

IN THE COURT OF APPEALS OF MARYLAND

NO. 96

SEPTEMBER TERM, 1994

FRANK P. LUSSIER

V.

MARYLAND RACING COMMISSION

Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker
McAuliffe, John F. (Retired,
specially assigned)

JJ.

DISSENTING OPINION BY BELL, J.

FILED: November 8, 1996

Administrative agencies are an important, if not essential, part of the legal and governmental landscape and, in any event, permanent fixtures in today's society. Indeed, there is likely not a single Marylander who has not had at least a modicum of interaction with an administrative agency. As one commentator has observed:

A Marylander today is born under the auspices of a doctor whose qualifications have been passed upon by a Board of Medical Examiners, and a nurse whose fitness has been determined by the State Board of Examiners of Nurses. If he attends the public schools, the scope of his education and the text books which mold his thoughts are selected or approved by the State Board of Education. If, after his schooling, he wishes to become a doctor, lawyer, dentist, architect or plumber, he must satisfy the appropriate State board of his qualifications before he can begin to earn his living. His very movements to and from work bring him into close contact with the processes of administrative law. The carfare or taxicab fare which he pays are determined by the Public Service Commission; if he drives an automobile, his license may be revoked for any cause which the Commissioner of Motor Vehicles deems sufficient; he cannot even take to the air without a license from the State Aviation Commission....if he places a bet at a race track, he does so under the rules and regulations prescribed by the Maryland Racing Commission....

Reuben Oppenheimer, Administrative Law in Maryland, 2 Md. L. Rev. 185, 186 (1938). Their purpose is to, and, in fact they do, make government more efficient; thus, administrative agencies are critical to the proper working of government. Administrative law involves the nature of the operations of administrative agencies, as well as the control exercised by courts over their creation and activities. Id. at 187.

An administrative agency, as a creature of statute, has only the power its enabling statute delegates to it. Commission on Med.

Discipline v. Stillman, 291 Md. 390, 413, 435 A.2d 747, 759 (1980). See also Holy Cross Hosp. of Silver Spring, Inc. v. Health Servs. Cost Review Comm'n, 283 Md. 677, 683, 393 A.2d 181, 184 (1978); Baltimore v. William E. Koons, Inc., 270 Md. 231, 236-37, 310 A.2d 813, 816-17 (quoting 1 Am. Jur.2d Administrative Law § 132 1962)); Gino's v. Baltimore City, 200 Md. 621, 640, 244 A.2d 218, 228-229, (1968)); "it has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute." Holy Cross Hospital, 283 Md. at 683, 393 A.2d at 184; Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 85 L.Ed. 1271, 61 S.Ct. 845 (1941) (the primary function of an administrative agency is to carry out the will of the State as enunciated in the legislation creating it). Administrative agencies exist because the Legislature does not have, and can not be expected to be able to acquire, the necessary sophisticated and specific knowledge in the variety of areas for which government has responsibility. Sullivan, 293 Md. at 122, 442 A.2d at 563. See also, 1 Am.Jur.2d Administrative Law, (1942). By contrast, an administrative agency is able to acquire the requisite expertise and, so, perform the task or administer the program with which it is charged. Dep't of Natural Resources v. Linchester, 274 Md. 211, 220, 334 A.2d 514, 522 (1975); Tighe v. Osborne, 150 Md. 452, 463, 133 A. 465, 469 (1926) (an administrative agency has "the task of acquiring information, working out the details, and applying these rules and standards [which it has been provided for guidance] to specific

cases.").

In the administrative law context, the exercise, by an administrative agency, without specific legislative authorization, of the power to fine is the exercise, by that agency, of the power to make laws. Furthermore, the imposition of a penalty, such as a fine, is an adjudicatory matter. But the power to make laws is a legislative function and the power to adjudicate ordinarily is reserved to the judiciary. The Legislature, without, at the least, providing safeguards and standards to direct its exercise, may not delegate the former power to an administrative agency, an arm of the executive branch of government. Department of Transportation v. Armacost, 311 Md. 64, 80, 532 A.2d 1056, 1063 (1987); Pressman v. Barnes, 209 Md. 544, 555, 121 A.2d 816, 822 (1955). Principles of due process, including proportionality, are applicable to the exercise of the latter power. Aravanis v. Somerset County, 339 Md. 644, 665, 664 A.2d 888, 898 (1995); Henry v. State, 273 Md. 131, 149, 328 A.2d 293, 304 (1974) ("The punishment ought to bear a due proportion to the offense"). Thus, notwithstanding the breadth of the scope of Maryland Code (1992) § 11-209¹ of the

¹Maryland Code (1992) § 11-209 of the Business Regulation Article provides:

- (a) In general.- Besides its other powers under this title, the Commission has the powers necessary or proper to carry out fully all the purposes of this title.
- (b) Scope.- The jurisdiction, supervision, powers, and duties of the Commission extend to each person who holds racing for a purse,

Business Regulation Article, neither it, nor § 11-210², authorizing the adoption of regulations, justified the respondent Maryland State Racing Commission in adopting that portion of the regulation pursuant to which the actions in this case were taken, COMAR 09.10.04.03D.³ That regulation purported to empower the Commission to

reward, or stake.

