

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Public Advocate,	:	
Appellant	:	
	:	
v.	:	
	:	
Philadelphia Water, Sewer and	:	No. 1070 C.D. 2019
Storm Water Rate Board	:	Argued: February 10, 2021

BEFORE: HONORABLE P. KEVIN BROBSON, President Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE ANNE E. COVEY, Judge  
HONORABLE MICHAEL H. WOJCIK, Judge  
HONORABLE CHRISTINE FIZZANO CANNON, Judge  
HONORABLE ELLEN CEISLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE FIZZANO CANNON

FILED: September 24, 2021

The appointed Public Advocate appeals from an order of the Court of Common Pleas of Philadelphia County (trial court) affirming a decision of the Philadelphia Water, Sewer and Storm Water Rate Board (Rate Board) that approved a portion of a water rate increase requested by the Philadelphia Water Department (Water Department). On review, we affirm the trial court’s order in part, reverse in part, vacate in part, and remand to the trial court for consideration of portions of the Public Advocate’s appeal, applying the proper evidentiary analysis and standard of review.

## I. Background

The Water Department is a municipal utility created by the City of Philadelphia (City) pursuant to the City's Home Rule Charter. *See* Reproduced Record (R.R.) 9a. As such, it is not regulated by the Pennsylvania Public Utility Commission (PUC). *Consumer Educ. and Protective Ass'n Int'l v. Phila. Water Dep't Comm'r*, 575 A.2d 160, 163 (Pa. Cmwlth. 1990) (*CEPA*), *aff'd*, 600 A.2d 189 (Pa. 1992).

The Rate Board was established as an independent ratemaking body in 2012 through an amendment of the City's Home Rule Charter. *See* Phila., Pa., Home Rule Charter § 5-801 (2012); Phila., Pa., City Code § 13-101 (2014); R.R. 9a. The City's implementing rate ordinance was signed by the Mayor in January 2014. Phila. Code, § 13-101. The ordinance requires the Rate Board to act on any rate proposal from the Water Department and to issue a decision (Rate Determination) approving, modifying, or rejecting such proposal. Phila. Code § 13-101(4)(b)(iii); R.R. 10a. The ordinance expressly provides that “[a]ny party to the [rate] proceedings of the Rate Board affected by the Rate Determination may appeal to the Court of Common Pleas in Philadelphia.” Phila. Code § 13-101(9).

Community Legal Services, Inc. has been appointed as the Public Advocate to represent the interests of residential and small business water customers in the ratemaking process.<sup>1</sup> *Pub. Advocate v. Phila. Water, Sewer & Storm Water Rate Bd.* (C.P. Pa., No. 00527, filed Nov. 18, 2019), slip op. (Trial Ct. Op.) at 2; *see also* R.R. 10a (defining the Public Advocate as a “qualified firm, organization or individual(s) appointed to represent the interests of Small User Customers pursuant to a formal City contract”).

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<sup>1</sup> There were several other participants in the ratemaking process, but they are not involved in this appeal.

In 2018, the Water Department filed a request with the Rate Board for water rate increases to be effective in 2019, 2020, and 2021. Trial Ct. Op. at 1. The Water Department proposed rate increases of 1.6% in 2019, 4.5% in 2020, and 4.5% in 2021. *Id.* The proposal included shifting the costs of public fire protection from the City’s General Fund and embedding those costs in the water rates. *See id.* at 6.

Following written discovery, a series of public input hearings, and submission of evidence to a Hearing Officer appointed by the Rate Board, the Hearing Officer issued a report (Hearing Officer Report) to the Rate Board. Trial Ct. Op. at 2; R.R. 401a-511a. Both the Public Advocate and the Water Department filed exceptions from the Hearing Officer Report with the Rate Board, which exceptions were briefed by the parties and considered by the Rate Board. *See* July 12, 2018 Final Rate Determination of the Philadelphia Water, Sewer and Storm Water Rate Board (Rate Det.), at 5; *see also* Trial Ct. Op. at 2. The Hearing Officer filed a supplemental report with the Rate Board that summarized and analyzed the positions of the Water Department and the Public Advocate. *See* R.R. 512a-19a. Ultimately, the Rate Board approved a portion of the rate increases requested by the Water Department for 2019 and 2020 and did not approve any rate increase for 2021. *See* Rate Det. at 95 & App. A. The Rate Board also rejected the Water Department’s proposal to move the budget for City fire protection from the General Fund to the water rates. *Id.* at 63. Overall, the Rate Board granted about 21% of the rate increase requested by the Water Department. *Id.* at App. A; Trial Ct. Op. at 6.

