

### 4.3 RIGHT TO A HEARING ARISING FROM DUE PROCESS

If a party is adversely affected by agency action and there is no statutory authorization for a hearing, no agency rule allowing for a hearing, and no contractual agreement requiring a hearing, then that party must depend on constitutional due process as the basis for a hearing.<sup>1</sup> Where due process is relied on, the burden of proving a constitutionally protected interest rests with the petitioner.<sup>2</sup> The extent of what due process is required, if the party is granted a hearing, will depend on the nature of the interest in question<sup>3</sup> and the party asserting the right.<sup>4</sup> In general, the need for a hearing will depend on the due process guarantee that the state must ensure that all individuals are treated with fundamental fairness.<sup>5</sup>

There must be more than an expectation or abstract need or interest in the matter in order to entitle a party to a hearing. Constitutionally protected rights must be concrete and identifiable.<sup>6</sup> If a claim for a hearing is based on an abstract interest, then no hearing is required.<sup>7</sup> Simply because a party has an expectation or desire for a particular agency action does not ensure that the party has a right to a contested case hearing.<sup>8</sup> On the other hand, describing a party's legal interest as a "privilege" rather than a "right" does not resolve the due process question because the right versus privilege distinction has been abandoned

<sup>1</sup> State *ex rel.* Indep. Sch. Dist. No. 276 v. Dep't of Educ., 256 N.W.2d 619, 624 (Minn. 1977); Setty v. Minn. State Coll. Bd., 305 Minn. 495, 498, 235 N.W.2d 594, 596 (1975). ; Jones v. Minn. State Bd. of Health, 301 Minn. 481, 483-84, 221 N.W.2d 132, 134-35 (1974); Indep. Sch. Dist. No. 581 v. Mattheis, 275 Minn. 383, 386, 147 N.W.2d 374, 376 (1966); see *In re* People's Coop. Power Ass'n, 447 N.W.2d 11, 13 (Minn. Ct. App. 1989) (stating that the APA does not itself provide a right to a contested case hearing but establishes procedures to be followed when another statute provides the right); Mankato Aglime & Rock Co., v. City of Mankato, 434 N.W.2d 490, 493 (Minn. Ct. App. 1989) (stating that the APA itself does not provide a right to a contested case hearing); Voettiner v. Comm'r of Educ., 376 N.W.2d 444, 448 (Minn. Ct. App. 1985) (stating that certain sections of the APA relating to procedure to be followed in contested case hearings, do not themselves provide right to contested case hearing).

<sup>2</sup> Setty, 305 Minn. at 498, 235 N.W.2d at 596.

<sup>3</sup> West v. Chafee, 560 F.2d 942, 947 (8th Cir. 1977); see § 4.4 in this chapter.

<sup>4</sup> State *ex rel.* Indep. Sch. Dist. No. 276, 256 N.W.2d at 624 (stating that governmental entities cannot demand formal hearings based on constitutional due process).

<sup>5</sup> See Patagonia Corp. v. Bd. of Governors, 517 F.2d 803, 816-17 (9th Cir. 1975); American Airlines, Inc. v. CAB, 359 F.2d 624, 632-33 (D.C. Cir. 1966),.

<sup>6</sup> Bd. of Regents v. Roth, 408 U.S. 564, 576-77 (1972).

<sup>7</sup> *Id.* at 578.

<sup>8</sup> Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship, 356 N.W.2d 658, 666 (Minn. 1984); see also Obara v. Minn. Dep't of Health, 758 N.W.2d 873, 877-79 (Minn. Ct. App. 2008) (concluding that due process did not require an evidentiary hearing to determine whether appellant had committed criminal offenses disqualifying him from working as a nurse in a state licensed program when he had been convicted of the offenses; the process already provided at the criminal trial minimized the risk of an erroneous decision); *In re* Implementation of Util. Energy Conservation Improvement Programs, 368 N.W.2d 308, 312-13 (Minn. Ct. App. 1985) (concluding that utility customers do not have a property interest in existing rates and therefore no constitutional right to a hearing) .

in both Minnesota and federal courts.<sup>9</sup> With the demise of the right-privilege distinction, claimants only need to show sufficient entitlement to government benefits or grants before invoking due process protections.<sup>10</sup>

A due process argument may be raised when official action causes a denial of life, liberty, or property.<sup>11</sup> A threat to life rarely occurs; therefore, the most significant questions arise over determining what property or liberty interests are protected. The Minnesota Supreme Court has said if a person is "to have a due process right to a hearing, [that person] must have a liberty or property interest at stake."<sup>12</sup> A variety of interests have been found to qualify as sufficient liberty or property interests to be protected by the Constitution's due process language. Ordinarily, they are not created by the Constitution itself but are created or defined by state statute, administrative rule, or another independent source that establishes entitlement to certain benefits.<sup>13</sup> The range of interests protected by procedural due process is not, however, infinite, and interests must be grounded in state or federal law if such constitutional protection is to be relied on.<sup>14</sup> Termination of welfare benefits,<sup>15</sup> revocation of a driver's license,<sup>16</sup> parole,<sup>17</sup> and probation<sup>18</sup> have all qualified as protected interests.