²That section provides:

- (a) In general.-- Except as provided in subsection (b) of this section, the Commission may;
 - (1) adopt regulations and conditions to govern racing and betting on racing in the State; and
 - (2) approve or disapprove:
 - (i) prices that a licensee may set for admission to a race, a service performed, or an article sold at a track; and
 - (ii) the size of the purse, reward, or stake to be offered at a race.
- (b) Prohibited regulations.-- The Commission may not adopt regulations that allow:
 - (1) racing a breed of horse not now authorized by law; or
 - (2) holding currently unauthorized:
 - (i) intertrack betting;
 - (ii) off-track betting; or
 - (iii) telephone betting other than telephone account betting.

³COMAR 09. 10. 04. 03D provides:

D. Denials of Licenses and Sanctions.

(1) The Commission may refuse to issue or renew a license, or may suspend or revoke a license issued by it, if it finds that the applicant or licensee:

- (a) Has engaged in unethical or criminal conduct;
- (b) Is associating or consorting with an

impose sanctions, including fines. Never before today has this Court approved, under the circumstances that exist sub judice, an administrative agency's exercise of the power to fine. I am convinced that it is unwise to do so now.

Notwithstanding that, as a creature of statute, an administrative agency has only that authority that is delegated to it, Sullivan supra, 293 Md. at 124, 442 A.2d at 564; Stillman, 291

individual who has been convicted of a crime in any jurisdiction;

or (c) Is consorting or associating with, has consorted with, a bookmaker, tout, or individual of similar pursuits;

(d) Is, or has been operating as a bookmaker, tout, or a similar pursuit;

(e) Is not financially responsible;

(f) Has been engaged in, or attempted to engage in, any fraud or misrepresentation in connection with the racing or breeding of a horse;

(g) Assaults, or threatens to do bodily injury to, a member of the Commission or any of its employees or representatives or a member or employee of an association;

to (h) Has engaged in conduct detrimental racing; or

violate: (i) Has violated or attempted to

(i) A law or resolution in any jurisdiction, including this State, or

(ii) A condition imposed by the Commission.

(2) Instead of, or in addition to, suspending a license, the Commission may impose a fine not exceeding \$5,000.

(3) In determining the penalty to be imposed, the Commission shall consider the:

(a) Seriousness of the violation;

(b) Harm caused by the violation;

(c) Good faith or lack of good faith of the licensee; and

(d) Licensing history of the licensee.

Md. at 413, 435 A.2d at 759; William E. Koons, Inc., 270 Md. at 236-37, 310 A.2d at 816-17, broad delegations of authority have been upheld. In fact, such delegations are particularly appropriate in some areas, e.g. "where the discretion to be exercised relates to police regulations for the protection of public morals, health, safety, or general welfare." Pressman v. Barnes, supra, 209 Md. at 555, 121 A.2d at 822.⁴ They include public health, see Department of Transportation v. Armacost, supra, 311 Md. at 73, 532 A.2d at 1060 (1987); zoning, see Petrushavsky v. State, 182 Md. 164, 174-5, 32 A.2d 696, 700-01 (1943; Tighe v. Osborne, supra, 150 Md. at 457, 133 A. at 467; and public safety, Pressman, 209 Md. at 555, 121 A.2d at 816.⁵

⁴It is of interest that the Court in Pressman v. Barnes, 209 Md. 244, 121 A.2d 816 (1956) placed a limitation on this principle. It required, in addition, that "it be impracticable to fix standards without destroying the flexibility necessary to enable the administrative officials to carry out the legislative will." Id. at 255, 121 A.2d at 822. It is equally interesting to note that there was no issue in that case concerning the City's authority to delegate to its traffic director the power to impose penalties. The ruling by the trial court that a regulation that sought to prescribe minimum fines and establish presumptions as to guilt was invalid was not appealed. Id. at 552, 121 A.2d at 820.

⁵At issue in Pressman was the authority of the City of Baltimore to empower its traffic director to set speed limits in the City and to promulgate administrative regulations related thereto. In upholding the delegation in that case, the Court made clear that it was the subject matter of the delegation that was critical to its determination of the proper standard:

On account of the tremendous growth of traffic and the need for constant supervision of traffic control, it has also become increasingly imperative for city councils in metropolitan centers to delegate to traffic

Nevertheless, this Court has been clear in its holdings: the Court will approve only those "delegations of legislative power to administrative officials where sufficient safeguards are legislatively provided for the guidance of the agency in its administration of the statute." Armacost, 311 Md. at 72, 532 A.2d at 1060 (and cases cited therein). This means that the delegations to the administrative agency should be reasonably specific and provide some guidelines for the agency to follow. Stillman, supra, 291 Md. at 413, 435 A.2d at 759. In other words, the Legislature must "lay down ... an intelligible principle to which the person or body authorized to [act] is directed to conform." J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409, 48 S.Ct. 348, 352,

experts a reasonable amount of discretion in their administrative duties. New traffic problems are constantly arising, and therefore to require the enactment of an ordinance to cover each specific problem would be likely to result in widespread delays and even serious hazards. It is obvious that there is a practical necessity for expert and prompt judgment in the application of the concept of public safety to concrete situations, and that the standards for administrative officials in the domain of public safety should be at least as flexible as in the domain of public health.