The Public Advocate participated in all stages of the rate proceeding, including discovery, submission of evidence, and examination of witnesses before the Hearing Officer. *See* R.R. 10a (in rate change proceedings, “the Public Advocate will be deemed to be [a] Participant[] without notification to the [Rate] Board”). As

the appointed representative of all of the City's residential and small business customers, *see* R.R. 10a, the Public Advocate appealed the Rate Board's decision to the trial court. After briefing and argument, the trial court denied the Public Advocate's appeal, based on the record made before the Rate Board. *See* Trial Ct. Op. at 3. The Public Advocate then appealed the trial court's order to this Court.

## II. Issues on Appeal

The Public Advocate raises several issues on appeal<sup>2</sup> to this Court, which we reorder as follows:

A. The trial court erred by denying the Public Advocate's right of appeal, because the Rate Board's final Rate Determination constituted an adjudication to which the Local Agency Law<sup>3</sup> must be applied.

A. The trial court erred by denying the Public Advocate's right of appeal, because that right was expressly granted by the rate ordinance.

B. The Rate Board erred by (1) allowing the City Treasurer to serve as a voting member of the Rate Board instead of requiring her recusal; (2) considering and incorporating revenue calculations submitted by the Water Department after the record was closed, such that the Public Advocate did not have an adequate opportunity to be heard concerning those calculations; and (3) accepting

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<sup>2</sup> Where there was a full record before a local agency and the trial court did not take additional evidence, we review the decision of the local agency rather than that of the trial court. *Yannone v. Town of Bloomsburg Code Appeal Bd.*, 218 A.3d 1002, 1006 n.6 (Pa. Cmwlth. 2019) (citing *Ficco v. Bd. of Supervisors of Hempfield Twp.*, 677 A.2d 897, 899 (Pa. Cmwlth. 1996)). This Court will affirm the local agency unless constitutional rights were violated, an error of law was committed, the procedure before the agency was contrary to statute, or a necessary finding of fact was not supported by substantial evidence. *Yannone*, 218 A.3d at 1006 n.6 (citing *Appeal of McClellan*, 475 A.2d 867, 869 (Pa. Cmwlth. 1984)).

<sup>3</sup> 2 Pa. C.S. §§ 551-555, 751-754.

a legally insufficient Hearing Officer Report which did not allow the Public Advocate to assert meaningful exceptions.

### **III. Discussion**

#### **A. Quasi-Judicial Status of Rate Determination**

In its opinion filed pursuant to Pennsylvania Rule of Appellate Procedure 1925(a), Pa. R.A.P. 1925(a), in support of its decision, the trial court explained its overarching conclusion that the Rate Determination was not an agency “adjudication” as defined by the Local Agency Law, *i.e.*, a “final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.” 2 Pa. C.S. § 101; *see* Trial Ct. Op. at 4-5. That determination informed the trial court’s consideration of each of the individual issues raised by the Public Advocate. We agree with the trial court in part and disagree in part. The rate ordinance is legislation that describes a quasi-legislative procedure for determining the rates. However, arising from this legislation is an express right of appeal from a Rate Determination, which also adds a quasi-judicial aspect to the Rate Determination.<sup>4</sup>

The trial court relied heavily on this Court’s decision in *Public Advocate v. Brunwasser*, 22 A.3d 261 (Pa. Cmwlth. 2011). In *Brunwasser*, this Court considered the Public Advocate’s right to appeal under the Local Agency Law from a water rate determination. We held there was no right of appeal because the City’s ratemaking determination was not an adjudication. This was so because the

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<sup>4</sup> Neither party has challenged the validity of the ordinance generally or the ordinance’s provision of a right of appeal from a quasi-legislative determination. Consequently, these issues are not before us.