According to the Minnesota Court of Appeals, residents of the Minnesota Veterans Home have a constitutional right to a contested case hearing on discharge or transfer, since they have a statutory entitlement to reside in the home and since discharge involves a state action that adjudicates important rights.<sup>19</sup> In addition, dismissal of a college professor,<sup>20</sup> suspension from public school for misconduct,<sup>21</sup> termination of social security disability payments,<sup>22</sup> and loss of a prisoner's "good time" credits<sup>23</sup> have also been determined to be

<sup>9</sup> Hall v. Univ. of Minn., 530 F. Supp. 104, 107 (D. Minn. 1982); see also Goldberg v. Kelly, 397 U.S. 254, 261-63 (1970).

<sup>10</sup> Goldberg, 397 U.S. at 262-63.

<sup>11</sup> Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

<sup>12</sup> Cable Commc'ns Bd., 356 N.W.2d at 666 ; see also Smith v. City of Owatonna, 439 N.W.2d 36, 40-41 (Minn. Ct. App. 1989) (concluding that the city was not required to provide property owners a pre-deprivation hearing on upgrading of gas mains), *aff'd*, 450 N.W.2d 309 (Minn. 1990); M.T. Properties, Inc. v. Alexander, , 433 N.W.2d 886, 891 (Minn. Ct. App. 1988) (concluding that due process does not require a hearing on relocation of pipeline a distance under 3/4 mile).

<sup>13</sup> Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Hall, 530 F. Supp. at 107; see also Smith v. Hennepin Cnty., 383 N.W.2d 391, 393 (Minn. Ct. App. 1986) (stating that whether an employee has a legitimate claim of entitlement to his job is "determined by state law and the employee's employment contract").

<sup>14</sup> Roth, 408 U.S. at 570, 576. .

<sup>15</sup> Goldberg v. Kelly, , 397 U.S. 254, 261-62 (1970).

<sup>16</sup> Bell v. Burson, 402 U.S. 535, 539 (1971).

<sup>17</sup> Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

<sup>18</sup> Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973).

<sup>19</sup> L.K. v. Gregg, 380 N.W.2d 145, 151-52 (Minn. Ct. App. 1986).

<sup>20</sup> Perry v. Sinderman, 408 U.S. 593, 599-603 (1972).

<sup>21</sup> Goss v. Lopez, 419 U.S. 565, 573-76 (1975).

<sup>22</sup> Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

<sup>23</sup> Wolff v. McDonnell, 418 U.S. 539, 557 (1974).

within the protected interests that require a hearing. Additionally, registered nurses who were disqualified from direct care positions by the Commissioner of Human Services on the grounds that they failed to report maltreatment were found to be entitled to a hearing with the opportunity to present oral testimony, to cross-examine, and to subpoena witnesses.<sup>24</sup> The Minnesota Court of Appeals determined that the employees clearly had a property interest in their employment and that their good names and reputations were at stake.<sup>25</sup> The court also decided that a statute making the Commissioner's maltreatment decision conclusive in other proceedings was unconstitutional.<sup>26</sup>

On the other hand, the following have been found insufficient to justify a hearing: decision to not rehire an untenured professor after his one year contract has expired,<sup>27</sup> suspension with pay and reassignment of a probationary teacher pending the outcome of a grievance procedure,<sup>28</sup> placement of a teacher on medical leave,<sup>29</sup> loss of employment as a police officer,<sup>30</sup> loss of reputation because of the circulation of an arrest record,<sup>31</sup> transfer of a prisoner to a less favorable prison,<sup>32</sup> and dismissal of a medical student.<sup>33</sup>

In general, a property interest will go beyond simple ownership of property such as land, chattel, or money and will include such things as specific benefits or licenses.<sup>34</sup> A student's interest in attending a college or university was found to be a property right protected by due process.<sup>35</sup> A state civil service classified position<sup>36</sup> and the opportunity to participate in intercollegiate athletics<sup>37</sup> are property interests sufficient to be protected by due process. The holder of a used car dealer's license has a property interest in the license that may not be revoked without a due process hearing.<sup>38</sup> An individual licensed to provide Truth-in-Sale-of-Housing evaluations has a property right protected by due process.<sup>39</sup>

<sup>24</sup> Fosselman v. Comm'r of Human Servs., 612 N.W.2d 456, 461-65 (Minn. Ct. App. 2000).

<sup>25</sup> *Id.* at 461.

<sup>26</sup> *Id.* at 464.

<sup>27</sup> Bd. of Regents v. Roth, 408 U.S. 564, 565 (1972).

<sup>28</sup> Johnson v. Indep. Sch. Dist. No. 281, 494 N.W.2d 270, 273-74 (Minn. 1992).

<sup>29</sup> Palmer v. Indep. Sch. Dist. No. 917, 547 N.W.2d 899, 904 (Minn. Ct. App. 1996).

<sup>30</sup> Bishop v. Wood, 426 U.S. 341, 343-47 (1976); *see also* Smith v. Hennepin Cnty., 383 N.W.2d 391, 393 (Minn. Ct. App. 1986) (concluding that a probationary deputy sheriff had no constitutional right to a hearing on dismissal).