Id. at 553, 121 A.2d at 821. We made clear, however, that whether the regulations were arbitrary or outside the delegation were entirely different issues and that, unless those matters are fairly debatable, the delegations should not withstand judicial review. Id.

55 L.Ed.2d 624, (1928). This principle, said to be its corollary, see Armacost, 311 Md. at 77, 532 A.2d at 1062, is thus consistent with, and conformable to, the separation of powers doctrine⁶. That doctrine is constitutional in scope and premised on the belief "that separating the functions of government and assigning the execution of those functions to different branches [is] fundamental to good government and the preservation of civil liberties." Id. at 77-78, 532 A.2d at 1062, citing M. Vile, Constitutionalism and the Separation of Powers (1967).

I am aware that the separation of powers doctrine does not impose, nor insist that there be, in every circumstance, a complete separation between the branches of government. Our cases recognize that there is a certain amount of acceptable overlap between the branches of government. They also recognize, however, that "this constitutional `elasticity' cannot be stretched to a point where, in effect there no longer exists a separation of governmental power, as the Maryland Constitution does not permit a merger of the three branches of our State government...." Linchester, 274 Md. at 220, 334 A.2d at 521.

Consistent with the foregoing, although Maryland's statement

⁶Article 8 of the Maryland Declaration of Rights provides as follows:

"That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one said Departments shall assume or discharge the duties of any other."

of the separation of powers is "a more concrete barrier than any which the Supreme Court has had to hurdle under the Federal Constitution," R. Oppenheimer, Administrative Law in Maryland, 2 Md. L. Rev. 185, 188, (1938), the right of the Legislature to delegate powers to administrative agencies has been recognized in this State for more than 125 years. Harrison v. Mayor & C. C. of Baltimore, 1 Gill 264 (1843). Thus, as we have held, "delegation of legislative power to the executive branch is constitutionally permissible

`where sufficient safeguards are legislatively provided for the guidance ... in ... administration of the statute.'" Judy v. Schaefer, 331 Md. 239, 261, 627 A.2d 1039, 1050 (1993), citing Armacost, 311 Md. at 81, 72, 532 A.2d at 1064, 1060. See also Dep't of Nat. Res. v. Linchester, 274 Md. 218-220, 334 A.2d at 520-521; County Council v. Investor Funding, 270 Md. 403, 441-442, 312 A.2d 225, 244-246 (1973); Baltimore v. State, 15 Md. 376, 459 (1860). Similarly, this Court has made clear, most recently in Maryland Aggregates v. State, 337 Md. 658, , 655 A.2d 886 (1995), that

"[A]n agency in the executive branch may ordinarily perform adjudicatory functions in harmony with the principle of separation of powers provided that there is an opportunity for judicial review of the agency's final determination."

Id. at 678, 655 A.2d at 896. See also Attorney General v. Johnson, supra, 282 Md. at 286-288, 385 A.2d at 64-65; Shell Oil Co. v.

Supervisor 276 Md. 36, 44-47, 343 A.2d at 526-27 (1975); County Council v. Investors Funding, *supra*, 270 Md. at 432-437, 312 A.2d at 241-243; Insurance Comm'r v. Nat'l Bureau, 248 Md. 292, 299-301, 236 A.2d 282, 286-287 (1967); Burke v. Fidelity Trust Co., 202 Md. 178, 187-189, 96 A.2d 254, 260 (1953); Johnstown Coal & Coke Co. v. Dishong, 198 Md. 467, 473-474, 84 A.2d 847, 850 (1951); Heaps v. Cobb, 185 Md. 372, 379, 45 A.2d 73, 76 (1945). The converse is equally true: "any attempt to authorize an administrative agency to perform what is deemed a purely judicial function or power, would violate the separation of powers principle." Maryland Aggregates, 337 Md. at 676, 655 A.2d at 895 (quoting Shell Oil Co. v. Supervisor, 276 Md. at 47, 343 A.2d at 526-27).

We have never allowed there to be a delegation to an administrative agency of adjudicatory power without insisting that it be accompanied by provisions for judicial review of the exercise of that power. On the other hand, this Court has never condoned the delegation of legislative power without first determining that the guidance provided the administrative agency was sufficient to direct its exercise of that power.