ratemaking affected the public generally, not merely the specific parties choosing to participate in a particular ratemaking proceeding. “If [an] agency action does not affect the rights of the parties, but only affects the interest of the public in general, then the action will not be deemed an adjudication.” *Id.* at 270. Specifically, the issues in a dispute over the Rate Determination “are not particular to the parties that chose to participate in the ratemaking process.” *Id.*

Moreover, in *Brunwasser*, this Court explained that under the City’s Home Rule Charter and the ratemaking provisions in the ordinance then in effect, “the hearings and processes leading up to a . . . rate determination were investigatory rather than adjudicatory.” *Id.* (citing *CEPA*, 575 A.2d at 163). The rate determination in that case, therefore, was not an adjudication and was not appealable *under the Local Agency Law*. *Brunwasser*, 22 A.3d at 270.

As the Rate Board points out in its brief, the process of review for approval, modification, or rejection of water rate proposals is largely the same before the Rate Board as it was before the Water Commissioner. The Rate Board asserts that the determination arising from this process was not rendered an “adjudication” simply because a separate administrative tribunal, the Rate Board, determined the outcome. Br. of Appellee at 24-26 (citing 2 Pa. C.S. § 101, *Brunwasser*; *Pa. Game Comm’n v. State Civ. Serv. Comm’n (Taccone)*, 789 A.2d 839 (Pa. Cmwlth. 2002), and *CEPA*).

In response, the Public Advocate argues that *Brunwasser* is distinguishable. Prior to the amendment of the Home Rule Charter in 2012 and the related enactment of the rate ordinance in 2014, the City’s Water Commissioner made the water rate determinations that are now made by the Rate Board. *Compare* R.R. 7a-17a (Rate Bd. regs.) *with* R.R. 22a-29a (former Water Comm’r regs.). Since

the 2012 amendment of the Home Rule Charter, the Rate Board, not the Water Commissioner, makes rate determinations. *Brunwasser*, 22 A.3d at 264. The Rate Board, unlike the Water Commissioner, is an “independent” City agency. Br. for Appellant at 36-39. The Public Advocate suggests that this distinction is sufficient to render *Brunwasser* inapplicable and make the Rate Determination an agency adjudication. *Id.* The Public Advocate posits that the creation of such an “independent” agency reflects a legislative intent by the City’s electors to invoke appeal rights under the Local Agency Law from water rate determinations. *Id.*

We disagree with *this basis* for distinguishing *Brunwasser*. The stated purpose of creating the independent Rate Board was to assure that going forward, “City Council will not be subject to the political pressures that have been brought to bear upon Council when it has undertaken to perform this [ratemaking] task.” Phila. Home Rule Charter § 5-801, Annot. The City’s ordinance further clarifies this purpose, stating that “[p]ursuant to Section 5-801 of the [Home Rule] Charter, an independent rate-making body shall fix and regulate rates and charges for supplying water . . . *without further authorization of [City] Council.*” Phila. Code § 13-101 (emphasis added). Indeed, in revising its Home Rule Charter to create the Rate Board, the City explained that it was *not* altering the legislative character of rate determinations, stating: “Rate-making for utility services has long been regarded as being primarily an administrative function *subject to legislative standards and this section follows this practice.*” Phila. Home Rule Charter § 5-801 (emphasis added).

Moreover, *Brunwasser* did not focus on which City agency made the ratemaking decision, but rather, on (1) who was affected by the decision, *i.e.*, the general public, not individual parties; and (2) the nature of the rate determination as

quasi-legislative rather than quasi-judicial. *See Brunwasser*, 22 A.3d at 270. The same reasoning applies to the Rate Determination at issue here, which likewise affected the general public and was likewise quasi-legislative in character. Accordingly, this Court concludes that the Rate Determination issued by the Rate Board did not constitute an adjudication giving rise to appeal rights *under the Local Agency Law*.

