board, after deliberating and

⁴ The Board is comprised of five members who are appointed by the Governor. 29 Del. C. § 5906(a). At the time of the February 3, 2022 hearing, Sheldon Sandler, Esq. was the fifth member of the Board. *See* <https://legis.delaware.gov/Nomination?nominationId=1814> (last accessed on Feb. 11, 2026).

voting on the Motion, granted at the hearing. The Board issued its written decision dismissing the grievance, and Fasano appealed the decision to the Delaware Superior Court, which reversed and remanded the decision.

On May 15, 2024, in accordance with the Superior Court's Order, the Board resumed hearing the merits of the grievance on remand. By that time, DAG Sweeney served as counsel for the Board,⁵ which was comprised of nearly all new members,⁶ and those present for the May 2024 Hearing included Jennifer Cohan; Sheldon Sandler, Esq., Joseph A. Pika, III, Ph.D., and Lester Johnson, Jr—none of whom heard the case previously. A186–87. DAG Scott continued to represent DNREC, and Fasano's current legal counsel continued to be his legal representation. A186.

At no time during the hearing—or at any point prior to the hearing—did Fasano raise DAG Sweeney's alleged conflict of interest with the Board or otherwise object to her representation of the Board. *See* A185–A219. During the hearing, DAG Sweeney did not serve as the trier-of-fact or make any statements regarding the merits of the case. *See id.* At no point did the Board seek legal advice from DAG Sweeney on how to rule on the grievance. *Id.* Instead, the Board deliberated on the

⁵ DAG Sweeney did not conduct a pre-hearing conference, as the pre-hearing conference conducted by DAG McCowan two years prior controlled

⁶ In May 2024, the members of the Board included Jennifer Cohan; Sheldon Sandler, Esq.; Joseph A. Pika, III, Ph.D.; Lester Johnson, Jr., and Dinah M. Davis-Russ. *See* <https://merb.delaware.gov/board-members/> (last accessed on Feb. 11, 2026).

matter and voted to deny the grievance. A219. After the hearing but before the Board issued its written decision, Fasano's counsel inquired as to when the Board would issue its written decision. A46–48. DAG Sweeney candidly acknowledged that the delay in issuing the decision was her own. A47. Ultimately, the Board issued its written decision, which memorialized its already-ruled-upon oral vote and decision on the grievance, on March 6, 2025. A220–31.

ARGUMENT

II. THE BOARD'S ACTIONS WERE WHOLLY APPROPRIATE AND DID NOT VIOLATE MR. FASANO'S DUE PROCESS RIGHTS.

A. Question presented.

Whether DAG Sweeney's representation of the Board at the May 2024 Hearing deprived Fasano of due process during the grievance appeal process before the Board. This question was presented to Superior Court by Fasano but not previously raised before the Board. A6, A36–37.

B. Scope of review.

This Court reviews appeals of administrative board decisions by determining whether the board's decision was supported by evidence sufficient to support its findings and free from legal error. *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981); *Unemployment Ins. Appeal Bd. v. Duncan*, 337 A.2d 308, 309 (Del. 1975). “Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion . . . [and] is greater than a scintilla and less than a preponderance.” *Gala v. Bullock*, 250 A.3d 52, 69 (Del. 2021) (citing *Olney*, 425 A.2d at 614). The Court “does not weigh the evidence, determine questions of credibility, or make its own factual findings.” *Thompson v. Christiana Care Health System*, 25 A.3d 778, 781–82 (Del. 2011). Questions of law are reviewed *de novo*. *Ward v. Department of Elections*, 2009 WL 2244413 (Del. 2009).

It is well settled that on appeal, arguments must first be raised with the administrative board and cannot be raised for the first time on appeal. *Wilmington Tr. Co. v. Conner*, 415 A.2d 773, 781 (Del. 1980). Indeed, Supreme Court Rule 8 provides that “[o]nly questions fairly presented to the trial court may be presented [to this Court] for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.”

C. Merits of argument.

In the Opening Brief, Fasano alleges that this Court should vacate the decision below because the proceedings before the Board “were infected with a structural due process violation” but fails to articulate facts sufficient to establish a due process violation. *See* Op. Br. at 28–35. First, Fasano’s attempt to attack the Superior Court’s application of *Blinder Robinson & Co., Inc. v. Bruton*⁷ is based on a misapplication of the law and total disregard for the facts as established by the record. Similarly, Fasano’s argument that DAG Sweeney’s participation in the May 2024 Hearing amounts to a due process violation also misses the mark, as DAG Sweeney was not the decision-maker in this case. Finally, as Fasano failed to raise any issues before the Board, he is precluded from asserting them on appeal. Therefore, the Board requests the Court affirm the Superior Court’s decision.

⁷ 552 A.2d 466 (Del. 1989).