The Commission's adoption of a regulation authorizing it to impose a fine on horse owners and related persons in the absence of legislative action permitting it is an impermissible exercise, if not a usurpation, of legislative power by an administrative agency in violation of the separation of powers doctrine. An

administrative agency may not impose fines or penalties⁷ except with the specific statutory authorization of the Legislature, tempered by prescribed legislative safeguards and standards. Holy Cross Hosp. v. Health Servs. Cost Review Comm'n, supra, 283 Md. at 683, 393 A.2d at 184; Gutwein v. Easton Publishing Co., 272 Md.

⁷Fines and penalties have been viewed historically as a form of criminal punishment, which can be sanctioned by specific legislative action only. See Maryland Code (1957, 1982 Repl. Vol.) Art. 38, § 1. That section provides:

When any fine or penalty is imposed by any act of Assembly of this State or by any ordinance of any incorporated city or town in this State enacted in pursuance of sufficient authority, for the doing of any act forbidden to be done by such act of Assembly or ordinance, or for omitting to do any act required to be done by such act of Assembly or ordinance, the doing of such act or the omission to do such act shall be deemed to be a criminal offense unless the offense is defined as a municipal infraction. Any such offense may be prosecuted by the arrest of the offender for such offense and by holding him to appear in or committing him for trial in the court which has jurisdiction in the said cases and shall proceed to try or dispose of the same in the same manner as other criminal cases may be tried or proceeded with or disposed of, or such offenses may be prosecuted by indictment in such court. If any person shall be adjudged guilty of any such offense by any court having jurisdiction in the premises, he shall be sentenced to the fine or penalty prescribed by such act of Assembly or ordinance and shall be liable for the costs of his prosecution; and in default of payment of the fine or penalty he may be committed to jail in accordance with Sec. 4 of this article until thence discharged by due course of law. Any undischarged fine, and any unpaid costs, may be levied and executed upon as for a judgment in a civil case. Any indictment for the violation of any ordinance of any incorporated city or town of this State may conclude "against the form of the ordinance in such case made and provided and against the peace, government and dignity of the State."

563, 574-77, 325 A.2d 740, 746-47 (1974); County Council v. Investors Funding Cop., 270 Md. 403, 440-43, 312 A.2d 225, 245-47 (1973). It may be authorized to "fill in the details" of laws entrusted to it to administer, but by no means is it permitted to itself promulgate the law. Insurance Comm'r v. Bankers Indep. Insur. Co., 326 Md. 617, 606 A.2d 1072 (1992). In Bankers, we put it thusly:

[A] legislatively delegated power to make rules and regulations is administrative in nature, and it is not and can not be the power to make laws; it is only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute. Legislation may not be enacted by an administrative agency under the guise of its exercise of the power to make rules and regulations by issuing a rule or regulation which is inconsistent or out of harmony with, or which alters, adds to, extends or enlarges, subverts, impairs, limits, or restricts the act being administered. 326 Md. at 624, 606 A.2d at 1075. See also Baltimore v. William E. Koons, Inc. 270 Md. 231, 236-37, 310 A.2d 813, 816-17 (1973) (quoting 1 Am. Jur.2d Administrative Law § 132 (1962)). Stated differently:

[E]ssential legislative functions may not be delegated to administrative agencies, and in this sense it is said that administrative agencies have no legislative power and are precluded from legislating in the strict sense. The most pervasive legislative power conferred upon administrative agencies is the power to make rules and regulations and the necessity for vesting administrative agencies with this power because of the impracticability of the lawmakers providing general regulations for various and varying details has been recognized by the courts.

Id. at § 92.

I do not quarrel with the Racing Commission's power to

regulate racing in this State. There simply can be no doubt that it has that authority. In fact, the enabling legislation applicable to it is explicit in empowering the Racing Commission to "adopt regulations and conditions," consistent with its legislatively prescribed mandate. To enforce those regulations and rules, the Racing Commission is free to revoke, restrict, or suspend any licenses required for participation in racing in Maryland. Such power may well be incidental to the power to regulate and, thus, fairly implied from it. I do not believe, however, that a provision broadly authorizing "powers necessary or proper to carry out fully all the purposes of this title" permits the Racing Commission to promulgate rules and regulations prescribing that fines and penalties may be assessed and, in the case of specified conduct, their amount. As to that issue the delegation is too broad; it provides absolutely no standard or guidance to focus and direct the power assumed.⁸

⁸Indeed, in this case, the Commission has assumed the power to fine. Moreover, it has also determined whether to fine, whom to fine, under what circumstances, and the amount of the fine, all without any Legislative authority whatsoever. The majority asserts that the loss of this power would render ineffective the Commission's ability to regulate racing. That simply is not so. To the extent that power beyond that which directly impacts licensure is necessary, the Racing Commission is free to go back to the source of its creation-- the General Assembly-- and request it. Then, because the delegation must be accompanied by guidelines and standards, see Christ v. Department, 335 Md. 427, 441, 644 A.2d 34, 40 (1994)("[u]nder our cases, delegations of legislative power to executive branch agencies or officials ordinarily do not violate the constitutional separation of powers requirement as long as guidelines or safeguards, sufficient under the circumstances, are contained in the pertinent statute or