Nonetheless, as discussed in the next section, The City's ordinance as enacted in 2014 confers a right of appeal upon any party affected by a rate determination. Generally, a right of appeal does not arise from a legislative action; appeals, rather, lie from adjudications. *See Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 607 (Pa. Cmwlth. 2020) (citing *Ondek v. Allegheny Cnty. Council*, 860 A.2d 644, 648 (Pa. Cmwlth. 2004)). Although the City expressly intended to retain the legislative character of the ratemaking procedure, by granting an express right of appeal from a rate determination, it inadvertently conferred upon the ratemaking process a quasi-judicial quality as well.<sup>5</sup> Accordingly, we conclude that the current ratemaking ordinance has both quasi-legislative and quasi-judicial aspects. Nonetheless, consistent with our opinion in *Brunwasser*, we agree with the trial court that in conveying an express right of appeal, the ordinance did not thereby create a right to appeal *under the Local Agency Law*.

### **B. Public Advocate's Right of Appeal Generally**

In *Brunwasser*, there was no right of appeal from a rate determination *under the Local Agency Law*, as explained above. However, there is now a right of

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<sup>5</sup> We note, moreover, that the City created the Rate Board for the express purpose of making rate determinations and relieving City Council from ultimate responsibility for that function. In that regard, the Public Advocate is correct that the Rate Board has an independent status not previously conferred on the Water Commissioner.



appeal under the City’s ordinance.<sup>6</sup> The rate ordinance as amended in 2014 now provides an express right to appeal from a Rate Determination: “Any party to the [rate] proceedings of the Rate Board affected by the Rate [Determination] may appeal to the Court of Common Pleas in Philadelphia.” Phila. Code § 13-101(9). As stated above, the Public Advocate was appointed by the City to represent the interests of all residential and small business ratepayers and to participate in all stages of the rate proceeding. Trial Ct. Op. at 2. Because the Public Advocate was a party to the rate proceeding and was affected by the Rate Determination, the Public Advocate had a right of appeal from the Rate Determination under the City’s rate ordinance. *See* Phila. Code § 13-101(9). Moreover, to the extent that the City suggests the Public Advocate lacks standing because it is not a ratepayer, that suggestion is unpersuasive; the City itself has appointed the Public Advocate to act in a representative capacity on behalf of ratepayers. *Cf. Duquesne Light Co. v. Pa. Pub. Util. Comm’n*, 715 A.2d 540, 542-43 & n.2 (Pa. Cmwlth. 1998) (PUC determined a township had standing to challenge rates in representative capacity on behalf of its citizens who were ratepayers, in that “the interests of administrative efficiency required the [t]ownship to be granted representational standing”; and further, noting that the Consumer Advocate participated in the action by reason of having been “appointed by the Attorney General to represent the interests of consumers before the [PUC]” pursuant to Section 902-A of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, added by the Act of July 9, 1976, P.L. 903, 71 P.S. § 309-2(a); and Section 201(b) of the Commonwealth

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<sup>6</sup> Article V, Section 9 of the Pennsylvania Constitution also provides a right of appeal to a court of record from an agency adjudication. *See* Pa. Const. art. V, § 9. We express no opinion concerning the applicability of this constitutional provision to a water rate determination under an ordinance having both quasi-legislative and quasi-judicial characteristics and, again, note that a challenge to the validity of the ordinance in question has not been raised in this matter.

Attorneys Act, Act of October 15, 1980, P.L. 950, *as amended*, 71 P.S. § 732-201(b)). Accordingly, we conclude the trial court erred in holding that the Public Advocate could not appeal from the Rate Determination. That portion of the trial court's decision is reversed.

Regarding the standards to be applied on appeal, as explained above, the City's ordinance sets forth a general ratemaking procedure for promulgating a Rate Determination. However, although the ordinance now expressly authorizes an appeal from a Rate Determination to the trial court, it does not set forth any specific procedure or standard of review to be followed in such an appeal. "In general, where the right to appeal is statutory, an appellant must comply with the procedures identified in the governing statute." *S. Chester Cnty. Concerned Citizens Org. v. Zoning Bd. of Lower Oxford Twp.*, 937 A.2d 1141, 1143 (Pa. Cmwlth. 2007). However, where the statute is silent on appeal rights and procedures, as is the case *sub judice* where the applicable standard of review on appeal is not specified, the Local Agency Law applies. 2 Pa. C.S. §§ 752 & 754. Therefore, we apply the provisions of the Local Agency Law to establish the applicable standard of review here, because the ordinance does not provide for such a standard. *See Cook v. City of Phila. Civ. Serv. Comm'n*, 246 A.3d 347, 360 (Pa. Cmwlth. 2021) (citing 36 Standard Pa. Prac. § 166:306 (2020 ed.) (Local Agency Law establishes a method of appeal that applies even if the local enabling legislation makes no provision for such a method)). Under the Local Agency Law, because the trial court decided the Public Advocate's appeal on the existing record after briefs and argument and did not receive any new evidence, its review of the Rate Determination was limited by Section 754(b) of the Local Agency Law, under which a trial court must affirm the local agency's determination unless that determination violates the rights of the