1. The Superior Court Correctly Applied *Blinder* to the Case at Bar.

Fasano’s argument that the Superior Court erred when relying on *Blinder* is premised on a misapplication of the law. Op. Br. at 28–32. In *Blinder*, the Court determined whether a due process violation occurred when one Deputy Attorney General presented evidence on behalf of a client before an administrative body represented by another Deputy Attorney General. *Blinder*, 552 A.2d at 472–73. In its analysis, the Court applied the holding in *Withrow v. Larkin*⁸ as *Withrow* serves as “[t]he seminal case on the commingling of investigative and adjudicative functions in an administrative setting.” *Id.* at 472. Following *Withrow*, the *Blinder* Court found that commingling prosecutorial and adjudicative roles does not amount to a due process violation unless there is a showing “sufficient to overcome the strong presumption” that the adjudicators acted honestly and with integrity, “in the absence of specific evidence of bias.” *Id.*

Rather than apply this controlling legal standard, Fasano attempts to mislead the Court to adopt the “widely followed rule” that an attorney who serves as “a party advocate in an administrative case may not then advise the decision-making body in the same case.” Op. Br. at 30. But this argument finds no support in the authority upon which Fasano relies.

Indeed, Fasano seems to have taken single sentences from each opinion out

⁸ 421 U.S. 35 (1975).

of context and attempted to apply them to this case. However, when reading each case in its entirety, it is clear that the cases are inapposite. See *Uhrich & Brown Ltd. P'ship v. Middle Republican Nat. Res. Dist.*, 998 N.W.2d 41, 49 (2023) (finding a due process violation when two attorneys who attempted to prove ground water management violations before an administrative board then provided legal advice to the board immediately following the hearing when the board was determining whether those same attorneys proved those violations); *Botsko v. Davenport Civil Rights Com'n*, 774 N.W.2d 841, 849 (Iowa 2009) (holding that an attorney who actively advocated for a complainant appearing before a tribunal who then participated in the tribunal's closed-door deliberations during that same hearing violated due process); *Nightlife Partners v. City of Beverly Hills*, 108 Cal. App. 4th 81, 84 (2003) (concluding that the attorney who provided legal advice to an entity that denied a petitioner's permit and then advised the neutral-decision maker on an administrative appeal of the denial violated due process); *Horn v. Hilltown Twp.*, 337 A.2d 858, 859 (Pa. 1975) (ruling a due process violation existed when an attorney simultaneously represented the local government enforcing an ordinance and served as counsel to the administrative tribunal at the very same hearing); *Walker v. City of Berkeley*, 951 F.2d 182, 185 (9th Cir. 1991) (finding that an attorney who served simultaneously as decisionmaker in an employee termination and an advocate for the party that benefited from the decision was a constitutional

defect); *but see Weissman v. Bd. of Ed. of Jefferson Cnty. Sch. Dist. No. R-1*, 547 P.2d 1267, 1276 (Colo. 1976) (declining to reverse on the basis that an attorney both prosecuted a matter before an administrative board and then ‘retired’ with the board in private to deliberate in light of the substantive evidence, the fact that the attorney did not cast a vote on the decision, and the absence of any substantial prejudice).

In arguing against the application of *Blinder*, Fasano fails to present an alternative legal standard for this Court to apply to this case because he cannot. Contrary to his assertion, nearly all the cases upon which Fasano relies are governed by the same legal standard established in *Withrow*, which the Court adopted in *Blinder*.⁹ *Ulrich*, 998 N.W.2d at 52–54; *Botsko*, 774 N.W.2d at 848–49; *Nightlife Partners*, 108 Cal. App. 4th at 90, 94; *Walker*, 951 F.2d at 184–85.

Accordingly, the Court correctly applied *Blinder* when analyzing this case, and properly found that, in the absence of specific evidence of bias, Fasano failed to overcome the presumption of the Board’s honesty and integrity. Nothing in the record demonstrates any sort of collusion between the Board and DAG Sweeney, nor can it. At the time of the May 2024 Hearing, the Board was composed of all new members, none of whom participated in the prior proceedings. Moreover, between

⁹ This does not include *Horn* and *Weissman*, as these cases did not articulate a clear standard on the same issue before the Court. Instead, the courts in *Horn* and *Weissman* found that the attorney’s alleged conflict of interest did not prejudice the complaining party. *Horn*, 337 A.2d at 860; *Weissman*, 547 P.2d at 1276.

2021 and 2024, different attorneys represented the Board while DAG Scott continually acted as counsel for DNREC. At no point did DAG Sweeney opine on the facts or deliberate with the Board behind closed doors.¹⁰ There is no basis for the Court to conclude that there was any collusion between the Board and DAG Sweeney, or any representative of the Department of Justice. Notably, the hearing transcript is completely devoid of any argument, advice, or even comment by DAG Sweeney demonstrating bias in favor of DNREC. Fasano has not, because he cannot, pointed to any facts in the record that would overcome the presumption of the Board's honesty and integrity, and therefore, under *Blinder*, his argument fails. Consequently, the Court should affirm the Superior Court's ruling.