The Maryland General Assembly is well aware of how to empower administrative agencies to impose fines. Examples of its having done so can be found throughout the Maryland Code. The agencies to which such power has been given include one with duties and responsibilities similar to and reminiscent of the Racing Commission, the State Athletic Commission, see Maryland Code (1992, 1996 Cum. Supp.) § 4-310 (a)(2)⁹ of the Business Regulation Article (hereinafter "BR"); the Maryland Home Improvement Commission, see BR § 8-620 ¹⁰; the State Board of Veterinary Medical Examiners, see

statutes."), see also Judy v. Schaefer, supra, 331 Md. at 263, 627 A.2d at 1051; Maryland State Police v. Warwick, supra, 330 Md. at 480-481, 624 A.2d at 1241; Department of Transportation v. Armacost, 311 Md. 64, 72, 532 A.2d 1056, 1060 (emphasis supplied), the application of the power will be subject to review for arbitrariness and capriciousness. Baltimore Import Car v. Maryland Port Auth., 258 Md. 335, 342, 265 A.2d 866, 870 (1970); Gaywood Ass'n v. M.T.A., 246 Md. 93, 98, 227 A.2d 735, 739, (1966); Gonzales v. Ghinger, 218 Md. 132, 136, 145 A.2d 769, 772 (1958); Maryland Theatrical Corp. v. Brennan, 180 Md. 377, 380, 24 A.2d 911, 914 (1942).

⁹That section states:

Instead of or in addition to suspending or revoking a license under this subsection, the Commission may impose a penalty of up to \$2,000 for each violation.

¹⁰ That section provides, in relevant part:

(a) In general.-- The Commission may impose on a person who violates this title a civil penalty not exceeding \$5,00 for each violation, whether or not the person is licensed under this title.

Maryland Code (1974, 1985 Replacement Volume), § 2-310.1¹¹ of the Agriculture Article; the Maryland Commission on Real Estate Brokers, see Maryland Code (1989, 1995 Replacement Volume, 1996 Cum. Supp.) § 17-322¹² of the Business Occupations and Professions Article; the State Board of Dental Examiners, see Maryland Code (1981, 1994 Replacement Volume) § 4-317(a)¹³ of the Health Occupations Article ("HO"); the Workers' Compensation Commission,

¹¹That section provides:

- (a) Penalty in lieu of or in addition to suspension.- In lieu of or in addition to suspension of the license, the Board may impose a penalty of not more than \$5,000.
- (b) Penalty in addition to revocation.- In addition to revocation of the license, the Board may impose a penalty of not more than \$5,000.

¹² As relevant, that section reads:

- (c) Penalty. -- (1) Instead of or in addition to suspending or revoking a license, the Commission may impose a penalty not exceeding \$2,000 for each violation.

¹³That section provides:

- (a) Imposition of penalty.- If after a hearing under § 4-318 of this subtitle the Board finds that there are grounds under § 4-315 of this subtitle to suspend or revoke a general license to practice dentistry, a limited license to practice dentistry, or a teacher's license to practice dentistry, or to reprimand a licensed dentist, the Board may impose a penalty not exceeding \$5,000:
 - (1) Instead of suspending the license; or
 - (2) In addition to suspending or revoking the license or reprimanding the licensee.

see Maryland Code (1991) § 9-664(a)¹⁴ of the Labor and Employment Article; the Insurance Commissioner, see Article 48A, § 55A¹⁵; the Commissioner of Labor and Industry, see, e.g. BR §§ 9-310(b)¹⁶ and 9-408(d)¹⁷. In some cases, the General Assembly has provided, in

¹⁴That section provides:

- (a) Fine.- (1) If the Commission finds that the employer or its insurer has failed, without good cause, to pay for treatment or services required by § 9-660 of this Part IX of this subtitle within 45 days after the Commission, by order, finally approves the fee or charge for the treatment or services, the Commission may impose a fine on the employer or insurer, not exceeding 20% of the amount of the approved fee or charge.
- (2) The employer or insurer shall pay the fine to the Commission to be deposited in the General Fund of the State.

¹⁵In that section, the General Assembly has provided that "[i]n lieu of or in addition to revocation or suspension of an insurer's certificate of authority the Commissioner may (1) impose a penalty of not less than one hundred dollars (\$100) or more than fifty thousand dollars (\$50,000) for each violation of this article on any insurer whose certificate of authority is subject to revocation or suspension under the provision of this article...."

Effective October 1, 1997, this provision will be codified in a new Insurance Article. See ch. 11, Acts of 1996.