appellant or the applicable procedural rules, constitutes an error of law, or lacks substantial evidence in support of a necessary finding of fact. 2 Pa.C.S. § 754(b).

Despite its erroneous conclusion that the Public Advocate had no right of appeal, the trial court nonetheless went on to examine the remaining issues raised by the Public Advocate. Trial Ct. Op. at 5-9. We, accordingly, examine each part of the trial court's analysis in turn.

### **C. Challenges to Specific Rate Board Rulings**

*Brunwasser*, which was decided before the 2014 amendment to the ordinance, is distinguishable from this matter in one important respect. As discussed above, the City's express creation of a right of appeal in the 2014 amendment to the ordinance lends a quasi-judicial aspect to Rate Determinations issued since the amendment. Therefore, unlike the proceeding at issue in *Brunwasser*, the City's current ratemaking procedure requires, along with a right to appeal, the application of the Local Agency Law.

In this regard, this matter is somewhat analogous to *Pennsylvania Coal Mining Association v. Insurance Department*, 370 A.2d 685 (Pa. 1977). That case involved the ratemaking process for mandatory insurance. Our Supreme Court concluded that the circumstances surrounding the ratemaking process, specifically the requirements that coal mining businesses maintain insurance, the significance of rates to maintaining those businesses, and the "purpose of regulation by the Insurance Department," created a "combination of dependence and reliance" which made applicable and necessary the procedures of the Local Agency Law. *Id.* at 691. Here, there is a similar combination of dependency on water service and reliance on

city government to oversee the associated rates, which likewise engenders a need for the application of procedures on appeal of the Rate Determination.

The Local Agency Law provides a default process for the assertion of rights under the City's Home Rule Charter, if no hearing is otherwise provided. *See Cook*, 246 A.3d at 360 (citing *McCormick v. Dunkard Valley Joint Mun. Auth.*, 218 A.3d 528, 532 (Pa. Cmwlth. 2019)). Here, the City's applicable ordinance and the Rate Board's related regulations provide a general description of the rules for promulgation of the Rate Determination, including required hearings. *See Phila. Code* § 13-101; R.R. 9a-16a. Moreover, the ordinance itself provides for appointment of and participation by the Public Advocate in ratemaking proceedings and also provides for a statutory appeal. However, the Local Agency Law's procedural requirements still provide guidance in determining the sufficiency of the process provided. *See Smith v. City of Phila.*, 147 A.3d 25, 32 (Pa. Cmwlth. 2016) (Section 553 of the Local Agency Law, 2 Pa. C.S. § 553, requires reasonable notice of a hearing and an opportunity to be heard); *accord In re Cox* (Pa. Cmwlth., No. 1574 C.D. 2018, filed Dec. 16, 2019), slip op. at 18, 2019 Pa. Commw. Unpub. LEXIS 685, at \*24 (unreported) (local agency hearing was procedurally sufficient where hearing followed the Local Agency Law).

Procedural requirements under the Local Agency Law vary according to the particular situation, including consideration of the protections and procedures already available. *Pa. Coal Mining Ass'n*, 370 A.2d at 691 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), and citing *Boddie v. Conn.*, 401 U.S. 371, 378 (1971)). Here, the record demonstrates that the Public Advocate was given notice and a meaningful opportunity to be heard in conjunction with the ratemaking process. *See Trial Ct. Op.* at 2, 5 & 8. The Public Advocate, in fact, participated at