2. DAG Sweeney's Limited Role in the May 2024 Hearing Did Not Amount to a Due Process Violation.

Fasano's argument that DAG Sweeney's "superficial participation as an advocate" amounts to a due process violation also misses the mark. *See* Op. Br. at 32–35. This argument relies on a misapplication of facts and inapposite authority. In fact, all of the cases upon which Fasano relies, concern instances in which the court addressed the fundamental fairness of an attorney who acted as both advocate and fact-finder in the same matter. *See e.g., Trans World Airlines, Inc. v. Civ. Aeronautics Bd.*, 254 F.2d 90, 91 (D.C. Cir. 1958) (finding that an attorney who

¹⁰ In fact, in accordance with the Freedom of Information Act, Title 29, Ch. 100, the Board deliberates in the presence of the parties.

signed a brief on behalf of a governmental agency filed with an administrative board who then became a member of the board and adjudicated the case, casting the deciding vote which favored the governmental agency, was fundamentally unfair); *Am. Gen. Ins. Co. v. F.T.C.*, 589 F.2d 462, 464–65 (9th Cir. 1979) (holding that a judge was disqualified from hearing a case in which the court was presented with a crucial jurisdictional issue that was identical to an issue argued by him in earlier proceedings); *Matter of Robson*, 575 P.2d 771, 775 (Alaska 1978) (determining that an attorney who investigated another attorney’s misconduct that supported a charge of suspension then participated in the decision to uphold the suspension was fundamentally unfair). But Fasano’s argument and reliance on this authority again is belied by the fact that DAG Sweeney did not serve as the trier-of-fact or decision-maker at any point during the administrative proceedings. At the May 2024 Hearing, the pre-hearing conference order recommended by another attorney controlled, and DAG Sweeney did not opine on the admissibility of evidence, presentation of witnesses, or any legal arguments. Additionally, the limited procedural ground DAG Sweeney raised in the Motion to Dismiss filed in 2021 nearly three years prior, was not only argued by another attorney and heard before an entirely different composition of the Board, but was also not at issue at the May 2024 Hearing. DAG Sweeney said nothing during the hearing to cause Fasano any concern.

Fasano’s conspiracy theory about an alleged nexus between DAG Sweeney’s procedural argument on timeliness in 2021, and the delay in the Board issuing a written decision memorializing its oral vote and decision on the merits of the grievance in 2025 (which DAG Sweeney acknowledged was her own) is based wholly on conjecture. As argued *supra*, the hearing transcript is completely devoid of any argument, advice, or even comment by DAG Sweeney demonstrating bias in favor of DNREC. Fasano was not denied a full and fair hearing and was clearly able to exercise his rights under the law, and there is nothing in the record showing that the delay in issuing the written decision caused Fasano any actual prejudice. Notably, DAG Sweeney’s participation in the administrative appeal process *after* the Board voted and made its final determination “does not inject unacceptable risks of bias into [that] determination” and therefore, does not amount to a due process violation. *See Botsko*, 774 N.W.2d at 853. Fasano’s argument therefore must fail, and the Court should affirm the Superior Court’s decision.

3. Fasano Waived Any Claim to Challenge Procedural Irregularities By Failing to Raise Such Claims Before the Board.

As Fasano’s due process argument is premised on a misapplication of the facts, and is unsupported by the law, his claim about DAG Sweeney’s so-called conflict of interest amounts to a challenge of procedural irregularities. Fasano waived any argument concerning DAG Sweeney’s involvement in the May 2024 Hearing when Fasano, and his counsel, argued the merits of his case without ever

raising an issue regarding DAG Sweeney's representation. *In re 244.5 Acres of Land*, 2001 WL 1469155, at *5 (Del. Super. Ct. Aug. 22, 2001), *rev'd sub nom. on other grounds, In re 244.5 acres of land*, 808 A.2d 753 (Del. 2002). When the Court "acts in its appellate capacity on an appeal from an administrative board, **the Court will not consider issues not raised before the tribunal.**" *Mazen v. City of Dover Bd. of Assessment Appeals*, 2016 WL 520996, at *4 (Del. Super. Jan. 22, 2016), *aff'd sub nom. Shahin v. City of Dover Bd. of Assessment Appeals*, 149 A.3d 227 (Del. 2016). Rather than raise this issue below, Fasano ambushed DAG Sweeney before the Superior Court and this tribunal, calling into question the ethics and integrity of a member of the Delaware Department of Justice. The Delaware Supreme Court has explicitly noted that a party's "failure to make a proper objection of bias or request a recusal when it knew the circumstances for potential bias at the time of the hearing, waives the claim of error." *Rehoboth Art League v. Board of Adjustment of The Town of Henlopen Acres*, 991 A. 2d 1163, 1166 (Del. 2010). Accordingly, the Board respectfully requests that the Court deem this argument waived.

CONCLUSION

For the reasons set forth above, the Board respectfully requests that the Court affirm the Superior Court's Order.

Respectfully submitted,

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