¹⁶That section provides:

- (b) Penalty instead of revocation or suspension.- Instead of revoking or suspending a license, the Commissioner may impose a penalty of not less than \$25 and not more than \$500.

¹⁷That section provides:

- (d) Penalty instead of revocation or suspension.-

addition to the power to fine, guidelines and standards to focus that power. E.G., BR § 8-620 (b)¹⁸ and Business Occup. § 17-322(c)(2)¹⁹. The preceding catalogue is by no means exhaustive. Suffice it to say, however, that the list of omitted agencies, those not mentioned here, does not include the Racing Commission.

That the Legislature, in so many instances, has expressly prescribed the power of administrative agencies to fine speaks volumes with regard to its intention in this case. When it has wanted to authorize an agency to fine or impose a monetary penalty, it has clearly and explicitly said so. A broad delegation of authority simply does not suffice. The Attorney General has expressed just this view in a different, but related context. See

Instead of revoking or suspending a license, the Commissioner may impose a penalty of not less than \$25 and not more than \$500.

¹⁸(b) Considerations.- In setting the amount of a civil penalty, the Commission shall consider:

- (1) the seriousness of the violation;
- (2) the good faith of the violator;
- (3) any previous violations;
- (4) the harmful effect of the violation on the complainant, the public, and the business of home improvement;
- (5) the assets of the violator; and
- (6) any other relevant factors.

¹⁹ (2) To determine the amount of the penalty imposed under this subsection, the Commission shall consider:

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;
- (iii) the good faith of the licensee; and
- (iv) any history of previous violations by the licensee.

66 Op. Att'y. Gen. 197 (1981). Recognizing that the power to impose fines could be implied from the broad language of a statute of a local jurisdiction, the Attorney General nevertheless concluded that the statute was invalid. He opined that the power to impose a fine, penalty or forfeiture--either civil or criminal-- "cannot ... be implied but, rather, depends on an express grant from the General Assembly." Id. at 203. As I have demonstrated, this is consistent with the practice of the General Assembly. It is also consistent with our cases.

This Court has held previously that, under some circumstances, the Legislature must grant express authority in order for agencies legitimately to act. Mossburg v. Montgomery County, MD, 329 Md. 494, 620 A.2d 886 (1993). In Mossburg, this Court, speaking through the author of the majority opinion, noted the instances in which supermajority requirements had been upheld, concluding that "where the General Assembly has intended to authorize a supermajority requirement, it has done so expressly." Id. at 505, 620 A.2d at 892. We also made clear that such a requirement "should not be implied from a general authorization to adopt rules and regulations." Id. at 508, 620 A.2d at 893. See also Office & Professional Employees Int'l Union, Local 2 v. Mass Transit Admin., 295 Md. 88, 97, 453 A.2d 1191, 1195 (1982) (stating that "absent express legislative authority," a governmental agency cannot enter into binding arbitration or binding collective bargaining agreements establishing wages, hours, pension rights, or working

conditions for public employees).

The majority has not cited even one case in which it was held, under circumstances similar to those sub judice, where there is no legislative direction on the subject, that an administrative agency may promulgate a rule or regulation imposing a fine or penalty. It relies, instead, on the broad delegation of authority given the Racing Commission, the Commission's power to promulgate rules and regulations, and the majority's conclusion that "the regulation authorizing the imposition of a fine is entirely in accord with the statutory purpose." ___ Md. ___, ___. ___A.2d ___, ___ (1996) [Majority op. at 10]. The majority cites Christ v. Department, 335 Md. 427, 644 A.2d 34 (1994), in support of the first two propositions. The power of the Department of Natural Resources to impose fines for violations of its regulations was not at issue in that case, only whether the regulation that was the subject of appeal was authorized by the enabling legislation pursuant to which it was adopted. That this is so is demonstrated by the very passage from Christ quoted by the majority:

In the State Boat Act, ... the General Assembly broadly granted to the Department the authority to adopt regulations governing the "operations of any vessels" which are subject to the Act. In numerous situations where the General Assembly has delegated similar broad power to an administrative agency to adopt legislative rules or regulations in a particular area, this Court has upheld the agency's rules or regulations as long as they did not contradict the language or purpose of the statute.

___ Md. at ___, ___ A.2d at ___ [Majority op. at 8] (quoting Christ

v. Department, 335 Md. at 437, 644 A.2d at 39) (Emphasis added).

I agree with the result reached in Christ. A statute permitting the Department of Natural Resources to "adopt regulations necessary to carry out the provisions of this subtitle," specifically "regulations governing ... operations of any vessels subject to this subtitle so that each vessel complying with the regulations may be operated with equal freedom or under similar requirements on all waters of the State," Maryland Code (1974, 1990 Repl. Vol., 1993 Cum. Supp.) § 8-704 (b-1)(1) of the Natural Resources Article, does authorize a regulation prohibiting a 14 year old from operating certain types of watercraft. I would have viewed the matter quite differently had the regulation been one fining the 14 year old for operating the prohibited watercraft. Such a regulation would have been unauthorized in the absence of a statutory provision permitting the imposition of a fine.