every level of the process, submitted nearly 700 pages of documentary evidence and written statements, examined witnesses before the Hearing Officer, and submitted and briefed extensive exceptions to the Rate Determination. Br. of Appellee at 32; *see, e.g.*, R.R. 60a-215a (Main Br. of Pub. Advocate, 7/23/18), 375a-90a (Pub. Advocate Comments on Draft Compliance Filing, 7/30/18), 562a-606a (Pub. Advocate Exceptions to Hearing Officer Report, 6/26/18), 607a-48a (Pub. Advocate Motion for Recusal of Rasheia Johnson & Mem. of Law, 4/6/18), 666a-78a (Pub. Advocate Motion for Entry of Order & Certification of Issues for Appeal), 692a-96a (Pub. Advocate Motion for Enlargement of Time for Hearing Officer Report, 6/20/18), 796a-843a (Pub. Advocate Statement No. 1, Direct Testimony of Lafayette K. Morgan, Jr., 4/20/18), 874a-81a (Pub. Advocate Technical Hearing Ex. 7), 899a-1085a (Water Dep't responses to Pub. Advocate discovery & Hearing Officer discovery rulings). Therefore, we agree with and affirm the trial court's conclusion that the ratemaking process generally provided sufficient rights of participation to the Public Advocate. However, the Public Advocate raises several specific concerns alleging defects in the process followed in this instance. We address those concerns separately below.

### **1. Recusal of the City Treasurer**

During the ratemaking process, the City Treasurer was also a member of the Rate Board and voted on the Rate Determination. Trial Ct. Op. at 2 & 5. The Public Advocate requested that the City Treasurer recuse herself from participation in the ratemaking process, arguing that by reason of that position, she was involved in formulating financial assumptions for the Water Department, possessed a financial and fiduciary relationship with the Water Department, exercised direct

contractual authority over persons who would be witnesses for the Water Department, coordinated legislative efforts that would affect rates, and had employment duties that would be impacted by the Rate Determination. Br. for Appellant at 40-46; *see* Trial Ct. Op. at 3. After seeking advice from the Rate Board's solicitor, the City Treasurer declined to recuse herself, and the Rate Board agreed with her position. R.R. 33a; Trial Ct. Op. at 2. The Public Advocate insists the City Treasurer's participation in the ratemaking process was impermissible<sup>7</sup> and created an appearance of impropriety.

The trial court reasoned that since there were no rights attached to the ratemaking process, no rights were violated. Trial Ct. Op. at 5. The trial court further opined that any appearance of partiality became moot once a fair hearing occurred. *See* Trial Ct. Op. at 6 (quoting *Reilly v. Se. Pa. Transp. Auth.*, 489 A.2d 1291, 1300 (Pa. 1985)). The trial court found the Public Advocate was unable to point to any actual bias or unfairness resulting from the City Treasurer's participation in the ratemaking process and vote. The trial court noted that the Rate Board granted only 21% of the requested rate increase and also denied the Water Department's request to reassign the costs of public fire protection from the General Fund to the City's water customers. Trial Ct. Op. at 6. The trial court also posited that the City Treasurer's participation in the ratemaking process had no effect on the outcome, because the vote of the Rate Board was unanimous. *Id.* at 7.

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<sup>7</sup> The Public Advocate's argument is somewhat analogous to our Supreme Court's analysis in *Lyness v. State Board of Medicine*, 605 A.2d 1204 (Pa. 1992), in which the Court condemned the commingling of prosecutorial and adjudicative functions by an administrative agency. *Id.* at 1204. Here, the Public Advocate essentially suggests the City Treasurer first supplied the information on which the Water Department relied in formulating its request concerning water rates, and then acted as a decision maker concerning the Water Department's rate request, thus impermissibly commingling functions of advocate and adjudicator.