<sup>31</sup> Paul v. Davis, 424 U.S. 693, 712 (1976).

<sup>32</sup> Meachum v. Fano, 427 U.S. 215, 224-25 (1976).

<sup>33</sup> Bd. of Curators v. Horowitz, 435 U.S. 78, 84-91 (1978); *see also* Ross v. Univ. of Minn., 439 N.W.2d 28, 34 (Minn. Ct. App. 1989) (concluding that university was not required to provide hearing to medical resident upon academic dismissal from school).

<sup>34</sup> Bd. of Regents v. Roth, 408 U.S. 564, 571-72 (1972); Hall v. Univ. of Minn., 530 F. Supp. 104, 107-08 (D. Minn. 1982). For example, a commercial fishing license is a protected property interest. Meins v. Comm'r of Natural Res., 755 N.W.2d 329, 337 (Minn. Ct. App. 2008)..

<sup>35</sup> Hall, 530 F. Supp. at 107; Abbariao v. Hamline Univ. Sch. of Law, 258 N.W.2d 108, 112 (Minn. 1977).

<sup>36</sup> Nyhus v. Civil Servs. Bd., 305 Minn. 184, 232 N.W.2d 779, 782 (1975); *see also* Martin v. Itasca Cnty., 448 N.W.2d 368, 370 (Minn. 1989) (concluding that required temporary leave of absence from county civil service position constituted sufficient property loss to invoke due process protection);

<sup>37</sup> Regents of Univ. of Minn. v. Nat'l Collegiate Athletic Ass'n, 422 F. Supp. 1158, 1161 (D. Minn. 1976), *rev'd on other grounds*, 560 F.2d 352 (8th Cir. 1977), *and cert. dismissed*, 434 U.S. 978 (1977); Behagan v. Intercollegiate Conf. of Faculty Representatives, 346 F. Supp. 602, 604 (D. Minn. 1972).

<sup>38</sup> Bird v. State Dep't of Pub. Safety, 375 N.W.2d 36, 43 (Minn. Ct. App. 1985).

<sup>39</sup> Staeheli v. City of Saint Paul, 732 N.W.2d 298, 304 (Minn. Ct. App. 2007).

However, an expectation of approval to teach a vocational school course is not a property right sufficient to require a contested case hearing.<sup>40</sup> And the holder of a non-exclusive cable communications franchise was not entitled to a contested case hearing on due process grounds when a city awarded a second cable franchise.<sup>41</sup>

A liberty interest has been defined as something more than the simple freedom from bodily restraint. It includes the right to contract, to engage in the common occupations of life, to marry or raise a family, to worship freely, to preserve one's personal reputation, and to enjoy those privileges essential to the pursuit of happiness.<sup>42</sup> Liberty interests may include such things as damage to one's good name, reputation, honor, or integrity.<sup>43</sup> Deprivation of such an interest requires that one be allowed the opportunity to respond to the adverse action because of the potential for damage to one's standing in the community.<sup>44</sup> It is often difficult to determine whether there is a sufficient liberty interest at stake to require specific due process protections. When corporal punishment or bodily restraint is involved, or when the state's actions stigmatize an individual, due process protections are required.<sup>45</sup>

Due process is triggered when there is a significant injury to a property or liberty interest, and not simply because a serious loss has been caused by specific government action.<sup>46</sup> If the injured interest is minimal or trivial, a due process hearing may not be necessary or appropriate. In fact, in the opinion of some courts, some claims do not "rise to the dignity of a protectable constitutional right."<sup>47</sup> For example, a high school student whose history grade was reduced to zero for plagiarism was not entitled to a full evidentiary hearing before an impartial hearing officer as a matter of due process.<sup>48</sup> A hearing before the superintendent followed by written findings by the school board was sufficient.<sup>49</sup>

<sup>40</sup> Voettiner v. Comm'r of Educ., 376 N.W.2d 444, 448 (Minn. Ct. App. 1985).

<sup>41</sup> *In re* Dakota Telecomm. Group, 590 N.W.2d 644, 648-49 (Minn. Ct. App. 1999).

<sup>42</sup> Bd. of Regents v. Roth, 408 U.S. 564, 572-73 (1972).

<sup>43</sup> Goss v. Lopez, 419 U.S. 565, 574 (1975).

<sup>44</sup> *Roth*, 408 U.S. at 573.

<sup>45</sup> Ingraham v. Wright, 430 U.S. 651, 673-74 (1977).

<sup>46</sup> 1 Meachum v. Fano, 427 U.S. 215, 224 (1976).

<sup>47</sup> Zeller v. Donegal Sch. Dist. Bd. of Educ., 517 F.2d 600, 606 (3d Cir. 1975); *see also* Goss, 419 U.S. at 586 (Powell, J., dissenting).

<sup>48</sup> Zellman v. Indep. Sch. Dist. No. 2758, 594 N.W.2d 216, 220-22 (Minn. Ct. App. 1999).

<sup>49</sup> *Id.*