The other cases cited by the majority also stand for the proposition, and only that proposition, that the Racing Commission has broad authority to promulgate rules and regulations governing racing in Maryland; as the majority opinion itself makes clear, see ___ Md. at ___, ___A.2d at ___ [Majority op. at 22], none was concerned with the Commission's power to impose fines.

With respect to the latter proposition, that the imposition of a fine may be in accord with the legislative purpose does not answer the pertinent question. Consistency with the legislative purpose is not synonymous with being authorized by the Legislature.

Nor is the power to regulate identical to the power to fine. In other words, an unauthorized act may be nevertheless consistent with the purpose for which a statute was enacted. In effect, therefore, the majority merely assumes the issue in controversy; it simply never directly addresses the principles, proffered by the petitioner, applicable to the resolution of that issue.

The majority takes comfort in "the history, nature and rationale of the regulatory scheme governing horse racing in this State, as well as actions by the General Assembly and opinions by this Court," which it maintains "confirm the validity of the [subject] regulation." ___ Md. at ___, ___A.2d at ___ [Majority op. at 11]. The comfort is not justified.

Of critical importance to the majority's argument is an Attorney General's opinion issued in 1921, 6 Op. Att'y Gen. 480. Issued against the backdrop of the enactment in 1920 of Ch. 273 of the Acts of 1920, which directly addressed, in some detail, the licensure and regulation of "[a]ny person or persons, association or corporation desiring to conduct racing within the State of Maryland," but was silent as to its applicability to racehorse owners, trainers, jockeys, etc., the Attorney General concluded that the statute nevertheless applied to the latter persons. I do not share the majority's view that this opinion makes clear that the Legislature intended the Racing Commission's regulatory power to be all-encompassing. All this opinion does and, therefore, the most the Legislature can be said to have acquiesced in, is to

indicate that the Commission's regulatory powers extend to persons critical to the racing industry; it simply does not address whether it has the authority to fine. Indeed, so broad an interpretation of the Attorney General's opinion is to accord to the Racing Commission unlimited power, i.e. whatever it takes, including legislating, to accomplish the purpose for which it was created.

Premised on the 1921 Attorney General's opinion and the statutory provisions applicable to racetrack owners, the Commission, since 1921, has promulgated regulations, including the power to fine, paralleling those provisions, but applicable to racehorse owners, trainers, jockeys, etc. The majority relies on this "long and consistent administrative construction of the statute," which has not been disturbed by the General Assembly, as support for its position. As previously indicated, I do not quarrel with the regulations insofar as they apply to licensure. Thus, administrative construction and Legislative acquiescence to that extent may be appropriate, even if not properly before this Court. With regard to the ability of the Commission to impose fines, however, an entirely different situation is presented.²⁰

²⁰It should be recalled that the 1921 Attorney General's opinion did not concern the Commission's authority to impose fines, nor, contrary to the suggestion in the majority opinion, ___ Md. ___, ___, ___ A.2d ___, ___ (1996) [Majority op. at 20-23], has this Court or any other appellate court in this State been presented with that issue. In Jacobson v. Maryland Racing Commission, 261 Md. 180, 274 A.2d 102 (1971), the only issue before the Court was the validity of a regulation prohibiting the sale of a horse for a specific period of time. The Commission's authority to fine was specifically and intentionally not

There is nothing ambiguous about the statute; as to owners, trainers, jockeys, etc., it does not authorize the Commission to impose fines. That power is given the Commission only in the case of track owners. "When statutory language is unambiguous, administrative constructions, no matter how well entrenched, are not given weight." Falik v. Prince George's Hospital, 322 Md.409, 416, 588 A.2d 324, 327 (1991). Macke Co. v. Comptroller, 302 Md. 18, 22-23, 485 A.2d 254, 256 (1984). Nor, for the same reason, is Legislative acquiescence.

The majority maintains that the cases relied upon by the petitioner do not stand for the proposition for which they were cited. I do not agree. On the contrary, they very specifically and persuasively demonstrate that administrative agencies require

challenged in that case; as the appellant said in his brief, "[n]or is any question presented as to the...imposition of a money fine." Appellant's Brief at 2-3. Consequently, the fact that the Court commented, in concluding its opinion, "that this State acquired sufficient personal jurisdiction over [Jacobson] in matters of licensed racing to permit it to enjoin him by Rule 80 from selling a horse claimed in a licensed Maryland race for sixty days, and to punish him if he disobeyed that rule," id. at 190, 274 A.2d at 103, is neither dispositive nor persuasive. Certainly, it is at best an extremely slender reed on which to base so important a proposition.