Upon review, this Court concludes that the trial court erred in its analysis of the recusal issue. “The standards requiring recusal for officials acting in their legislative capacities are different from those applicable to officials acting in adjudicative capacities.” *Springwood Dev. P’ship, L.P. v. Bd. of Supervisors of N. Cornwall Twp.*, 985 A.2d 298, 305 (Pa. Cmwlth. 2009). However, we agree with the trial court that an alleged appearance of impropriety, standing alone, will not necessarily invalidate a decision based on an official’s participation in that decision. When a local official acts in an adjudicative or quasi-judicial capacity, where “an appearance of nonobjectivity is sufficient to trigger judicial scrutiny, the significant remedy of invalidation often depends on something more tangible.” *Caln Nether Co. v. Bd. of Supervisors of Thornbury Twp.*, 840 A.2d 484, 496 (Pa. Cmwlth. 2004). “Before it can be said that [an official] should have recused himself the record must demonstrate bias, prejudice, capricious disbelief or prejudgment . . . . If [an official] thinks he is capable of hearing a case fairly his decision not to withdraw will ordinarily be upheld on appeal.” *Id.* (quoting *Appeal of Miller & Son Paving, Inc.*, 636 A.2d 274, 278 (Pa. Cmwlth. 1993); *In re Blystone*, 600 A.2d 672, 674 (Pa. Cmwlth. 1991)) (additional quotation marks omitted); *see also Christman v. Zoning Hearing Bd. of Twp. of Windsor*, 854 A.2d 629, 634 (Pa. Cmwlth. 2004) (“a tangential relationship between a tribunal member and the litigation, without evidence of bias, prejudice, capricious disbelief or prejudgment, is insufficient to warrant recusal”).

Because the trial court did not apply the correct standard in examining the recusal issue, we vacate the trial court’s holding on the recusal issue and remand for the trial court to determine whether the facts indicate “evidence of bias, prejudice, capricious disbelief or prejudgment” on the part of the City Treasurer. *Id.* In making

that determination, the trial court shall apply the standard of review provided by the Local Agency Law, 2 Pa.C.S. § 754(b), as discussed above.

## **2. Water Department's Post-Hearing Revenue Recalculations**

The Public Advocate also asserts that the Rate Board erred by accepting revised calculations from the Water Department after the close of the record in the ratemaking proceeding. According to the Public Advocate, this denied it an opportunity to discover, examine, or refute the new calculations.

As the trial court explained, the Rate Board, after tentatively approving rate increases, merely asked the Water Department to re-run updated revenue projections reflecting the approved increases. Trial Ct. Op. at 7. Section II.8(a)(3) of the Rate Board's regulations expressly authorizes the Hearing Officer to make exceptions to the schedule for obtaining information. R.R. 16a. The Public Advocate was present at the Rate Board's meeting when the request for updated projections was made. Trial Ct. Op. at 8. Moreover, the Public Advocate had access to the same figures and was capable of running the new calculations itself, as it had done in the past. *Id.* In addition, the revised figures were shared with the Public Advocate the day before the Rate Board meeting at which the Rate Board incorporated the new tables into its Rate Determination. *Id.* The Public Advocate was present at that Rate Board meeting, as well, and *did not object* when the Rate Board announced it was incorporating the new tables received from the Water Department. *Id.* In any event, the Public Advocate could – and did – have input regarding the new calculations in its motion for reconsideration of the Rate Determination. *Id.*



The trial court found that the Public Advocate had ample opportunity to challenge the new rate calculations. Trial Ct. Op. at 8. We agree and, accordingly, affirm this aspect of the trial court's decision.

### **3. Legal Sufficiency of Hearing Officer's Report**

The Hearing Officer is responsible to present a Hearing Officer Report that provides a summary and recommendation to the Rate Board addressing all relevant issues. *See* Trial Ct. Op. at 9; R.R. 9a-10a. Here, the Hearing Officer submitted an extensive draft report over 100 pages long. *Id.*; R.R. 401a-511a. However, despite its length and overall comprehensiveness, the report contained placeholders and parentheticals in places that suggested the Hearing Officer still planned to complete some portions of the report with additional information. *See, e.g.*, R.R. 406a-09a, 414a-15a, 421a, 433a-34a, 440a, 469a-74a, 480a, 482a, 493a-504a & 506a-11a. According to the Public Advocate, the Hearing Officer never provided a final and complete report. The Public Advocate therefore contends it was not able to assert meaningful exceptions to the Rate Board concerning the incomplete portions of the Hearing Officer Report. Br. for Appellant at 55-62.

The trial court rejected this argument, relying once more on its conclusion that the Rate Determination was not an adjudication giving rise to procedural rights. Trial Ct. Op. at 8. The trial court concluded that the Public Advocate had no protected interest in the process by which the Rate Board determines water rates, and in any event, the report was sufficient to allow meaningful exceptions. *Id.* at 9.