To be sure, therefore, the Commission's power to impose fines has not been challenged during the entire time that the Commission has exercised that power. In anticipation of an argument based on that premise, please note that this Court has observed: "[T]he mere fact that no one has thought it worth the trouble or expense to contest the Act in the courts until now [in that case, 40 years] does not detract from the right of the appellant to do so." Maryland Theatrical Corp. v. Brennan, 180 Md. 377, 38, 24 A.2d 911, 916 (1942).

authorization from the Legislature to impose a fine or a penalty and that a mere general authorization will not suffice.

In Gutwein v. Easton Publishing Co., 272 Md. 563, 325 A.2d 740, the Maryland Commission on Human Relations, having found employment discrimination, awarded compensatory damages to the complainant.²¹ Although the Commission was statutorily charged by the Legislature "to promote in every way possible the betterment of human relations," and was specifically empowered "to take such affirmative action as will effectuate the purposes of the particular subtitle," id. at 564, 325 A.2d at 741 (emphasis added), this Court held that the Commission acted "plainly beyond its power and jurisdiction," there being no express authorization to make monetary awards.

In the same vein, this Court held that a statutory grant of "full power to review and approve the reasonableness of hospital rates" did not empower the Maryland Health Services Cost Review Commission to review and set certain physician charges billed to hospital patients. Holy Cross Hospital, 283 Md. 677, 679, 682-83, 687, 690, 393 A.2d at 181. And in Investors Funding Corp., 270 Md. at 442, 312 A.2d at 246, where a county agency was properly cloaked with specific authority to impose a monetary penalty up to a specified amount, this Court held that delegation of power,

²¹Although not given the power to fine, the Commission on Human Relations has been authorized, explicitly, to grant monetary relief. Maryland Code (1957, 1994 Replacement Volume) Article 49B, § 11(e).

otherwise permissible, unconstitutional due to the "complete lack of any legislative safeguards or standards." Without safeguards and standards governing its exercise, the agency's discretion to fix the penalties up to the specified ceiling, we noted, would be unlimited.

Cases from other jurisdictions are to like effect. See, e.g., Groves v. Modified Retirement Plan et. al., 803 F.2d 109, 117 (3rd Cir. 1986) ("...while an administrative agency has wide discretion in deciding how to implement remedial legislation, see Steuart & Bros. v. Bowles, 322 U.S. 398, 88 L.Ed. 1350, 64 S.Ct. 1097 (1944), it may decide to penalize specific kinds of conduct only when [the Legislature] has expressly delegated that power to the agency"); In re Fayetteville Hotel Assocs., 450 S.E.2d 568, 570 (N.C. App. 1994) (The power to impose sanctions requires specific legislative authority and without such authority, the power to impose sanctions "exceed[s] the Commission's general rulemaking authority"); Continental Construction Co. v. Board of Trustees of the Internal Improvement Trust Fund, 464 So.2d 204, 205, (Fla. 1985) ("...assessment of the penalty is erroneous because the Board has not been legislatively delegated the power to impose penalties... in the absence of specific legislative authorization"); State of Florida Dep't of Environmental Regulation v. Puckett Oil Co., Inc., 577 So.2d 988, 993, (Fla. App. 1991) ("...[the] law is clear that an agency's authority to impose sanction must be expressly delegated to the agency"); Division of Administrative Hearings v.

Department of Transportation, 534 So.2d 1219, 1220 (Fla. App. 1988) (agency without necessary legislative authority to adopt rule allowing hearing officer to impose sanction); People v. Harter Packing Co., 325 P.2d 519, 521 (Cal. App. 1958) ("If the act under which the administrative agency gets its powers provides no sanctions or penalties for failure to comply, the agency may not by rule promulgate them."); Columbus Wine Co. v. Sheffield, 64 S.E.2d 356, 362 (Ga. App. 1951) (agency could not, by regulation, make penal something not made penal under the law itself, but could only enforce regulation by suspension or cancellation of license).

It is a fundamental principle of our system of government that "the rights of men are to be determined by the law itself, and not by the let or leave of administrative agencies," 1 Am.Jur. 2d Administrative Law § 108 (1992). See also Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-214, 96 S.Ct. 1375, 1391, 47 L.Ed.2d 668, 688 (1976) ("The rulemaking power granted to an administrative agency is not the power to make law") and Commission on Med. Discipline v. Stillman, *supra*, 291 Md. at 413, 435 A.2d at 759, citing Gino's v. Baltimore City, 250 Md. 621, 640, 244 A.2d 218, 229 (1968), in which this Court stated:

"When legislative power is delegated to administrative officials it is constitutionally required that adequate guides and standards be established by the delegating legislative body so that the administrative officials, appointed by the executive and not elected by the people, will not legislate, but will find and apply facts in a particular case in accordance with the policy established by the legislative

body." (Emphasis in original.)

Therefore, "[t]he exercise of undefined general power legislative in character must be denied" to administrative agencies, 1 Am. Jur.2d Administrative Law § 108, for "[a] statute... which in effect reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers." Id.

I dissent.