However, the trial court did not consider whether the nature of the missing record citations and figures in the Hearing Officer Report were such as to

prevent the Report from being substantially complete. Moreover, the Public Advocate contends the Hearing Officer Report was inadequate in summarizing specific aspects of the record, *see* Br. for Appellant at 55-62, but the trial court did not determine the degree to which the applicable regulations mandate the contents of the summary. Thus, the trial court did not determine whether the contents of the Hearing Officer Report complied with the requirements of the ordinance.

The Rate Board's governing regulations define a "Hearing Officer Report" as "[t]he Hearing Officer's summary of all written information submitted and all testimony presented in both public hearings and technical review hearings with the Hearing Officer's proposed findings of fact and conclusions of law for the Board's consideration. The Hearing Officer Report may also include a discussion and recommended decision." R.R. 9a-10a. The related regulation describing the Hearing Officer's authority empowers her to "[p]repare and submit the Hearing Officer Report to the [Rate] Board and all Participants." R.R. 12a; *see also* R.R. 14a-15a.

As described above, the Hearing Officer Report was lengthy and comprehensive and included an extensive summary of the record. *See* R.R. 401a-511a. The Hearing Officer also submitted a supplemental report summarizing and analyzing the positions taken by the Department and the Public Advocate in their exceptions to the Hearing Officer Report. R.R. 512a-19a. The Rate Board apparently found the Hearing Officer Report adequate to inform the formation of the Rate Determination. We agree with the trial court that requiring the Hearing Officer to include every detail of the record in its summary would render that summary "redundant and useless." Trial Ct. Op. at 9. However, that is a different issue from the question of whether, applying the proper standard of review, the Hearing Officer

Report addressed every pertinent issue and was sufficiently complete to comply with the ordinance's requirements that the Report's summary must include "all written information submitted and all testimony presented in both public hearings and technical review hearings." R.R. 9a-10a. As that is a mixed question of fact and law, the trial court should make that specific determination. Accordingly, we vacate the trial court's decision as to that issue and remand for further consideration.

#### **IV. Conclusion**

Based on the foregoing discussion, we reverse the trial court's conclusion that the Rate Determination was not appealable. We affirm the trial court's conclusion that the City's ratemaking procedure generally provided the Public Advocate with adequate participation in the ratemaking process. We vacate the trial court's conclusion approving the City Treasurer's non-recusal and remand to the trial court for further consideration of that issue consistent with the foregoing opinion. We affirm the trial court's conclusion that the Public Advocate received a sufficient opportunity to challenge the revenue calculations relating to the Rate Determination. Finally, we vacate the trial court's conclusion concerning the sufficiency of the Hearing Officer Report and remand to the trial court for further consideration of that issue consistent with the foregoing opinion.

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CHRISTINE FIZZANO CANNON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Public Advocate,	:	
Appellant	:	
	:	
v.	:	
	:	
Philadelphia Water, Sewer and	:	No. 1070 C.D. 2019
Storm Water Rate Board	:	

ORDER

AND NOW, this 24th day of September, 2021, the order of the Philadelphia County Court of Common Pleas (trial court) is AFFIRMED in part, REVERSED in part, and VACATED in part, and this matter is REMANDED, as follows:

1. The trial court’s conclusion that the Rate Determination was not appealable is REVERSED.
2. The trial court’s conclusion that the ratemaking procedure employed by the City of Philadelphia (City) generally provided the Public Advocate with adequate participation in the ratemaking process is AFFIRMED.
3. The trial court’s conclusion approving the City Treasurer’s non-recusal is VACATED, and this matter is REMANDED to the trial court for further consideration of that issue consistent with the foregoing opinion.
4. The trial court’s conclusion that the Public Advocate had a sufficient opportunity to challenge the revenue calculations relating to the Rate Determination is AFFIRMED.

5. The trial court's conclusion concerning the sufficiency of the Hearing Officer Report is VACATED, and this matter is REMANDED to the trial court for further consideration of that issue consistent with the foregoing opinion.

Jurisdiction is relinquished.

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CHRISTINE FIZZANO CANNON, Judge